NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. STEVEN LAZAR, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2191 EDA 2013

Appeal from the PCRA Order July 15, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0002056-2008

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.: **FILED JULY 23, 2014**

Steven Lazar appeals from the July 15, 2013 order denying him PCRA relief following an evidentiary hearing. We affirm.

On May 11, 2010, Appellant was convicted by a jury of second-degree murder, robbery, and possession of an instrument of crime ("PIC") in the death of seventy-nine-year-old Dario Guttierrez. The court sentenced him to life imprisonment on the murder charge and two five-to-ten-year concurrent sentences for robbery and PIC. The decedent's decomposing body was discovered in his Philadelphia home by his daughter, Evelyn Guttierrez, on January 9, 2007. The medical examiner placed the time of death sometime between January 6 and 8, 2007. Death resulted from a head injury caused by a dozen blows to the decedent's face and skull inflicted by a weapon such

as a hatchet or an axe. There was no forced entry, but the victim's wallet and keys were missing and his upstairs drawers had been ransacked.

Approximately three months after the murder, Ms. Guttierrez returned to clean out her father's home and discovered a small travel bag on a chair on the rear porch, under an awning. Ms. Guttierrez telephoned police, who retrieved the bag and later searched it. The bag contained clothing, a plastic gun, correspondence from a methadone clinic addressed to Appellant, and a school yearbook containing Appellant's photograph and two wallets. The wallets contained a social security card and an access card in Appellant's name. Police located and transported Appellant to the Homicide Unit for questioning on July 3, 2007.

Appellant admitted to Detective David Baker that the bag belonged to him, but advised the detective that he did not know why the bag was located on the decedent's porch. He maintained that a friend had taken the bag and given it to an older man who lived three doors away from the place where he and the friend were ingesting drugs. After taking Appellant's statement, the police returned the bag to him and permitted him to leave.

Thereafter, Appellant made statements to five people, including Russell Angely, implicating himself in the murder. After a dispute with Appellant in November 2007, Mr. Angely called police and reported Appellant's statements. Mr. Angely testified at trial that Appellant admitted to him that he was involved in a murder and that a hatchet was the "best

weapon to use" to kill someone. Appellant made similar comments to Sarn Wilson and Mark Kedra. June Blase and John Barry, Appellant's downstairs neighbors, testified that Appellant told them on November 17, 2007, that he would be going to jail because he killed somebody with an axe. N.T. Trial (Jury), 5/6/10, at 85.

Police arrested Appellant on November 19, 2007, at 8:00 a.m. on an outstanding bench warrant from a neighboring county and transported him to the Homicide Unit for questioning. Over a thirty-hour period, Appellant gave two statements to police. In the first statement, signed at 7:20 p.m. on November 19, 2007, Appellant implicated John, a Puerto Rican man with whom he was doing drugs in an abandoned house located near the decedent's home, in the murder. He recounted that John had talked about robbing the decedent, that he had a hatchet in his pants, and that the two separated when police drove by. When Appellant went to the decedent's home to look for John, the door was open, the decedent was on the floor, and John, covered in blood, was ransacking drawers.

While Appellant remained in custody, police unsuccessfully attempted to locate the abandoned house or corroborate the details of Appellant's story. Appellant remained in the interview room overnight and questioning resumed around noon the next day. At 2:45 p.m. on November 20, 2007, Appellant gave a second statement in which he recounted that he went with John to the decedent's house to have oral sex with the decedent. John took

a hatchet with him to scare the decedent. After they performed oral sex on the decedent, the decedent tried to perform oral sex on Appellant. Appellant struck him with his hand, knocked him backwards, and John struck the decedent with the hatchet. John took the victim's wallet and ransacked the drawers.

Prior to trial, Appellant filed a motion to suppress his statements. After a hearing, the court denied the motion. At trial, a jury found him guilty, the court subsequently sentenced him, and we affirmed judgment of sentence on August 2, 2011. ***Commonwealth v. Lazar***, 32 A.3d 820 (Pa.Super. 2011) (unpublished memorandum). On June 20, 2012, Appellant filed the within PCRA petition, his first. Counsel was appointed and the PCRA court held an evidentiary hearing on July 15, 2013. The PCRA court found that trial counsel was deficient in failing to glean from Appellant's subpoenaed medical records that Appellant was going through methadone withdrawal during the interrogation. The court concluded, however, that there was no reasonable probability that the outcome of the suppression hearing or the trial would have been different had this information and expert testimony regarding withdrawal been presented. N.T. PCRA Hearing, 7/15/13, at 15. Hence, the court denied relief and Appellant timely filed this appeal. Appellant presents two issues on appeal:

> 1. Did not the lower court err in denying P.C.R.A. relief under either a Sixth Amendment ineffectiveness analysis or a 14th Amendment Due Process analysis where appellant's conviction was based primarily upon a two-day custodial

> interrogation regarding which his jury was told he was not a recent methadone user and was fine during the interrogation, and in fact records and expert testimony now show that had received methadone up until the day before his arrest and thus was in the throes of withdrawal during questioning, a critical factor in assessing voluntariness and the accuracy of any inculpatory statement (and innocence)?
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> 2. Was not appellant deprived of the effective assistance of counsel and a fair trial when trial counsel failed to investigate and produce evidence that contradicted police averments that appellant was not in discomfort during interrogation and that the confession was knowing and voluntary, thereby compounding the error complained of in question 1, *supra* and entitling him to relief under a "cumulative error" standard?

Appellant's brief at 5.

"Our standard of review of the denial of a PCRA petition is limited to examining whether the court's rulings are supported by the evidence of record and free of legal error." ***Commonwealth v. Feliciano***, 69 A.3d 1270, 1274-75 (Pa.Super. 2013). "Our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." ***Commonwealth v. Medina***, 2014 PA Super 108 (Pa.Super. 2014) (*en banc*) (quoting ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012)). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court[,]" but we review the PCRA court's legal conclusions *de novo*. ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011).

When we review claims of ineffective assistance of counsel, such as the claims asserted herein, we are mindful that "[c]ounsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." ***Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014). In order to prove counsel ineffective in this Commonwealth, a petitioner must demonstrate all of the following: "(1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result." ***Id***. at 311. Prejudice involves a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." ***Id***. at 312.

Appellant also claims, in the alternative, that if counsel was not ineffective in failing to discover evidence that Appellant was going through methadone withdrawal, evidence that he was receiving daily dosages of methadone at the time of his arrest constituted after-discovered evidence that could not have been obtained with the exercise of due diligence prior to trial.

In order to obtain relief based on after-discovered evidence,

> [an] appellant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted. ***Commonwealth v. Pagan***,

> 597 Pa. 69, 106, 950 A.2d 270, 292 (2008) (citations omitted). "The test is conjunctive; the [appellant] must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted." ***Commonwealth v. Padillas***, 2010 PA Super 108, 997 A.2d 356, 363 (Pa.Super. 2010) (citation omitted).

Commonwealth v. Foreman, 55 A.3d 532, 536 (Pa.Super. 2012). When we review the decision to grant or deny a new trial based on after-discovered evidence, we determine whether the PCRA court committed an abuse of discretion or error of law that controlled the outcome of the case. ***Id***.

Appellant contends first that trial counsel was deficient in failing to examine the third set of medical records for evidence that he was receiving daily dosages of methadone at the time of his arrest and in stipulating that, according to clinic records, Appellant's last dosage of methadone was more than a month before on October 24, 2007. With regard to a second stipulation describing Appellant's self-reported symptoms upon admission to the hospital, counsel was ineffective in omitting the fact that the symptoms were of one day in duration.

Trial counsel testified that he requested Appellant's methadone treatment records from the Goldman Clinic and received records that included a printout of Appellant's methadone treatments. Counsel also made multiple phone calls to the facility to ascertain if the records were complete, and twice sent a paralegal to look for them. Finally, in anticipation of trial, counsel subpoenaed the records custodian and the

records. Upon receiving five hundred pages of records, counsel noted that the dosage sheet on the top was identical to those he had previously received, and he did not closely examine the subpoenaed records. Appellant demonstrated that the subpoenaed medical records that counsel had in his possession confirmed that Appellant received his last dosage of methadone on November 18, 2007 at 10:48 a.m., which was the day before his arrest. The medical record would have supplied the factual foundation for expert medical testimony that Appellant was experiencing withdrawal from methadone when he provided those statements, and that the statements were not voluntary. Appellant presented the expert testimony of George E. Woody, M.D., to that effect.

Dr. Woody opined that since Appellant did not receive his usual methadone dose on November 19, "it is highly likely that by the morning of the 20th, he would have been in opioid withdrawal and appeared restless, and anxious, and depressed." N.T. Hearing, Vol. I, 5/30/13, at 23-4. He added that one using methadone would start to withdraw twenty-four to thirty-six hours after the last dose, and "typically the person will complain of feeling sick." ***Id***. at 19-20. The person may feel uncomfortable, and have a runny nose and eyes, vomiting and diarrhea. The physician pointed to the Hahnemann emergency room records from the night of November 20, 2007, where Appellant reported "one-day history of shaking, some [leg] pain, and dizziness, and nausea, and diarrhea," symptoms consistent with opiate

withdrawal. He was treated with Clonidine and Compazine, drugs traditionally used to treat opiate withdrawal. Dr. Woody conceded that symptoms present gradually and a note in the medical records to the effect that the patient's insight was fair, his appearance neat and appropriate, that he was cooperative, and his speech normal in rate and rhythm, did not undermine his conclusion that Appellant was in withdrawal. Dr. Woody concluded that Appellant's state of mind at the time he gave the statement would possibly have been "desperate or mindless," ***id***. at 57, although he admitted upon cross-examination that he had not read Appellant's statement. ***Id***. at 59. He reviewed the testimony of the police officers who conducted the interrogation and conceded that it was possible that they did not witness any indications that Appellant was in withdrawal, ***id***. at 60, and that several of the drugs Appellant was taking may have suppressed withdrawal symptoms.

The Commonwealth presented the expert testimony of John Sebastian O'Brien II, M.D., a psychiatrist and attorney, and the testimony of the police officers who interrogated Appellant. The expert concluded from his review of the records that Appellant was treated with methadone from 2005-2007, and that his last dosage prior to being arrested and interrogated was November 18, 2007 at 10:34 a.m. He agreed with Dr. Woody that some of the other prescription medications that Appellant was taking would alleviate symptoms of opiate withdrawal, and that the hospital admission occurred

hours after Appellant executed his second statement to police. The expert found Appellant's answers to be very detailed and not indicative of impulsive responses. He saw no verbal expression of physical discomfort, and noted that the dose of medication prescribed at the hospital was lower than usually prescribed for treatment of opiate withdrawal symptoms. The fact that Appellant was discharged within three hours of his presentation at the emergency room suggested the symptoms were not substantial. ***Id***. at 96. Notably, Dr. O'Brien testified that methadone withdrawal does not cause hallucination, inability to distinguish truth from falsehood, formation of false memory, or involuntary speaking. ***Id***. at 101-02. Thus, he opined that Appellant's statement was knowing, voluntary and intelligent. Nothing in the materials he reviewed suggested otherwise. ***Id***. at 108.

Each of the police officers professed familiarity with the signs of drug withdrawal. Detective John McDermott of the Pennsylvania Office of the Attorney General initially placed Appellant under arrest and subsequently took a statement from him. Detective McDermott reported, "Physically, he was fine. He was aware of what was going on. He was cooperative." ***Id***. at 178. The detective did not see any signs of shakiness, nausea, or agitation over the two days, nor did Appellant complain of being sick or experiencing withdrawal. On the second day, the detective accompanied Appellant to the bathroom. Appellant complained of painful urination, prompting

Detective McDermott to arrange for transportation to the hospital. ***Id***. at 179.

When Detective Kenneth Rossiter took Appellant's statement during the afternoon of November 20, 2007, Appellant appeared normal and had no complaints of stomach pain, nausea, or sickness. ***Id***. at 186. He described Appellant as "coherent" and insisted that the words of Appellant's statement were verbatim. He learned the next day that Appellant was taken to the hospital that evening, but that upon discharge, returned for a preliminary arraignment. The parties stipulated that Sergeant Kuhlmeir would testify that he supervised the interrogation of Appellant. He knew Appellant and his family from the neighborhood, which was why he had a specific recollection of the events and a desire to see that proper procedures were followed. Sergeant Kuhlmeir would have testified that he was present when the second statement was taken in an open room, that he did not witness Appellant suffering any withdrawal symptoms, and he heard no complaints of any medical problems. ***Id***. at 194.

The PCRA court agreed with Appellant that his claim had arguable merit in that trial counsel failed to examine the subpoenaed medical records and locate the documentation that Appellant had received methadone the day before his arrest. That conclusion is challenged by the Commonwealth

herein.[1] Furthermore, the court found no reasonable basis for counsel to omit from the stipulation that the symptoms Appellant reported to the hospital were ongoing for one day. The court went on to hold, however, that evidence that Appellant may have been going through withdrawal when he provided statements to police, and the reported duration of the symptoms, together with expert testimony, would not have affected the outcome of the suppression motion nor was there a reasonable probability that it would have changed the verdict. N.T. PCRA Hearing, 7/15/13, at 15.[2]

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[1] The Commonwealth contends that counsel's performance was "objectively reasonable: he requested the records, made multiple calls to the facility, sent a paralegal twice to look for the record, and then again subpoenaed the records for trial." Commonwealth's brief at 24. Appellant counters that if that is true, then the evidence is after-discovered since the records could not have been discovered by due diligence prior to trial. The latter argument fails because the medical records indicating that Appellant received a dosage of methadone on November 18, 2007 were in the possession of the defense at the time of trial, and thus, not after-discovered. To be entitled to relief under the PCRA on the basis of after-discovered evidence, "the petitioner must plead and prove by a preponderance of the evidence '[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.' 42 Pa.C.S.A. § 9543(a)(2)(vi)." ***Commonwealth v. Foreman***, 55 A.3d 532, 536 (Pa.Super. 2012).

[2] Following the suppression hearing, the court made extensive factual findings. It found that Appellant's statements were not confessions; they merely placed Appellant at the scene of the murder. Appellant gave his first statement within twelve hours of detention, and much of that time was spent trying to identify the perpetrator named John. The court noted that Appellant corrected eight misspellings in his typed statement. He was fed, permitted to use the bathroom, and he never asked for methadone or medical care. N.T. Suppression, 5/4/2010, at 33. Appellant's second statement was made thirty-one hours after detention. Appellant was
(Footnote Continued Next Page)

Appellant claims that the confession was "the crux of the Commonwealth's case[,]" Appellant's brief at 29, and the only evidence that established the commission of the felony underlying his second-degree murder conviction. ***Id***. at 24. Furthermore, Appellant maintains that absent the statements, the evidence of guilt was not overwhelming. Appellant attacks the reliability of the testimony of Mr. Angely, who had a *crimen falsi* conviction, a pending drug case, and a motive for lying. Similarly, Mr. Wilson, Mr. Kedra, Ms. Blase and Mr. Barry, were not "slam dunk" witnesses for the Commonwealth. ***Id***. at 29. Furthermore, Appellant alleges that the discovery of his bag on the rear porch of the murder scene months after the murder did not link him to the crime.

The PCRA court preliminarily noted that a person could be experiencing opiate withdrawal and still give a voluntary statement. N.T. PCRA Hearing, 7/15/13, at 7. It viewed withdrawal as "but one circumstance to consider in the totality-of-the-circumstances test" for determining whether a statement is voluntary. ***Id***. at 8. Appellant's expert acknowledged that metabolism affected the speed of onset of withdrawal symptoms, and both experts agreed that Appellant's admitted concurrent use of other substances could affect the timing of withdrawal. Most telling,

(Footnote Continued) ———————————

described in hospital records as pleasant and cooperative, neat and appropriate. Furthermore, Appellant was released from the hospital after only three hours. ***Id***. at 109.

according to the PCRA court, were the records of the hospital. As Dr. O'Brien observed, the medical records contained no report of objectively manifested symptoms of withdrawal such as vomiting or frequent urination. ***Id***. at 10. Furthermore, hospital personnel prescribed low doses of sedatives and released Appellant within three hours, which suggested that withdrawal symptoms were not substantial. The court placed great weight on notations in the records that Appellant's appearance was "neat and appropriate" and that he was "irritable but cooperative;" his speech was "normal in tone, rate, and rhythm;" he was "oriented," "and his insight and judgment were fair." ***Id***. at 12-13. The court concluded that the only new fact was that Appellant had received his last dosage of methadone twenty-four hours before he gave his first statement to police, and expert testimony that withdrawal could commence twenty-four to thirty-six hours after the last dosage. This would not have changed the result of the earlier suppression motion.[3] ***Id***. at 14. The court also concluded that defense counsel's cross-examination was effective in informing the jury of the length of detention, the conditions, Appellant's psychiatric status, and the physical complaints that prompted the hospital visit. Despite the fact that the jury was not told that Appellant was on methadone maintenance, that it did not

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[3] The PCRA court noted that at the time of the suppression hearing, it was aware that Appellant told hospital personnel that he was on methadone at the time.

hear expert testimony regarding withdrawal, and that Appellant reported that the symptoms were present for one day, the PCRA court found no reasonable probability "that the outcome of this trial would have been different had the jury received this information." ***Id***. at 15. The court characterized Appellant's statements to his friends of involvement in the murder, five of whom testified at trial, as "overwhelming evidence of guilt," and that the experts' testimony regarding subjective and objective symptoms of withdrawal, as well as the medical records, militated against a finding that the police officers lied. ***Id***. Since we find ample record support for the PCRA court's conclusions, this claim fails.

Appellant also argues that counsel was ineffective in failing to produce additional evidence, the cumulative effect of which would have undermined the voluntariness of Appellant's statements. ***See Commonwealth v. Johnson***, 966 A.2d 523, 542 (Pa. 2009) (recognizing that where a court finds multiple instances of counsel's deficient performance, the assessment of prejudice properly may be premised upon the cumulative effect of those errors). The evidence to which Appellant initially refers is his statement at the hospital emergency room that his symptoms persisted for one day. Counsel omitted the duration of the symptoms from the stipulation presented to the jury.

The PCRA court considered the cumulative prejudicial effect of both the withdrawal evidence and the incomplete stipulation. It accorded greater

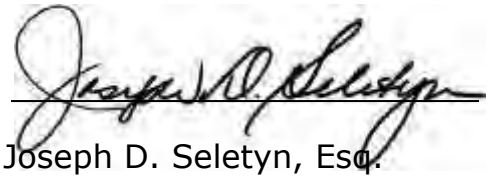
weight, however, to the medical records, which did not contain any documentation of physical signs of withdrawal upon Appellant's admission to the emergency room. Additionally, only a low dose of medication was prescribed and Appellant was released in less than three hours. This tended to suggest to the PCRA court that Appellant was not so debilitated as a result of methadone withdrawal that his statements were involuntary. Furthermore, the court found that the absence of noted objective signs of withdrawal in the medical records lent credence to the police officers' testimony that Appellant appeared fine and in no discomfort. The record amply supports the court's findings.

Appellant also blames counsel for failing to debunk the notion that he attended Drexel University, contending that such a strategy would have tended to show police fabrication and/or demonstrate that Appellant was so debilitated by withdrawal that he could not provide accurate information. The misinformation was contained in Appellant's statement. We find that proof of its falsity could have supported yet a third reasonable inference: that Appellant lied to police. Given this downside of highlighting the factual inaccuracy, counsel cannot be deemed ineffective for declining to pursue that strategy.

In conclusion, we reject Appellant's claim that the cumulative effect of counsel's inadequacies was prejudicial, and deny relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014