

MEMORANDUM

TO: Judge Ehrlich
FROM: Caroline Hubbard
DATE: July 8, 2014
RE: Commonwealth v. Pedro Silva, #6668-2007 Post Conviction Relief Act

I. Introduction

Pedro Silva, hereinafter Petitioner, was convicted of one count of unauthorized use of an automobile and one count possession with intent to deliver on November 2, 2007. He was sentenced to a term of two to five years' incarceration. The Pennsylvania Superior Court affirmed the judgment of sentence on March 4, 2009, and the Pennsylvania Supreme Court denied allocatur on October 27, 2009. He filed a *pro se* petition pursuant to the Post Conviction Relief Act on June 1, 2010. Counsel was appointed and an amended petition was filed on January 27, 2014. Petitioner raises two issues: (1) that his trial counsel was ineffective for failing to investigate or call the witnesses that he provided and (2) that counsel was ineffective on appeal for failing to argue that the verdict was against the weight of the evidence. Both of the claims Petitioner puts forth should fail as a matter of law.

II. Factual History

Petitioner was pulled over for running a stop sign at the intersection of Front and Noble Streets on February 21, 2007. Petitioner was unable to produce a valid license, and a record check revealed that his driving privileges had been suspended. When asked who owned the vehicle he was driving, Petitioner claimed that the car belonged to a friend. He could not provide a name for the friend, however. Petitioner was issued two citations by Philadelphia Police

Officer, Dominic Ditizio, for disregarding a stop sign, and for driving with a suspended license. Officer Ditizio called a tow truck to remove the vehicle pursuant to Philadelphia's "Live-Stop" Directive. Ditizio told Petitioner that he could remove any personal belongings from the vehicle and was then free to leave. Petitioner removed a brown billfold from the glove compartment. He placed the just-issued citations inside of the billfold and dropped the entire billfold into a public trashcan, in view of Officer Ditizio. The Petitioner then entered a nearby gentleman's club.

Officer Ditizio sent an officer to the address listed on the vehicle's registration. Police spoke with the owner of the SUV, and learned that he did not give anyone permission to drive it. Officer Ditizio had Petitioner removed from the gentleman's club and arrested. Additionally, police removed the billfold that Petitioner had placed in the public trashcan. Inside were two citations that had been just issued to the Petitioner, as well as 185 yellow pills that were later identified as 3,4-methylenedioxy-*N*-methyldamphetamine (MDMA), a schedule I narcotic. Petitioner was charged with unauthorized use of an automobile, and possession with intent to deliver a controlled substance.¹ After a jury trial, he was convicted of one count of each charge on November 2, 2007. He was sentenced to a term of two to five years' incarceration, followed by five years supervised probation. The Pennsylvania Superior Court affirmed the judgment of sentence on March 4, 2009, and the Pennsylvania Supreme Court denied allocatur on October 27, 2009. Pursuant to the procedures under the PCRA, Petitioner contends the following:

1. Trial counsel was ineffective for failing to investigate witnesses
2. Appellate counsel was ineffective for failing to argue that the verdict was against the weight of the evidence.

¹ 18 Pa.C.S. § 3928 and 35 P.S. § 780-113(a)(30), respectively.

III. Claims of Ineffective Counsel

The law presumes that counsel was effective, and therefore Petitioner carries the burden of proving that counsel was ineffective. *Commonwealth v. Baker*, 531 Pa. 541, 562, 614 A.2d 663, 673 (1992) To establish ineffectiveness under the PCRA, a Petitioner must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel’s course of conduct was without any reasonable basis designed to effectuate his or her client’s interest; and (3) that he or she was prejudiced by counsel’s ineffectiveness. *Commonwealth v. Lauro*, 819 A.2d 100, 105–106 (Pa. Super. 2003). Prejudice in the context of ineffective assistance of counsel means establishing that there is a reasonable probability that, but for counsel’s alleged errors, the outcome of the trial would have been different. *Commonwealth v. Bond*, 572 Pa. 588, 603, 819 A.2d 33, 42 (2002). Moreover, ineffectiveness only occurs where the alternative not selected “offered a potential for success substantially greater than the tactics used.” *Commonwealth v. Clemmons*, 505 Pa. 356, 361, 479 A.2d 955, 957 (1984). Where it is clear that allegations of ineffectiveness of counsel are baseless or meritless, then an evidentiary hearing is unnecessary and the unfounded allegations should be rejected and dismissed. *Id.* at 361, 479 A.2d at 957. As evidenced below, both of Petitioner’s claims of ineffectiveness are without merit.

A. Ineffective Trial Counsel

To prevail on a claim that counsel was ineffective for failing to interview or call a witness a Petitioner must demonstrate (1) that the witness existed; (2) that the witness was available to testify of Petitioner’s behalf (3) that counsel knew or should have known that witness existed (4) that the witness was willing to testify on Petitioner’s behalf; and (5) that the absence of the testimony prejudiced Petitioner. *Commonwealth v. Brown*, 767 A.2d 576, 581–582 (Pa. Super. 2011). Counsel will not be deemed ineffective for failing to call a witness unless there is some

showing that the witness' testimony would have been helpful to the defense. *Commonwealth v. Khalil*, 806 A.2d 415, 423 (Pa. Super. 2002). Furthermore, counsel is not ineffective for failing to call a witness where a Petitioner fails to provide affidavits from the alleged witnesses indicating availability and willingness to testify on the Petitioner's behalf. *See id.* at 422. "We will not grant relief based on an allegation that a certain witness may have testified in the absence of an affidavit to show that the witness would, in fact testify." *Commonwealth v. Burton*, 770 A.2d 771, 788 (Pa. Super. 2001).

In regards to the first claim that trial counsel was ineffective for failing to call witnesses, Petitioner failed to provide affidavits on behalf of his proposed witnesses demonstrating that they were available and willing to testify on his behalf at trial. Instead, Petitioner attached a document entitled "Affadavit" that was authored by the Petitioner himself, alleging that certain witnesses would have testified that (1) he had permission to drive the owner's vehicle, and (2) that he strongly disliked drugs. The PCRA mandates that Petitioner include a signed certification from his proposed witnesses in order for witness testimony to be admissible. 42 Pa.C.S.A. §9545(d)(1). Because Petitioner has failed to provide signed certifications from any of his proposed witnesses, their testimony would be inadmissible at an evidentiary hearing. *Brown, supra* at 583. Noticeably, Petitioner's petition does not comment on the adequacy of the "Affidavit" he presented.

Even if the affidavit was proper, however, Petitioner still cannot show that there is a reasonable probability that the outcome of his trial would have been different if trial counsel had investigated his proposed witnesses. Petitioner cites in his petition *Commonwealth v. Nock*, 606 A.2d 1380 (Pa. Super. 1992). In *Nock*, the Superior Court granted a new trial where trial counsel failed to present testimony of known eyewitnesses. As distinguished from *Nock*, Petitioner's

witnesses are merely character witnesses, not eyewitnesses. Petitioner cannot show that lack of testimony from character witnesses claiming that the Petitioner “hates” drugs and “would never sell . . . or take one” was unfairly prejudicial to his case, in light of the overwhelming evidence of guilt.

The evidence at trial established that minutes after Petitioner disposed of a billfold containing citations issued by Officer Ditizio, the billfold was recovered containing Petitioner’s identification, the citations, and 185 pills of MDMA. In regards to Petitioner’s other witnesses, who would have testified that the Petitioner had permission to drive the car, the testimony would have been cumulative to witness testimony already presented at trial. Counsel will not be deemed ineffective for failing to call a witness whose testimony is merely cumulative of that of another witness. *Commonwealth v. Bell*, 476 A.2d 439, 451 (Pa. Super. 1998) (“Counsel will not be held to be ineffective in not calling every conceivable witness to testify to the same facts.”). If Petitioner cannot adequately prove that he was prejudiced by lack of witness testimony, no evidentiary hearing on ineffectiveness claim is warranted. *See Commonwealth v. Pirela*, 556 Pa. 32, 54, 726 A.2d 1026, 1037 (1999). Thus, the Petitioner’s claim that trial counsel was ineffective must fail.

B. Ineffective Appellate Counsel

Petitioner also asserts that appellate counsel was ineffective for failing to raise a weight-of-the-evidence claim, which had been preserved by trial counsel in post-sentence motions. To reiterate, in order for counsel to be determined as ineffective, Petitioner must prove (1) that the underlying claim is of arguable merit; (2) that counsel’s course of conduct was without any reasonable basis designed to effectuate his or her client’s interest; and (3) that he or she was prejudiced by counsel’s ineffectiveness. *Lauro, supra* at 105–106. In the instant, the evidence

presented at trial amply supported the verdict, thus Petitioner's claim is meritless. Moreover, because it is a meritless claim, Petitioner was not prejudiced by Counsel's failure to raise it.

The principal case setting forth the evidentiary weight standard in regards to the verdict is *Commonwealth v. Champney*, 574 Pa. 435, 832 A.2d 403 (2003). It states that the weight of the evidence is exclusively for the finder of fact. *Id.* at 444, 832 A.2d at 408. The finder of fact is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. *Id.* The appellate court can only reverse the lower court's verdict if it is so contrary to the evidence as to *shock one's sense of justice*. *Id.* (emphasis added). Moreover, where the trial court has ruled on a weight claim, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. *Id.* Appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim. *Id.* Because the trial judge is in the best position to view the evidence presented, an appellate court will give that judge the utmost consideration when reviewing the court's determination that the verdict is against the weight of the evidence. *Commonwealth v. Morgan*, 913 A.2d 906, 908 (Pa. Super. 2006). *See also Commonwealth v. Wright*, 865 A.2d 894, 895 (Pa. Super. 2004).

Petitioner postures that the Commonwealth's case was built on "mere speculation and pure conjecture." Specifically, Petitioner contends that there was no evidence presented to the jury to show that Petitioner knew that the substance found in his billfold was a controlled substance. Petitioner also asserts that there was no evidence to show that he was a drug dealer, because he was not found to be in possession of money or drug packaging. However, Petitioner cannot show that the court would have granted relief on a weight-of-the-evidence claim simply because of these assertions. Great discretion is given to the jury, as finder-of-fact, and ample evidence supports their verdict.

Officer Ditizio testified that he pulled over the Petitioner for running a stop sign. He discovered that the Petitioner was driving with a suspended license in a vehicle that didn't belong to him, and whose owner he could not name. Officer Ditizio issued citations based on the preceding infractions, which the Petitioner placed in a billfold. As the Petitioner walked away, Officer Ditizio witnessed him throw the billfold into a nearby trashcan. The billfold was later recovered from the trashcan containing the issued citations as well as the Petitioner's identification and 185 pills of MDMA. In addition to Officer Ditizio's testimony, Detective John Ryan, a narcotics expert, testified that such a quantity of pills was consistent with possession with intent to distribute, rather than personal use. Also, the owner of the vehicle that Petitioner was driving testified that the Petitioner did not have permission to drive the car.

In light of the evidence adduced at trial, the verdict did not "shock one's sense of justice." Consequently, appellate counsel cannot be deemed ineffective for failing to raise a meritless weight-of-the-evidence claim. *Commonwealth v. Riviera*, 816 A.2d 282, 295 (Pa. Super. 2003).

IV. Conclusion

Petitioner's allegations of ineffective counsel are without merit. Petition should be dismissed without a hearing.