NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. AARON L. GARNETT Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 421 EDA 2013

Appeal from the PCRA Order of January 25, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0002194-2007

BEFORE: BOWES, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED APRIL 15, 2014**

Aaron L. Garnett appeals from the January 25, 2013 order that dismissed his petition pursuant to the Post-Conviction Relief Act ("PCRA").[1] We affirm.

The PCRA court has summarized the factual and procedural history of this case as follows:

> [On July 22, 2006, at approximately 2:00 a.m., Garnett] was . . . stopped by [officers of the Philadelphia Police Department] for failing to signal before the start of a turn; [Garnett] was issued a Traffic Citation for the violation. Upon stopping the vehicle, the officer saw, in plain view in a sneaker in the back seat behind [Garnett], a clear sandwich bag containing five brown . . . wraps filled with green-colored weed and also some loose green-colored weed. . . . Also[] in plain view in the right-side rear floor area was a loaded gun sticking

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[1] 42 Pa.C.S. §§ 9541, *et seq*.

> out of a black briefcase. . . . Upon arrest, $7,936.00 . . . was recovered from [Garnett]. The narcotics field[-]tested positive for marijuana. The gun was later discovered to be [stolen].

PCRA Court Opinion ("P.C.O."), 4/25/2013, at 3 n.2.

> After a jury trial, on April 14, 2010, [Garnett] was found guilty of two violations of the Uniform Firearms Act [("UFA")[2]] and possessing a small amount of marijuana. On June 16, 2010, [Garnett] was sentence[d] to 36 to 84 months[′] incarceration on 18 Pa.C.S. § 6106 and a $5,000[] fine, for carrying a loaded firearm without a license; a consecutive period of 12 to 48 months[′] incarceration for 18 Pa.C.S. § 6108, carrying a loaded firearm in a public place in Philadelphia; and a consecutive sentence of 15 to 30 days[′] incarceration for 35 P.S. § 780-113(a)(31), possessing a small amount of marijuana.
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> [Garnett] filed a direct appeal on July 15, 2010, represented by Tariq El-Shabazz, Esquire, to this sentence, but [Garnett's] "Notice of Withdrawal of his Direct Appeal" was ordered to be processed by the Prothonotary by the Pennsylvania Superior Court on May 17, 2011.
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> On July 15, 2011, [Garnett] filed a *pro se* [PCRA petition]. Dated April 13, 2012, Burton A. Rose, Esquire, notified this court by letter that he was retained by [Garnett] to represent him at the PCRA level. Dated May 17, 2012, PCRA counsel sent [the PCRA court] "Petitioner's Amended Petition Under Post Conviction Relief Act." On October 15, 2012, the Commonwealth filed its Motion to Dismiss [Garnett's] PCRA [p]etition. On November 15, 2012, [Attorney Rose] filed a Memorandum of Law in Opposition to [the] Commonwealth's Motion to Dismiss. On December 26, 2012, [the PCRA court] sent [Garnett] a notice of its intent to dismiss his PCRA [p]etition, explaining [that it] found his PCRA issues to be without merit. On January 25, 2013, [Garnett's] PCRA [p]etition was formally dismissed by [the PCRA court].
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> On February 6, 2013, [Garnett] filed a Notice of Appeal, represented by [Attorney Rose]. On March 5, 2013, [the PCRA

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[2] 18 Pa.C.S. §§ 6101, *et seq*.

> court] ordered [Garnett] to file a [concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b)]. [O]n March 21, 2013, [the PCRA court] received [Garnett's s]tatement, in which he listed three claims of error.

P.C.O. at 1-2 (internal citations and footnote omitted).

Garnett presents the following issues for our review:

> 1. Did the [PCRA] court err in dismissing [Garnett's] PCRA petition without a hearing where trial counsel was ineffective for failing to challenge testimony regarding cash taken from [Garnett]?
>
> 2. Did the [PCRA] court err in dismissing [Garnett's] PCRA petition without a hearing where trial counsel was ineffective in failing to object to the prosecutor's closing argument stressing that [Garnett] had failed to testify?
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> 3. Did the [PCRA] court err in dismissing [Garnett's] PCRA petition without a hearing where trial counsel was ineffective in failing to preserve an objection to the unreasonable sentences imposed in this case for the single act of violating the Uniform Firearms Act?

Garnett's Brief at 3. We will address each claim in turn.

Our standard of review of a PCRA court's order granting or denying relief is limited to examining whether "the determination of the PCRA court is supported by the evidence of record and is free of legal error." ***Commonwealth v. Garcia***, 23 A.3d 1059, 1061 (Pa. Super. 2011). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Wah***, 42 A.3d 335, 338 (Pa. Super. 2012). Pennsylvania has recast the standard for ineffective assistance of counsel ("IAC"), set forth by the United States'

Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984), as the following three-factor inquiry:

> [I]n order to obtain relief based on [an IAC] claim, a petitioner must establish: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (Pa. 2005) (citing ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987)). Trial counsel is presumed to be effective, and Appellant bears the burden of pleading and proving each of the three factors by a preponderance of the evidence. ***Commonwealth v. Rathfon***, 899 A.2d 365, 369 (Pa. Super. 2006); ***see also Commonwealth v. Meadows***, 787 A.2d 312, 319-20 (Pa. 2001).

In his first issue, Garnett asserts that "trial counsel ought to have objected by way of a motion *in limine* or at time of trial to the admission of testimony that [Garnett] . . . was found to be in possession of approximately $7936.00 in various denominations."[3] ***Id.*** at 9. Garnett argues that this

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[3] Our review of the certified record indicates that trial counsel filed a motion to suppress the admission of both the currency at issue, and any testimony related to it. Specifically, on December 4, 2007, Garnett's counsel filed a "Motion to Suppress Statement and Physical Evidence" which, in relevant part, asked that the trial court suppress "[a]ll articles and items of evidence of every kind and description which were unlawfully seized," and also requested that "no testimony or comment shall be received respecting the same. . . ." Garnett's Suppression Motion, 12/4/2007, at 1 (unpaginated). However, the basis for suppression asserted in that motion was that Garnett's arrest was illegal. Instantly, Garnett is arguing that the
(Footnote Continued Next Page)

testimony improperly was elicited by the Commonwealth to suggest that Garnett was a drug trafficker: "[T]rial counsel[4] was under an obligation to advance and preserve an objection to this testimony and argument which was intended to suggest to the jury that [Garnett] was a drug trafficker." Garnett's Brief at 9. Thus, Garnett argues that the "admission of testimony that he was in possession of a firearm along with a large amount of United States[']] currency in these denominations" was an attempt, by the Commonwealth, to invite the jury to convict Garnett on an improper basis. ***Id.*** at 11-12. We disagree, and conclude that Garnett has failed adequately to prove that trial counsel's inaction was unreasonable.

Garnett's argument, with respect to his first claim, does not address the standards attendant to IAC. Although Garnett attempts to support his claims with citations to Pennsylvania case law, he has not organized his argument with reference to his burdens of proof pursuant to ***Pierce***. "[T]he ***Pierce*** test requires the PCRA petitioner to set forth the three[-]prong

(Footnote Continued) ———————————

testimony regarding the seized money was unduly prejudicial, which trial counsel did not address in his motion. Thus, we will address the merits of Garnett's first claim.

[4] During the pre-trial period, Garnett was represented by Daniel Walls of the Defender Association of Philadelphia. Thereafter, on or about June 20, 2007, Adam J. Rodgers began representing Garnett. At some point prior to trial, Gerald B. Ingram took over Garnett's representation. Despite the fact that the criminal docket reflects that Attorney Ingram first entered his appearance on April 15, 2010, Attorney Ingram unquestionably represented Garnett during the jury trial. ***See*** Notes of Testimony, 4/14/2010, at 2.

standard of ineffectiveness as it relates to the performance of counsel." ***Commonwealth v. Jones***, 876 A.2d 380, 386 (Pa. 2005) (citing ***Pierce***, 527 A.2d at 975). Furthermore, "a petitioner must set forth and individually discuss substantively each prong of the ***Pierce*** test." ***Commonwealth v. Steele***, 961 A.2d 786, 797 (Pa. 2008).

Even were we, charitably, to construe Garnett's discussion as an attempt to establish both the arguable merit and the prejudicial effect of counsel's alleged failure, we can find nothing in Garnett's argument that pertains to the reasonableness of trial counsel's inaction. "When determining whether counsel's actions or omissions were reasonable, 'we do not question whether there were other more logical courses of action[] which counsel could have pursued: rather, we must examine whether counsel's decisions had *any* reasonable basis.'" ***Id.*** (quoting ***Commonwealth v. Rios***, 920 A.2d 790, 799 (Pa. 2007)) (italics in original). "A chosen strategy will not be found to have lacked a reasonable basis unless it is proven 'that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." ***Commonwealth v. Williams***, 899 A.2d 1060, 1064 (Pa. 2006) (quoting ***Commonwealth v. Howard***, 719 A.2d 233, 237 (Pa. 1998)).

Instantly, Garnett offers only a bald assertion that "trial counsel was under an obligation to advance and preserve an objection to this testimony." Garnett's Brief at 9. By way of support, Garnett offers only a general citation to the United States' Supreme Court's holding in ***Strickland***. ***Id.***

Garnett has not crafted a cogent argument as to why an objection to this testimony at trial carried a substantially greater chance of success than trial counsel's previous attempt to exclude this evidence through a motion *in limine* based upon the theory that Garnett's arrest was illegal. ***See*** *supra* at 4 n.3. Although trial counsel's suppression motion ultimately was denied by the trial court, Garnett has not addressed why an objection to this same testimony on the basis of undue prejudice carried a greater chance of success. "Failure to address any prong of the test will defeat an effectiveness claim." ***Williams***, 899 A.2d at 1063. Additionally, "[w]here it is clear that a petitioner has failed to meet any of the three, distinct prongs of the ***Pierce*** test, the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met." ***Steele***, 961 A.2d at 797 (citing ***Commonwealth v. Basemore***, 744 A.2d 717, 738 n.23 (Pa. 2000)). Because Garnett has failed substantively to address the second prong of ***Pierce***, we conclude that his first claim is without merit.

In his second claim, Garnett asserts that the assistant district attorney, in his closing statement, improperly referenced Garnett's decision not to testify. Specifically, Garnett argues that the district attorney "argued to the jury that [Garnett] had failed to testify to prove that the gun and drugs found in the car did not belong to him," and that counsel's failure to object to these statements constituted ineffectiveness. Garnett's Brief at 13. The Commonwealth responds that the prosecutor's comments constituted a "fair response" to defense counsel's argument, during his closing statement,

that the evidence showed that Garnett was unaware of the gun or drugs in the car. Commonwealth's Brief at 12. We conclude that Garnett has, again, failed to address the reasonableness of trial counsel's inaction.

As in his first claim, Garnett has not structured his argument around the three required elements of ***Pierce***. While our review of his brief reveals discussions that arguably are related to the arguable merit and prejudicial effect of his second claim, Garnett confines his discussion of the reasonableness of trial counsel's actions to an unsupported assertion that "trial counsel was under an obligation to object to such a reference . . . ." Garnett's Brief at 13. "[U]ndeveloped claims, based on boilerplate allegations, cannot satisfy [a]ppellant's burden of establishing ineffectiveness." ***Steele***, 961 A.2d at 797 (citing ***Jones***, 876 A.2d at 386). Garnett's bald assertion is insufficient to establish that an objection offered a substantially greater potential to secure an acquittal than trial counsel's decision not to object. In sum, Garnett has offered no substantive discussion of the reasonableness of trial counsel's actions. Consequently, he has failed to meet his burden of proof. ***See Steele***, *supra*. Garnett's second claim fails.

In his third claim, Garnett argues that counsel was ineffective for failing to object to the imposition of consecutive sentences:

> [Garnett] was convicted of committing a single act of violating the [UFA] by possessing a weapon unlawfully. While [Garnett] acknowledges that the sentences do not merge, defense counsel was nevertheless under an obligation to advance and preserve an argument in the lower court, so that it would be available for

> direct appeal, that the consecutive sentences imposed in this case were clearly unreasonable.

Garnett's Brief at 17 (internal citations, footnote omitted). We disagree, and conclude that Garnett has not established the arguable merit of his claim.

"[I]mposition of sentence is vested in the discretion of the sentencing court and will not be disturbed by an appellate court absent a manifest abuse of discretion." ***Commonwealth v. Simpson***, 829 A.2d 334, 336 (Pa. Super. 2003). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Commonwealth v. Walls***, 926 A.2d 957, 961 (Pa. 2007). "The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is 'in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.'" ***Id.*** (quoting ***Commonwealth v. Ward***, 568 A.2d 1242, 1243 (Pa. 1990)).

In support of his argument, Garnett cites to Chief Justice Castille's concurring opinion in ***Commonwealth v. Baldwin***, 985 A.2d 830 (Pa. 2009). In ***Baldwin***, our Supreme Court upheld the imposition of separate, consecutive sentences for violations of 18 Pa.C.S. §§ 6106 and 6108: "Because the offenses for which [a]ppellant was convicted in this case each contain an element the other does not, merger would not have been proper here. . . . The Superior Court did not err in affirming the trial court's

imposition of separate sentences." 985 A.2d at 837. In his concurring opinion, Chief Justice Castille stated that he considered the imposition of consecutive sentences for convictions that arise from "the same core conduct" to be unreasonable:

> In my judgment, it is patently unreasonable to impose consecutive sentences in scenarios like these. . . . We should not lose sight, as judges, of that which common sense dictates. Just as defendants are not entitled to volume discounts for multiple crimes, neither should they suffer multiple punishments for the same core conduct - such as entering a building. That is unreasonable.

Baldwin, 985 A.2d at 839. Justice Baer joined this concurring opinion. Based upon the foregoing, Garnett asserts that "he was entitled to have his attorney challenge this abuse of discretion on the part of the sentencing court in imposing consecutive sentences in this case for a single act of possession of one firearm in violation of the [UFA]." Garnett's Brief at 18. We disagree.

At the outset, we note that the "[n]on-majority decisions of the Pennsylvania Supreme Court are not binding on lower courts." ***Commonwealth v. Minor***, 647 A.2d 229, 231 n.3 (Pa. Super. 1994) (citing ***Commonwealth v. Davenport***, 342 A.2d 67, 75 n.3 (Pa. 1975)). Garnett's assertion of ineffectiveness relies upon a conclusion that the concurring opinion in ***Baldwin*** augured a new legal paradigm in Pennsylvania respecting the imposition of consecutive sentences for separate offenses arising from the same "core conduct." Such a conclusion is error.

Garnett concedes in his brief that his sentences at 18 Pa.C.S. §§ 6106 and 6108 **do not merge** for sentencing purposes. Garnett's Brief at 17 ("[Garnett] acknowledges that the sentences do not merge . . . ."); ***see Baldwin***, *supra*. "Long[-]standing precedent of this Court . . . affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time . . . ." ***Commonwealth v. Marts***, 889 A.2d 608, 612 (Pa. Super. 2005) (citing ***Commonwealth v. Graham***, 661 A.2d 1367, 1373 (Pa. 1995)). Moreover, to the extent that Garnett's claim also implicates the discretionary aspects of his sentence, we note that "[a] challenge to the court's imposing consecutive rather than concurrent sentences . . . does not present a substantial question regarding the discretionary aspects of sentence." ***Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (Pa. Super. 1995).

Garnett's only allegation of ineffectiveness related to sentencing is that trial counsel should have objected to the imposition of consecutive sentences. He alleges no other irregularities or errors with regard to his sentence, and offers only the concurrence in ***Baldwin*** by way of support.[5] Without more compelling authority, we cannot conclude that Garnett's third claim presents an issue of arguable merit. The concurring opinion cited by

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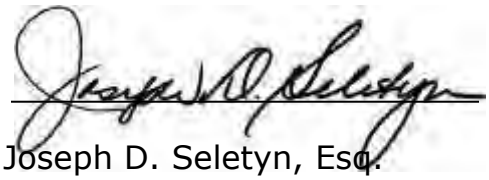
[5] The petitioner in ***Baldwin*** did not challenge the consecutive nature of his sentences. Thus, the majority in ***Baldwin*** did not directly address the issue of the reasonableness of consecutive sentences.

Garnett certainly suggests some disagreement in the Pennsylvania Supreme Court over the issue of imposing multiple consecutive sentences for "the same core conduct," but it does not constitute binding precedent. In the absence of a clear pronouncement to the contrary from either the legislature or the Supreme Court, we conclude that Garnett's third claim is unavailing. "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1042 (Pa. Super. 2007). Garnett has not met his burden to prove that the underlying issue was of arguable merit. Thus, Garnett's third claim fails.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014