J-S36014-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
TIMOTHY MICHAEL O'BRIEN,	:	
	:	
Appellant	:	No. 1266 WDA 2012

Appeal from the PCRA Order June 29, 2012,
Court of Common Pleas, Venango County,
Criminal Division at No. CP-61-CR-0000839-2004

BEFORE: DONOHUE, OLSON and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED JULY 22, 2013**

Appellant, Timothy Michael O'Brien ("O'Brien"), appeals from the June 29, 2012 order dismissing his petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46. We affirm.

The trial court summarized the relevant facts and procedural history as follows:

> The charges upon which [O'Brien] was convicted are the result of the kidnapping, sexual assault and murder of eleven year old Shauna Howe [("Howe")]. In or about October, 1992, [O'Brien] and co-defendants, James E. O'Brien [("James O'Brien")] and Eldred Ted Walker [("Walker")], agreed to kidnap a child off the streets of Oil City Pennsylvania. In the early evening hours of October 27, 1992, [Howe] was walking home along West First Street on the South Side of Oil City[.] At that time, Walker approached [Howe], grabbed her off the street, carried her to the corner of West First and Reed Street, and handed her off to [O'Brien], who was waiting with his brother, James O'Brien, around

> the corner. [O'Brien] then put [Howe] in the back seat of Walker's Chevette, got in with the victim and held her there. James O'Brien drove off with the victim and [O'Brien] still in the back seat of the Chevette. Walker returned to his other vehicle and left the scene.
>
> Later that evening, [James O'Brien and O'Brien] returned to Walker's home with [Howe] and took her to an upstairs bedroom. Walker could hear [Howe] yelling, 'get off me. Let me up. Let me go.' Sometime thereafter Walker heard the Chevette leave his house after which Walker discovered that the O'Brien brothers along with [Howe] were gone.
>
> [Howe] was then taken to a remote area known as Coulter's Hole and killed by being thrown off a railroad trestle. Two days later, on October 29, 1992, a child's body suit was discovered along an abandoned railroad bed near to where [Howe's] body was found on October 3, 1992. A forensic exam conducted on the body suit revealed traces of seminal fluid, which was later discovered to match James O'Brien. In addition, swabs taken from [Howe's] mouth revealed DNA evidence matching James O'Brien's profile. The autopsy conducted revealed evidence of a sexual assault and that the victim died of blunt force trauma to the chest and head apparently from being thrown from the railroad trestle into the creek below.

Trial Court Opinion, 11/25/08, at 2-4.

O'Brien and James O'Brien were tried jointly. The 15-day trial concluded on October 26, 2005, after which the jury found O'Brien guilty of second and third degree murder, involuntary deviate sexual intercourse ("IDSI"), kidnapping, and conspiracy.[1] At the conclusion of a May 28, 2006

[1] 18 Pa.C.S.A. §§ 2502(b) and (c), 3123, 2901, 903.

Megan's Law hearing, the trial court found O'Brien to be a sexually violent predator. On April 6, 2006, the trial court sentenced O'Brien to life in prison for second-degree murder, a consecutive ten to twenty years of incarceration for IDSI, and a consecutive five to ten years for conspiracy.

This Court affirmed the judgment of sentence in an unpublished memorandum on July 15, 2009, and our Supreme Court subsequently denied allowance of appeal on March 10, 2010. ***Commonwealth v. O'Brien***, 981 A.2d 930 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 605 Pa. 698, 990 A.2d 729 (2010). O'Brien filed a timely first PCRA petition on January 3, 2011. On July 27, 2011, counsel filed an amended PCRA petition on O'Brien's behalf. The PCRA court conducted a hearing on October 23, 2011 and subsequently entered the order presently on appeal.

O'Brien's appellate brief sets forth three assertions of error:

> I. Was [O'Brien's] trial counsel ineffective for pursuing the wrong strategy at trial by not vigorously pointing out the weaknesses of the Commonwealth's case as to [O'Brien] and the strengths of the Commonwealth's case as to [Walker and James O'Brien]?
>
> II. Did counsel render ineffective assistance in failing to discover and prepare [O'Brien's] partial alibi until the middle of jury selection?
>
> III. Did trial counsel render ineffective assistance by failing to give notice of intent to impeach a Commonwealth witness with prior convictions of *crimen falsi*?

O'Brien's Brief, Statement of the Questions Involved.[2]

We review the PCRA court's order as follows:

> On appeal from the denial of PCRA relief, our standard of review calls for us to determine whether the ruling of the PCRA court 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. The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to our plenary review.

Commonwealth v. Nero, 58 A.3d 802, 805 (Pa. Super. 2012) (citations omitted).

Pursuant to § 9543 of the PCRA, a petitioner is eligible for relief if the petitioner's counsel rendered ineffective assistance, "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." 42 Pa.C.S.A. § 9543(2)(ii).

> To obtain relief on a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient and that such deficiencies prejudiced the petitioner. A petitioner establishes prejudice when he demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell petitioner from counsel's act or omission.

[2] O'Brien's brief is not paginated.

Commonwealth v. Tedford, 598 Pa. 639, 659, 960 A.2d 1, 12 (2008) (citations omitted). The petitioner must satisfy all three prongs of the analysis, or the claim fails. ***Commonwealth v. Spotz***, 582 Pa. 207, 220, 870 A.2d 822, 830 (2005), *cert. denied*, 546 U.S. 984 (2005). The petitioner must rebut the presumption of counsel's effectiveness. ***Id.***

O'Brien first argues that trial counsel pursued an inappropriate strategy. Specifically, O'Brien asserts that counsel's strategy should have been more antagonistic toward his brother. O'Brien argues that his best defensive strategy would have been to establish that James O'Brien was the perpetrator and that O'Brien was not involved.

At trial, DNA evidence established that James O'Brien's semen was in the victim's mouth and on her clothing. O'Brien's trial attorneys noted that the Commonwealth had strong DNA evidence against James O'Brien and argued that the Commonwealth had no credible evidence of any wrongdoing on O'Brien's part. N.T., 10/13/11, at 23, 25, 36, 58. O'Brien's attorneys' strategy was to attack the credibility of the witnesses – primarily Walker and an inmate to whom O'Brien allegedly offered a jailhouse confession – who testified to O'Brien's involvement. ***Id.***

We disagree with O'Brien's assessment of his counsel's strategy. Attacking the credibility and motives of the witnesses who implicated O'Brien and highlighting the lack of other physical evidence implicating O'Brien appears to be a very reasonable strategy. Moreover, the DNA evidence

against James O'Brien was highly damning to James O'Brien, regardless of whether O'Brien's defense was antagonistic toward him. Furthermore, the strong evidence against James O'Brien does not diminish the possibility that O'Brien was an additional perpetrator. The Commonwealth charged O'Brien and his brother with a conspiracy that encompassed the murder and kidnapping of the victim in addition to the sexual assault. O'Brien fails to explain how an antagonistic stance toward James O'Brien would have improved his own chance of obtaining an acquittal.[3]

Throughout his first argument, O'Brien asserts that he would have been better able to defend himself if he and his brother were tried separately. The record reflects that O'Brien's counsel filed a motion to sever. The trial court severed Walker's trial but permitted a joint trial of the O'Brien brothers. This Court affirmed that decision. ***O'Brien***, 981 A.2d 930, unpublished memorandum, at 4-5. The PCRA does not permit a petitioner to obtain relief on a previously litigated issue. 42 Pa.C.S.A. § 9543(3). Since counsel litigated the severance issue before the trial court and on direct appeal, that issue cannot be a basis for collateral relief. ***See***

[3] O'Brien also asserts that he had a learning disability and that his lawyers, knowing this, should have disregarded his instruction not to become antagonistic toward James O'Brien. The record reflects that O'Brien's lawyers were aware of his condition and took appropriate steps to ensure that he understood his situation. N.T., 10/13/11, at 67-68. In any event, we believe counsel's strategy was reasonable for the reasons we have explained in the main text.

Commonwealth v. Hawkins, 567 Pa. 310, 331, 787 A.2d 292, 304 (2000) (A PCRA petitioner cannot obtain collateral review of an issue that was fully and finally litigated in a prior appeal).

We are cognizant that a petitioner can obtain collateral review of a previously litigated issue by asserting "deficient stewardship in the presentation of the claim." ***Commonwealth v. Rega***, 2013 Pa. Lexis at *37 (June 7, 2013). To the extent we can construe O'Brien's argument as challenging counsel's deficient presentation of the severance argument, it still lacks merit. Our Supreme Court has held that joint trials are preferred where, as here, co-defendants are charged with conspiracy. ***Commonwealth v. Marinelli***, 547 Pa. 294, 313, 690 A.2d 203, 212-13 (1997), *cert. denied*, 523 U.S. 1024 (1998). "The fact that hostility exists between the defendants or that one defendant may try to save himself at the expense of the other constitutes insufficient grounds to require severance." ***Id.*** We therefore cannot conclude that O'Brien's counsel could have obtained separate trials simply by adopting a more antagonistic posture toward James O'Brien.

Based on all of on the foregoing, we conclude O'Brien's first argument lacks merit.

In his second argument, O'Brien asserts that his trial attorneys were ineffective for failing to discover evidence of a potential alibi prior to jury selection. O'Brien argues that, during jury selection, he and his brother

suddenly remembered that they were at a baptism the night after the victim's abduction. James O'Brien produced a datebook with an entry for the day after the abduction that appeared to read "b-a-p-r-s." Trial Court Opinion, 7/29/12, at 6. Prior to the brothers' recollection of the baptism, counsel were unsure what the entry meant.

This claim fails because, by O'Brien's own admission, he did not explain the cryptic datebook entry to his attorneys prior to jury selection. Furthermore, counsel correctly never viewed the datebook as potential alibi evidence, inasmuch as it did not account for O'Brien's whereabouts at the time of the victim's abduction, but rather the night after. N.T., 10/13/11, at 47, 49-50. Our Supreme Court has held that the defendant has an alibi defense if "at time of commission of crime charged in indictment defendant was at different place so remote or distant or under such circumstances that he could not have committed offense." ***Commonwealth v. Jones***, 529 Pa. 149, 152, 602 A.2d 820, 822 (1992) (*quoting* BLACK'S LAW DICTIONARY (4th ed. 1968)).

O'Brien also argues that the datebook evidence was useful to impeach Walker, who testified that the O'Brien brothers were at his house the night after the abduction. The trial court permitted O'Brien's counsel to introduce evidence that he was at a baptism the night after the abduction, and they did so. Thus, this cannot be a basis for asserting their ineffectiveness. O'Brien's second argument fails.

With his third and final argument, O'Brien asserts that his lawyers were ineffective for failing to give notice of their intent to introduce a *crimen falsi* conviction against Commonwealth witness Ryan Heath ("Heath"). Heath is a fellow inmate of O'Brien's who testified to O'Brien's jailhouse confession. The *crimen falsi* in question was Heath's 1984 burglary conviction that predated the trial by 21 years. Rule 609 of the Pennsylvania Rules of Evidence prohibits admission of a *crimen falsi* conviction more than ten years old unless the proponent gives advance written notice of its intent and the trial court concludes that its "probative value substantially outweighs its prejudicial effect." Pa.R.E. 609(b).[4]

The record reveals that the Commonwealth waived the notice requirement at O'Brien's trial. The trial court then determined that the probative value of Heath's 1984 *crimen falsi* conviction did not substantially outweigh its prejudicial effect, and therefore denied its admission. This Court affirmed that decision on direct appeal. ***O'Brien***, 981 A.2d 930, unpublished memorandum, at 5.

O'Brien's assertion that his lawyers were ineffective for failing to provide Rule 609 notice lacks arguable merit, because the Commonwealth waived the notice requirement. O'Brien cannot obtain collateral relief on the

[4] Rule 609 was rescinded and replaced effective March 18, 2013. The language quoted in the main text appeared in the previous and current versions of Rule 609.

underlying issue because it was previously litigated and he does not argue that counsel were ineffective in presenting it. 42 Pa.C.S.A. § 9543(3); ***Hawkins***, 567 Pa. at 331, 787 A.2d at 304.

In summary, we have concluded that all three of O'Brien's arguments lack merit. We therefore affirm the order dismissing O'Brien's PCRA petition.

Order affirmed.

Judgment Entered.

Nicholas V. Cosetti

Deputy Prothonotary

Date: 7/22/2013