



Commonwealth of Pennsylvania v. Kevin Dejoun Jordan

2013 | Cited 0 times | Supreme Court of Pennsylvania | April 15, 2013

J-S16043-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

BEFORE: GANTMAN, J., OLSON, J., and PLATT, J.¹

MEMORANDUM BY PLATT, J.

Appellant, Kevin Dejoun Jordan, appeals pro se from the order denying his first petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court set forth the facts of this case as follows:

In December 2006, narcotics agents from the Pennsylvania Attorney General's Office and Philadelphia police officers began making undercover cocaine buys from Zakia Clark. The agents and police later identified Shannon McKeiver and Preston Suttles as Clark's suppliers. Narcotics agents obtained permission to wiretap McKeiver's and Suttles' phones in March 2007.

Law enforcement agents learned during the course of their investigation that [Appellant] had enlisted the help of McKeiver and [Derrick] Thompson to kidnap and rob another drug dealer.

The officers subsequently stopped [Appellant] and McKeiver in the parking lot of a drug store in Philadelphia as the men were leaving to commit the kidnapping and robbery. Police recovered a .40 caliber handgun, an extra magazine, a crowbar, latex gloves, a roll of duct tape and bungee cords with clips from [Appellant's] vehicle. They also discovered a .40 caliber handgun inside McKeiver's vehicle.

On February 21, 2008, the Twenty-Seventh Statewide Investigating Grand Jury recommended the arrests of numerous individuals, including [Appellant]. He subsequently was tried alongside McKeiver, . Thompson, [and several other co- defendants]. On March 26, 2009, a jury found [Appellant] guilty of Criminal Conspiracy (Violation of Drug Act), Criminal Use of a Communication Facility, Criminal Attempt (Kidnapping and/or Robbery), Criminal Solicitation (Kidnapping and/or Robbery), Criminal Conspiracy (Kidnapping and/or Robbery) and Possession of Instrument of Crime (handgun). The jury found [Appellant] not guilty of Corrupt Organizations and Criminal Conspiracy (Corrupt Organizations).



Commonwealth of Pennsylvania v. Kevin Dejoun Jordan

2013 | Cited 0 times | Supreme Court of Pennsylvania | April 15, 2013

On June 16, 2009, th[e trial] court sentenced [Appellant] to an aggregate term of incarceration of 12 to 24 years. On July 7, 2009, [Appellant]'s counsel throughout trial and sentencing, Leonard D. Biddison, Esquire, was granted leave to withdraw his appearance, and the Montgomery County Public Defender Office was appointed to represent [Appellant].

[Appellant] filed a Notice of Appeal on July 9, 2009, which was indexed in the Superior Court at No. 2073 EDA 2009. The Superior Court affirmed [Appellant]'s judgment of sentence on December 9, 2010. Our Supreme Court denied a Petition for Allowance of Appeal on June 1, 2011.

On October 21, 2011 [Appellant] filed a pro se Petition for Post-Conviction Collateral Relief. On November 9, 2011, th[e PCRA] court appointed Erin C. Lentz, Esquire, to represent [Appellant] as PCRA counsel. . . [O]n January 6, 2012, PCRA counsel . filed a Petition to Withdraw as Counsel. The Petition, which attached as an exhibit a letter to [Appellant] dated January 5, 2012, prepared in accordance with *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1998), set for the bases for PCRA counsel's belief that [Appellant] was not eligible for post-conviction relief.

After review of counsel's Petition and the record, th[e PCRA] court issued a Notice on January 18, 2012, advising [Appellant] of the court's intention to dismiss the PCRA Petition without a hearing. The court further informed [Appellant] that PCRA counsel's request to withdraw had been granted and that [Appellant], either pro se or with the assistance of private counsel, could respond to the Notice within 20 days.

On February 7, 2012, [Appellant] filed a pro se Petition to Amend the PCRA Petition. Two days later, [Appellant] filed a Motion for Transcription of All Proceedings, seeking the notes of testimony from the grand jury, his preliminary hearing, the trial and the sentencing hearing. By Order dated February 21, 2012, the court directed the Commonwealth to file a response to [Appellant]'s Motion for Transcription within 10 days, and stayed [Appellant]'s obligation to respond to the Notice of Intention to Dismiss. On March 2, 2012, the Commonwealth filed a response indicating that it had not been served with a copy of [Appellant]'s pro se Motion. By Order dated May 8, 2012, [the] court instructed [Appellant] to serve a copy of the Motion on the Commonwealth, and directed the Commonwealth to file a response within 20 days. The court continued the stay on [Appellant]'s obligation to respond to the Notice of Intention to Dismiss. On June 1, 2012, the Commonwealth filed an Answer to the Motion. On June 7, 2012, [the] court issued an Order denying [Appellant]'s Motion for Transcription of All Proceedings and granted [Appellant] 20 days to respond to the Notice of Intention to Dismiss.

On June 25, 2012, [Appellant] filed another Motion for Transcripts. On July 2, 2012, [Appellant] filed an Objection to the Notice of Intention to Dismiss. [The] court denied [Appellant]'s Motion for Transcripts on July 3, 2012. By Order dated July 11, 2012, [the] court denied [Appellant]'s PCRA Petition, having found no merit to the issues raised in [Appellant]'s objection to the Notice of Intention to Dismiss.



Commonwealth of Pennsylvania v. Kevin Dejoun Jordan

2013 | Cited 0 times | Supreme Court of Pennsylvania | April 15, 2013

(PCRA Court Opinion, 10/24/12, at 1-4 (footnotes omitted)). Appellant filed a pro se appeal to this Court, which was docketed on August 17, 2012. On September 26, 2012, this Court filed an order per curiam directing Appellant to show cause why his appeal should not be quashed as untimely filed.

Appellant timely responded, providing a cash slip indicating that the postage for his notice of appeal was requisitioned on August 6, 2012, and received on August 9, 2012.

"[T]he prisoner mailbox rule provides that a pro se prisoner's document is deemed filed on the date he delivers it to prison authorities for mailing." *Commonwealth v. Chambers*, 35 A.3d 34, 38 (Pa. Super. 2011), appeal denied, 46 A.3d 715 (Pa. 2012) (citation omitted).

Furthermore, as observed in *Chambers*, our Supreme Court has held that, "due to the unique circumstances facing an incarcerated pro se petitioner, a cash slip 'may be sufficient to establish that an appeal was delivered to prison officials or deposited in the prison mailbox within the [...] filing period.'" *Id.* at 40 (citing *Smith v. Pa. Bd. of Prob. & Parole*, 683 A.2d 278, 282 (Pa. 1996)). Accordingly, we deem Appellant's notice of appeal timely filed where, pursuant to the Prisoner Mailbox Rule, Appellant's cash slip establishes that his notice of appeal was timely delivered to prison officials.²

Appellant, pro se, raises four questions for our review:

I. Whether PCRA counsel was ineffective for failure to raise Brady³ violation/spoliation of "exculpatory evidence" relevant to surveillance still photographs/videotapes?

II. Whether PCRA counsel was ineffective for failing to raise ineffective assistance of counsel on direct appeal for failing to raise severance issue?

III. Whether PCRA counsel was ineffective for failing to amend/raise appeal counsel ineffectiveness for failing to raise prosecutorial misconduct due to prejudicial remarks made during closing arguments pertaining to Appellant?

IV. Whether PCRA counsel was ineffective for failure to raise prosecutor misconduct for presenting false testimony before the jury?

(Appellant's Brief, at 3).

Our standard of review is well settled: In addressing the grant or denial of post-conviction relief, an appellate court will consider whether the PCRA court's conclusions are supported by record evidence and are free of legal error. To be entitled to PCRA relief, a petitioner must establish, by a preponderance of the evidence, his conviction or sentence resulted from one or more of the errors found in 42 Pa.C.S. § 9543(a)(2), his claims have not been previously litigated or waived, *id.*, § 9543(a)(3), and "the failure to litigate the issue prior to or during trial, during unitary review or on



Commonwealth of Pennsylvania v. Kevin Dejoun Jordan

2013 | Cited 0 times | Supreme Court of Pennsylvania | April 15, 2013

direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." Id., § 9543(a)(4). An issue is previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue ." Id., § 9544(a)(2). An issue is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding." Id., § 9544(b).

Commonwealth v. Keaton, 45 A.3d 1050, 1060 (Pa. 2012) (case citation and some quotation marks omitted).

In his first issue, Appellant claims that PCRA counsel was ineffective for failing to litigate his Brady claim "that the prosecution inadvertently withheld photographs and videotapes testified to support surveillance evidence allegedly showing that Appellant committed an overt act to plan and commit a robbery kidnapping by meeting up with co-defendant McKeiver." (Appellant's Brief, at 10). We disagree.

To be entitled to relief on an ineffectiveness claim, [an appellant] must prove the underlying claim is of arguable merit, counsel's performance lacked a reasonable basis, and counsel's ineffectiveness caused him prejudice. Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001); see also Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (Pa. 1987). Prejudice in the context of ineffective assistance of counsel means demonstrating there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. This standard is the same in the PCRA context as when ineffectiveness claims are raised on direct review. Failure to establish any prong of the test will defeat an ineffectiveness claim.

Keaton, supra at 1060-61 (some case citations omitted).

Appellant asserts that his underlying Brady claim was of arguable merit, and PCRA counsel provided ineffective assistance when he failed to "amend[] the Brady claim in a legally meaningful fashion, [allowing] the Commonwealth [to] misapprehend[] the basis of Appellant's Brady claim[.]" (Appellant's Brief, at 14). Appellant alleges that his Brady claim "is based upon the allegation that the Commonwealth built its case on surveillance, presented testimony that video surveillance proved Appellant took a substantial step toward committing robbery kidnapping, but did not disclose the video to Appellant's defense for a fair opportunity to impeach testimony of the prosecution's witnesses." (Id.).

"[T]o prove a Brady violation, the defendant must show that: (1) the prosecutor has suppressed evidence; (2) the evidence, whether exculpatory or impeaching, is helpful to the defendant; and (3) the suppression prejudiced the defendant." Commonwealth v. Busanet, 54 A.3d 35, 48 (Pa. 2012) (citation omitted).

"[U]nless a criminal defendant can show bad faith on the part [of] the police, failure to preserve



Commonwealth of Pennsylvania v. Kevin Dejoun Jordan

2013 | Cited 0 times | Supreme Court of Pennsylvania | April 15, 2013

potentially useful evidence does not constitute a denial of due process of law." *Commonwealth v. Small*, 741 A.2d 666, 676 (Pa. 1999), cert. denied, 531 U.S. 829 (2000) (citation omitted).

Furthermore, "support for an allegation that destroyed evidence was exculpatory . . . cannot be based on a 'mere assertion.'" *Commonwealth v. Snyder*, 963 A.2d 396, 405 (Pa. 2009) (citations omitted); see also *Commonwealth v. Free*, 902 A.2d 565, 571 (Pa. Super. 2006) ("The allegation that the evidence at issue was exculpatory cannot be based on a mere assertion.") (citation omitted).

Here, Appellant concedes that the Brady materials at issue, a surveillance video allegedly showing that Appellant met with his co- conspirators, could not be produced at trial because it was "possibly thrown away since [the prosecutor's] office was going through construction at that time." (Appellant's Brief, at 11 (citing N.T. Vol. II, 3/11/09, at 71-72)). Appellant makes no allegation of bad faith in the loss of this material. (See *id.* at 11-12); see also *Small*, *supra* at 676. Furthermore, Appellant's claim, that this material is exculpatory of the overt act required to prove conspiracy, disregards the determination that, regardless of this missing material, the Commonwealth adduced sufficient evidence in the form of telephone conversations over the course of ten days to plan the robbery and kidnapping to convict Appellant of conspiracy. (See *Commonwealth v.*

Jordan, No. 2073 EDA 2009, unpublished memorandum at 18-19 (Pa. Super. 2010); *id.* at 19 ("[T]he conversations were in no way isolated, demonstrating a concerted effort that extended over a period of ten days between March 16 and March 26, 2007. [Appellant's] intention was clear.")

(record citation omitted)). Accordingly, Appellant cannot show prejudice and his Brady claim would fail. See *Busanet*, *supra* at 48. Because there is no merit to the underlying claim, Appellant's assertion of ineffective assistance of PCRA counsel for failing to pursue this issue as he frames it must also fail. See *Keaton*, *supra* at 1060-61. Appellant's first issue is without merit.

In his second issue, Appellant claims that "PCRA counsel [was] ineffective for failing to raise ineffective assistance of counsel on direct appeal for failing to raise [his] severance issue." (Appellant's Brief, at 15).

This issue is waived.

For PCRA purposes, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42 Pa.C.S.A.

§ 9544(b). "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a); see also *Commonwealth v. Albrecht*, 720 A.2d 693, 701 (Pa. 1998) (holding that appellant's "claim was not raised in the pro se and the amended PCRA petitions and is therefore waived") (citation omitted).



Commonwealth of Pennsylvania v. Kevin Dejoun Jordan

2013 | Cited 0 times | Supreme Court of Pennsylvania | April 15, 2013

Here, the PCRA court and the Commonwealth note that Appellant failed to raise the issue of ineffective assistance of PCRA and appeal counsel for failing to raise a severance issue. (See PCRA Ct. Op., 10/24/12, at 8-9; Commonwealth's Brief, at 15). Our independent review of Appellant's pro se PCRA petition, his petition to amend his PCRA petition, and his objection to the PCRA court's notice of intent to dismiss his petition supports the PCRA court's determination that "[Appellant], having had three opportunities to raise this issue during the PCRA proceedings, should not be heard to raise it now for the first time on appeal." (PCRA Ct. Op., 10/24/12, at 9; see also PCRA Petition, 10/21/11, at "Supplement Petition"; Petition to Amend PCRA, 2/07/12, at 1; Objection to Notice to Dismiss PCRA Motion, 7/02/12, at 1-6). Therefore, this issue is waived. See 42 Pa.C.S.A. § 9544(b); Pa.R.A.P. 302(a); Albrecht, *supra* at 701.

In his third issue, Appellant claims "PCRA counsel [was] ineffective for failing to amend/raise appeal counsel[s] ineffectiveness for failing to raise prosecutorial misconduct due to prejudicial remarks made during closing arguments pertaining to Appellant." (Appellant's Brief, at 21). In his fourth issue, he alleges that "PCRA counsel [was] ineffective for failure to raise prosecutor misconduct for presenting false testimony before the jury." (Id. at 24). Appellant failed to raise these issues with the PCRA court in his pro se PCRA petition, his petition to amend his PCRA petition, or his objection to the PCRA court's notice of intent to dismiss his petition. (See PCRA Petition, 10/21/11, at "Supplement Petition"; Petition to Amend PCRA, 2/07/12, at 1; Objection to Notice to Dismiss PCRA, 7/02/12, at 1-6). Accordingly, his third and fourth issues are waived.⁴ See 42 Pa.C.S.A. § 9544(b); Pa.R.A.P. 302(a); Albrecht, *supra* at 701.

Order affirmed.

1. Retired Senior Judge assigned to the Superior Court.
2. Pursuant to the PCRA court's order, Appellant filed a revised Rule 1925(b) statement on October 16, 2012, and the PCRA court entered its Rule 1925(a) opinion on October 24, 2012.
3. Brady v. Maryland, 373 U.S. 83 (1963).
4. Moreover, the PCRA court did not abuse its discretion in determining that, even if Appellant had preserved these claims, his failure to "provide[] any specificity regarding the alleged prejudicial remarks, false testimony or false statements" would prevent meaningful review of these issues. (See PCRA Ct. Op., 10/24/12, at 10); see also Commonwealth v. Koehler, 36 A.3d 121, 158 (Pa. 2012); Keaton, *supra* at 1060.

