

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

RASSAN RICHARDSON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3112 EDA 2014

Appeal from the PCRA Order October 24, 2014
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0010426-2007

BEFORE: GANTMAN, P.J., PANELLA, J., and OLSON, J.

MEMORANDUM BY PANELLA, J.

FILED AUGUST 03, 2015

Appellant, Rasan Richardson, appeals from the order entered October 24, 2014, in the Court of Common Pleas of Philadelphia County, which denied his petition filed pursuant to the Post Conviction Relief Act¹ ("PCRA"). No relief is due.

The factual history of this matter is well known to the parties, so we direct the reader to the PCRA court's recitation of facts as set forth on pages 1-7 of the Rule 1925(a) opinion filed December 24, 2014. Briefly, a jury convicted Appellant of murder of the third degree, conspiracy and possession of an instrument of crime. On August 15, 2008, the court sentenced Appellant to 22 to 44 years' imprisonment. On appeal, this Court affirmed

¹ 42 Pa.C.S.A. §§ 9541-9546.

Appellant's judgment of sentence, the Pennsylvania Supreme Court denied allocatur, and the United States Supreme Court denied certiorari. **See Commonwealth v. Richardson**, 31 A.3d 757 (Pa. Super. 2011) (unpublished memorandum), **appeal denied**, 34 A.3d 829 (Pa. 2011), **cert. denied**, --- U.S. ---, 132 S.Ct. 2683 (2012).

Appellant filed a timely *pro se* PCRA petition. The PCRA court appointed counsel who later filed an amended petition. The PCRA court issued Pa.R.Crim.P. 907 notice and subsequently dismissed Appellant's petition. This timely appeal followed.

Appellant raises the following issues for our review.

1. Did the PCRA [c]ourt err in finding that trial counsel was not ineffective and Appellant was not prejudiced when counsel failed to object to and preserve the issue of prosecutorial misconduct when the assistant district attorney said that, unlike defense counsel, the assistant district attorney had to seek the truth and uphold, protect, and defend the Constitution?
2. Did the PCRA [c]ourt err in determining that trial counsel was not ineffective and Appellant was not prejudiced when counsel failed to request a drug usage and effect jury instruction when an eyewitness, Lamar Dawkins, admitted being under the influence of several narcotics when he allegedly identified Appellant as having handed a firearm to co-Defendant?

Appellant's Brief at 4.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." **Commonwealth v. Edmiston**, 65 A.3d 339, 345 (Pa. 2013) (citation omitted), *cert. denied*,

Edmiston v. Pennsylvania, --- U.S. ---, 134 S. Ct. 639 (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. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation omitted).

In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. **See** 42 Pa.C.S.A. § 9543(a)(3). “[T]his Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted).

As this Court has repeatedly stated,

[t]o plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel’s actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel’s act or failure to act. **Commonwealth v. Chmiel**, 612 Pa. 333, 30 A.3d 1111, 1127 (2011).

Commonwealth v. Rykard, 55 A.3d 1177, 1189-1190 (Pa. Super. 2012).

We have previously recognized that

“[n]ot every unwise remark made by an attorney amounts to misconduct or warrants the grant of a new trial.” **Commonwealth v. Carson**, 913 A.2d 220, 242 (Pa. 2006). “Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence

objectively and render a true verdict.” **Commonwealth v. Stokes**, 839 A.2d 226, 230 (Pa. 2003), quoting **Commonwealth v. Fisher**, 813 A.2d 761, 768 (Pa. 2002).

Furthermore, according to the Pennsylvania Supreme Court in **Commonwealth v. Chmiel**[, 889 A.2d 501, 543-44 (Pa. 2005)]:

In determining whether the prosecutor engaged in misconduct, courts must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel’s conduct. It is well settled that the prosecutor may fairly respond to points made in the defense closing. A remark by a prosecutor, otherwise improper, may be appropriate if it is in [fair] response to the argument and comment of defense counsel. Moreover, prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair.

Commonwealth v. Collins, 70 A.3d 1245, 1252-53 (Pa. Super. 2013) (some bracketed citations omitted), **appeal denied**, 80 A.3d 774 (Pa. 2013).

We have reviewed Appellant’s issues raised on appeal, along with the briefs of the parties, the certified record, and the applicable law. Having determined that the Honorable Sheila Woods-Skipper’s December 24, 2014 opinion ably and comprehensively disposes of Appellant’s issues raised on appeal, with appropriate reference to the record and without legal error, we affirm on the basis of that opinion. **See** PCRA Court Opinion, 12/24/14 at 8-12 (finding: prosecutor’s statements made during closing argument amounted to fair response to arguments made by defense counsel during closing; and that trial court adequately instructed jury as to weight of the

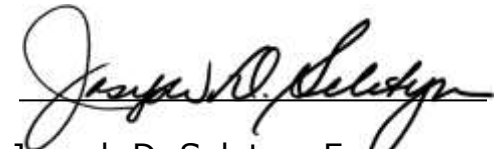
evidence and how to evaluate the credibility of witness testimony such that specific drug usage instruction was not warranted).

Order affirmed.

President Judge Gantman joins the memorandum.

Judge Olson concurs in the result.

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: 8/3/2015

FILED

DEC 24 2014

**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION**

**Criminal Appeals Unit
First Judicial District of PA**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
	:	CP-51-CR-0010426-2007
v.	:	
	:	
RASSAN RICHARDSON	:	
PP# 821113	:	
	:	
DOCKET NO.: 3112 EDA 2014	:	

OPINION

Appellant, Rassan Richardson, appeals the dismissal of his petition for relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9542, et seq. (PCRA). On October 24, 2014, following a thorough independent review of appellant's pro se petition, the submissions of counsel, the record and the controlling law, appellant's petition was dismissed without a hearing. The facts and procedural history are as follows.¹

On January 4, 2007, at approximately 12:18 AM, Philadelphia Police Officer Brian Smith and his partner Officer Eric Tyler were preparing to begin their shift at the 12th Police District, 65th and Woodland Avenue in the City and County of Philadelphia, when they heard several radio calls of gunshots, and a person shot on the highway at 6516 Regent Street. They obtained a police vehicle, acknowledged to radio that they were responding, proceeded to the

¹ More detailed facts from appellant's trial can be found in the Superior Court opinion affirming the judgment of sentence. (905 EDA 2009).

east side of the 6200 block of Regent Street, and worked their way over to 65th and Regent Street. As they proceeded down 6200 Regent Street, they observed a large crowd on the corner, huddled around someone lying on the ground next to a Jeep. They exited their patrol car and observed a male, later identified as Derrick Armstrong (Armstrong), on the ground between the curb and the Jeep, his back facing the driver's door, his head facing the curb, in a fetal position. The male appeared to be bleeding from the abdomen, head and face. At approximately the same time, paramedics arrived and transported the victim to the Hospital of the University of Pennsylvania where he was pronounced dead.

The subsequent autopsy revealed that Armstrong's cause of death was multiple gunshot wounds. He suffered a gunshot wound to his left back that went through his left lung, his heart and his right lung, causing massive damage to both lungs and the heart and massive internal bleeding. A large caliber bullet was recovered from his chest wall. A second bullet entered his left buttock and exited through the upper left thigh causing hemorrhaging within the muscles of the buttock and left thigh. A third bullet entered the right buttock traveled through the bowel, the liver and the diaphragm and into the right chest cavity where a large caliber non jacketed bullet was recovered. This bullet caused extensive bleeding in the bowel, liver and buttock. A fourth bullet entered the back of the right lower leg below the knee and lodged in the muscle of the right thigh from which a large caliber non-jacketed bullet was recovered. The bullets were turned over to the police for analysis. Police Officer Robert Stott of the Firearms Identification Unit examined the bullets submitted by the

medical examiner. He determined that the bullets were .38/.357 caliber with similar microscopic characteristics, but that there were insufficient markings to determine whether the bullets were fired from the same firearm.²

Officers Smith and Tyler secured the crime scene and began a crime scene log. Crime Scene Unit (CSU) Officer Lamont Fox and technician William Whitehouse photographed the area, took measurements and sketched the crime scene. A cell phone located about three feet away from the body and a small black screw top vial found between the Jeep and the Lexus parked behind it, items which had been marked previously during Officer Smith and Officer Tyler's initial survey of the crime scene, were collected. No ballistic evidence was recovered. Technician Whitehouse performed a latent fingerprint examination on the vial and was able to develop a fingerprint from the vial. He also obtained a latent fingerprint from the face of the cell phone. Clifford Parsons, the fingerprint technician from CSU was able to make an identification of the fingerprint on the glass vial. The print had consistent characteristics with the co-defendant Carrington, 13 points of identification. He found no prints belonging to appellant.

Homicide Detective John Keen was assigned to coordinate the homicide investigation. In connection with his investigation into the death of Derrick Armstrong, he conducted interviews of Lamar Adams, Gregory Powell and Ebony Dawkins, all of whom were present at the time of the shooting. On January 11, 2007, Lamar Adams (Adams), who was friends with both

² Officer Stott analyzed two bullet specimens submitted on property receipt number 2697822. The stated sources were Armstrong's right chest wall and right thigh.

Carrington and Armstrong, was interviewed by Detective Keen and Detective Bayard. Adams told the detectives that he was at 65th and Regent Street as was Armstrong. Carrington arrived, and an argument ensued between him and Armstrong about money. Carrington insulted Armstrong's girlfriend and the two began to physically fight. Gregory Powell (Powell, aka Black) broke up the fight, but Carrington and Armstrong began to fight again. This time Adams broke it up, but again the two began to fight. The fight stopped when it appeared that Armstrong had won. A couple minutes thereafter, Adams observed Carrington point a revolver at Armstrong and shoot him in the back 3-4 times. Adams stated that Armstrong was standing at the pole on Regent Street, and Carrington was on the sidewalk about ten feet away from Armstrong when Carrington shot him. After the shooting, Carrington ran down Regent Street toward 63rd Street. Adams did not mention appellant in this statement. Upon completion of the interview, Adams read and signed the

statement. Adams also identified Carrington's photograph from a photo spread and signed the photograph to so indicate. However, at trial, Adams claimed that he did not remember giving the statement or anything in the statement because he was high on "E" at the time. He denied that it was his signature on the statement and the photograph. The Commonwealth introduced exemplars of Adams' signature for comparison with the signature on the photograph and the statement.

Gregory Powell was interviewed by Homicide detectives on January 17, 2007, and again on March 10, 2007. However, at the time of appellant's trial,

Powell was unavailable and his August 29, 2007, preliminary hearing testimony was read into the record. Powell testified that on January 4, 2007, he witnessed a fight between Carrington and Armstrong. He broke the fight up, but they began to fight again. Armstrong was winning the fight. Powell again broke the fight up and this time Armstrong went toward the 65th Street corner and Carrington began walking toward the crowd. As Carrington walked toward the crowd, Powell testified that he observed appellant hand Carrington a chrome .38 caliber hand gun. Upon seeing the gun, Powell ran toward the alleyway. When he reached the front of the alleyway, he heard gunshots. He looked back and saw that Armstrong had been shot. At that point, Powell saw his car, being driven by Mir, pulling away from the space where it had been parked with appellant and Carrington as passengers. He ran after his car and caught up with it in the middle of the block. Powell ordered appellant and Carrington to get out because he wanted to avoid involvement with the shooting. Powell indicated that he did not see any other guns at the time of the shooting. Powell acknowledged that it was his signature on the statement and the photograph of Carrington. On March 10, 2008, Powell was re-interviewed by homicide detectives and indicated that he observed appellant pass Carrington the gun. However, at the preliminary hearing, Powell testified that he did not actually see appellant pass a gun; that the detectives made him sign the statement saying that he did.

Detective Keen interviewed Ebony Dawkins (Dawkins) approximately a week after Armstrong was killed. At the time of the interview, Dawkins

appeared extremely jittery and nervous prompting Detective Keen to inquire whether she was under the influence of drugs or alcohol. She answered no and the interview commenced. Dawkins, who lived at 6335 Regent Street, told Detective Keen that, at the time of the incident, she was in her bedroom on the second floor facing Regent Street. She heard some noises coming from outside and looked out of the window to see the source. She observed Carrington and Armstrong, who she knew from the neighborhood, fighting each other. Several other people were outside as well, namely Chuck, Samir, Powell and others. Dawkins came downstairs to her front door to further observe the incident. A male broke up the fight. After a few minutes, Carrington and Armstrong began to fight again. Armstrong appeared to be winning, Carrington was on the ground. The fighting stopped, then began again. Someone else broke it up and Armstrong began to walk away toward 65th Street from out in the street, toward the sidewalk in front of Dawkins' house. Carrington was across the street near 6340 Regent Street. Dawkins then observed a black male she later identified as appellant, hand Carrington a gun, a silver revolver. Carrington took the gun, and began walking toward Armstrong. She then closed her door, and was walking toward her living room when she heard 4-5 gunshots and a car speed off. She put on her sneakers, called 911 and told them to send an ambulance. Dawkins then went outside and observed Armstrong lying on the street. She identified appellant from a photo array. At trial, Dawkins testified in conformance with her statement. She was extensively cross-examined on her memory and the inconsistencies with her preliminary hearing testimony. She

testified that, while she had always had problems with her memory generally, she was sure she saw appellant give Carrington the gun.

On March 22, 2007, an arrest warrant was obtained for appellant and Carrington. Carrington surrendered himself at the Homicide Unit on March 22, 2007. Appellant was arrested without incident the same day. Both appellant and Carrington were charged with murder and related offenses. Following a jury trial with co-defendant Charles Carrington, appellant was convicted of third degree murder, conspiracy and possession of an instrument of crime and sentenced to 22-44 years incarceration. Post sentence motions were litigated and denied. Appellant's judgment of sentence was affirmed by the Superior Court on June 28, 2011. The petition for allowance of appeal to the Pennsylvania Supreme Court was denied on December 22, 2011.

On December 11, 2012, appellant timely filed a pro se PCRA petition. PCRA counsel was appointed and on February 11, 2012, filed an amended petition alleging that trial counsel was ineffective for failing to object and preserve the issue of prosecutorial misconduct where the prosecutor remarked that, unlike defense counsel, he had to seek the truth and uphold, protect, and defend the Constitution; and for failing to request a drug usage and effect jury instruction when eyewitness, Lamar Adams, admitted being under the influence of narcotics when he identified Appellant as having handed a firearm to co-defendant. On September 11, 2014, the Commonwealth filed a motion to dismiss, asserting that the assistant district attorney's argument was appropriate when placed within the context of the extensive personal attacks

made against the prosecutor by the two defense attorneys, and that Appellant failed to demonstrate that trial counsel was ineffective for not requesting a jury instruction regarding the alleged drug use of a witness who never inculcated the Appellant. The Court reviewed the submissions of both counsel, the record and the controlling law, and determined that Appellant was not entitled to PCRA relief. After giving proper notice, Appellant's PCRA petition was dismissed without a hearing on October 24, 2014. He now appeals.

An order dismissing a petition under the PCRA is reviewed in the light most favorable to the prevailing party at the PCRA level. Commonwealth v. Burkett, 5 A.3d 1260, 1267 (Pa.Super.2010). This review is limited to the findings of the PCRA court and the evidence of record and a PCRA court's ruling will not be disturbed if it is supported by evidence of record and is free of legal error. Commonwealth v. Ford, 2012 PA Super 98, 44 A.3d 1190, 1194 (2012). In the instant matter, Appellant complains that trial counsel was ineffective. It is well settled that counsel is presumed effective and will only be deemed ineffective if the petitioner demonstrates that counsel's performance was deficient and that he was prejudiced by that deficient performance. Commonwealth v. Pierce, 515 Pa. 153, 158, 527 A.2d 973, 975 (1987). To properly plead ineffective assistance of counsel, a petitioner must plead and prove: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act. Id. Prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the

proceeding would have been different. Commonwealth v. Cooper, 596 Pa. 119, 941 A.2d 655, 644 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Appellant first complains that the Court erred in finding that trial counsel was not ineffective where he failed to object to and preserve the issue of alleged prosecutorial misconduct during closing argument. The legal principles relevant to a claim of prosecutorial misconduct are well established. Comments by a prosecutor constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in [the jurors'] minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict. Commonwealth v. Hutchinson, 611 Pa. 280, 25 A.3d 277, 307 (2011). A prosecutor has reasonable latitude during his closing argument to advocate his case, respond to arguments of opposing counsel, and fairly represent the Commonwealth's version of the evidence to the jury. Commonwealth v. Hanible, 612 Pa. 183, 248, 30 A.3d 426, 465 (2011). The prosecutor is entitled to comment during closing arguments on matters where such comments constitute fair response to matters raised by the defense, or where they are merely responsive to actual evidence admitted during a trial. Commonwealth v. Trivigno, 561 Pa. 232, 750 A.2d 243, 249 (2000).

Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made. Commonwealth v. Sanchez, 82 A.3d 943, 981 (Pa. 2013). During his closing argument, the prosecutor stated:

Because I was the hallmark, apparently, in the first closing, let me say this to you. The judge has already instructed you, yes, everybody in here is an attorney, but there's one difference. Like the judge, I had to take a second oath to uphold, protect, and defend the Constitution. Different than a defense attorney, because my job is to seek the truth, not to muddle it, not to make it gray. That's what the evidence in this case has done. It has shown you the truth.

(N.T. 06/27/08 pg. 95).

This comment was made in response to the evidence and the arguments of counsel. Gregory Powell testified that the prosecutor coerced him into changing his statement to say that Carrington had the firearm used to shoot Armstrong by telling Powell that, if he so testified, he could get out of custody and go

home. (N.T. 06/24/08 pg. 342-343, 345)³ Additionally, appellant's counsel argued in his closing that the prosecutor and the police used heavy handed tactics to coerce Powell into giving this second statement. (N.T. 06/27/08 pg.

34-36) Co-defendant's counsel also referenced the alleged coercion in his closing. (N.T. 06/27/08 pg. 68-69) Therefore, the prosecutor's comment

amounted to fair response. As such trial counsel had no basis to object. Trial counsel will not be found ineffective for failing to raise a meritless claim. See Commonwealth v. Culver, 2012 PA Super 172, 51 A.3d 866, 876

(2012)(prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair).

Appellant next complains that counsel was ineffective for failing to request a drug usage and effect jury instruction to evaluate the eyewitness

³ Gregory Powell's testimony from the preliminary hearing was read into the record as he was deceased at the time of Appellant's trial.

testimony of Lamar Dawkins who admitted to being under the influence of narcotics when he identified appellant as having handed the firearm to the co-defendant. When evaluating the propriety of jury instructions, the reviewing court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper. Commonwealth v. Charleston, 2014 PA Super 116, 94 A.3d 1012, 1021 (2014). Appellant cites language from Rudovsky & Sosnov, Pennsylvania Criminal Procedure Forms and Commentary, 12.46 (vol. 2 West's Pennsylvania Practice) as the language that trial counsel should have requested to guide the jury in their assessment of Lamar Dawkins' testimony.⁴ However, the trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Commonwealth v. Hornberger, 2013 PA Super 231, 74 A.3d 279, 283 (Pa. Super. Ct. 2013). There are no magic, talismanic, words which must be uttered in order for a charge to pass muster. Rather, the instructions are read in their entirety with an eye towards assessing the overall accuracy and clarity of the instructions. Commonwealth v. Soto, 693 A.2d 226, 230 (Pa. Super. Ct. 1997). While the Court did not use appellant's suggested language, it did give the jury clear accurate instructions on how to weigh the evidence presented in making

⁴ The suggested instruction reads...You have heard evidence in this case that the witness _____ used drugs at the time of the incident. There was evidence that _____ used the drug _____, taking (amount) a period of (time) before the incident occurred. You should consider this evidence in deciding whether to believe all part or none of his testimony. You should consider whether this drug impaired his powers of observation and memory so that his recollection and account of the experience might be inaccurate.

their determination of guilt or innocence. The Court instructed the jury as follows:

As judges of the facts, ... you must judge the truthfulness and accuracy of each witness' testimony and decide whether to believe all part or none of their testimony. The following are some factors that you may and should consider when judging credibility and deciding whether or not to believe testimony: Was the witness able to see, hear or know the things about which he or she testified? How well could the witness remember and describe the things about which he or she testified? Was the ability of the witness to see, hear, know, remember or describe those things affected by youth, old age, or by any physical, mental, or intellectual deficiency? Did the witness testify in a convincing manner? As the sole judges of the credibility and facts, you the jurors are responsible to give the testimony of every witness and all of the other evidence whatever credibility and weight you think it deserves. ...

(N.T. 06/27/08 pp. 146-147) Therefore, while the Court employed different language, the jury was still accurately instructed on how to evaluate witness testimony, including Lamar Dawkins'. Accordingly, trial counsel will not be ~~deemed ineffective for failing to raise a meritless claim.~~

For the foregoing reasons, appellant's petition for PCRA relief was properly dismissed.

BY THE COURT:



SHEILA WOODS-SKIPPER, PJ

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the present Brief has been served by in-hand service on the following individual on February 2, 2015:

Hugh Burns, Esquire
Chief, Appeals Unit
District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107



Stephen T. O'Hanlon, Esquire
Attorney I.D. No. 208428
Attorney for Appellant
2 Penn Center Plaza, Suite 1850
1500 John F. Kennedy Boulevard
Philadelphia, PA 19102
(267) 546-9066