NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KEVIN BRIAN DOWLING, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 744 MDA 2013

Appeal from the PCRA Order March 28, 2013
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0000952-1997

BEFORE: BOWES, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: **FILED JULY 09, 2014**

Brian Dowling appeals from the March 28, 2013 order denying him PCRA relief. After careful review, we affirm.

On August 5, 1996, Appellant robbed at gunpoint and attempted to rape Jennifer Myers at the Tailfeather's Art Gallery in West Manchester Township, York County, Pennsylvania. After the victim saw him in a Sheetz store, recognized him as her assailant, and notified police, he was arrested and charged with robbery and attempted rape. On October 20, 1997, just days before Appellant's robbery/attempted rape trial was scheduled to begin, Ms. Myers was shot and killed in her art gallery.

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* Former Justice specially assigned to the Superior Court.

On April 30, 1998, a jury convicted Appellant of robbery, criminal attempt to commit rape, and indecent assault in connection with the August 5, 1996 incident, and he was sentenced to nine to eighteen years imprisonment. On November 6, 1998, a jury found Appellant guilty of the murder of Ms. Myers, and shortly thereafter returned a sentence of death. After formal sentencing, an automatic notice of appeal was filed in the capital murder case and new counsel, Attorney Frank Arcuri, was appointed to represent Appellant on that appeal. Attorney Arcuri was also appointed to represent Appellant on his direct appeal to this Court in the instant case. This Court affirmed Appellant's robbery and attempted rape convictions in ***Commonwealth v. Dowling***, 742 A.2d 202 (Pa.Super. 1999) (unpublished memorandum), and the Supreme Court denied his petition for allowance of appeal on August 17, 2000. ***Commonwealth v. Dowling***, 760 A.2d 851 (Pa. 2000).

On July 10, 2001, the Supreme Court remanded the capital case for an evidentiary hearing as to ineffective assistance of counsel claims in the murder action. On November 9, 2001, Appellant filed a timely *pro se* PCRA petition in the present action as to his robbery/attempted rape convictions. Therein, he alleged ineffective assistance of all prior counsel, including Attorney Arcuri, who was still representing him in the capital matter. Upon learning of the petition, Attorney Arcuri filed a motion to withdraw as counsel in the capital appeal, which was granted, and Attorney John Arnold

was appointed to represent Appellant both in connection with the pending PCRA and in the capital case. Although the actions were never consolidated, the trial court scheduled a consolidated hearing on the issues of ineffective assistance of counsel in both the capital case and in the present matter.

On July 12, 2002, pursuant to the trial court's direction, Attorney Arnold filed a list of ten issues to be addressed at the evidentiary hearing, a five-page witness summary list, and a twenty-four page brief in support of Appellant's claims in both cases. Four of the ten issues related to the robbery/attempted rape trial. After a two-day hearing on August 1 and 2, 2002, the trial court filed an opinion dated April 2, 2004. The court concluded therein that Appellant had not established ineffective assistance of counsel in either case. However, there is no order in the record denying the PCRA petition.

The Supreme Court subsequently affirmed the denial of relief in the capital murder appeal. In its review of that case, the Supreme Court noticed that there had not been a final order entered in the PCRA proceeding in this robbery/attempted rape case, prompting it to direct the trial court to enter a final order disposing of the PCRA petition so that Appellant could appeal the disposition to this Court.[1] ***See Commonwealth v. Dowling***, 883 A.2d 570,

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[1] The Supreme Court noted in footnote 4:

(Footnote Continued Next Page)

574 n.4 (Pa. 2005). A *per curiam* order to the same effect issued that same day. Inexplicably, no PCRA court order was entered pursuant to that directive.

Instead, for two years, the matter lay dormant. On February 15, 2006, attorney David Zuckerman of the Federal Community Defender's Unit entered an appearance on behalf of Appellant in this robbery/attempted rape PCRA matter. Thereafter, over a six-year period, Appellant filed a plethora of motions, including motions for discovery, recusal, and mandamus, and

(Footnote Continued)

> Appellant appears to argue, however, that this Court should consider his underlying ineffectiveness claims related to his robbery trial in this appeal because the trial court linked the two cases together by hearing argument on Appellant's ineffectiveness claims from both the robbery case and the instant case at the remand hearing. While the trial court did indeed consider Appellant's ineffectiveness claims from both cases at the remand hearing, nothing in the record indicates that the two cases were ever officially consolidated for purposes of that hearing, appeal or otherwise. In fact, as noted above, when the Commonwealth originally filed a motion to consolidate the two matters, Appellant actually opposed that motion and the trial court denied it.
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> Even though the two cases were never formally consolidated, Appellant's attempt to raise claims regarding his counsel's ineffectiveness at the robbery trial in the instant appeal prompted us to review the record from the robbery case to ascertain the status of that matter. Upon doing so, we discovered that the record did not contain any clear disposition of Appellant's PCRA petition, much less an order definitively disposing of that petition. Under these circumstances, we feel compelled to direct the trial court to enter a final order disposing of Appellant's PCRA petition in the robbery case so that Appellant has the opportunity to appeal that disposition to the Superior Court. We will therefore enter an order to that effect.

the case was reassigned to two different judges. On August 5, 2008, Appellant filed another *pro se* PCRA petition. Numerous motions and petitions were pending as of October 1, 2012, when the Honorable Robert J. Eby was assigned to this case. On March 28, 2013, Judge Eby entered an order denying PCRA relief, finding moot all PCRA petitions and related filings that post-dated the Supreme Court's 2005 order. Judge Eby dismissed the original PCRA petition.

Appellant timely appealed to this Court. Appellant also filed a petition seeking remand for purposes of resolving the myriad ineffective assistance of counsel issues raised after the Supreme Court's 2005 directive. We previously denied this petition without prejudice to Appellant to raise and brief the issue, and he has done so. We must resolve the threshold issue of whether remand is warranted for resolution of post-conviction claims raised after the Supreme Court's directive in 2005, as it implicates our jurisdiction to entertain most of Appellant's fifteen issues raised in this appeal.

Appellant alleges that Judge Eby incorrectly interpreted the High Court's order as a mandate to dismiss the petition, and that, by refusing to entertain later-filed claims, Judge Eby "overruled a judge of equal jurisdiction." Appellant's brief at 9. Furthermore, he characterizes at least some of the claims that Judge Eby refused to review as ineffective assistance of PCRA counsel claims, which Appellant notes must be raised at the earliest opportunity. In asserting PCRA counsel's ineffectiveness, he points to the

fact that PCRA counsel did not file an amended petition to the original petition, and asserts that the list of issues PCRA counsel supplied to the trial court in advance of the evidentiary hearing was "devoid of legal argument" and the list of witnesses inadequate. Appellant's brief at 10. Judge Eby disagreed, concluding that Appellant's *pro se* petition was "supplemented by a counseled filing on July 12, 2002[,]" a reference to the statement of issues and brief. Order, 3/28/13, at ¶ 17(A).

Initially, we note, "[a]n appellate court reviews the PCRA court's findings of fact to determine whether they are supported by the record, and reviews its conclusions of law to determine whether they are free from legal error." ***Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014). "The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level." ***Id***.

We have thoroughly reviewed the *pro se* PCRA petition, counsel's filings on Appellant's behalf, the transcript of the evidentiary hearing, the trial court's opinion, the Supreme Court's order, post-2005 filings, and Judge Eby's opinion. We conclude the following. Appellant's timely *pro se* PCRA petition of November 9, 2001, was supplemented by a counseled filing. The absence of a formal amended petition is not *per se* ineffectiveness of PCRA counsel where counsel filed a statement of issues, a thorough brief in support of those issues, and meaningfully participated in an evidentiary

hearing.[2] ***Commonwealth v. Murray***, 836 A.2d 956 (Pa.Super. 2003) (abrogated on other grounds by ***Commonwealth v. Robinson***, 970 A.2d 455 (Pa.Super. 2009) (PCRA counsel's failure to amend *pro se* petition did not require reversal where he filed memorandum of law raising seven claims including both sentencing issues and averments of ineffective representation by guilty plea counsel); ***cf. Commonwealth v. Davis***, 526 A.2d 440 (Pa.Super. 1987) (reversal of the denial of PCHA relief was mandated where counsel's failure to amend petition or file a brief rendered appellant uncounseled).

Having determined that the PCRA court properly treated Appellant's first petition as counseled, we turn to the question whether remand is necessary to address the host of issues raised by subsequent PCRA counsel

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[2] The record also provides additional support for the PCRA court's conclusion that Appellant's first petition was counseled. Attorney Arcuri testified that he was appointed to represent Appellant in both the robbery and homicide cases shortly after sentencing in each case. N.T., 8/1-2/02, at 187. He also initially represented Appellant on direct appeal. In the spring of 2001, after an unsuccessful appeal, Attorney Arcuri prepared a PCRA petition raising about 120 points, some of which were boilerplate that he maintained would have been edited out, and provided it to Appellant. ***Id***. at 190-91. In September 2001, Mr. Arcuri and Appellant revised that document, and counsel made a November visit to SCI Greene for the purpose of working with Appellant to finalize that pleading. Upon Attorney Arcuri's arrival, however, Appellant advised him that his services were no longer wanted and that he had accused Mr. Arcuri of ineffective assistance of counsel in the homicide case to create a conflict of interest. ***Id***. at 190. In addition, Appellant told Mr. Arcuri that he had completely redone the prior petition. Counsel Arcuri testified at the evidentiary hearing that Appellant was given "a lot of opportunities to amend" that petition with the assistance of counsel. ***Id***.

years after the Supreme Court entered its order directing the PCRA court to enter an order disposing of Appellant's petition. We conclude that no remand is necessary for the following reasons.

Following the 2002 evidentiary hearing, the PCRA court issued an opinion finding that Appellant "has failed to sustain his burden of establishing that **any** of the attorneys who represented him pre-trial, at trial, and post-trial were ineffective." Trial Court Opinion, 4/2/04, at 5 (emphasis in original). As noted, however, the record does not contain a final order expressly denying the PCRA petition. It is apparent from the Supreme Court's directive to the PCRA court to enter an order disposing of the petition that it anticipated that the court would deny relief in accordance with its thirty-five page opinion concluding that counsel was not ineffective. The Supreme Court made this abundantly clear when it stated that a final order should be entered so that Appellant could pursue an appeal. Thus, we find the post-2005 filings to be untimely serial PCRA petitions over which the trial court had no jurisdiction. The Supreme Court's directive cannot be construed to any extent as permission for Appellant to start filing new motions and petitions. It remanded for entry of an order disposing of the first petition. Judge Eby complied with that directive when he entered a formal order disposing of Appellant's timely first petition.

Only two issues on appeal were raised in Appellant's timely *pro se* PCRA petition, statement of issues, or brief, and developed at the evidentiary hearing:[3]

> d. Was physical evidence, including Appellant's car and items contained within, seized without a warrant and absent probable cause, where no exceptions to the warrant and probable cause requirements applied and were prior counsel ineffective for failing to properly raise, litigate and pursue these claims, in violation of the Fourth, Sixth, and Fourteenth Amendments, and Article I, Sections 1,6,8,9,13,14 and 25 of the Pennsylvania Constitution?
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> k. Is Appellant entitled to a renewed direct appeal because he was deprived of effective assistance of counsel on direct appeal?

Appellant's brief at 1-2.

Ineffective assistance of counsel claims are governed by 42 Pa.C.S. § 9543(a)(2)(ii). In seeking relief on that basis, the petitioner must plead and prove by a preponderance of the evidence that his conviction resulted from ineffective assistance that "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Id***. In order to prevail on an ineffective assistance of counsel claim, the petitioner must demonstrate: (1) the underlying claim is of arguable

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[3] Issue (a) involves the question whether remand was necessary for a second evidentiary hearing on issues raised after the Supreme Court's 2005 directive. Since we have determined that the post-2005 filings constitute untimely serial PCRA petitions, we have no jurisdiction to entertain Appellant's issues designated as (b), (c), (e) through (j) and (l) through (o).

merit; (2) counsel had no reasonable basis for the act or omission in question; and (3) he suffered prejudice as a result of counsel's deficient performance. ***Commonwealth v. Steele***, 961 A.2d 786, 796-97 (Pa. 2008); ***Commonwealth v. Stewart***, 84 A.3d 701, 706 (Pa.Super. 2013) (*en banc*).

Prejudice involves a showing by a defendant that "but for the act or omission in question, the outcome of the proceedings would have been different." ***Commonwealth v. Elliott***, 80 A.3d 415, 432 (Pa. 2013); ***Steele***, ***supra***. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." ***Commonwealth v. Rathfon***, 899 A.2d 365, 370 (Pa.Super. 2006). If it is clear that an appellant has not demonstrated prejudice, the first two prongs need not be addressed by the reviewing court. ***Commonwealth v. Bomar***, 826 A.2d 831, 855 (Pa. 2003) (limited on other grounds by ***Commonwealth v. Holmes***, 79 A.3d 562, (Pa. 2013)).

With regard to the second prong, "Trial counsel . . . is presumed to have acted effectively and in his client's best interests, and it is the defendant who bears the burden of demonstrating ineffectiveness." ***Commonwealth v. Hancharik***, 633 A.2d 1074, 1079 (Pa. 1993). Whether counsel had a reasonable basis for the course charted, "[t]he test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record." ***Commonwealth v. Hawkins***, 894 A.2d 716,730

(Pa. 2006). The test is whether no competent counsel would have chosen that particular course of action, or the alternative not selected offered a greater chance of success. ***Commonwealth v. Colavita***, 993 A.2d 874 (Pa. 2010). Our inquiry is an objective one, and counsel is effective if his decision had any reasonable basis. ***Hawkins***, ***supra***.

The first issue herein concerns the seizure of evidence pursuant to an automobile search that was justified as an inventory search. Appellant argues that evidence obtained from the vehicle would likely have been suppressed if trial counsel had asserted that impoundment of the vehicle that was legally parked on private property was not authorized by the Motor Vehicle Code, 75 Pa.C.S. § 3352(c).[4] He continues that, absent lawful impoundment, the inventory search was improper, as police had no probable cause to seize and search the car based on the description of a witness who did not observe the crime and the officer's "pure speculation" that Appellant was the person whom Ms. Myers' saw in the Sheetz. He continues that the Commonwealth could have easily obtained a warrant prior to seizing the car and searching its interior. Prejudice lay in the fact, according to Appellant,

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[4] Appellant's argument is misleading as it suggests that all items removed from Appellant's car were seized during the inventory search following the vehicle's impoundment, a fact unsupported by the record. The uncontroverted evidence presented at the suppression hearing established that Detective Smith removed a loaded gun and sunglasses prior to transporting Appellant to the station for questioning and conducting the inventory search.

that he was convicted largely on the strength of evidence illegally seized from his car.

We conclude that Appellant's ineffectiveness claim fails because he cannot demonstrate prejudice as a result of counsel's allegedly defective performance. Our Supreme Court's recent decision in ***Commonwealth v. Gary***, 2014 Pa. LEXIS 1119 (Pa. 2014) (Opinion Announcing the Judgment of the Court with five Justices agreeing on the adoption of the federal automobile exception), altered the legal landscape in Pennsylvania regarding vehicle searches. Furthermore, we look to present law, rather than the law at the time of counsel's allegedly deficient performance, in determining whether Appellant was prejudiced by counsel's performance. ***See Lockhart v. Fretwell***, 506 U.S. 364 (1993) (holding that the ultimate question in a prejudice determination, whether the result of the proceeding was unreliable or fundamentally unfair, is made with reference to the law presently existing, rather than the law at the time of counsel's actions).[5] For the reasons that follow, we find there was probable cause for the vehicle search.

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[5] In determining whether counsel was deficient, we use the law at the time of the conduct as the measure of ineffectiveness. In ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993), the Supreme Court explained that, "a more rigid requirement 'could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.'" (quoting ***Strickland v. Washington***, 466 U.S. 668, 690 (1984)). The ***Lockhart*** Court reasoned, however, that the prejudice component of the ineffectiveness test did not implicate these concerns since the focus was on whether counsel's
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Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution generally prohibit the police from searching a person or his or her property and seizing personal items without a search warrant. There are, however, exceptions to the warrant requirement where there is consent to search, either actual or implied, and where the search is conducted incident to arrest. A separate exception to the warrant requirement for automobiles was recognized in ***Carroll v. United States***, 267 U.S. 132 (1925). Under the automobile exception, a warrantless investigatory search of an automobile was justified based on two factors: the ready mobility of the vehicle and a diminished expectation of privacy in an automobile, in contrast to a home or office. ***See California v. Carney***, 471 U.S. 386, 391-92 (1985). A decade later, the Court expressly stated that the automobile exception to the search warrant requirement necessitated only a finding of probable cause; there was no need for a finding of exigent circumstances. ***See Maryland v. Dyson***, 527 U.S. 465 (1999).

This Commonwealth, until recently, imposed a stricter standard under Article I, Section 8 of our Constitution. Despite our long-held belief that privacy protections in a motor vehicle are diminished, we required both

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performance "renders the result of the trial unreliable or the proceeding fundamentally unfair." ***Id***. at 372 (quoting ***Strickland***, ***supra*** at 687).

probable cause and exigent circumstances to justify a warrantless search of an automobile under the exception. ***See Commonwealth v. White***, 669 A.2d 896, 900 (Pa. 1995) (authorizing warrantless searches when there exists probable cause to believe the car contains evidence of criminal activity and exigent circumstances preclude police from obtaining a search warrant).

In ***Gary***, ***supra***, our High Court concluded that there were "no unique Pennsylvania policy considerations that counsel in favor of a state standard for motor vehicle searches that is distinct from the federal standard[,]" ***id***. at *101, and "no compelling reason to interpret Article I, Section 8 of the Pennsylvania Constitution as providing greater protection with regard to warrantless searches of motor vehicles than does the Fourth Amendment." ***Id***. at *103. Our Supreme Court held that, "in this Commonwealth, the law governing warrantless searches of motor vehicles is co-extensive with the federal law under the Fourth Amendment." ***Id***. at *103. Under federal law, probable cause is the only prerequisite for a warrantless search of a motor vehicle; "no exigency beyond the inherent mobility of a motor vehicle is required." ***Id***.

In evaluating whether probable cause exists, our courts have applied the totality of the circumstances test set forth in ***Illinois v. Gates***, 462 U.S. 213 (1983). ***Commonwealth v. Rodriguez***, 585 A.2d 988 (Pa. 1991). The benchmark of such a test is "whether the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of

which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." ***Commonwealth v. Griffin***, 24 A.3d 1037, 1042 (Pa.Super. 2011) (quoting ***Commonwealth v. Burns***, 700 A.2d 517, 520 (Pa.Super. 1997)). "The evidence required to establish probable cause for a warrantless search must be more than a mere suspicion or a good faith belief on the part of the police officer." ***Commonwealth v. Lechner***, 685 A.2d 1014, 1016 (Pa.Super. 1996).

The following evidence was adduced at the January 12, 1998 suppression hearing. Detective Arthur D. Smith, Jr. of the West Manchester Township Police Department testified that Ms. Myers reported to him that her assailant was employed at the Sheetz store in Hanover as she had observed him there. Thereafter, in the early morning hours of December 3, 1996, the police put that location under surveillance. They saw a vehicle that matched the description of the vehicle seen leaving the scene of the robbery by eyewitnesses William and Linda Jarmon. That vehicle was described as an early 1991 or 1992 off-white/grayish color Lincoln Continental, with a light-colored Pennsylvania specialty plate on the rear, a tag from a Lancaster auto dealer on the trunk, an honorary sheriff's association member sticker in the shape of a star on the bumper, a cracked front windshield and a windshield wiper stuck in the vertical position in the

center of the windshield.[6] They saw a man who matched the description of Ms. Myers' assailant driving that vehicle away from the scene immediately after the crime occurred. The detective opined that, upon observing Appellant's vehicle, he suspected it was the vehicle that had been used in the perpetration of the crime at the art gallery.

The next day, Detective Smith and Officer Keith Roehm entered the Sheetz store where Appellant was working and told him they wanted to discuss the assault of Ms. Myers. The detective testified that Appellant matched the description and composite sketch provided by the victim. The detective asked Appellant whether he owned any weapons. Appellant advised the detective that he did, and volunteered that a loaded weapon was located under the driver's side seat of his vehicle, which was parked in the Sheetz lot. After speaking briefly to Appellant in the store, the detective asked him to accompany him to the Hanover Police Station. The detective testified that he was concerned, however, about leaving the store and the vehicle with the gun in it. Thus, Detective Smith secured the gun from the vehicle and, while in the vehicle for that purpose, he retrieved aviator-style

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[6] The Jarmons' description of the vehicle they saw leaving the scene of the robbery was remarkably similar to the Appellant's vehicle. Detective Smith described Appellant's vehicle as a 1991 Lincoln Continental, light blue in color, with a Pennsylvania Wildlife Resources tag on the rear. N.T. Hearing, 1/12/98, at 24-25. Displayed on the trunk area was a tag from a Lancaster County dealership, and there was an honorary sheriff's association member sticker on the bumper. ***Id***. In addition, the front windshield was cracked and the windshield wipers were fixed in a partially upright position. ***Id***.

sunglasses that were in plain view on the floor of the driver's side rear seat.[7] N.T., 1/12/98, at 38. After questioning at the Hanover Police Station, Detective Smith placed Appellant under arrest. His vehicle was then seized and searched. Among the items seized were three pieces of rope later determined to match the rope used to restrain Ms. Myers during the assault from the trunk and a Daily Record newspaper dated August 6, 1996, which contained an article about the August robbery. ***Id***. at 37, 41-42. Defense counsel conceded at the close of the suppression hearing that there was probable cause, but maintained that there were no exigent circumstances that prevented the police from obtaining a warrant to search the car. N.T. Suppression, 1/12/98, at 47. The PCRA court also concluded that there was probable cause to believe that the Defendant's car was involved in criminal activity. Opinion, 4/5/04, at 10.

We find that, prior to the search of Appellant's vehicle, the police had probable cause to believe that Appellant had committed the robbery/attempted rape and that the vehicle was used after the crime and

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[7] According to Appellant, the police officer's claim that he secured the gun for "safety purposes" was undercut by police reports stating that the gun and sunglasses were not seized until after Appellant was in custody and just prior to the tow. Those reports, however, were not introduced into evidence at the suppression hearing and are not part of the certified record. Nor is there any evidence of record substantiating Appellant's representation that the car keys were confiscated by police at the station and that police returned to the car and removed the gun and sunglasses. Appellant's brief at 30-31.

would contain evidence. Furthermore, after ***Gary***, probable cause alone would justify a warrantless search of a motor vehicle. ***Gary***, rather than the prevailing law at the time of the suppression hearing, informs our review of the prejudice prong of the ineffectiveness test for the reasons advanced in ***Lockhart***, ***supra***.

In ***Lockhart***, Fretwell relied upon an Eighth Circuit case to challenge his sentence as unconstitutional on direct appeal. Fretwell obtained federal *habeas* relief because the district court held that counsel's failure to object based on that Eighth Circuit decision constituted prejudice under ***Strickland***. The Court of Appeals for the Eighth Circuit subsequently overruled the precedent Fretwell relied upon. However, it affirmed the district court because it reasoned that the objection would have been sustained if it had been made at trial. The United States Supreme Court reversed, holding that counsel's failure to make the objection at sentencing did not constitute prejudice within the meaning of ***Strickland***. Prejudice required a demonstration that counsel's errors were so serious as to deprive him of a trial that was fundamentally fair and reliable. ***See Commonwealth v. Kimball***, 724 A.2d 326, 331 (Pa. 1999) (relying upon ***Lockhart***, ***supra***, in rejecting a prejudice analysis based solely on outcome determination and holding that whether the result of the proceeding was fundamentally unfair or unreliable was the ultimate consideration). Since the precedent Fretwell relied upon had been overruled, Fretwell suffered no

prejudice due to counsel's deficient performance. The Court specifically rejected the notion that prejudice had to be determined as of law existing at the time of trial.

While the law relied upon by Appellant regarding inventory searches of motor vehicles has not been overruled, the ***Gary*** decision supplies an alternative basis for upholding the search of Appellant's vehicle. The police had probable cause to search Appellant's vehicle, and that alone is enough to justify the warrantless search. Thus, counsel's allegedly deficient performance did not render the result of the suppression hearing unreliable or fundamentally unfair, and there is no prejudice. ***See Lockhart, supra***, and ***Kimball***, ***supra***.

We find also that even if the gun, sunglasses, rope and newspaper article found in Appellant's vehicle had been suppressed, other evidence cemented Appellant's guilt. At the Sheetz store, the victim saw Appellant and told police he was her assailant. Mr. Jarmon identified Appellant as the man who drove away in the Lincoln Continental at the scene of the robbery. The Jarmons specifically described Appellant's vehicle at the scene. With this proof of Appellant's guilt, it was not probable that the result at trial would have been different absent the items from the car. ***See Steele***, ***supra***. No relief is due.

Appellant also claims that he was denied effective assistance of counsel on direct appeal and is entitled to a new direct appeal.[8] Attorney Frank Arcuri was allegedly ineffective because he failed to attend oral argument before this Court, send a substitute, or notify this Court in advance of argument that he was unable to attend. Appellant alleges that counsel's failure to appear "left Appellant completely without counsel during the appellate court's decisionmaking process" and was presumptively prejudicial. Appellant's brief at 84. In the alternative, Appellant maintains that he can demonstrate prejudice because "this Court denied all five claims on legal grounds" and had he been there, "he could have offered convincing legal arguments." ***Id***. at 84-85. We find no merit in Appellant's position.

Mr. Arcuri testified at the evidentiary hearing that he was ill on the morning of oral argument and that his wife informed this Court of that fact. However, he had submitted a timely brief with this Court on Appellant's behalf in which he provided argument and legal support for all of the issues identified in Appellant's Rule 1925(b) statement. Despite the fact that he

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[8] Appellant asserts first that, while court-appointed counsel, Gerald Lord, filed a timely notice of appeal, his Pa.R.A.P. 1925(b) statement was deficient because it only listed five issues without any supporting facts, legal argument or citation. That issue is not before us, however, as Appellant concedes that the only issue raised in either the PCRA petition, the statement of issues, or brief in support thereof, was whether appellate counsel Arcuri was ineffective for missing oral argument.

was too ill to attend oral argument, this Court considered his brief and all the issues and arguments contained therein in disposing of the direct appeal.

Mr. Arcuri, an experienced appellate practitioner, explained that submission on brief alone is "the way it's normally done in Superior Court." N.T., 8/1-2/01, at 201. Mr. Arcuri flatly denied that he was contacted by this Court and asked to address and argue issues of prosecutorial and judicial misconduct at oral argument as was suggested.[9] ***Id***. at 202. In his experience, the Superior Court has never contacted him prior to oral argument and made such a request. ***Id***. at 202-03. He opined that had he attended oral argument and tried to raise issues that were not properly before the Court, he would not have been unsuccessful. ***Id***.

The PCRA court concluded that appellate counsel could not be deemed ineffective for failing to attend oral argument due to illness. We agree. This Court had the benefit of Mr. Arcuri's brief filed on Appellant's behalf. The suggestion that Appellant was "completely without counsel during the appellate court's decisionmaking process" simply because there was no oral argument, which is the normal procedure in the majority of cases before this Court, is specious. Furthermore, the suggestion that counsel's absence from

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[9] The specific issue regarding appellate counsel Arcuri's ineffectiveness was articulated as follows: "Whether appellate counsel, Frank Arcuri, Esquire, was ineffective for missing oral argument in the robbery appeal at which time the Superior Court was to hear various supplemental issues including those of prosecutorial and judicial misconduct?" PCRA Court Opinion, 4/5/04, at 31.

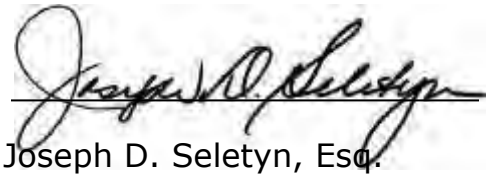
oral argument deprived Appellant of an opportunity to advance arguments at this Court's invitation that were not contemplated in the Rule 1925(b) concise statement is refuted by the record. Moreover, Mr. Arcuri's articulated belief that this Court does not address issues that have not been identified in the Pa.R.A.P. 1925(b) statement comports with our practice and procedures. No relief is due on this ground.

Consequently, we deny Appellant's petition for remand and affirm the denial of post-conviction relief.

Petition for remand denied. Order affirmed.

Judge Olson and Justice Fitzgerald Concur in the Result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014