NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
FRANKLIN JOHONOSON,	:	
	:	
Appellant	:	No. 251 MDA 2013

Appeal from the PCRA Order January 23, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division No(s).: CP-36-CR-0004407-2009

BEFORE: BENDER, P.J., LAZARUS, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED APRIL 17, 2014**

Appellant, Franklin Johonoson, appeals *pro se* from the order of the Lancaster County Court of Common Pleas that denied, without an evidentiary hearing, his first petition filed under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. Appellant claims that he is entitled to an evidentiary hearing on his myriad claims for relief. We affirm.

The PCRA court has summarized the factual history of the burglary at Lancaster Catholic School that gave rise to Appellant's conviction, ***see*** PCRA Ct. Op., 12/31/12, at 1-3, and it is unnecessary to repeat that history for the purposes of this appeal. Procedurally, a jury found Appellant guilty of

* Former Justice specially assigned to the Superior Court.

burglary,[1] and the trial court sentenced him to four to ten years' imprisonment on August 23, 2010. Appellant took a direct appeal to this Court, and on September 12, 2011, we affirmed the judgment of sentence. ***Commonwealth v. Johonoson***, 1772 MDA 2010 (unpublished memorandum) (Pa. Super. Sept. 12, 2011). Appellant did not seek allowance of appeal in the Pennsylvania Supreme Court.

Appellant timely filed the *pro se* PCRA petition giving rise to this appeal, and the PCRA court appointed counsel. Appointed PCRA counsel subsequently filed a petition to withdraw and a ***Turner***/***Finley***[2] letter without amending Appellant's *pro se* petition. Appellant filed a *pro se* motion for reappointment of counsel in response to counsel's petition to withdraw. The court, on November 14, 2012, denied Appellant's motion for reappointment of counsel.

Thereafter, on December 31, 2012, the PCRA court issued a Pa.R.Crim.P. 907(1) notice of intent to dismiss and granted appointed PCRA counsel's petition to withdraw from representation. Appellant, on January 14, 2013, responded to the PCRA court's Rule 907 notice. The court, on January 23, 2013, entered the instant order denying Appellant's PCRA

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[1] 18 Pa.C.S. § 3502(a)(4).

[2] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

petition without a hearing. Appellant timely filed a notice of appeal and complied with the court's order to file a Pa.R.A.P. 1925(b) statement.

Appellant's principal assertion is that the PCRA court erred in denying his *pro se* PCRA petition without convening an evidentiary hearing.[3] ***See*** Appellant's Brief at 5. Specifically, he seeks relief based on the four underlying issues, which we will address in the following order:

> (1) He was technically unrepresented and thus denied his right to counsel at trial, because trial counsel failed to file an entry of appearance;
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> (2) trial counsel failed to present his intended defense;
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> (3) the arresting officer perjured himself in the affidavit of probable cause in support of the criminal complaint; and
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> (4) the execution of a warrant to obtain a DNA sample from him violated the Municipal Police Jurisdiction Act.

The standards governing our review are as follows:

> In reviewing a challenge to an order denying a PCRA petition, our standard of review is "whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record."

[3] Although Appellant preserved a claim that appointed PCRA counsel provided deficient representation in his response to the Rule 907 notice, he did not set forth a similar claim in his Pa.R.A.P. 1925(b) statement. ***See*** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived."). In any event, Appellant did not develop specific arguments directed towards PCRA counsel's performance in his appellate brief. Therefore, we may not grant relief *sua sponte* based a review of appointed PCRA counsel's ***Turner***/***Finley*** letter. ***See Commonwealth v. Pitts***, 981 A.2d 875, 880 (Pa. 2009).

* * *

> Our Supreme Court has emphasized, "[a] PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only where the petition presents genuine issues of material fact. . . . A PCRA court's decision denying a claim without a hearing may only be reversed upon a finding of an abuse of discretion."

Commonwealth v. McLaurin, 45 A.3d 1131, 1135-36 (Pa. Super. 2012) (citations omitted), *appeal denied*, 65 A.3d 413 (Pa. 2013). This Court may affirm the PCRA court's order denying relief on any basis. ***Commonwealth v. Doty***, 48 A.3d 451, 456 (Pa. Super. 2012).

With respect to claims of ineffective assistance of counsel,

> "[i]t is well-established that counsel 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." More specifically,
>
> > [t]o prevail on a claim alleging counsel's ineffectiveness under the PCRA, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, *i.e.* there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different.

McLaurin, 45 A.3d at 1136 (citations omitted).

Appellant first contends that he was denied the right to counsel at trial because trial counsel did not file a formal entry of appearance. From this, he fashions several claims for PCRA relief, namely, (1) trial counsel was

ineffective for failing to file an entry of appearance; (2) the sentence imposed by the trial court was illegal because he was not afforded the right to counsel; (3) prior appellate counsel was ineffective for failing to raise this issue in his direct appeal; and (4) the trial court and prior appellate counsel conspired to ensure this issue was not raised on direct appeal. No relief is due.

Following our review, we agree with the PCRA court that Appellant's contention that he was *de jure* or *de facto* unrepresented was meritless. An attorney-client relationship between Appellant and trial counsel was established under the circumstances of this case and the local rules that govern.[4] Accordingly, Appellant's contention that he was unrepresented due to trial counsel's failure to file a formal entry of appearance warranted no relief, whether cast as claims sounding in the ineffective assistance of trial counsel, the legality of sentence, the ineffectiveness of prior appellate counsel, or interference by the trial court.

[4] Under Lancaster County Rule of Criminal Procedure 120(A)(5), the filing of a motion on behalf of a defendant shall be deemed an entry of appearance if a case has been returned to the Court of Common Pleas. Pa.R.Lancaster Cty R.Crim.P. 120(A)(5). Instantly, the Office of the Public Defender, on August 24, 2009, issued a letter to the magisterial district judge confirming its representation of Appellant, and trial counsel waived Appellant's arraignment on October 23, 2009. Trial counsel was listed as counsel of record in the magisterial district court's paperwork forwarded to the Court of Common Pleas. Moreover, trial counsel subsequently filed a motion to suppress after the magisterial district court returned the case to the Court of Common Pleas. Under local rule 120(A)(5), trial counsel's filing in the Court of Common Pleas constituted an entry of appearance.

Appellant next asserts that he had an "honest and true" defense to the charge of burglary. He presently claims that trial counsel was ineffective for failing to present his defense.

The PCRA court determined that Appellant failed to substantiate his alleged defense or his related claim of ineffective assistance of counsel. PCRA Ct. Op at 6. However, Appellant attached to his *pro se* PCRA petition an exhibit detailing his assertions that he had been struck by a motor vehicle, broke a window at the school to summon emergency assistance, and waited outside for help to arrive. Appellant's PCRA Pet., 6/19/12, Ex. P, at 53-56. He claimed that had these allegations been presented to the jury, they would have established that he did not enter the school with the intent to commit a crime. ***Id.*** Therefore, we disagree with the PCRA court that Appellant's intended defense was not substantiated in his pleadings.

Nevertheless, we conclude Appellant was not entitled to an evidentiary hearing based on his claim of ineffective assistance of counsel regarding his intended defense. At trial, the Commonwealth's testimony referred to Appellant's statements that he had injured himself and broke the window to summon assistance. N.T., Trial, 5/10-13, 2010, at 213. Thus, Appellant's defense was raised by the evidence presented at trial. Moreover, Appellant's claim that trial counsel was ineffective for failing to present his defense overlooks the fact that he elected not to testify at trial. ***Id.*** at 284-85.

Accordingly, we conclude that there was no arguable merit to Appellant's claim that trial counsel was ineffective for failing to present his defense.

Next, Appellant alleges that the arresting officer, Manheim Township Police Officer Samuel Echternach,[5] perjured himself in the affidavit of probable cause filed in support of the criminal complaint.[6] Appellant relies on inconsistencies between affidavit and the suppression testimony to allege that Officer Echternach's affidavit of probable cause contained a material falsity. For the reasons that follow, we conclude that Appellant sufficiently identified an issue of arguable merit, *i.e.*, that trial counsel was ineffective for failing to challenge a misrepresentation in the affidavit of probable cause. Nevertheless, our review reveals that Appellant cannot establish prejudice in conjunction with this claim. Accordingly, we have no basis to grant the relief requested.

At the outset, we note that the PCRA court denied relief on Appellant's allegations because they were "unsupported by the record and too vague to warrant PCRA review." PCRA Ct. Op, 12/31/12, at 6. Our review, however, confirms Appellant's contention that a misstatement of fact existed in the affidavit of probable cause. Specifically, in the affidavit of probable cause

[5] The record contains several variations of the officer's last name. We have used the spelling "Echternach" as it is found on the affidavit of probable cause he submitted.

[6] Appellant cited the affidavit of probable cause and the suppression transcript verbatim in his *pro se* PCRA petition and underlined the portions he deemed relevant.

filed in support of the criminal complaint, Officer Echternach averred that "Nathan Whatmore, a fireman with the Southern Manheim Township Fire Company, observed a black male walking from the area of the [the crime scene]. Whatmore reported that this black male had several blood stains on his clothing." Aff. of Probable Cause, 8/20/09, ¶ 2. However, the suppression hearing testimony made clear that Whatmore did not make this report to the responding officers. N.T. Suppression Hr'g, 5/3-5/4/10, at 24. Rather, a second officer, Officer Raymond Bradley obtained information regarding a suspicious individual near the school from an unidentified fireman and broadcast that information over the police radio. ***Id.*** at 33. Officer Echternach, in turn, testified at the suppression hearing that he first received information that a "[b]lack male with a striped shirt, possibly bloody shirt on the front" was seen near the crime scene from Officer Bradley's radio broadcast. ***Id.*** at 51.[7] Therefore, we disagree with the trial court's opinion that Appellant's allegations were unsupported by the record or too vague.

Nevertheless, the nature of the specific misstatement identified by Appellant—namely, the identity of the fireman who first reported Appellant's presence in the area of the school—was not material to the question of

[7] We note that this Court, in the direct appeal, affirmed the suppression court's ruling that the officers had reasonable suspicion to detain Appellant. ***Johonoson***, 1772 MDA 2010, at 6-7.

whether the affidavit supported a magisterial district judge's determination that probable cause existed to support the criminal complaint. ***See Commonwealth v. Taylor***, 850 A.2d 684, 688 n.3 (Pa. Super. 2004) (reiterating that a misstatement is material if "the allegedly false statement is necessary to the finding of probable cause."). Therefore, even if trial counsel had raised Appellant's issue, we discern no reasonable possibility that outcome of the suppression hearing would have been different.[8] Accordingly, Appellant cannot establish prejudice for the purposes of the PCRA, and we detect no basis to conclude that Appellant was entitled to an evidentiary hearing based on this claim of ineffective assistance of counsel.

Lastly, Appellant contends that the DNA evidence obtained by the Commonwealth should have been suppressed because investigators violated the Municipal Police Jurisdiction Act ("MPJA"). The genesis of Appellant's contention is that a violation of the MPJA occurred when (1) a Manheim Township magisterial district judge issued a search warrant to obtain a DNA sample from Appellant, (2) the warrant was executed by Manheim Township police detectives, but (3) the DNA sample was ultimately obtained in Lancaster City while Appellant was held in custody in the Lancaster County Prison. We note that trial counsel had sought suppression based on a violation of the MPJA. Moreover, the trial court, following the suppression

[8] To the extent Appellant claims prior appellate counsel was ineffective for raising this issue in his direct appeal, such a claim fails for the same reasons.

hearing, concluded that the Commonwealth's evidence established an implied consent by Lancaster City police sufficient to show compliance with the MPJA. Lastly, although the issue of a possible violation of the MPJA was raised in the Pa.R.A.P. 1925(b) statement filed for his direct appeal, that issue was not raised before this Court. According to Appellant, all prior counsel were ineffective for failing to pursue relief based upon the alleged violation of the MPJA.

The MPJA provides, in relevant part:

> **(a) General rule.—**Any duly employed municipal police officer who is within this Commonwealth, but beyond the territorial limits of his primary jurisdiction, shall have the power and authority to enforce the laws of this Commonwealth or otherwise perform the functions of that office as if enforcing those laws or performing those functions within the territorial limits of his primary jurisdiction in the following cases:
>
> > (1) Where the officer is acting pursuant to an order issued by a court of record or an order issued by a district magistrate whose magisterial district is located within the judicial district wherein the officer's primary jurisdiction is situated, or where the officer is otherwise acting pursuant to the requirements of the Pennsylvania Rules of Criminal Procedure, **except that the service of an arrest or search warrant shall require the consent of the chief law enforcement officer, or a person authorized by him to give consent, of the organized law enforcement agency which regularly provides primary police services in the municipality wherein the warrant is to be served**.

42 Pa.C.S. § 8953(a)(1) (emphasis added).

In ***Commonwealth v. Ebersole***, 492 A.2d 436 (Pa. Super. 1985), this Court held:

> Section 8953(a)(1), when liberally construed, requires a police officer who is outside of his primary jurisdiction to obtain the consent of the county prison warden, or one authorized by him to give consent, before serving an arrest warrant upon one being held in a county prison. It does not require the police officer to obtain the consent of the chief law enforcement officer of the municipality in which the prison is located

Id. at 439.

Instantly, at the suppression hearing, the Commonwealth presented the testimony of Captain Pete Andrews of the Lancaster City Police Department. Captain Andrews testified that he was authorized to consent to the execution of search warrants for the purposes of the MPJA. N.T. Suppression Hr'g, at 86. He stated that in practice, officers from outside jurisdictions did not request his consent with respect to warrants served in the county prison, the courthouse or Lancaster General Hospital. ***Id.*** He further noted that although the Manheim Township detectives did not ask for his consent to serve the warrant on Appellant, he would have consented if asked. ***Id.*** at 86.

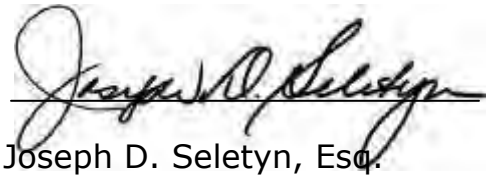
We conclude that there is arguable merit to Appellant's allegation that the Manheim Township detectives who served and executed the search warrant for a DNA sample at Lancaster County Prison violated the MPJA. Specifically, because Appellant was detained in Lancaster County Prison, the proper law enforcement officer to give consent was the prison official responsible for granting access to Appellant. ***See Ebersole***, 492 A.2d at 439. Therefore, the Commonwealth did not demonstrate proper consent for

the service of the Manheim Township warrant in the Lancaster County Prison.

However, to obtain PCRA relief, Appellant was required to establish that he was entitled to suppression based on the violation of the MPJA, ***see Commonwealth v. Hilliar***, 943 A.2d 984, 990-991, 992 (Pa. Super. 2008) (holding that minor infraction of MPJA did not require exclusion of evidence), and that there was a reasonable possibility that the outcome of trial would have been different had the DNA evidence been suppressed, ***McLaurin***, 45 A.3d at 1136. Having reviewed the record, we detect no basis to conclude that Appellant established that the technical violation of the MPJA entitled him to suppression of the DNA evidence. Furthermore, our review of the trial record reveals that in light of the overwhelming circumstantial evidence against Appellant, there was no reasonable possibility that the outcome of trial would have different had the DNA evidence been excluded.[9]

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary
Date: 4/17/2014

[9] As Appellant notes the DNA testing confirmed that the blood found outside of school was his. N.T. Trial, at 274-75. The DNA testing on the blood found inside the school was inconclusive because the sample did not contain sufficient DNA material. ***Id.*** at 274.