

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ALAN ROBERT BENNETT, JR.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 951 MDA 2013

Appeal from the PCRA Order entered April 29, 2013,
in the Court of Common Pleas of Snyder County,
Criminal Division, at No(s): CP-55-CR-0000393-2008.

BEFORE: ALLEN, LAZARUS, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED APRIL 15, 2014

Alan Robert Bennett, Jr., ("Appellant"), appeals from the order denying his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.

The pertinent facts have been summarized as follows:

After a jury trial, [Appellant] was convicted of two (2) counts of aggravated assault resulting in serious bodily injury, two (2) counts of aggravated assault with a deadly weapon, two (2) counts of simple assault, and two (2) counts of recklessly endangering another person. Prior to imposition of sentence, the Commonwealth and [Appellant] agreed that the convictions for simple assaults [sic] and recklessly endangering another person merged with the aggravated assaults. The court held that the aggravated assaults with a deadly weapon merged with the aggravated assaults resulting in serious bodily injury, and sentenced only on the §2702(a) aggravated assaults. The standard range sentences for those offenses was seventy-

*Former Justice specially assigned to the Superior Court.

two (72) to ninety (90) months. [The trial court] sentenced [Appellant] to consecutive ninety (90) month to twenty (20) year periods of incarceration in a State Correctional Institution.

The testimony at trial was rather straightforward. [Appellant] and his friend, Keith Reagen, had smoked marijuana earlier in the evening of October 17th, 2008. They then drove to the Iron Skillet, a bar in Oriental, Pennsylvania, and consumed beer. They then drove to Sorb's in Liverpool, Pennsylvania, another bar, and consumed more beer. They then traveled to Wild J's, located in Port Trevorton, Pennsylvania, which, perhaps, would fit the loosest of definitions of a "gentlemen's club". They were at Wild J's for a few hours.

In the early morning hours of October 18th, 2008, [Appellant] was told to leave Wild J's for alleged violation of "club policy". He did as instructed. A short time later, Mr. Reagen was also asked to leave, given that [Appellant] had been asked to leave and they had traveled together. Mr. Reagen was not happy about being asked to leave, but exited the building. A short time later several security staff from Wild J's walked outside and observed Mr. Reagen walking past the front of the establishment, traveling to the south. Mr. Reagen then turned west in the parking lot, where a verbal exchange occurred between he and one or more of the members of the security staff.

Mr. Reagen walked up to the passenger side of a blue Chevrolet Blazer and stood there with the door open. Two (2) members of the security staff testified that the dome light in the Blazer was on. One (1) of the members of the security staff testified that they saw [Appellant] sitting in the driver's seat. Both members of the security staff testified that they saw Mr. Reagen get into the passenger side of the vehicle and close the door. The vehicle then began to move east to leave the premises, but as it approached two (2) members of the security staff it accelerated rapidly and turned toward them, striking the two (2) security staff. One (1) of them was severely injured.

Mr. Reagen testified that [Appellant] was operating the vehicle at the time that it struck two (2) members of the security staff.

Donald Oakley testified that between 7:00 and 7:30 in the morning of October 18th, 2008, [Appellant] arrived at his residence in Hershey and asked to work on his brother's Blazer, which had damage to the front bumper, hood, and driver's right side fender.

Daniel Bennett, [Appellant's] brother, testified that the dome light in his Blazer did not work.

[Appellant] testified that he borrowed his brother's Blazer. He and Mr. Reagen then drove to the Iron Skillet, stayed there for approximately one (1) hour, and while there each had four (4) to five (5) drinks. At approximately 1:00 a.m. they went to the Sunoco gas station on Routes 11/15 in Liverpool to get cigarettes. They then went to Sorb's Place and each had four (4) to five (5) more drinks, leaving when Sorb's closed. [Appellant] testified that Mr. Reagen purchased a six (6) pack to take with them. [Appellant] then drove to Wild J's and parked on the south side of the building. While in Wild J's [Appellant] testified that he had two (2) more beers.

[Appellant] also testified that he then went into the bathroom at Wild J's with some marijuana. It was at that point the he was observed by a member [of] the security staff and told to leave the building, which he did. [Appellant] testified that he then went to his vehicle, climbed in the backseat, smoked some weed, and passed out. [Appellant] testified that he was having difficulty standing. He testified that he vaguely remembered Mr. Reagen returning to the vehicle, but that the next thing [he] remembered was being at his house.

Commonwealth v. Bennett, 11 A.3d 1009 (Pa. Super. 2010), unpublished memorandum at 1-3, (citations and footnotes omitted).

On August 3, 2010, this Court affirmed Appellant's judgment of sentence. ***Bennett, supra***. Appellant did not file a petition for allowance of

appeal to our Supreme Court. On August 11, 2011, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel, and PCRA counsel filed an amended petition on April 16, 2012. The PCRA court held evidentiary hearings on August 22, 2012, and November 7, 2012. By order entered April 29, 2013, the PCRA court denied Appellant's PCRA petition. This timely *pro se* appeal followed.

Within his brief, Appellant first claims that he was entitled to post-conviction relief because of "the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial." Appellant's Brief at 4 (emphasis omitted). Additionally, he claims that prior counsel was ineffective for failing to: 1) ensure that a transcript of the preliminary hearing was made; 2) object to and/or insist on proper jury instructions being provided; 3) raise a motion for judgment of acquittal at trial; 4) raise a motion for new trial challenging the weight of the evidence supporting his convictions; 5) properly argue his sufficiency claim on appeal; 6) raise and/or preserve for appeal an alleged Pa.R.Crim.P. 600 violation; 7) raise a double jeopardy claim at the time of sentencing; 8) object to the denial of discovery; and 9)

object to the Commonwealth's withholding evidence of his blood alcohol content. **See** Appellant's Brief at 4-5.¹

In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. **Commonwealth v. Johnson**, 966 A.2d 523, 532 (Pa. 2009). We pay great deference to the findings of the PCRA court, "but its legal determinations are subject to our plenary review." **Id.** Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that a petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. **Commonwealth v. Jordan**, 772 A.2d 1011, 1014 (Pa. Super. 2001).

Appellant first claims that he is entitled to post-conviction relief based upon his claim of after-discovered evidence. This Court has recently summarized:

To be entitled to relief on this basis, the [PCRA] 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). As our Supreme Court has summarized:

¹ To the extent that Appellant asserts trial court error with regard to these issues, the claim is waived under the PCRA. Appellant could have raised such issues in his direct appeal. **See** 42 Pa.C.S.A. § 9544(b).

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 [PCRA petitioner] 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***, 997 A.2d 356, 363 (Pa. Super. 2010)(citation omitted). Further, when reviewing the decision to grant or deny a new trial on the basis of after-discovered evidence, an appellate court is to determine whether the PCRA court committed an abuse of discretion or error of law that controlled the outcome of the case. ***Commonwealth v. Reese***, 444 Pa. Super. 38, 663 A.2d 206 (1995).

Commonwealth v. Foreman, 55 A.3d 532, 536-37.

Appellant’s remaining claims challenge the ineffective assistance of prior counsel. To obtain relief under the PCRA premised on a claim that counsel was ineffective, a petitioner must establish by a preponderance of the evidence that counsel's ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. ***Johnson***, 966 A.2d at 532. “Generally, counsel’s performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner.” ***Id.*** This requires the petitioner to demonstrate that: (1) the underlying claim is

of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) petitioner was prejudiced by counsel's act or omission. ***Id.*** at 533. A finding of "prejudice" requires the petitioner to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** In assessing a claim of ineffectiveness, when it is clear that appellant has failed to meet the prejudice prong, the court may dispose of the claim on that basis alone, without a determination of whether the first two prongs have been met. ***Commonwealth v. Travaglia***, 661 A.2d 352, 357 (Pa. 1995). Counsel cannot be deemed ineffective for failing to pursue a meritless claim. ***Commonwealth v. Loner***, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*), *appeal denied*, 852 A.2d 311 (Pa. 2004).

After careful review, we conclude that the Honorable Louise O. Knight has prepared a thorough and well-reasoned opinion that amply demonstrates why Appellant's "after-discovered evidence" claim fails, and why his multiple ineffectiveness claims lack merit. We therefore adopt Judge Knight's April 29, 2013 opinion as our own in disposing of this appeal.

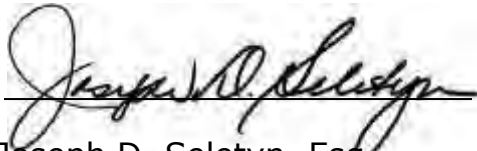
In doing so, we note that with regard to Appellant's second issue, even if such a claim were cognizable under the PCRA, Appellant failed to meet his burden of proof. It is petitioner's burden to produce counsel at a PCRA evidentiary hearing in order to meet his burden of proof that his claims warrant relief. ***Commonwealth v. Jones***, 596 A.2d 885 (Pa. Super. 1991). Although Appellant stipulated that prior counsel could not recall whether

Appellant asked him to have the hearing transcribed, there is no proffered testimony from preliminary hearing counsel regarding his notes or recollection of the testimony from the witnesses Appellant now claims testified inconsistently at trial. Given the denial of relief, it is clear that the PCRA court discredited the self-serving testimony from Appellant and his mother.²

Order affirmed.

Judge Lazarus files a Dissenting Statement.

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: 4/15/2014

² Moreover, at the evidentiary hearing, trial counsel testified that the handwritten notes taken by Appellant's mother did not contain "major inconsistencies." N.T., 8/22/12, at 12.