

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
KEVIN HILTON	:	
	:	
Appellant	:	No. 2232 EDA 2020

Appeal from the PCRA Order Entered October 14, 2020
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0011010-2016

BEFORE: NICHOLS, J., MURRAY, J., and SULLIVAN, J.

MEMORANDUM BY NICHOLS, J.:

FILED JUNE 28, 2022

Appellant Kevin Hilton appeals from the order dismissing his timely first Post Conviction Relief Act¹ (PCRA) petition. Appellant claims that his PCRA counsel was ineffective for failing to file an amended petition raising trial counsel's ineffectiveness. We affirm.

The underlying facts of this matter are well known to the parties. **See** Trial Ct. Op., 3/29/18, at 3-6. Briefly, the Commonwealth charged Appellant with attempted murder, aggravated assault, resisting arrest, recklessly endangering another person (REAP), carrying a firearm by a prohibited person, firearms not to be carried without a license, carrying firearms in public in Philadelphia, and possession of a controlled substance² in connection to an

¹ 42 Pa.C.S. §§ 9541-9546.

² 18 Pa.C.S. §§ 901(a), 2501; 2702(a)(2); 5104; 2705; 6105(a)(1); 6106(a)(1); 6108; and 35 P.S. § 780-113(a)(16), respectively.

altercation between Appellant and several police officers on September 25, 2016.

The trial court held a non-jury trial on June 1, 2017. The trial court found Appellant guilty of resisting arrest, REAP, carrying a firearm by a prohibited person, firearms not to be carried without a license, carrying firearms in public in Philadelphia, and possession of a controlled substance. N.T. Trial, 6/1/17, at 119. The trial court acquitted Appellant of attempted murder. **Id.** Lastly, the trial court found Appellant guilty of aggravated assault under 18 Pa.C.S. § 2702(a)(6), which the Commonwealth had not charged in the bills of information. **Id.** at 120. Therefore, the Commonwealth asked to amend the bills and Appellant's trial counsel agreed to that amendment. **Id.**

On October 23, 2017, the trial court sentenced Appellant to an aggregate term of eight-and-a-half to seventeen years' imprisonment.

On direct appeal, Appellant challenged the sufficiency of the evidence supporting his conviction for aggravated assault and claimed that the trial court erred in granting the Commonwealth's motion to amend the bills of information. **Commonwealth v. Hilton**, 3593 EDA 2017, 2019 WL 2114223 at *1 (Pa. Super. filed May 14, 2019) (unpublished mem.). This Court concluded that the evidence was sufficient to sustain the conviction for aggravated assault. **Id.** at *3. This Court also determined that Appellant waived the issue of the Commonwealth's motion to amend the bills of information because trial counsel failed to object. **Id.** at *4. After this Court

affirmed Appellant's judgment of sentence, our Supreme Court denied Appellant's petition for allowance of appeal on September 25, 2019. ***Commonwealth v. Hilton***, 218 A.3d 382 (Pa. 2019).

On April 23, 2020, Appellant filed a timely *pro se* PCRA petition, asserting that his trial counsel was ineffective because he failed to object to the Commonwealth's motion to amend the bills of information. *Pro Se* PCRA Pet., 4/23/20, at 4. The PCRA court appointed William J. Ciancaglini, Esq. (prior PCRA counsel) to represent Appellant.

On July 26, 2020, prior PCRA counsel filed a ***Turner/Finley***³ no-merit letter and a motion for leave to withdraw. The PCRA court issued a Pa.R.Crim.P. 907 notice of intent to dismiss Appellant's PCRA petition without a hearing on August 27, 2020. Appellant did not file a response to the Rule 907 notice.

The PCRA court dismissed Appellant's PCRA petition and appointed Matthew Sullivan, Esq. to represent Appellant on appeal. Appellant filed a timely notice of appeal. Appellant filed a timely court-ordered Pa.R.A.P. 1925(b) statement in which he argued that there was arguable merit to his claim that trial counsel was ineffective for failing to object to the amendment of the bills of information. The trial court issued a Rule 1925(a) opinion addressing Appellant's claim. ***See*** PCRA Ct. Op., 9/7/21, at 5-10.

³ ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

Appellant raises the following issue for our review:

Did [prior] PCRA counsel render ineffective assistance for failing to file an amended PCRA petition alleging trial counsel's ineffectiveness for failing to object to the Commonwealth's post-verdict motion to amend the bills of information to include a charge of aggravated assault, 18 Pa.C.S. § 2702(a)(6)?

Appellant's Brief at 5.

Appellant argues that trial counsel was ineffective because he failed to object when the Commonwealth moved to amend the bills of information. ***Id.*** at 11-15. Specifically, Appellant asserts his claim has arguable merit because the bills of information should not have been amended to substitute an offense that is materially different from the elements of or defenses to the crime that was originally charged. ***Id.*** at 11-13 (citing ***Commonwealth v. Sinclair***, 897 A.2d 1218, 1221 (Pa. Super. 2006)). Appellant asserts that aggravated assault under Section 2702(a)(2) and Section 2702(a)(6) each contain an element not found in the other subsection. ***Id.*** at 12-13. Appellant also contends that he was prejudiced by trial counsel's failure to object because (1) the amended charge involved an element not found in the original charge; (2) the amended charge necessitated a change in defense strategy, but occurred after trial counsel cross-examined the Commonwealth's witnesses; and (3) the timing of the amendment did not provide Appellant with ample notice and time to prepare because it occurred after both sides had rested and made closing arguments. ***Id.*** at 14-15 (citing ***Sinclair***, 897 A.2d at 1222). For these reasons, Appellant concludes that trial counsel was ineffective.

Appellant also argues that prior PCRA counsel was ineffective for failing to file an amended PCRA petition. ***Id.*** at 9-11, 15-17. Appellant argues that his claim against prior PCRA counsel has arguable merit because there is merit to his underlying ineffectiveness claim against trial counsel. Appellant argues that prior PCRA counsel lacked a reasonable basis for failing to file an amended PCRA petition because prior PCRA counsel erroneously concluded that the amended bills of information aided Appellant by reducing the grading of aggravated assault from a first-degree felony to a second-degree felony. ***Id.*** at 15-16 (citation omitted). Appellant contends that prior PCRA counsel erred in assuming that the trial court would have convicted Appellant of aggravated assault under the original charge if the amendment had not been made because Section 2702(a)(2) and Section 2702(a)(6) contain different elements. ***Id.*** at 16. Lastly, Appellant argues that he was prejudiced because the outcome of the PCRA proceeding would likely have been different if prior PCRA counsel had filed an amended PCRA petition, because the PCRA court would have addressed the merits of his claim of trial counsel ineffectiveness. ***Id.*** at 17. Therefore, Appellant concludes that prior PCRA counsel was ineffective for filing a no-merit letter instead of an amended PCRA petition.

This Court has explained that

our standard of review from the denial of a PCRA petition is limited to examining whether the PCRA court's determination is supported by the evidence of record and whether it is free of legal error. The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a *de novo* standard of review to the PCRA court's legal conclusions.

Commonwealth v. Sandusky, 203 A.3d 1033, 1043 (Pa. Super. 2019) (citations omitted and formatting altered).

Recently, our Supreme Court decided ***Commonwealth v. Bradley***, 261 A.3d 381 (Pa. 2021), which held that a PCRA petitioner may raise claims of ineffective assistance of PCRA counsel at the first opportunity, even if on appeal. ***Bradley***, 261 A.3d at 405. As Appellant's appeal was pending at the time the ***Bradley*** Court made its decision, it is applicable to this appeal. ***See Commonwealth v. Chesney***, 196 A.3d 253, 257 (Pa. Super. 2018) (stating that "Pennsylvania appellate courts apply the law in effect at the time of the appellate decision" (citations omitted)).

The standard we apply when reviewing claims of ineffective assistance of counsel is as follows:

[T]o establish a claim of ineffective assistance of counsel, a defendant 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. The burden is on the defendant to prove all three of the following prongs: (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.

* * *

Boilerplate allegations and bald assertions of no reasonable basis and/or ensuing prejudice cannot satisfy a petitioner's burden to prove that counsel was ineffective. Moreover, a failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness.

Sandusky, 203 A.3d at 1043-44 (citations omitted and formatting altered).

Further, when a defendant claims that counsel was ineffective for failing to raise a claim of prior counsel's ineffectiveness, the defendant must present a layered claim of ineffectiveness. **See Commonwealth v. McGill**, 832 A.2d 1014, 1022-23 (Pa. 2003); **see also Commonwealth v. Parrish**, --- A.3d ---, 791 CAP, 2022 WL 1244413 (Pa. filed Apr. 28, 2022) (holding that under **Bradley**, a defendant may raise a layered claim of the ineffective assistance of trial and PCRA counsel on appeal for the first time).

This Court has explained:

Where the defendant asserts a layered ineffectiveness claim he must properly argue each prong of the three-prong ineffectiveness test for each separate attorney.

Layered claims of ineffectiveness are not wholly distinct from the underlying claims, because proof of the underlying claim is an essential element of the derivative ineffectiveness claim. In determining a layered claim of ineffectiveness, the critical inquiry is whether the first attorney that the defendant asserts was ineffective did, in fact, render ineffective assistance of counsel. If that attorney was effective, then subsequent counsel cannot be deemed ineffective for failing to raise the underlying issue.

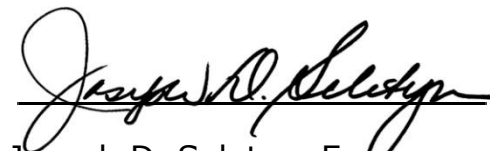
Commonwealth v. Rykard, 55 A.3d 1177, 1190 (Pa. Super. 2012) (citations omitted and formatting altered); **see also Commonwealth v. Ly**, 980 A.2d 61, 90-91 (Pa. 2009) (concluding that the defendant waived his claim of trial counsel ineffectiveness because he failed to properly layer his claims regarding subsequent counsel's ineffectiveness).

Here, as noted previously, Appellant purports to raise a layered ineffectiveness claim against prior PCRA counsel and trial counsel. In his brief,

Appellant discusses all three prongs of the ineffectiveness standard with respect to his claim against prior PCRA counsel. However, in developing his underlying claim against trial counsel, Appellant fails to discuss the reasonable basis prong. **See Rykard**, 55 A.3d at 1190. Therefore, because Appellant failed to present any argument about the reasonable basis prong with respect to trial counsel, we are constrained to conclude that Appellant has waived his layered ineffectiveness claim. **See Ly**, 980 A.2d at 90-91; **see also Sandusky**, 203 A.3d at 1044 (stating that “a failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness”). For these reasons, we affirm the PCRA court’s order dismissing Appellant’s first PCRA petition.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/28/2022