

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

GREGORY ORLANDO FANN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1794 MDA 2013

Appeal from the Order Entered August 22, 2013
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s):
CP-40-CR-0001392-2009
CP-40-CR-0002735-2008

BEFORE: BENDER, P.J.E., BOWES, J., and PANELLA, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED JULY 29, 2014

Appellant, Gregory Orlando Fann, appeals from the trial court's August 22, 2013 order denying his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

On February 16, 2010, Appellant was convicted following a non-jury trial of first-degree murder, theft, robbery, and criminal solicitation to commit criminal homicide. Appellant's convictions of murder, theft and robbery stemmed from his shooting and killing Aaron Witko during the course of an illegal firearm sale. While incarcerated and awaiting trial for those offenses, Appellant attempted to arrange for the murders of two Commonwealth witnesses, thus resulting in his conviction of criminal solicitation to commit homicide.

On March 9, 2010, Appellant was sentenced to life imprisonment without the possibility of parole. He filed a timely appeal and, after this Court affirmed his judgment of sentence, our Supreme Court denied his subsequent petition for allowance of appeal on July 19, 2011. ***Commonwealth v. Fann***, 26 A.3d 1189 (Pa. Super. 2011) (unpublished memorandum), *appeal denied*, 24 A.3d 863 (Pa. 2011).

On June 11, 2012, Appellant filed a timely *pro se* PCRA petition raising various claims of trial counsel's ineffectiveness. Counsel was appointed, but did not file an amended petition on Appellant's behalf. The PCRA court conducted an evidentiary hearing on July 8, 2013, after which it issued an order denying Appellant relief on August 22, 2013. Appellant filed a timely appeal and, herein, he presents one issue for our review: "Did the PCRA Court err as a matter of law or abuse its discretion in failing to grant [Appellant] a new trial where, as a result of the ineffective assistance of trial counsel, [Appellant] did not voluntarily and knowingly waive his right to a jury trial?" Appellant's Brief at 2.

Initially, we note that "[t]his Court's standard of review from the grant or denial of post-conviction relief is limited to examining whether the lower court's determination is supported by the evidence of record and whether it is free of legal error." ***Commonwealth v. Morales***, 701 A.2d 516, 520 (Pa. 1997) (citing ***Commonwealth v. Travaglia***, 661 A.2d 352, 356 n.4 (Pa. 1995)). Where, as here, a petitioner claims that he received ineffective assistance of counsel, our Supreme Court has stated that:

[A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the “[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” Generally, counsel’s performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner. To obtain relief, a petitioner must demonstrate that counsel’s performance was deficient and that the deficiency prejudiced the petitioner. A petitioner establishes prejudice when he demonstrates “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” ... [A] properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel’s actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel’s act or omission.

Commonwealth v. Johnson, 966 A.2d 523, 532-33 (Pa. 2009) (citations omitted).

Here, Appellant contends that his trial counsel acted ineffectively by advising him to waive his right to be tried by a jury where, “based on [Appellant’s] background and history, it is unlikely that he understood the ramifications of proceeding with the non-jury trial over a jury trial....” Appellant’s Brief at 8-9. Appellant argues that “his decision to proceed with [a non-jury] trial was not necessarily based upon his own personal choice, but rather [was] based upon the cajoling by trial counsel and the representations [counsel] made to [Appellant] about [Appellant’s] parent’s [*sic*] preferences, rather than his own.” ***Id.*** at 9. In sum, Appellant maintains that he “did not voluntarily and knowingly make a personal

decision to waive his [right to a] jury trial and the waiver is, therefore, not valid." **Id.**

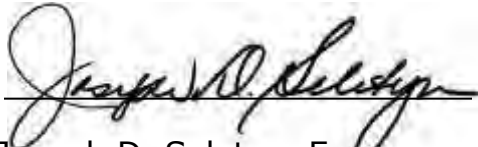
The record belies Appellant's claims. Initially, Appellant concedes that he signed a "Waiver of Jury Trial" document indicating that he "fully underst[ood]" his right to be tried by a jury of his peers and was waiving that right. **See** Appellant's Brief at 7 (citing "Waiver of Jury Trial," 1/26/10). Moreover, at the PCRA hearing, Appellant's trial counsel stated that she extensively reviewed with Appellant and his parents "the pluses and minuses" of waiving his right to a jury trial. N.T. PCRA Hearing, 7/8/13, at 43. Counsel explained that the Commonwealth had agreed not to seek the death penalty if Appellant proceeded to a nonjury trial, which ultimately convinced Appellant to waive his right to a jury. **Id.** In particular, counsel stated: "[Appellant] vacillated but ultimately he agreed that a nonjury trial with the death penalty not being on the table ... was the better option." **Id.** Trial counsel also answered affirmatively when asked if Appellant's decision appeared "to have been made of his own free will[,]" and when she was asked if she "[w]ould ... have honored his preference either way, whether he wanted a jury trial or a [nonjury] trial[.]" **Id.** at 43-44.

Based on this record, we conclude that the PCRA court did not err in finding that Appellant's waiver of his right to a jury trial was voluntary, knowing, and intelligent. Counsel's testimony demonstrated that Appellant's decision was freely made after extensive consultation with his attorney and

his parents. Moreover, we agree with the PCRA court's conclusion that counsel had a reasonable basis for advising Appellant to waive his right to a jury trial. As the court pointed out, counsel's advising a defendant "to accept a nonjury trial in order to avoid the possible imposition of a death penalty has been held to be a reasonable tactical decision." PCRA Court Opinion at 23 (citing **Commonwealth v. Rivera-Rodriguez**, 39 A.3d 439, 442-443 (Pa. Super. 2012) (affirming "the PCRA court's conclusion that counsel made a reasonable tactical decision when they advised [the] [a]ppellant to proceed to nonjury to avoid death")). Accordingly, we ascertain no error in the PCRA court's denying Appellant's petition.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/29/2014