

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
DASHAWN MCLENDON	:	
	:	
Appellant	:	No. 1689 MDA 2021

Appeal from the PCRA Order Entered December 20, 2021
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s): CP-40-CR-0001475-2016

BEFORE: BOWES, J., STABILE, J., and SULLIVAN, J.

MEMORANDUM BY SULLIVAN, J.:

FILED: JANUARY 18, 2024

Dashawn McLendon ("McLendon") appeals *pro se* from the order denying his petition for relief under the Post-Conviction Relief Act ("PCRA"), relating to alleged ineffectiveness relating to his convictions by separate juries for violations of the Uniform Firearms Act.¹ We affirm.

This Court previously summarized the relevant facts on direct appeal:

[McLendon's] convictions stem from events occurring on the night of December 4, 2015, in Wilkes-Barre, Pennsylvania. The victim, Ian Nieves ["Mr. Nieves"], testified that he saw [McLendon] and [McLendon's] brother, Ibn McClain ("Co-defendant"), whom he knew from the area. They approached his car and requested a ride. [McLendon] entered the vehicle and sat in the front passenger seat, while Co-defendant sat in the rear passenger seat. When Mr. Nieves stopped the car at their request, Co-defendant exited the vehicle and shot Mr. Nieves in the left shoulder. When Mr. Nieves attempted to drive away with [McLendon] still in the car, [McLendon] shot Mr. Nieves in the leg. A struggle over a firearm ensued, and the weapon fired and hit the car's windshield. The car eventually crashed outside the home

¹ **See** 42 Pa.C.S.A. §§ 9541-9546.

of someone Mr. Nieves knew, and Co-defendant came running and shooting toward the car. [McLendon] and Co-defendant fled. The police arrived at the scene, and ultimately determined that the firearm that was used to shoot Mr. Nieves in the leg was a Glock 37 .45 GAP (hereafter "Glock").

[McLendon] testified to a different story. According to [McLendon], Mr. Nieves picked up [McLendon] after [McLendon] called to purchase cannabis. After [McLendon] paid for the drugs, Mr. Nieves indicated that he had to go retrieve them. [McLendon] demanded his money back, and Mr. Nieves refused. During the confrontation, Mr. Nieves brandished the Glock, the two struggled over it, and it fired twice. The vehicle crashed, [McLendon] left the vehicle, but went back to check on Mr. Nieves. [McLendon] took the Glock but left his money behind. [McLendon] then fled to a residence of a friend to whom he gave the Glock.¹

¹On cross-examination, [McLendon] added Co-defendant into this story and acknowledged that Co-defendant had a revolver, although he claimed he had not known earlier that Co-defendant was armed.

After the encounter, [McLendon] and Co-defendant fled to Allentown, where they were found in a hotel room a few days after the incident as a result of cell phone pinging technology. After requesting that [McLendon] and the other hotel occupants leave the room, the police obtained consent to a search of the hotel room from the third party in whose name it was registered. The Glock was retrieved from the room, along with ammunition for the weapon. [McLendon] and Co-defendant were arrested.

See Commonwealth v. McLendon, 2019 WL 4052448 (Pa. Super. 2019), unpublished memorandum at *1-2.

McLendon filed a successful motion to sever his charge of possession of a firearm by a prohibited person. As a result, he had two separate jury trials on the charges against him: a first trial for attempted murder, aggravated

assault, and carrying a firearm without a license,² and a second trial two months later for possession of a firearm by a prohibited person. Prior to the first trial, McLendon moved to suppress the evidence found in the hotel room on the basis that the police failed to obtain valid consent to search. **See** McLendon's Memorandum in Support of Pre-Trial Motions, 8/10/16, at 27-29. At the first trial, trial counsel, Robert C. Trichilo, Esquire ("trial counsel"), did not request a justification defense. At the second trial, trial counsel requested, and the trial court issued, a justification instruction; the jury at the second trial convicted McLendon of possession of a firearm by a prohibited person. In November 2017, the court imposed an aggregate sentence of seventy-two to one-hundred-and-ninety-two months of imprisonment for McLendon's crimes. In August 2019, this Court affirmed McLendon's judgment of sentence. **See McLendon**, 2019 WL 4052448, unpublished memorandum at *7. McLendon did not seek allowance of appeal in our Supreme Court.

On July 27, 2020, McLendon filed a timely *pro se* PCRA petition, and on August 31, 2020, a substantially similar PCRA petition relating to his convictions at the first and second trials. The PCRA court appointed counsel for McLendon ("PCRA counsel"). In October 2020, PCRA counsel filed a supplemental PCRA petition asserting that trial counsel was ineffective for

² The first jury convicted McLendon of carrying a firearm without a license and acquitted him of all other charges.

failing to request a “necessity” [sic] jury instruction³ at McLendon’s first trial, and for failing to seek suppression of evidence found in the hotel room where the police arrested McLendon.

The PCRA court conducted an evidentiary hearing on McLendon’s petition at which Detective Shane Yelland testified that the hotel room in which the police arrested McLendon was registered to Abdul Khiari (“Khiari”), Khairi consented to the search of the room, and that he had testified at the motion to suppress. **See** N.T., 4/6/21, at 4-10, 12-15. Trial counsel testified that he filed a motion to suppress the evidence recovered from the hotel room, including a challenge to the voluntariness of the consent to search. **See id.** at 30-31.

McLendon testified trial counsel said after the first trial that he had forgotten to request a justification/“necessity” instruction. **See id.** at 17-19. Trial counsel testified at the evidentiary hearing that based on the version of events McLendon gave him – McLendon wrestled the gun from Nieves and walked away from the scene with the gun and sold it to someone else that day – a “necessity” instruction would not have been plausible because

³ The reference to “necessity” is apparently a reference to the defense of justification, which, in relevant part, provides that conduct an actor believes necessary to avoid a harm or evil to himself is justifiable if the harm sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. **See** 18 Pa.C.S.A. § 503(a)(1). For the purposes of this memorandum, we use the terms “justification” and “necessity” to refer to the justification defense.

McLendon retained the gun for a substantial period of time **after** any emergency permitting his possessing and use of the gun. Trial counsel also testified there was evidence McLendon bought ammunition five days after the shooting, and police found four guns in the hotel room that day as well, which wholly undermined a justification/"necessity" defense. **See id.** at 34-35.⁴ Trial counsel further testified that given the seriousness of the charges McLendon faced, and the lack of a valid defense to the charge of possessing firearms without a license, it made sense to focus on the more serious charges. Trial counsel also testified he feared losing credibility with the jury by arguing an implausible justification/"necessity" defense. **See id.** at 36-37.

At the conclusion of the hearing, the PCRA court held the case under advisement. In December 2021, the PCRA court denied the petition. McLendon timely file a notice of appeal. After PCRA counsel withdrew from representation and was replaced by two attorneys in succession, McLendon requested the right to proceed *pro se* and after a **Grazier** hearing⁵ the court granted him permission to do so. McLendon and the PCRA court complied with Pa.R.A.P. 1925.

⁴ Trial counsel also testified he believed there was no factual support for a justification/"necessity" instruction at the second trial, for persons not to possess firearms, and he was surprised the trial court gave that instruction. **See** N.T., 4/6/21, at 35-36.

⁵ **See Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998).

On appeal, McLendon raises the following issues for our review:

- I. Was trial counsel ineffective because he failed to ask the [trial j]udge to give the necessity defense [instruction] to the jury at [McLendon's] first trial?
- II. Was trial counsel ineffective because he failed to file a motion to suppress evidence that was found during a search of a hotel room in which [McLendon] was staying?

See McLendon's Brief at 9 (unnecessary capitalization eliminated).

Both of McLendon's claims implicate the effective assistance of trial counsel. Our standard and scope of review of a PCRA court's dismissal of a PCRA petition are well-settled:

Appellate review of a PCRA court's dismissal of a PCRA petition is limited to the examination of whether the PCRA court's determination is supported by the record and 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. This Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. In contrast, we review the PCRA court's legal conclusions *de novo*.

Commonwealth v. Maxwell, 232 A.3d 739, 744 (Pa. Super. 2020) (*en banc*) (internal citations omitted). Further, a "PCRA court's credibility findings are to be accorded great deference, and where supported by the record, such determinations are binding on a reviewing court." **Commonwealth v. Williams**, 141 A.3d 440, 452 (Pa. 2016) (internal citations omitted).

Generally, to prevail on a claim of ineffective assistance of counsel, a PCRA petitioner must demonstrate:

(1) that the underlying claim has arguable merit; and (2) that no reasonable basis existed for counsel's actions or failure to act; and (3) that the petitioner suffered prejudice as a result of counsel's error. To prove that counsel's chosen strategy lacked a reasonable basis, a petitioner must prove that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. Regarding the prejudice prong, a petitioner must demonstrate that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. Counsel is presumed to be effective; accordingly, to succeed on a claim of ineffectiveness[,], the petitioner must advance sufficient evidence to overcome this presumption.

Commonwealth v. Johnson, 139 A.3d 1257, 1272 (Pa. 2016) (internal citations omitted). Failure to establish any prong of the ineffectiveness test will defeat an ineffectiveness claim. ***See Commonwealth v. Smith***, 995 A.2d 1143, 1151 (Pa. 2010). Trial counsel cannot be ineffective for failing to pursue a meritless claim. ***See Commonwealth v. Wilson***, 273 A.3d 13, 20 (Pa. Super. 2020).

McLendon asserts trial counsel rendered ineffective assistance by failing to request a justification/"necessity" instruction at his first trial. He claims trial counsel had no reasonable basis for his actions and that trial counsel said he was not aware of the defense. ***See*** McLendon's Brief at 12. McLendon further alleges he suffered prejudice from counsel's failure to request the instruction because the court would likely have given it and there is a reasonable probability the jury would have acquitted him of possessing a firearm without a license, having acquitted him of the other charges. ***See id.*** at 14. He also asserts that trial counsel later disparaged his own performance

by asserting in a post-trial motion that his failure to request the instruction undermined the reliability of the verdict, **see id.** at 12, and he was entitled to the instruction in his first trial because he received it at his second trial, **see id.** at 14.

The PCRA court rejected McLendon's ineffectiveness claim because McLendon's version of events conflicted with the evidence and McLendon's actions of retaining the gun made it reasonable to doubt the applicability of the justification/"necessity" instruction. **See** PCRA Court Opinion, 7/13/22, at 5 n.4. The court also found that McLendon could not show prejudice from trial counsel's failure to request the instruction. **See id.** at 5 n.5.

The PCRA court properly rejected McLendon's claim. On direct appeal, this Court explained the jury convicted McLendon of the gun possession without a license, which makes it illegal for a person to carry a firearm in any vehicle or concealed on or about his person without a valid and lawfully issued license. **See** 18 Pa.C.S.A. § 6106(a)(1). The Court found that Nieves testified he never had a gun and, in any event, evidence the gun and boxes of ammunition for it were recovered from the hotel room in which McLendon was arrested showed his continuing possession of it. **See McLendon**, 2019 WL 4052448, unpublished memorandum at *2-3 (record citations omitted). Relevant to his ineffectiveness claim for failing to seek the necessity instruction, McLendon did not dispute that he was not licensed to carry a firearm and the evidence showed at a minimum (assuming the gun was not

his originally) that he continued to possess the gun in the car after shooting Nieves when any justification for his possessing the gun had passed, and, further, possessed it for several days thereafter. McLendon thus cannot show that trial counsel was ineffective for failing to seek a justification instruction to which he was not entitled. **See Wilson**, 273 A.3d at 20; **Commonwealth v. Miklos**, 159 A.3d 962, 968 (Pa. Super. 2017) (stating that a justification defense does not apply to the charge of persons not to possess firearms where the person asserting the defense possessed the gun for a longer period of time than required to exercise self-defense). **See also Commonwealth v. Hairston**, 84 a.3d 657, 668 (Pa. 2014) (stating that a trial court “shall only instruct on an offense where the offense has been made an issue in the case and where the trial evidence reasonably would support such a verdict”).

That trial counsel later claimed the first trial verdict was unreliable because he did not request a justification defense is of no significance. Trial counsel testified that his remark was merely zealous post-trial advocacy. **See** N.T., 4/6/21, at 41. We agree and further note that even had trial counsel been offering an honest, **subjective** self-assessment, that would not prove ineffective assistance; in assessing ineffective assistance, this Court looks to whether counsel’s action had any reasonable basis not to his subjective motivation. **See Commonwealth v. Chmiel**, 30 A.3d 1111, 1127 (Pa. 2011). We also find no merit to McLendon’s assertion that the jury’s acquittal on other charges showed he would have been acquitted on the gun possession charge.

An acquittal “cannot be interpreted as a specific finding in relation to some of the evidence.” **See Commonwealth v. Shaffer**, 420 A.2d 722, 724 (Pa. Super. 1980). Finally, we reject McLendon’s assertion that he was entitled to the justification/“necessity” instruction at the first trial because the court gave it at his second trial. McLendon had no right to that instruction at the second trial given the evidence that he possessed the gun days after the shooting. **See Miklos**, 159 A.3d at 968.⁶ Thus, McLendon failed to prove trial counsel’s ineffectiveness concerning the instruction.

McLendon’s second issue asserts trial counsel was ineffective for failing to file a motion to suppress the evidence recovered in the hotel room where he was arrested based on lack of consent, and that Khiari would have testified and denied consenting to the search. The PCRA court rejected McLendon’s claim because it found that trial counsel had in fact filed, on August 10, 2016, a motion to suppress the items found in the hotel room based on an alleged lack of consent. **See** PCRA Court Opinion, 7/13/22, at 5. The PCRA court further noted that evidence was presented at the hearing on that motion that Abdul Khiari, the renter of the hotel room, had consented to the search. **See id.** at 5-6 n.5. The PCRA court accordingly denied the claim.

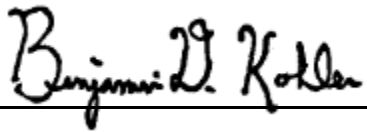
We perceive no error in the PCRA court’s determination. Trial counsel cannot have been ineffective for filing a motion he did in fact file, and on the

⁶ McLendon’s erroneous receipt of the instruction at the second trial does not prove his right to receive it at his first trial.

precise grounds McLendon asserts he should have raised. Accordingly, we do not address McLendon's claim that had trial counsel filed the suppression motion, he would have called Khiari, who would have refuted consent to search, except to note that at the suppression hearing the Commonwealth presented Wilkes-Barre Detective Yelland's testimony that Khiari consented to the search, and McLendon offered no contradictory witnesses or testimony to support his claim at the PCRA hearing. McLendon is due no relief on his ineffective assistance claim.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/18/2024