

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
NATHANIEL MILLER	:	
	:	
Appellant	:	No. 250 EDA 2023

Appeal from the PCRA Order Entered November 3, 2022
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0004971-2018

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

MEMORANDUM BY DUBOW, J.:

FILED JANUARY 18, 2024

Appellant, Nathaniel Miller, appeals from the November 3, 2022 Order, entered in the Philadelphia County Court of Common Pleas, dismissing his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46, as meritless. After careful review, we affirm.

The relevant facts and procedural history are as follows. On February 6, 2020, a jury convicted Appellant of First-Degree Murder, Firearms Not to be Carried Without a License, Carrying a Firearm on Public Streets in Philadelphia, and Possessing an Instrument of Crime.¹ The Commonwealth secured Appellant's convictions, in part, by placing him at the scene of the crime using data collected by the GPS ankle monitor that Appellant wore as a

¹ 18 Pa.C.S §§ 2502(a), 6106(a)(1), 6108, and 907(a), respectively.

condition of his state parole and with surveillance video from the area.² That same day, the trial court sentenced Appellant to life imprisonment without parole for his First-Degree Murder conviction.³ Appellant appealed from his judgment of sentence, challenging the trial court's decision to permit the Commonwealth's video analysis and recovery expert witness, Detective Thorston Lucke, "to testify as to hearsay statements [] regarding the time off-set of video evidence presented where such statements . . . were introduced for the sole purpose of establishing the existence of the time off-set listed on the reports."⁴ **Commonwealth v. Miller**, No. 1014 EDA 2020, unpublished memorandum at 1 (Pa. Super. filed April 15, 2021).

² Philadelphia Police Detective James Sloane, an expert in video surveillance analysis, recovered surveillance footage from a minimarket outside of which the victim was shot. In reviewing the surveillance footage, Detective Sloane noticed a five minute and fifty-five second difference between the time as shown on the video and real-time as cross-referenced with the United States Naval Observatory's Atomic Clock. PCRA Ct. Op., 11/3/22, at 4 (quoting Trial Ct. Op., 7/8/20).

³ The court also imposed concurrent sentences of 3½ to 7 years of incarceration for Appellant's Firearms Not to be Carried Without a License conviction and 1 to 2 years of incarceration for his Carrying a Firearm on Public Streets in Philadelphia conviction.

⁴ As this Court explained in its memorandum opinion affirming Appellant's judgment of sentence, the Commonwealth offered Detective Lucke's testimony to establish that Appellant was present at the scene of the shooting and "relied, in part, on observations relating to the differences between the timestamp appearing on the surveillance video and so-called 'real-time.' This time differential information was relayed to Detective Lucke through a report prepared by Detective Sloane." **Id.** at 2.

On April 15, 2021, this Court affirmed Appellant's judgment of sentence.

Id. Appellant did not seek further review.

On March 10, 2022, Appellant *pro se* filed a PCRA Petition raising numerous claims of ineffective assistance of counsel. The PCRA court appointed counsel who, on June 20, 2022, filed an amended PCRA Petition.

In the Amended Petition, Appellant explained that the primary issue in his case was whether he was at the scene of the crime. Appellant noted that the Commonwealth introduced GPS and surveillance video evidence that purportedly placed Appellant there, but the time and place data collected by Appellant's GPS monitor did not match the surveillance video's time stamp. Appellant asserted that his trial counsel had rendered ineffective assistance of counsel by failing to "consult with an expert or present evidence to rebut [Detective Lucke's] testimony about a time offset in [the] surveillance video of the scene." Amended PCRA Petition, 6/20/22, at ¶ 2. Appellant alleged that his counsel's ineffectiveness prejudiced him because the Commonwealth had no credible eyewitnesses placing him at the scene of the crime and no other direct evidence. **Id.** at ¶ 7. Therefore, if his counsel had retained an expert to discredit Detective Lucke's testimony regarding the surveillance video's time offset, "the jury probably would have acquitted [Appellant]." **Id.** Appellant claimed that his counsel spoke with an expert, Arthur Young, who informed counsel that "he or an expert of similar qualifications was available and would have offered testimony designed to advance [Appellant's] cause." **Id.** at 8. Appellant identified his trial counsel, Attorney Benjamin Cooper, Mr.

Young, and “any other witnesses necessary to prove the claims for relief” as potential witnesses at an evidentiary hearing.^{5, 6} ***Id.*** at 9.

On October 7, 2022, the PCRA court issued a Notice of Intent to Dismiss Appellant’s Petition without a hearing pursuant to Pa.R.Crim.P. 907. Appellant did not file a response to the Rule 907 Notice. On November 3, 2022, the PCRA court dismissed Appellant’s Petition as meritless.

Appellant did not file a timely notice of appeal from the order dismissing his Petition. However, at Appellant’s request, the PCRA court reinstated his direct appeal rights *nunc pro tunc*, and this appeal followed.

Appellant raises the following issue for our review:

Did the lower court err and abuse its discretion in dismissing [Appellant’s] PCRA petition without first conducting an evidentiary hearing where trial counsel rendered ineffective assistance for failing to consult with an expert about a purported time offset in a surveillance video that was a critical piece of evidence?

Appellant’s Brief at 5.

⁵ Appellant appended a copy of Mr. Young’s *curriculum vitae* to his Amended Petition. Although the nature of Mr. Young’s exact expertise is not clear from a review of his *curriculum vitae*, his current job title at Guardian Forensic Sciences is “Forensic Biology Specialist & Managing Partner.” His *curriculum vitae* indicates that he also worked in the past as a forensic biologist and forensic chemist.

⁶ On September 28, 2022, Appellant also filed, with leave of court, a Supplemental PCRA Petition raising an additional claim of ineffective assistance of counsel pertaining to his counsel’s failure to investigate a confidential informant and to cross-examine a Commonwealth witness about the informant. Appellant does not challenge on appeal the court’s finding that that claim lacked merit.

A.

We review an order denying a petition for collateral relief to determine whether the PCRA court's decision is supported by the evidence of record and free of legal error. ***Commonwealth v. Fears***, 86 A.3d 795, 803 (Pa. 2014). "This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings." ***Commonwealth v. Anderson***, 995 A.2d 1184, 1189 (Pa. Super. 2010).

To prevail on a petition for PCRA relief, a petitioner must plead and prove, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2). These circumstances include ineffective assistance of counsel, which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii).

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Rivera***, 10 A.3d 1276, 1279 (Pa. Super. 2010). "[T]he burden of demonstrating ineffectiveness rests on [the] appellant." ***Id.*** To satisfy this burden, the appellant must plead and prove by a preponderance of the evidence that: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) there is a reasonable probability that the outcome of the challenged proceeding would have been different absent counsel's error. ***Commonwealth v.***

Fulton, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the appellant's claim. **Id.**

To establish the prejudice prong, the petitioner must prove a reasonable probability that the outcome of the relevant proceedings would have been different but-for counsel's action or inaction. **Commonwealth v. Busanet**, 54 A.3d 35, 46 (Pa. 2012). Importantly, "counsel cannot be deemed ineffective for failing to raise a meritless claim." **Fears**, 86 A.3d at 804.

B.

Appellant asserts that his counsel was ineffective for not consulting with an expert who could rebut the Commonwealth's expert's testimony explaining the discrepancy of almost six minutes between the timestamp on the surveillance video and the data generated by Appellant's ankle monitor. Appellant's Brief at 14-15. He reiterates that Mr. Young was available to testify, trial counsel should have known about him, and he would have testified about the reasons why the Commonwealth's expert's testimony was inaccurate. **Id.** at 15-16. Appellant avers that the outcome of the trial would likely have been different had his counsel consulted with an expert because the counsel would have "exposed the flaws and assumptions in the methods used to calculate the time offset" and the Commonwealth's "theory of the case" would have been challenged. **Id.** at 16, 18. Appellant posits that trial counsel's cross-examination of the Commonwealth's witness would not have been as "ineffective," "ill-prepared" and "feeble" had counsel consulted with a defense expert. **Id.** at 18. Appellant baldly asserts that "trial counsel's

decision not to consult with an expert was unreasonable because there was no legitimate, strategic reason not to do so.” ***Id.*** at 17.

The PCRA court concluded that Appellant’s claim lacked merit because “there is no evidence that the time offset of five minutes and fifty-five seconds is incorrect.” PCRA Ct. Op. at 8. The Court further noted as follows:

While [Appellant] attempt[ed] to satisfy his burden by alleging that Arthur Young was available to testify about the time offsets, he fail[ed] to allege that Mr. Young would have testified that the time offset is wrong. Furthermore, it is unlikely that Mr. Young would have even been accepted as an expert witness on video recovery, given that, by his own admission, Mr. Young’s credentials have nothing to do with video recovery or video analysis.

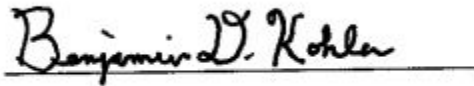
Id. at 8-9.

The record supports the PCRA court’s conclusion that Appellant’s claim that trial counsel was ineffective for failing to consult with an expert to rebut the Detective Lucke’s testimony lacked merit. Critically, the record supports the PCRA court’s finding that Appellant failed to make an offer of proof that any expert, including Mr. Young, could testify that Detective Lucke’s testimony concerning the difference between the time displayed on the surveillance video and the actual time was, in fact, incorrect or the result of unreliable methodology. Absent such an offer of proof, Appellant cannot demonstrate that his trial counsel was ineffective for not presenting an expert to undercut Detective Lucke’s testimony. In addition, the PCRA court aptly noted that Mr. Young’s expertise appears not to be in the field of video recovery or analysis and, thus, it is unlikely that, even if trial counsel had retained him as an

expert, Mr. Young would have been accepted as an expert witness.⁷ Accordingly, the PCRA court properly concluded that Appellant's ineffective assistance of counsel claim was meritless.

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

⁷ In addition, we observe that, because Appellant's location and movements were tracked and recorded by the GPS ankle monitor he was wearing, thus, placing him at the scene of the crime, he also failed to demonstrate that, even if trial counsel had obtained an expert to attempt to undermine Detective Locke's testimony, there is a reasonable probability that the outcome of the proceedings would have been different.