NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TITO RIVERA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 310 WDA 2012

Appeal from the Order entered February 1, 2012,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0013002-2007.

BEFORE: BENDER, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY ALLEN, J.: Filed: January 28, 2013

Tito Rivera ("Appellant") appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. sections 9541-9546. We affirm.

The pertinent facts and procedural history have been summarized as follows:

> The evidence presented at trial established that in the early morning hours of August 25, 2007, college students Michael Zalac and Andrew Herlihy were outside their house on Zulema Street in Oakland when they were approached by [Appellant], who asked to borrow a cell phone to make a call. After making two calls, [Appellant] returned the phone to the young men, who turned to walk into the house. [Appellant] then pulled a gun and forced the young men into the house, and then into the living room, where their housemates, Reese Schoy and Nathan Good, were watching a movie. [Appellant] threatened to kill them and demanded money from them, and all complied except for Michael, whose wallet was in his room on the third floor. [Appellant] made the young men walk upstairs to the

bedroom in a line at gunpoint, continuously threatening to kill them. After retrieving Michael's wallet, [Appellant] asked if there were any other housemates, and was told that the last housemate, Keith Haselhoff, was asleep with his girlfriend, Logan Dillinger, on the second floor. [Appellant] moved the group to Keith's room, woke Keith and Logan, and demanded their money. After they complied, [Appellant] searched Logan's purse and found some other money she had forgotten about. Angered, [Appellant] made the men lay face down on the floor, threatened to kill them if they moved or spoke[,] and took Logan into the adjoining bathroom, where he undressed her, touched her breasts, forced her to perform oral sex on him twice and [also had] intercourse with her. Afterwards, he ordered her to shower and to return to her room without her clothes – though she was able to grab a towel on her way out. Back in the bedroom, [Appellant] ordered the men to pack up an X-Box video game system and various Steeler jerseys he noticed in the room, allowed Logan to get dressed and then had her count the money he had collected – approximately $300.00. Unsatisfied with that amount, [Appellant] ordered all the men to stand and dress in non-descript clothing so they could all go to a nearby ATM and withdraw more money. As [Appellant] was preparing to move the group out of the room, Michael noticed that [Appellant] was no longer holding the gun and jumped on him. The other men followed suit and Logan ran out of the house and summoned the police. When the police arrived, they found [Appellant] on the bedroom floor being restrained by the men, his hands tied with shoelaces and his feet bound with an extension cord.

[Appellant] was charged with six (6) counts each of Robbery and Terroristic Threats – one (1) count for each victim – and also with Rape, Involuntary Deviate Sexual Intercourse (IDSI), Aggravated Indecent Assault, Indecent Assault, Simple Assault, and Burglary, but prior to trial the Aggravated Indecent Assault charge was withdrawn. Following a jury trial, [Appellant] was found guilty of all charges except for Simple Assault.

[Appellant] appeared before [the trial court] on September 9, 2008 and was sentenced to eight (8) consecutive terms of imprisonment of 10-20 years at each of the Robbery counts, Rape and IDSI, for an aggregate

> term of 80-160 years. Timely Post-Sentence Motions were filed and denied on September 17, 2008.

Commonwealth v. Rivera, 988 A.2d 728 (Pa. Super. 2009), unpublished memorandum at 1-3 (citation omitted).

Appellant filed a timely appeal to this Court in which he raised challenges to the discretionary aspects of his sentence. Finding no merit to these claims, this Court affirmed Appellant's judgment of sentence on November 20, 2009. ***Rivera***, ***supra***. Our Supreme Court denied Appellant's petition for allowance of appeal on July 10, 2010. ***Commonwealth v. Rivera***, 997 A.2d 1177 (Pa. 2010).

On July 8, 2011, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel, and on January 11, 2012, PCRA counsel filed a motion to withdraw as counsel and a "no merit" letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On January 12, 2012, the PCRA court entered an order granting PCRA counsel's motion to withdraw, and giving Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's PCRA petition. Appellant did not file a response. By order entered February 1, 2012, the PCRA court dismissed Appellant's PCRA petition. This timely appeal followed.

Appellant raises the following issues:

> I. WAS APPELLANT DENIED HIS RULE BASED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON HIS FIRST PCRA PETITION?

II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO REQUEST A MISTRIAL WHERE THE JURORS WERE DISCUSSING THE CASE IN THE HALLWAY PRIOR TO THE BEGINNING OF DELIBERATIONS?

III. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S USE OF THE WORD "MURDER" IN THE JURY CHARGE?

IV. WAS [sic] APPELLANT'S RIGHTS AS PROTECTED BY THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONS VIOLATED WHERE HIS CASE WAS INAPPROPRIATELY REASSIGNED?

Appellant's Brief at 4.

When examining a post-conviction court's grant or denial of relief, we are limited to determining whether the court's findings were supported by the record and whether the court's order is otherwise free of legal error. ***Commonwealth v. Quaranibal***, 763 A.2d 941, 942 (Pa. Super. 2000). We will not disturb findings that are supported in the record. ***Id.*** The PCRA provides no absolute right to a hearing, and the post-conviction court may elect to dismiss a petition after thoroughly reviewing the claims presented, and determining that they are utterly without support in the record. ***Id.***

To be entitled to relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the errors enumerated in section 9543(a)(2) of the PCRA. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). Additionally, the petitioner must establish that the issues he raises have not been previously litigated. ***Commonwealth v. Carpenter***, 725 A.2d 154,

160 (Pa. 1999). An issue has been "previously litigated" if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or if the issue has been raised and decided in a proceeding collaterally attacking the conviction or sentence. ***Carpenter***, 725 A.2d at 160; 42 Pa.C.S.A. § 9544(a)(2), (3). If a claim has not been previously litigated, the petitioner must then prove that the issue was not waived. ***Carpenter***, 725 A.2d at 160. An issue will be deemed waived under the PCRA "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding." 42 Pa.C.S.A. § 9544(b).

In his first issue, Appellant essentially claims that PCRA counsel was ineffective for filing a "no-merit" letter. We must first determine whether Appellant's claim is properly preserved for review. "[A] petitioner waives issues of PCRA counsel's ineffectiveness regarding ***Turner***/***Finley*** requirements if he declines to respond to the PCRA court's [Rule 907] notice of intent to dismiss." ***Commonwealth v. Rykard***, 55 A.3d 1177, *16 (Pa. Super. 2012). Although the Commonwealth indicates it received a copy of Appellant's Rule 907 response, it does not appear in the certified record and the PCRA court did not address Appellant's claim before dismissing his *pro se* petition. Thus, as Appellant inappropriately has raised his claim of PCRA counsel's ineffectiveness for the first time on appeal, it is waived. ***See generally***, Pa.R.A.P. 302(a).

Because Appellant's next two issues challenge the stewardship of prior counsel, we apply the following principles. Counsel is presumed to be effective, and Appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa. Super. 2004).

> In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, ineffective 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. ***Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326, 333 (1999). Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Id.*** The petitioner bears the burden of proving all three prongs of the test. ***Commonwealth v. Meadows***, 567 Pa. 344, 787 A.2d 312, 319-20 (2001).

Commonwealth v. Johnson, 868 A.2d 1278, 1281 (Pa. Super. 2005). In assessing a claim of ineffectiveness, when it is clear that an 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).

In his second issue, Appellant claims that trial counsel was ineffective for failing to request a mistrial when several jurors were observed by his

family members discussing the case in the hallway prior to beginning their deliberations. We disagree.

"The decision to declare a mistrial is within the sound discretion of the court and will not be reversed absent a flagrant abuse of discretion." ***Commonwealth v. Bracey***, 831 A.2d 678, 682 (Pa. Super. 2003) (citation omitted). "A mistrial is an 'extreme remedy . . . [that] must be granted only when an incident is of such a nature that its unavoidable effect is to deprive a defendant of a fair trial.'" ***Id.*** The record reflects that, prior to the closing arguments of counsel, the trial court was informed that Appellant's family members claimed to have heard several jurors discussing the case. In response, the trial court spoke to the jurors in chambers and inquired as to whether any of them had discussed the case:

> THE COURT: Hi, ladies and gentlemen. There is nothing to be concerned about, nothing to be concerned about, nothing has happened.
>
> It has been reported - - it is unfounded, and I'm not accusing you of this, that four of the jurors were lingering in the hall discussing the case. That's an issue that we need to resolve. If anyone did that, and I'm not saying that I believe it or disbelieve it, if you would let me know now it would eliminate any future problems.
>
> So if anybody wants to raise their hand. Isn't that nice. You are such good guys. Okay. Good work. We are going to go out now, you are going to have to line up.

N.T., 5/29/08, at 252.

In rejecting Appellant's claim, the PCRA court reasoned as follows:

> None of the jurors indicated that they had been discussing the case, and although the matter was brought to this Court's staff's attention, there is no evidence that such an incident actually occurred.
>
> * * *
>
> There is nothing about this unsupported averment that requires a mistrial. The jurors themselves denied the allegation, and other than [Appellant's] family – which has an obvious interest in the case – there were no independent observers of the incident. According to counsel's "no merit" letter, [trial counsel] did not know about the alleged incident. [Appellant] has not established that he was prejudiced in any way by the alleged unsupported incident, nor can he show that had a request for mistrial been made, it would have been granted.

PCRA Court Opinion, 6/28/12, at 5-6 (footnote omitted). In the omitted footnote, the PCRA Court opined that it "can say with certainty that had such a motion been made, it would have been denied." ***Id.*** at 6 n.9.

Our review of the record supports the trial court's conclusion. Although Appellant makes the bare assertion that trial counsel "should have sought a mistrial where members of the jury had in their minds predetermination of guilt," Appellant's Brief at 11, he proffers no evidence to support this claim. Moreover, while Appellant faults trial counsel for failing "to independently seek out and/or inquire as to who reported the incident and whether or not descriptions of the specific jurors and court officials that were present at said discussion could have been made," evidence of record

indicates trial counsel was unaware of the incident.[1] Appellant's Brief at 11. Finally, Appellant asserts that "the prejudice is inherent where there is a likelihood that said jurors would have been removed or given proper cautionary instructions and the outcome of the proceedings would have been different." ***Id.*** at 12. Appellant's claim of prejudice is no more than speculation. Thus, as Appellant has failed to meet his burden of proof, his claim of ineffectiveness fails. ***Travaglia***, ***supra***.

In his third issue, Appellant claims that trial counsel was ineffective for failing to object to the trial court's use of the word "murder" when instructing the jury on the elements of robbery. According to Appellant, "the word murder was used [by the trial court] to inflame the jury and [demonstrates] bias and ill will of the [trial court] to state that murder is somehow included in the definition of robbery. That such instruction was unclear and/or misleading resulting [sic] in a misstatement of law." Appellant's Brief at 14. We disagree.

"When reviewing a challenge to part of a jury instruction, we must review the jury charge as a whole to determine if it is fair and complete. A trial court has wide discretion in phrasing its jury instructions, and can

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[1] Appellant includes within his brief an e-mail Appellant's mother sent to PCRA counsel in which she provided details of the incident. Because there is no indication that this information was relayed to trial counsel, it cannot affect the PCRA court's conclusion regarding trial counsel's alleged ineffectiveness.

choose its own words as long as the law is clearly, adequately, and accurately presented to the jury for its consideration. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law." ***Commonwealth v. Roser***, 914 A.2d 447, 455 (Pa. Super. 2006) (citation omitted). Stated differently, "[a] faulty jury charge will require the grant of a new trial only where the charge permitted a finding of guilt without requiring the Commonwealth to establish the critical elements of the crimes charged beyond a reasonable doubt." ***Commonwealth v. Wayne***, 720 A.2d 456, 465 (Pa. 1998).

The crime of robbery is defined, in part, as follows:

> **§ 3701. Robbery**
>
> **(a) Offense defined.—**
>
> (1) A person is guilty of robbery if, in the course of committing a theft, he:
>
> (i) inflicts serious bodily injury upon another;
>
> (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
>
> (iii) commits or threatens to commit any felony of the first or second degree;

18 Pa.C.S.A. § 3701(a)(1) (i-iii).

In its charge to the jury, the trial court included the following instruction:

> In order to find [Appellant] guilty of robbery you must be satisfied that the following elements have been proven beyond a reasonable doubt: First, that [Appellant] inflicted serious bodily injury on the victims or threatened

> the victims with immediate serious bodily injury or intentionally put them in fear of immediate serious bodily injury or threatened to immediately commit the crime of murder; second that [Appellant] did so in the course of committing a theft.

N.T., 5/29/08, at 278-79.

In rejecting Appellant's claim of ineffectiveness, the PCRA court reasoned as follows:

> The instruction given by this Court was virtually verbatim to the Suggested Standard Jury Instruction. Moreover, as the victims testified that [Appellant] threatened to shoot and kill them during the course of the robbery, the use of the term "murder" in the instruction was factually supported and legally appropriate and counsel was not ineffective for failing to object to it. This claim is meritless.

PCRA Court Opinion, 6/28/12, at 8. We agree. At trial, each of Appellant's victims testified that Appellant threatened to kill them if they did not comply with his demands. Therefore, the trial court did not use the term "murder" to "inflame the jury," but rather used it to appropriately describe to the jury the type of threats made by Appellant. Additionally, the use of the term "murder" did not diminish the Commonwealth's burden of proof. ***Wayne***, ***supra***. Thus, because trial counsel's objection would have been meritless, Appellant's third issue fails. ***Loner***, ***supra***.

In his final issue, Appellant asserts that his constitutional rights were violated because his case was inappropriately reassigned to the trial court by the clerk of courts, a relative of one of Appellant's victims. According to Appellant, this reassignment occurred after the clerk of courts "used his

personal influence and power on behalf of the alleged victim" and "made a clandestine, [*ex parte*] communication with the [criminal court administrator]" in order to have "the case reassigned to the judge of his choosing." Appellant's Brief at 15. Appellant also asserts that PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to raise this claim. We find Appellant's claim to be unavailing.

Initially, to the extent Appellant claims trial court error, because Appellant could have raised this claim on direct appeal, it is waived under the PCRA. ***See Carpenter***, ***supra***, 42 Pa.C.S.A. § 9544(a). Moreover, we have already determined that Appellant did not properly preserve his challenge to the effectiveness of PCRA counsel. ***See supra***. Finally, we concur with the PCRA court's conclusion that any claim of trial counsel's ineffectiveness for failing to object to the reassignment is meritless. The PCRA court explained:

> [Appellant] points to a newspaper account of an [e-mail] sent by [the clerk of courts] to the Court Administrator requesting a postponement of the case because of [the victim's] unavailability due to travel abroad as evidence of prejudice. According to [Appellant], at the time this email was sent, the case was assigned to Judge Sasinoski of this Court, but after the e-mail was sent, the case was reassigned to this Court. Although the purported e-mail in question does not request a transfer or reassignment of the case to any judge or to this Court in particular, [Appellant] sees this as a vast conspiracy against him. [Appellant] points to the lengthy sentence he received – though he neglects to mention that the sentence has been affirmed and deemed appropriate for the particular circumstances of these crimes – as evidence of the purported prejudice. Presumably, [Appellant's]

> argument is that [the clerk of courts] intervened on behalf of his relative to have a case transferred to this Court so that [Appellant] would receive a harsher sentence.
>
> This claim is utterly and absolutely without support. First, the transfer of the case to this Court was purely an administrative matter and had nothing to do with [the clerk of courts], nor was it done at his request or on his behalf. Second, [Appellant] has not established that the verdict or sentence imposed would have been any different had the case remained with Judge Sasinoski or been transferred to a different judge altogether. As [PCRA] counsel pointed out in his "no-merit" letter, the case was a jury trial and this Court did not adjudicate guilt or innocence. Thus, [Appellant] cannot establish prejudice in the verdict due to reassignment to this Court.
>
> As to the sentencing issue, although this Court may have a "reputation" amongst the prison population as sentencing more harshly for certain types of offenses, [Appellant's] particular sentence in this case was affirmed by the Superior Court and found to be appropriate given the particularly heinous nature of the crimes. As this Court said previously, [Appellant's] unhappiness with the length of his sentence is unfortunate, but the length of the sentence was appropriate to the crimes and is not evidence of any type of conspiracy against him. This claim must fail.

PCRA Court Opinion, 6/28/12, at 9-10.

Once again, our review of the record supports the PCRA court's conclusion. We first note that, at the beginning of trial, the trial court stated on the record that it had spoken with both counsel and told them one of the victims was related to the clerk of courts, with whom the trial court worked as president judge. The trial court then stated that counsel for the parties "saw no conflict nor do I feel any prejudice." N.T., 5/28/08, at 3. Additionally, beyond the fact that the case was reassigned, Appellant points

to no conduct, statement, or ruling by the trial court that demonstrated prejudice. Finally, we note that the Appellant's crimes involved six separate victims. Appellant has failed to meet his burden of proof, such that any claim of trial counsel's ineffectiveness fails. ***Travaglia***, ***supra***.

In sum, Appellant's claims are either not preserved for appeal, waived, or without merit. We therefore affirm the PCRA court's order dismissing Appellant's *pro se* PCRA petition.

Order affirmed.