

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KENNETH JOHN SELVAGE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 708 WDA 2012

Appeal from the PCRA Order March 28, 2012
In the Court of Common Pleas of Clearfield County
Criminal Division at No(s): CP-17-CR-0000620-2006

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.:

Filed: April 2, 2013

Kenneth John Selvage appeals from the March 28, 2012 order denying him PCRA relief. After careful review, we affirm.

On January 23, 2007, Appellant was sentenced to three to six years incarceration, consecutive to all other periods of incarceration currently being served, after he was convicted at a jury trial of persons not to possess firearms, a felony of the second degree. This Court on direct appeal summarized the facts underlying the conviction:

On May 3, 2006, Pennsylvania State Police Officers went to a trailer in which Selvage was living in order to arrest Selvage on an assault charge. When the officers first arrived and knocked on the trailer door, there was no answer. The officers remained at the trailer to wait for Selvage. As they were waiting, the officers were informed that Selvage had a firearm in the trailer. After approximately five hours, Selvage emerged from the trailer. At that time, Selvage was arrested and the police searched the trailer for firearms. They found a rifle under Selvage's bed. As a

result of this discovery, Selvage was charged with the above-referenced offense.

Commonwealth v. Selvage, 988 A.2d 730 (Pa.Super. 2009) (unpublished memorandum).

Stephen Jarrett, Esquire, represented Appellant at trial. A post-sentence motion, which included an allegation of ineffectiveness regarding counsel's failure to present Appellant as a witness, was filed on Appellant's behalf by Daniel Payne, Esquire, of the Clearfield County Public Defenders' Office. After a hearing held on April 14, 2007, the post-sentence motion was denied. Appellant's first direct appeal was dismissed after counsel failed to file a brief. Joseph Ryan, Esquire, obtained reinstatement of appellate rights and represented Appellant on direct appeal.

On direct appeal, Appellant raised three contentions: 1) trial counsel was ineffective for failing to permit Appellant to testify on his own behalf; 2) the trial court erred in allowing evidence of his three prior convictions when Appellant was willing to stipulate that he was not authorized to possess a firearm; and 3) the Commonwealth made two improper remarks during argument. We rejected all three contentions on the merits and affirmed. ***Id.*** The allegation of ineffectiveness was entertained under the exception to

Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), announced in *Commonwealth v. Bomar*, 826 A.2d 831 (Pa. 2003).¹

Appellant filed this timely PCRA petition on December 10, 2009. Counsel was appointed and filed an amended petition that included allegations that prior counsel were ineffective for failing to litigate other claims of trial counsel's ineffectiveness. The PCRA court held an evidentiary hearing at which trial, post-trial and appellate counsel testified. On March 28, 2012, the trial court denied relief and issued its opinion. This timely appeal followed, and Appellant complied with the trial court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant raises two issues for our review:

1. Did the trial court err in determining that prior counsel were not ineffective despite [their] failure to interview and call witnesses to testify on behalf of [Appellant] at trial and during [the] post-sentence [hearing]?
2. Did the trial court abuse its discretion in sentencing [Appellant] to a term of three years of total confinement, disregarding any mitigating factors?

Appellant's brief at 4.

¹ In *Bomar*, our Supreme Court permitted direct-appeal review of ineffectiveness allegations that had been examined at a hearing and were addressed by the trial court. In *Commonwealth v. Barnett*, 25 A.3d 371, 377 (Pa.Super. 2011) (*en banc*), we recognized that, in subsequent decisions, our Supreme Court limited the holding of *Bomar*. Presently, a defendant cannot obtain review in the direct appeal setting of ineffectiveness claims absent an express waiver of the right to PCRA relief that is informed and voluntary. *Id.*

Our standard of review of a PCRA court's decision "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. Our 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 party who prevailed in the PCRA court proceeding." ***Commonwealth v. Busanet***, 54 A.3d 35, 45 (Pa. 2012) (citation omitted).

Appellant's first issue implicates the effectiveness of his counsel. In order to prevail, he must establish

(1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, *i.e.* there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different.

Commonwealth v. Wah, 42 A.3d 335, 338 (Pa.Super. 2012) (citations omitted).

Appellant first asserts that trial counsel was ineffective for failure to call witnesses; that Attorney Payne properly preserved the issue via post-trial motion, but was ineffective at the hearing on the motion by failing to call these witnesses to testify; and that appellate counsel Ryan was ineffective in failing to advance both trial counsel and post-trial counsel's

ineffectiveness on appeal.² In order to establish that trial counsel was ineffective for failing to call certain witnesses, Appellant must show:

(1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied [appellant] a fair trial.”

Commonwealth v. Johnson, 966 A.2d 523, 536 (Pa. 2009) (quoting ***Commonwealth v. Washington***, 927 A.2d 586, 599 (Pa. 2007)).

In his brief, Appellant fails to identify the alleged witnesses who should have been presented by his trial counsel.³ Appellant also neglects to provide us with the substance of their testimony, or argue how the absence of the witnesses’ testimony was so prejudicial as to deny him a fair trial.⁴

² Thus, Appellant has properly layered his ineffectiveness claims. ***Commonwealth v. McGill***, 832 A.2d 1014 (Pa. 2003) (where direct-appeal counsel litigated a claim of trial counsel’s ineffectiveness, to obtain review in PCRA setting, defendant must allege that appellate counsel was ineffectiveness for failing to litigate allegation of trial counsel’s ineffectiveness raised in the PCRA petition).

³ Appellant mentioned in passing that he supplied his daughter’s name as a witness. Without elaborating on the nature of her possible testimony, he conceded that someone from trial counsel’s office did contact her. N.T. PCRA Hearing, 8/2/2011, at 9.

⁴ Appellant alleged that post-trial counsel Payne was ineffective for failing to subpoena Susan Ross to testify at the hearing on the post-sentence motion. However, Susan Ross testified at trial. She maintained that she placed the gun in Appellant’s trailer without his knowledge, and even Appellant conceded that trial counsel handled her testimony quite well and that there was little that could have been added. N.T. PCRA Hearing, 8/2/2011, at 14. (Footnote Continued Next Page)

Furthermore, the purported witnesses did not testify at the PCRA evidentiary hearing. Moreover, post-trial counsel Payne offered testimony that none of the several witnesses Appellant identified to him could offer testimony that changed the fact that the gun was found in Appellant's residence while he lived there. N.T. PCRA Hearing, 2/18/11, at 25. Hence, we agree with the PCRA court that Appellant has failed to substantiate that the witnesses were available or prepared to offer relevant testimony at trial, and that Appellant's proof "falls far short of establishing the requisite prejudice." Trial Court Opinion, 3/29/12, at 5. Thus, Appellant's ineffectiveness claim fails. ***Commonwealth v. Brown***, 767 A.2d 576 (Pa.Super. 2001).

Appellant's brief contains argument on five additional discrete issues of ineffectiveness of counsel that were not identified in his statement of questions presented nor fairly suggested thereby. Such a practice violates Pa.R.A.P. 2116(a)⁵, and that rule provides that we can refuse to consider them on that basis. However, since the issues were identified in Appellant's PCRA petition, addressed by the PCRA court in denying relief, and contained in Appellant's Rule 1925(b) statement, we will address them *seriatim*.

(Footnote Continued) _____

⁵ In pertinent part, Pa.R.A.P. 2116(a) provides that the statement of questions presented "will be deemed to include every subsidiary question fairly comprised therein. No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby."

Appellant charges that post-trial counsel was ineffective because he admittedly did not prepare Appellant for his testimony at the hearing on his post-sentence motion. Appellant maintains that he was prejudiced because he had no idea what to say or how to say it on the witness stand. However, Appellant fails to proffer what he would have stated differently at the hearing had he been prepared, nor does he make any showing of how preparation would have changed the outcome of the proceeding. This undeveloped allegation of ineffectiveness does not satisfy Appellant's burden of proof and will not be entertained. *See Commonwealth v. Steele*, 961 A.2d 786, 797 (Pa. 2008); *Commonwealth v. Faulk*, 21 A.3d 1196, 1203 (Pa.Super. 2011).

Appellant next avers that trial counsel's performance was deficient in that "the verdict of 'guilty' was pronounced because no defense was offered[,]. . . no witnesses were called to the stand, and no evidence was presented." Appellant's brief at 11. The record does not bear out that proposition. Susan Ross testified in Appellant's defense that she went to Appellant's trailer, used her key to enter because he was not home, and dropped off the rifle, a tent and a water jug. N.T. Trial, 11/16/06, at 67. She maintained that Appellant had no prior knowledge that the rifle was there. *Id.* at 77. This claim lacks merit.

Appellant also attacks trial counsel's failure to object to several of the prosecutor's remarks in closing. This Court recently explained in ***Commonwealth v. Noel***, 53 A.3d 848 (Pa.Super. 2012):

It is well settled that a prosecutor has considerable latitude during closing arguments and his or her statements are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence. Further, prosecutorial misconduct does not take place unless the "unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict."

Id. at 858 (quoting ***Commonwealth v. Paddy***, 800 A.2d 294, 316 (Pa. 2002)). A new trial is granted only when the remark is "of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial." ***Id.*** (citing standard set forth in ***Commonwealth v. Goosby***, 381 A.2d 673 (Pa. 1973)).

Appellant takes issue with trial counsel's failure to object to the prosecutor's statement regarding the Commonwealth's reasons for not vouching for the truth of Susan Ross's testimony. The argument pertained to the fact that Susan Ross, originally subpoenaed as a Commonwealth witness, provided a statement to police that implicated Appellant in obtaining and possessing the firearm. However, she subsequently changed her account of how the firearm came to be in Appellant's possession to one favorable to Appellant, and thus, the Commonwealth opted not to call her as

a witness. Instead, Susan Ross testified for the defense and was examined and cross-examined as to why she changed her story.

Defense counsel, during closing argument, told the jury:

I represent Mr. Selvage. Mr. Selvage doesn't have a trooper, Mr. Selvage didn't have a witness, except for one subpoenaed by [the prosecutor] that I chose to put on.

N.T. Trial, 11/16/06, at 82.

The prosecutor, in his closing argument, stated:

The Commonwealth puts a witness on the stand. When we do that, we vouch for them. We did not put Sue Ross on the stand. We do not vouch for her.

She gave two different statements. Yes, it's okay to lie to a police officer, not just verbally, but then to write out a statement where she basically tells a story, which is Kenny's going camping, shoot squirrels, I saw Kenny leave the house with John's gun. Then she comes in and tells a different story. You can find that she's not a credible witness, at least as in part, if not all, of what she told you.

N.T. Trial, 11/16/06, at 90.

Appellant complains that the prosecutor's argument was improper because the prosecutor expressed his personal belief as to the witness's credibility and bolstered the credibility of Commonwealth witnesses. The Commonwealth counters that where, as here, the evidence supported the inference that Susan Ross did not tell the truth, the prosecutor's argument fell within the ambit of fair comment. *Commonwealth v. Johnson*, 588 A.2d 1303, 1305 (Pa. 1991); *see also Commonwealth v. Shain*, 426 A.2d 589 (Pa. 1981) (holding a prosecutor's remarks fall within the ambit of fair

comment if they are supported by the evidence and if they contain inferences which are reasonably derived from that evidence). Additionally, the Commonwealth contends that the prosecutor's argument was proper rebuttal in light of defense counsel's insinuation that the Commonwealth was trying to hide something by not calling Susan Ross to the stand. N.T. PCRA Hearing, 8/2/11, at 36.

With regard to the prosecutor's statements that the Commonwealth did not call Ms. Ross and would not vouch for her testimony, we agree that this was proper rebuttal to defense counsel's suggestion that the Commonwealth was hiding the witness. In fact, the prosecutor would have been remiss if he did not explain the Commonwealth's rationale for not calling Susan Ross. We also concur with the PCRA court's conclusion that the prosecutor's argument regarding Susan Ross's credibility fell within the ambit of fair comment. He was not expressing his personal opinion of Susan Ross's truthfulness; he was merely pointing to the evidence that she changed her story and suggesting that the jury could infer from this evidence that she was not credible. ***See Commonwealth v. Barren***, 462 A.2d 233, 235 (Pa. 1983). Simply, we find nothing in the prosecutor's remarks that would rise to the level of depriving Appellant of a fair trial; hence, trial counsel was not ineffective for failing to timely object.

Next, Appellant avers that trial counsel was ineffective because he made two remarks about firearms that prejudiced him. First, in cross-

examining the state trooper regarding the search for the rifle, defense counsel asked the trooper, "Could you go over and pick up – I don't handle firearms. Could you go over and pick up that rifle – " N.T. Trial, 11/16/2006, at 29. The trooper complied with the request. Appellant maintains that this remark was prejudicial because it showed trial counsel's disdain for firearms. Appellant's brief at 17. The PCRA court disagreed, characterizing counsel's statement as a "neutral statement of fact." Trial Court Opinion, 3/29/12, at 12-13.

Appellant is also critical of trial counsel's reminder to the state trooper who was examining the unloaded rifle, "Don't point it at the jury, please." N.T. Trial, 11/16/2006, at 29. Appellant contends that this admonition undercut Appellant's defense that the rifle when seized from his residence was unloaded. In response, the Commonwealth points to trial counsel's explanation that this was an attempt at levity that was calculated to ingratiate him with the jury and that it did produce a few smiles. N.T. PCRA Hearing, 9/22/11, at 45.

The PCRA court found no showing of prejudice, noting that the fact a gun is unloaded is not a defense under the statute. **See** 18 Pa.C.S. § 6105(i) (defining "the term 'firearm' to include any weapons which are designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon."). Furthermore, it viewed counsel's attempt to develop a rapport with the jury

as a reasonable strategy. Finally, the court found no showing of prejudice, *i.e.*, that the outcome would have been different had counsel refrained from making such remarks. We agree and find no merit in Appellant's contention that these comments were improper or that they prejudiced him in any way.

Appellant's final claim of ineffectiveness is that appellate counsel failed to brief and argue on appeal all fifteen issues that Appellant wanted him to pursue. He maintains that, appellate counsel "should have presented and argued all of the issues in order to properly convey the persuasive and consistent lack of fairness in the trial which resulted in his conviction." Appellant's brief at 18-19. To the extent that Appellant is suggesting that simply arguing a greater number of trial errors on appeal increases the likelihood of success, he is misguided. ***See Commonwealth v Snyder***, 870 A.2d 336, 340 (Pa.Super. 2005) ("[T]he effectiveness of appellate advocacy may suffer when counsel raised numerous issues, to the point where a presumption arises that there is no merit to any of them.") (citations omitted).

Furthermore, in order to prevail on this ineffectiveness claim, Appellant must substantiate how each of the issues not pursued individually meets the three-prong ineffectiveness test. Appellant has failed, at a minimum, to identify the underlying issues. Since Appellant's development of this issue falls woefully below the mark, this claim fails. ***See Commonwealth v. Steele***, 961 A.2d 786, 797 (Pa. 2008) (holding a

petitioner must set forth and individually discuss substantively each prong of the ineffectiveness test).

Appellant's final issue is that his mitigated-range sentence was "harsh and excessive" because the sentencing court failed to consider mitigating factors. Appellant's brief at 19. We note that Appellant failed to identify this issue in his Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. **See** Pa.R.A.P. 1925(b)(3)(vii) ("Issues not included in the Statement . . . are waived"). Furthermore, this challenge to the discretionary aspects of sentence was not asserted on direct appeal, and the issue is waived because Appellant could have raised it but failed to do so before trial, at trial, during unitary review, or on appeal. **See** 42 Pa.C.S. § 9544 (b).⁶ Finally, while the issue may have been cognizable under the

⁶ Even if Appellant had complied with Rule 1925(b) and asserted the claim in the context of ineffectiveness of appellate counsel, we would find no basis for relief. The trial court was fully apprised of Appellant's mitigating circumstances at the sentencing hearing on January 23, 2007. Appellant's counsel reminded the court that the crime in question had no victim and Appellant had no history of firearm violence. N.T. Sentencing, 1/23/2007, at 5-6. Furthermore, counsel pointed out that the gun found was not loaded, and there was no ammunition on the premises. **Id.** The court was advised that Appellant was acquitted of the simple assault charge that precipitated State Police presence at his residence and culminated in the firearm violation. Appellant addressed the sentencing court and advised that upon his release from prison in 2006, he made a positive effort to be a productive member of society, hold a job, and support his family. He blamed poor decisions on a negative relationship, expressed remorse for the wrongs he had perpetrated, and asked for leniency. Each of the facts in mitigation that Appellant identifies in his brief was disclosed at trial or sentencing and the court is presumed to have weighed all factors of which it was aware. **See** *(Footnote Continued Next Page)*

PCRA if it was framed as appellate counsel's ineffectiveness in neglecting to argue the underlying discretionary sentencing claim, ***Commonwealth v. Watson***, 835 A.2d 786 (Pa.Super. 2003), Appellant failed to present the issue in that context. Thus, the question is not cognizable. ***Commonwealth v. Wrecks***, 934 A.2d 1287 (Pa.Super. 2007); ***Commonwealth v. Evans***, 866 A.2d 442 (Pa.Super. 2005).

Order affirmed.

(Footnote Continued) _____

Commonwealth v. Macias, 968 A.2d 773 (Pa.Super. 2009). The sentencing court noted that even a mitigated range sentence would be extensive based upon Appellant's prior record, and sentenced Appellant to three to six years imprisonment, a mitigated range sentence consecutive to all other periods of incarceration currently being served. Since the sentencing court did not abuse its discretion, appellate counsel could not be ineffective for failing to pursue this meritless issue on appeal.