

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
:
v. :
:
LAFENUS L. BURTON :
:
Appellant : No. 1113 EDA 2021

Appeal from the PCRA Order Entered May 20, 2021
In the Court of Common Pleas of Delaware County Criminal Division at
No(s): CP-23-CR-0004259-2016

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

MEMORANDUM BY BOWES, J.:

FILED JUNE 28, 2022

Lafenus L. Burton appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We vacate the PCRA court's order and remand for further proceedings.

Appellant was convicted by a jury of conspiracy to possess cocaine with intent to deliver and possession of cocaine. This Court previously provided the following summary:

[Appellant] and his 13 co-defendants ran an elaborate scheme to distribute cocaine in 2015. To dismantle their criminal enterprise, the Pennsylvania State Police and local officers conducted numerous controlled buys and video surveillance throughout Delaware County, including outside [Appellant's] residence. Investigators also obtained six wiretap orders from this Court, and a judge of the court of common pleas issued various search warrants. Police intercepted and transcribed phone calls and text messages from, to, and between the drug dealers numbering in the thousands.

A camera police positioned outside [Appellant's] home recorded him driving a green, Chrysler Town & Country minivan. The investigators eventually obtained a search warrant for his residence. Among other things, the trial judge who signed that warrant authorized police to search for and to seize indicia of ownership of the vehicle(s) described herein, including but not limited to keys.

When they executed the search warrant, officers uncovered no drugs. Instead, they found \$2,000 in a safe and \$800 in the pocket of a pair of pants next to [Appellant's] bed. Also, in the pants were car keys to his Town & Country minivan. The police took those keys, located the vehicle on the street outside, unlocked it, and drove the minivan back to the barracks. Police then obtained a warrant to search it.

Inside they uncovered [Appellant's] expired driver's license, a vehicle registration in [Appellant's] name, 10 bags of cocaine totaling 87 grams, and a substance commonly used to "cut" (*i.e.*, dilute) cocaine for retail sale.

Law enforcement arrested [Appellant] and his co-conspirators. [Appellant] filed a motion to suppress the evidence. The court of common pleas denied the motion, and the case proceeded to a jury trial. The jury convicted [Appellant], and the trial court sentenced him [to an aggregate term of imprisonment of five-and-one-half to eleven years.]

Commonwealth v. Burton, 222 A.3d 875 (Pa.Super. 2019) (non-precedential decision at 1-3) (cleaned up).

Of relevance to this appeal, Appellant raised, *inter alia*, two suppression issues on direct appeal. Specifically, he argued the trial court erred in denying his suppression motion "when there was false or misleading statements in the affidavit" for the minivan search warrant, and where the "minivan key, and the minivan itself, were not listed in the application" to search the residence and thus the keys and minivan were "seized without a warrant[.]" ***Id.*** (non-precedential decision at 3-4) (citation omitted). We dismissed the first issue

as waived for failure to include the affidavit in the transmitted record. **See id.** (non-precedential decision at 7-9). We found the second issue meritless as the keys were listed in the warrant for the residence and the officers were permitted to seize the minivan pursuant to the automobile exception and hold it until a search warrant specific to the minivan could be obtained. **Id.** (non-precedential decision at 9-14). Appellant did not seek further review.

Thereafter, Appellant timely filed *pro se* the instant PCRA petition, his first. Appellant retained the services of Scott D. Galloway, Esquire. Attorney Galloway filed an amended PCRA petition, alleging that trial counsel was ineffective for failing to: (1) adequately establish that the affidavit contained false statements; and (2) argue that the minivan was illegally seized and searched. The Commonwealth filed a response. On April 5, 2021, the PCRA court issued notice of its intent to dismiss Appellant's petition without a hearing pursuant to Pa.R.Crim.P. 907.¹ Appellant *pro se* filed a response and requested new counsel. As a result, Attorney Galloway sought leave to withdraw. On May 20, 2021, the PCRA court granted Attorney Galloway leave to withdraw and dismissed Appellant's PCRA petition.

This timely appeal followed. The PCRA court appointed Stephen D. Molineux, Esquire, to represent Appellant. Both Appellant and the PCRA court

¹ On April 29, 2021, the PCRA court dismissed Appellant's petition. However, the court vacated that order to accommodate Appellant's request for additional time to file a response. Appellant *pro se* filed a notice of appeal from the April 29, 2021 order, which this Court dismissed as moot in light of the instant appeal from the May 20, 2021 dismissal order.

complied with Pa.R.A.P. 1925. Initially, Attorney Molineux filed a no-merit brief pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa.Super. 1988) (*en banc*), as well as an application to withdraw. This Court denied the application to withdraw and struck the brief because Attorney Molineux improperly framed Appellant's ability to respond as contingent on this Court granting the motion to withdraw. Thereafter, Attorney Molineux filed a brief raising a single issue:

1. Whether Appellant was denied his constitutional right to effective PCRA counsel when PCRA counsel failed to raise the issue of ineffective assistance of appellate counsel for failing to submit the affidavit of probable cause for the search warrant for the minivan as part of the certified record for review by Superior Court, causing said issue to be waived.

Appellant's brief at 6 (unnecessary capitalization omitted).

Our Supreme Court has held that a PCRA petitioner may "raise claims of PCRA counsel's ineffectiveness at the first opportunity to do so, even if on appeal." **Commonwealth v. Bradley**, 261 A.3d 381, 401 (Pa. 2021) (footnote omitted). Upon review of the certified record, we conclude Appellant raised this issue at the first opportunity to do so, *i.e.*, in his brief following the issuance of **Bradley**. Accordingly, we turn to the merits of Appellant's issue.

On appeal from a PCRA court's decision, our scope of review is "limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error. We view the findings of the PCRA court and the evidence of record in a light most favorable to the prevailing party." **Commonwealth v. Johnson**, 236 A.3d

63, 68 (Pa.Super. 2020) (*en banc*) (cleaned up). The PCRA court's credibility determinations are binding on this Court when supported by the certified record, but we review its legal conclusions *de novo*. **Id.** (citation omitted).

Appellant challenges the effective assistance of PCRA and appellate counsel. Preliminarily, we observe that counsel is presumed to be effective and the petitioner bears the burden of proving otherwise. **Id.** (citation omitted). To do so, he must establish the following three elements:

(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different.

Id. (citations omitted). Failure to prove any of the three elements will result in dismissal of the ineffectiveness claim. **Id.** (citation omitted).

Appellant's claim focuses on PCRA counsel's ineffectiveness for failing to raise a claim that appellate counsel was ineffective. "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. Burkett**, 5 A.3d 1260, 1270 (Pa.Super. 2010).

In permitting petitioners to raise ineffectiveness claims as to PCRA counsel for the first time on appeal, the **Bradley** Court recognized that remand may sometimes be necessary:

In some instances, the record before the appellate court will be sufficient to allow for disposition of any newly-raised ineffectiveness claims. However, in other cases, the appellate court may need to remand to the PCRA court for further development of the record and for the PCRA court to consider such claims as an initial matter. Consistent with our prior case law, to advance a request for remand, a petition would be required to provide more than mere boilerplate assertions of PCRA counsel's ineffectiveness; however, where there are material facts at issue concerning claims challenging counsel's stewardship and relief is not plainly unavailable as a matter of law, the remand should be afforded.

Bradley, supra at 402 (cleaned up). In other words, "appellate courts will have the ability to grant or deny relief on straightforward claims, as well as the power to remand to the PCRA court for the development of the record." **Id.** at 403. Thus, our Supreme Court reaffirmed the preference for evidentiary hearings and the "general rule" that "a lawyer should not be held ineffective without first having an opportunity to address the accusation in some fashion." **Commonwealth v. Colavita**, 993 A.2d 874, 895 (Pa. 2010), *overruled on other grounds by Bradley, supra*. Moreover, the appropriate forum for the development of an evidentiary record on PCRA claims is the PCRA court as the appellate courts do not serve as fact-finding courts. **See Commonwealth v. Shaw**, 247 A.3d 1008, 1017 (Pa. 2021) (citations omitted).

As discussed *supra*, Appellant raised PCRA counsel's ineffectiveness at the earliest opportunity. As a result, he has not had the opportunity to develop this claim outside the argument in his appellate brief. Additionally, his claims are not mere boilerplate assertions. **See Bradley, supra**, at 402. According to the Commonwealth and the PCRA court, Appellant cannot prove prejudice

in connection with a claim about false statements in the affidavit of probable cause for the minivan search warrant because this Court held that the search of the minivan was permissible without a warrant. **See** Commonwealth's brief at 10-11; Notice of Intent to Dismiss, 4/5/21, at 7. Thus, the Commonwealth argues that this Court's alternate analysis that no warrant was needed to search the minivan is the law of the case and makes proof of actual prejudice impossible. **See** Commonwealth's brief at 12 (citing **Commonwealth v. Reed**, 971 A.2d 1216 (Pa. 2009)).

Both the Commonwealth and the PCRA court overstate our prior holding. Notably, we did not conduct an alternative analysis regarding Appellant's claim that the minivan warrant contained false statements. Rather, as noted *supra*, we found that issue waived because Appellant failed to include the affidavit in the record. As to Appellant's second suppression issue on direct appeal, that issue concerned the seizure of the minivan without a warrant. Upon review, we held that the **seizure** of the vehicle was permissible without a warrant and that "the police protected [Appellant's] right of privacy under both constitutions, because, when they seized the minivan, investigators refrained from searching it until **after** convincing a neutral magistrate that the search was justified with probable cause and obtaining a search warrant." **Burton, supra** (non-precedential decision at 14) (emphasis in original). Critically, we did not hold that the **search** of the minivan was permissible without a warrant.

It is apparent that the Commonwealth and the PCRA court attributed an imaginary holding to this Court, which hampered their ability to analyze the

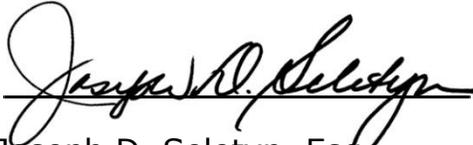
prejudice prong of Appellant's claim regarding the ineffective assistance of counsel in relation to the allegedly false statements in the affidavit for the minivan search warrant. Given that this Court dismissed Appellant's issue on direct appeal as waived specifically because counsel did not include the affidavit in the certified record and we did not reach the merits in the alternative, we conclude that relief is not plainly unavailable as a matter of law. ***See Colavita, supra; Shaw, supra.***

Unfortunately, the affidavit of probable cause for the minivan search warrant application is once again not included in the certified record. Since we cannot review the merits of the underlying claim, remand is necessary for Appellant to have the opportunity to develop the evidentiary record in conjunction with his claim that PCRA counsel was ineffective for failing to raise appellate counsel's ineffectiveness for omitting the affidavit and causing that issue to be waived on direct appeal. Remand will also provide the PCRA court the opportunity to consider this issue in the first instance.

Accordingly, we vacate the order dismissing Appellant's PCRA petition and remand to the PCRA court. Upon remand, counsel shall file an amended petition on Appellant's behalf, wherein he can fully develop this claim. Thereafter, the PCRA court must decide whether to conduct an evidentiary hearing.

Order vacated. Case remanded for further proceedings. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/28/2022