

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
FRANCIS EDWARD HARMAN,	:	
	:	
Appellant	:	No. 2028 WDA 2012

Appeal from the PCRA Order entered on April 4, 2012
in the Court of Common Pleas of Erie County,
Criminal Division, No. CP-25-CR-0000781-2010

BEFORE: DONOHUE, OLSON and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED: August 6, 2013

Francis E. Harman ("Harman") appeals from the Order dismissing his Petition filed pursuant to the Post Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S.A. §§ 9541-9546. Additionally, Harman's counsel, Tina M. Fryling, Esq. ("Fryling"), has filed a separate Petition to withdraw as counsel. We affirm and grant Fryling's Petition to withdraw.

On February 4, 2010, Harman and his co-conspirators unlawfully entered a residence, robbing the occupants and hitting one of them in the head with a golf club. Harman also pointed a gun towards one of the occupants and ordered him to the ground. Following a jury trial, Harman was convicted of robbery, criminal conspiracy to commit robbery, burglary, aggravated assault, terroristic threats, theft by unlawful taking or disposition, simple assault, and criminal mischief. On January 10, 2011,

Harman was sentenced to a prison term of 72 to 144 months, to be served consecutive to a previous sentence. Harman filed a timely appeal, which this Court dismissed on July 19, 2011, for failure to file an appellate brief.

On January 26, 2012, Harman, through counsel, filed a PCRA Petition. After conducting an evidentiary hearing, the PCRA court entered an Order denying Harman's Petition on April 4, 2012. No appeal to this Court was filed. On October 3, 2012, Harman, *pro se*, filed a second PCRA Petition, arguing that his PCRA counsel should have appealed the PCRA court's denial of his Petition. The PCRA court appointed Fryling as Harman's counsel. Following an evidentiary hearing, the PCRA court entered an Order reinstating Harman's appellate rights as to the denial of his first PCRA Petition. Harman filed a timely Notice of appeal.

Initially, Fryling has filed a Petition to withdraw as counsel. Fryling purports to withdraw from this appeal pursuant to the procedural requirements of ***Anders v. California***, 386 U.S. 738 (1976). Where counsel seeks to withdraw during collateral proceedings, counsel must fulfill the procedural requirements set forth in ***Turner/Finley***.¹ **See *Commonwealth v. Widgins***, 29 A.3d 816, 817, n.2 (Pa. Super. 2011) (stating that where counsel seeks to withdraw on collateral appeal, the procedure outlined in ***Turner/Finley*** must be followed). However, "[b]ecause an ***Anders*** brief provides greater protection to a defendant, this

¹ **See *Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

Court may accept an **Anders** brief in lieu of a **Turner/Finley** letter.”
Widgins, 29 A.3d at 817, n.2.

Our Supreme Court has explained the procedure for withdrawal pursuant to **Turner/Finley** as follows:

- 1) A “no-merit” letter by PCRA counsel detailing the nature and extent of his review;
- 2) The “no-merit” letter by PCRA counsel listing each issue the petitioner wished to have reviewed;
- 3) The PCRA counsel’s “explanation,” in the “no-merit” letter, of why the petitioner’s issues were meritless;
- 4) The PCRA court conducting its own independent review of the record; and
- 5) The PCRA court agreeing with counsel that the petition was meritless.

Commonwealth v. Pitts, 981 A.2d 875, 876, n.1 (Pa. 2009) (citation and brackets omitted). Further, our Court held that the Supreme Court in **Pitts** did not expressly overrule the additional requirement imposed by this Court in **Commonwealth v. Friend**, 896 A.2d 607, 615 (Pa. Super. 2006), stating

that PCRA counsel seeking to withdraw contemporaneously forward to the petitioner a copy of the application to withdraw that includes (i) a copy of both the “no-merit” letter, and (ii) a statement advising the PCRA petitioner that, in the event the trial court grants the application of counsel to withdraw, the petitioner has the right to proceed *pro se*, or with the assistance of privately retained counsel.

Widgins, 29 A.3d at 818.

Here, in her brief on behalf of Harman and in her Petition to withdraw as counsel, Fryling described the extent of her review, identified the issues

that Harman sought to raise, and explained why those issues lacked merit. In addition, Fryling provided Harman with notice of her intention to seek permission to withdraw from representation, a copy of the brief filed on his behalf, and advised Harman of his rights in lieu of representation. Thus, we conclude that Fryling has substantially complied with the requirements necessary to withdraw as counsel. **See Commonwealth v. Karanicolas**, 836 A.2d 940, 947 (Pa. Super. 2003) (holding that substantial compliance with the requirements to withdraw as counsel will satisfy the **Turner/Finley** criteria). We now independently review Harman's claims to ascertain whether they are without merit.

Harman, through Fryling, raises the following question for our review: "[Whether] [t]he PCRA [c]ourt erred in denying [] Harman's first PCRA Petition where he argued that his trial counsel was ineffective in failing to present an alibi defense and in failing to have [] Harman [] testify on his own behalf[?]" **Turner/Finley** Brief at 1.

The applicable standards of review regarding the denial of a PCRA petition and ineffectiveness claims are as follows:

Our standard of review of a PCRA court's denial of a petition for post[-]conviction relief is well-settled: We must examine whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record.

* * *

It is well-established that counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error. The PCRA court may deny an ineffectiveness claim if the petitioner's evidence fails to meet a single one of these prongs. Moreover, a PCRA petitioner bears the burden of demonstrating counsel's ineffectiveness.

Commonwealth v. Franklin, 990 A.2d 795, 797 (Pa. Super. 2010) (citations omitted). Additionally, the Pennsylvania Supreme Court has stated that “[g]enerally, where matters of strategy and tactics are concerned, counsel’s assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client’s interests.” **Commonwealth v. Lesko**, 15 A.3d 345, 380 (Pa. 2011) (citation omitted).

Harman first argues that the PCRA court erred in denying his PCRA Petition because he had established that trial counsel was ineffective in failing to present alibi witnesses. **See Turner/Finley** Brief at 3-5. According to Harman, three people, Emmanuel Harman (“Emmanuel”), Anthony Ruggles (“Ruggles”), and Leah Finefrock (“Finefrock”), would have testified that Harman was with them in Emmanuel’s apartment at the time the offenses were committed. **Id.** at 4.

To prove a claim that trial counsel was ineffective for the failure to call a potential witness, the petitioner must establish the following:

(1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel know 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 the defendant a fair trial. To demonstrate [] prejudice, a petitioner must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case. Thus, counsel will not be found ineffective for failing to call a witness unless the petitioner can show that the witness's testimony would have been helpful to the defense. A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy.

Commonwealth v. Sneed, 45 A.3d 1096, 1108-09 (Pa. 2012) (citations and quotation marks omitted).

In this case, Harman's trial counsel, Dennis Williams, Esq. ("Williams") filed a notice of alibi defense and listed the above-named witnesses in support of that alibi. N.T. (Trial), 11/15/10, at 237. Prior to trial, however, Williams learned that one of the witnesses, Finefrock, had made a statement to the state police that there was no truth to the alibi defense. N.T. (PCRA Hearing), 3/26/12, at 45. Thereafter, considering that Finefrock had recanted her version of the events and that Emmanuel's familial relationship to Harman would not make him a compelling alibi witness, Williams advised Harman that it would not be in Harman's best interest to pursue the alibi defense. ***Id.*** at 46-47.² At trial, Harman had a full colloquy with the court,

² Additionally, Harman did not present Ruggles as a witness at the PCRA hearing, nor did he provide an affidavit demonstrating that Ruggles was available and willing to be an alibi witness. **See** PCRA Court Opinion, 4/4/12, at 6; **see also *Commonwealth v. McLaurin***, 45 A.3d 1131, 1137-38 (Pa. Super. 2012) (concluding that relief cannot be granted on claim

in which he represented that he agreed with Williams's assessment and abandoned his alibi defense. N.T. (Trial), 11/15/10, at 237-38. Thus, Harman has failed to show that this claim is of arguable merit, or that counsel lacked a reasonable basis in effectuating his interests. **See Sneed**, 45 A.3d 1108-09.

Harman further argues that trial counsel was ineffective for preventing Harman from testifying on his own behalf at trial. **See** Brief for Appellant at 3-4. Harman testified during the PCRA hearing that he had wanted to testify on his own behalf, but Williams told him not to testify. **See** N.T. (PCRA Hearing), 3/26/12, at 12, 18-19.

This Court has set forth the requirements necessary to support a claim of ineffectiveness for failure to call the defendant to the stand as follows:

[T]he decision to testify on one's own behalf[] is ultimately to be made by the accused after full consultation with counsel. In order to support a claim that counsel was ineffective for "failing to call the appellant to the stand," the appellant must demonstrate either that (1) counsel interfered with his client's freedom to testify, or (2) counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf. Counsel is not ineffective where counsel's decision to not call the defendant was reasonable.

Commonwealth v. O'Bidos, 849 A.2d 243, 250 (Pa. Super. 2004)

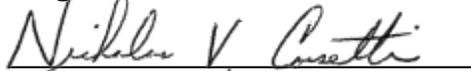
(citations and quotation marks omitted).

witness would have testified on defendant's behalf where an affidavit from the witness indicating availability and willingness to testify was absent).

Williams testified that he advised Harman against testifying on his own behalf, given that Harman would be subject to impeachment by a prior *crimen falsi* offense. **See** N.T. (PCRA Hearing), 3/26/12, at 47-48. Additionally, the trial court conducted a full colloquy with Harman regarding his decision not to testify. **See** N.T. (Trial), 11/15/10, at 237-240. Harman stated that he was voluntarily waiving his right to testify on his own behalf. **Id.** Accordingly, Harman's ineffectiveness claim based on the failure to call Harman as a witness lacks merit. **See O'Bidos**, 849 A.2d at 251. We therefore grant Fryling's Petition to withdraw.

Petition to withdraw granted; Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: 8/6/2013