NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN DAVID BROOKINS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2118 EDA 2012

Appeal from the PCRA Order Entered June 27, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0005060-1991

BEFORE: BENDER, J., BOWES, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, J.: **FILED SEPTEMBER 05, 2013**

Appellant, John David Brookins, appeals from the trial court's June 27, 2012 order denying his petition for post conviction relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541-9546. We affirm.

On July 7, 1992, a jury convicted Appellant of first-degree murder. Appellant's conviction stemmed from the December 20, 1990 killing of Sheila Ginsberg, the mother of Appellant's girlfriend, Sharon Ginsberg. The victim's body was discovered "lying partially on the couch [in her apartment] with a pair of large scissors embedded in her chest." PCRA Court Opinion, 12/31/12, at 2.[1] An autopsy revealed that the victim was not only stabbed

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* Retired Senior Judge assigned to the Superior Court.

[1] The PCRA court's citations to the record have been omitted.

in the chest, but also had "eight significant internal injuries, including skull penetration consistent with an object such as scissors, protruding wounds, and bone fractures." ***Id.*** at 6. The forensic pathologist further stated that the victim's hyoid bone had been broken, opining that she had likely been strangled. ***Id.***

Several of Appellant's fingerprints were discovered at the scene, including a bloody print on a television remote control found near the victim's body. ***Id.*** at 5. Additionally, letters written between the victim and Appellant were found in the apartment and indicated that the two had a romantic relationship. ***Id.*** at 4. The letters also evinced that Appellant and the victim had also recently quarreled about money. ***Id.*** at 4-5. When Appellant was interviewed by police after the murder, he gave varying accounts of what occurred on the night the victim was killed. ***Id.*** at 9-13. For instance, while he initially denied seeing the victim the night she died, after being arrested and confronted with the fingerprint evidence, Appellant admitted that he had been inside the victim's apartment the night of the murder, but claimed that he left for a short time and returned later to find her dead. ***Id.*** at 9-13. He told police that he touched the victim's body, got blood on his hands, and then touched several objects in the apartment, such as the phone. ***Id.*** at 12. However, he denied touching the television remote control. ***Id.*** at 13.

Appellant was charged with murder and proceeded to a jury trial, where he attempted to convince the jury that Sharon Ginsberg murdered her

mother. However, the jury rejected Appellant's version of events and convicted him of first-degree murder on July 17, 1992. Following a penalty hearing, Appellant was sentenced to life imprisonment. He filed a timely notice of appeal with this Court, and after we affirmed his judgment of sentence, our Supreme Court denied his subsequent petition for permission to appeal. ***Commonwealth v. Brookins***, 723 A.2d 228 (Pa. Super. 1998) (unpublished memorandum), *appeal denied*, 736 A.2d 602 (Pa. 1999).

On January 18, 2000, Appellant filed a *pro se* PCRA petition and counsel was appointed. At this point, the procedural history of Appellant's case becomes tortuous, to say the least, and we decline to reproduce the specifics herein.[2] Instead, for purposes of this appeal, it is only necessary to explain that for various reasons - including the apparent carelessness of the court – the litigation of Appellant's PCRA petition did not commence until the Honorable Rea B. Boylan of the Court of Common Pleas of Bucks County took over his case on November 24, 2008. While Judge Boylan attempted to conduct a PCRA hearing shortly thereafter, due to continuance requests and other filings by the parties, Judge Boylan was only able to conduct a partial PCRA hearing on July 1, 2009, and did not complete that proceeding until June 15, 2011. We also note that in the meantime, on October 29, 2010, Appellant filed a "Motion to Subject Seized Gloves for [DNA] Testing," which

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[2] A complete discussion of the procedural history can be found in the PCRA court's Pa.R.A.P. 1925(a) opinion on pages 13 through 17.

the court denied on April 27, 2011. On June 27, 2012, the court also denied Appellant's PCRA petition.

Appellant filed a notice of appeal to this Court on July 23, 2012. Additionally, he filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, he raises two issues for our review:

> 1. Did the PCRA Court err in determining Trial Counsel to be effective despite Trial Counsel's failure to call Paul Cottman as a witness on behalf of the defense?
>
> 2. Did the PCRA Court erred [*sic*] in denying [Appellant's] motion for DNA testing of the "red gloves?"

Appellant's Brief at 5.

Initially, we lack jurisdiction to address Appellant's second issue challenging the court's denial of his motion for DNA testing. While Appellant appropriately raised his request for DNA testing of certain evidence in a motion filed separately from his PCRA petition, he did not file a timely notice of appeal from the denial thereof. ***See Commonwealth v. Gacobano***, 65 A.3d 416, 419 (Pa. Super. 2013) (stating a request for DNA testing and "other PCRA-based requests for relief … must be bifurcated and the DNA testing issue is to be addressed first") (citing ***Commonwealth v. Williams***, 35 A.3d 44, 50 (Pa. Super. 2011) ("An application for DNA testing should be made in a motion, **not** in a PCRA petition.") (emphasis in original)); ***see also*** Pa.R.A.P. 903(a) ("Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be

filed within 30 days after the entry of the order from which the appeal is taken."). Therefore, this Court does not have jurisdiction to review Appellant's argument that the court improperly denied that motion. ***See In re Greist***, 636 A.2d 193, 195 (Pa. Super. 1994) (stating that "[t]he 30-day period [in which to file an appeal] must be construed strictly" and "[t]his Court has no jurisdiction to excuse a failure to file a timely notice.").

In regard to Appellant's remaining issue, our standard of review "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).

Appellant contends that his trial counsel, Mark Rickles, Esquire, was ineffective for failing to call Paul Cottman as a witness for the defense. Appellant explains the importance of Mr. Cottman's proposed testimony as follows:

> Unlike some of the other defense witnesses, Mr. Cottman was engaged in an intimate relationship with Sharon Ginsberg. He would have testified that in the evening hours of the homicide[,] [] Sharon Ginsberg was in need of money to buy drugs. She left Mr. Cottman wearing blue jeans. Sharon Ginsberg had not returned when Bristol Township Detectives told Mr. Cottman that Sheila Ginsberg had been murdered. Upon later returning to her residence, Mr. Cottman noticed that Sharon Ginsberg was now wearing red jeans with a split in the knee. Both Sharon Ginsberg and Mr. Cottman were taken to the Bristol Township Police Department. It was there that Mr. Cottman "could feel the crack vials in her back pocket."
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> The statement [Mr. Cottman gave] to [a] private investigator on June 13, 1992[,] also contained the observations of Mr. Cottman that when Sharon Ginsberg left the house, she was wearing boots and a blue sweater, as well as the blue jeans. Upon seeing her later, she was wearing sneakers and the red jeans.
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> As [t]rial [c]ounsel confirmed in his testimony [at the PCRA hearing], the stabbing injuries sustained by the victim would have produced significant amounts of blood, and "whoever did this would have had blood on them."
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> At trial, the defense argued that Sharon Ginsberg could have killed her mother, with robbery as a motive. The failure of [t]rial [c]ounsel to call Mr. Cottman to the stand, who would have testified to Sharon Ginsberg's change of clothing, as well as her need for drugs, and suddenly having them, was so prejudicial as to deny [A]ppellant a fair trial.

Appellant's Brief at 9-10 (citations to the record omitted).

The PCRA court rejected Appellant's ineffectiveness claim mainly due to its conclusion that Attorney Rickles had a reasonable basis for not calling Mr. Cottman as a witness at trial. After examining Attorney Rickles' testimony at the PCRA hearing, we are compelled to agree. There, counsel explained that he had his defense investigator interview Mr. Cottman. N.T. PCRA Hearing, 6/15/11, at 75. After reviewing the investigator's report, Attorney Rickles made a "tactical decision" not to call Mr. Cottman because he believed that Mr. Cottman's testimony would "hurt us more than help us, and the help he would have offered had its limitations." ***Id.*** at 79. For instance, counsel explained that Mr. Cottman was a drug user and was Sharon Ginsburg's boyfriend "when [Appellant] wasn't around." ***Id.*** at 75. Furthermore, prior to trial, the Commonwealth had revealed to Attorney Rickles that during its interview with Mr. Cottman, Mr. Cottman stated that Appellant "had beat up Sharon Ginsburg in the past." ***Id.*** at 78. Attorney Rickles testified at the PCRA hearing that he "wasn't going to call a witness that [the Commonwealth] could cross-examine and have him testify that my client, who's accused of murder is – was beating up a little woman, … because Sharon Ginsburg was not a big woman, she was like 5 foot, 5 foot 1, I forget her size, but she's not a big woman." ***Id.*** at 78-79.

Additionally, Mr. Cottman had informed the Commonwealth that Appellant knew "about [the murder] … early on that day or the next day." ***Id.*** at 79. In other words, Attorney Rickles believed that Mr. Cottman would

testify that Appellant knew about the murder earlier than he would have if he were not involved in that crime. Attorney Rickles also explained that he decided not to call Mr. Cottman to the stand because his testimony would have been of limited value to the defense. Specifically, counsel stated Mr. Cottman's testimony about seeing Sharon Ginsberg in different clothing after the murder occurred could be explained because Sharon Ginsberg was a prostitute at that time. ***Id.*** at 80.

Based on counsel's testimony at the PCRA hearing, the court concluded that counsel's decision not to call Mr. Cottman at trial was reasonable. We agree. Moreover, as the PCRA court emphasized, Appellant was colloquied during the trial "and asked whether there were any additional witnesses he was aware of or wanted to produce. [Appellant] stated there were not." PCRA Court Opinion, 12/31/12, at 22. In light of this evidence, we conclude that the PCRA court did not err in denying Appellant's ineffective assistance of counsel claim.

Order affirmed.

Judgment Entered.

Prothonotary

Date: 9/5/2013