

*Trialonas*

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 v. : No. CP-14-CR-1312-2009  
 :  
 TONI JOHNSON :

*Attorney for the Commonwealth:* Megan A. McGoron, Esquire  
*Attorney for the Defendant:* Steven P. Trialonas, Esquire

**OPINION AND ORDER**

**KISTLER, J.**

Presently before the Court is an Amended Motion for Post Conviction Relief (“Amended PCRA Petition”) filed by Toni Johnson (“Petitioner”) on May 27, 2014. On June 16, 2016, the Commonwealth filed an Answer to Petitioner’s Amended Petition for Post Conviction Collateral Relief and Motion to Dismiss without a Hearing. For the following reasons, Petitioner’s Amended PCRA Petition is **GRANTED**.

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**BACKGROUND**

The procedural history of this case is summarized in the Superior Court of Pennsylvania’s Opinion and Order filed on January 20, 2016, whereby the case was remanded to this Court for further proceedings. Petitioner was convicted by a jury of Burglary, 18 Pa.C.S.A. §3502(a); Criminal Conspiracy, 18 Pa.C.S.A. § 3502(a), 18 Pa.C.S.A. 903(a)(1); Theft by Unlawful Taking, 18 Pa.C.S.A. 3921(a); Receiving Stolen Property, 18 Pa.C.S.A. § 3925(a). Petitioner was sentenced to five (5) to ten (10) years of incarceration for Burglary and two and a half (2 1/2 ) to five (5) years for Criminal Conspiracy. Petitioner received an aggregate sentence of seven and a half (7 ½) to fifteen (15) years of incarceration.

Petitioner was represented at trial and for a portion of the appeal process by Tami Fees,

Esquire (“trial counsel”). Steven Trialonas, Esq. was appointed as PCRA counsel and filed the instant Amended PCRA Petition. Petitioner asserts he was deprived of the effective assistance of counsel for the following reasons:

- a) Petitioner was deprived of the effective assistance of counsel when trial counsel failed to object (or join in the objection of attorney Parviz Ansari) to the Commonwealth calling Kelly Marie Golding to testify against Petitioner, armed with the knowledge that Ms. Golding, a co-defendant, would exercise her rights under the Fifth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment.
- b) Petitioner was deprived of the effective assistance of counsel when trial counsel failed to raise the *Duval* error in the post-sentence motion.
- c) Petitioner was deprived of the effective assistance of counsel when trial counsel failed to file a docketing statement with the Superior Court as per Pa.R.A.P. 3517, thereby denying meaningful review of Petitioner’s appeal.

### DISCUSSION

Pursuant to the Post Conviction Relief Act, a petitioner is entitled to relief on his claims if he proves by a preponderance of the evidence:

- (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
  - (i) currently serving a sentence of imprisonment, probation or parole for the crime;
  - (ii) awaiting execution of a sentence of death for the crime; or
  - (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.
- (2) That the conviction or sentence resulted from . . .
  - (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (3) That the allegation of error has not been previously litigated or waived.
- (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa.C.S.A. § 9543(a). Here, Petitioner was convicted of crimes under the laws of Pennsylvania, and he is currently serving his sentence at a state correctional institution. In

addition, Petitioner's instant PCRA Petition is timely, as determined by the Superior Court on January 20, 2016.

To obtain relief on a claim that counsel was constitutionally ineffective under the PCRA, a petitioner must overcome the presumption of competence and show that counsel's performance was deficient and resulted in prejudice to the petitioner. *Commonwealth v. Dennis*, 17 A.3d 297, 301 (Pa. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, (1984)). In Pennsylvania, this requires the petitioner to demonstrate: "(1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error." *Id.* (citing *Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa.1987)). Further, "[a] petition for post-conviction collateral relief may be granted without a hearing when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law." Pa.R.Crim.P. 907(2).

In reviewing the trial transcript and the filings of the parties, and applying the above standard of review to the pertinent actions of Attorney Fees, this Court finds Petitioner has proven his claim for the ineffective assistance of counsel and relief may be granted without a hearing.

#### **I. *Pierce* Test**

Preliminarily, the Commonwealth argues Petitioner failed to address the second and third prongs of the *Pierce* test in his Amended PCRA Petition, and therefore waived the issue of ineffective assistance of counsel. "[A] petitioner must set forth and individually discuss substantively each prong of the *Pierce* test." *Commonwealth v. Steele*, 961 A.2d 786, 797 (Pa. 2008) (citations omitted). "Such undeveloped claims, based on boilerplate allegations, cannot

satisfy Appellant's burden of establishing ineffectiveness.” *Id.* While Petitioner does not address each prong of the Pierce test in a separate paragraph in his Petition, Petitioner’s claims are not mere boilerplate allegations. Petitioner cites to case law and the trial transcript in support of his position. Petitioner’s claims are set forth in a manner in which the Commonwealth could thoroughly respond in their Answer and the Court could easily understand and analyze.

## **II. Arguable Merit**

First, Petitioner’s underlying claim is of arguable merit. Petitioner argues he was deprived of the effective assistance of counsel when trial counsel failed to object (or join in the objection of attorney Parviz Ansari) to the Commonwealth calling Kelly Marie Golding to testify against Petitioner, armed with the knowledge that Ms. Golding, a co-defendant, would exercise her rights under the Fifth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment. The Supreme Court of Pennsylvania has held:

[T]he prosecution, once informed that a witness intends to claim a privilege against self-incrimination, commits error in calling that witness to the stand before the jury where the witness is a person (co-defendant, accomplice, associate, etc.) likely to be thought by the jury to be associated with the defendant in the incident or transaction out of which the criminal charges arose. Whether or not the prosecution has a good faith belief that the assertion of privilege is legally invalid is irrelevant; that matter can be settled outside the hearing of the jury.

*Commonwealth v. DuVal*, 307 A.2d 229, 234-35 (Pa. 1973).

Here, Attorney Ansari, counsel for Ms. Golding, stated the following at sidebar:

Mr. Ansari: I represent Ms. Golding she has open charges in this case. I’ve advised Mr. Boob that she will be taking the Fifth today. I don’t know why Mr. Boob is doing this, especially in front of a jury. So I’m kind of at a loss. I’m asking him to either reconsider or do this outside the hearing of the jury. I just thought it was appropriate for the Court to know that since I’ve given that advice to Ms. Golding in terms of taking the Fifth Amendment and exercising her right under the Fifth Amendment.

The Court: Thank you. Mr. Boob?

Mr. Boob: I went over that this morning, if that's what she's going to do that's what she's going to do. Obviously, but she must assert that right in open court, in front of the judge, because the Fifth Amendment applies to certain questions but not other questions, and the Court needs to make decision as to whether or not it applies to the question I'm asking.

Trial Transcript 124:16 – 125:12. Despite this knowledge, trial counsel did not object to Ms. Golding's testimony. When questioned, Ms. Golding stated her name and age. When asked if she knew the Defendant, Toni Johnson, she responded: "I was advised by my attorney to plead - - to exercise my right to plead the 5<sup>th</sup>." Trial Transcript 126:6-7. Thereafter Attorney Boob stated: "Judge, I believe that Ms. Golding has a right to the Fifth Amendment privilege against testifying against herself and incriminating herself in this matter. Therefore, I do not have any further questions for Ms. Golding." Trial Transcript 126:12-17. At no point did trial counsel object to questioning this witness in front of the jury. As such, Petitioner's claim is of arguable merit.

### **III. Inaction Lacked Objectively Reasonable Basis**

The second prong requires a petitioner to plead and prove that trial counsel's inaction lacked any objectively reasonable basis designed to effectuate Petitioner's interest. "[C]ounsel's chosen strategy lacked a reasonable basis only if Appellant proves that 'an alternative not chosen offered a potential for success substantially greater than the course actually pursued.'"

*Commonwealth v. Hutchinson*, 25 A.3d 277, 286 (Pa. 2011) (citation omitted).

The Commonwealth agrees that pursuant to *DuVal* the Supreme Court of Pennsylvania has held that allowing a co-defendant to invoke the Fifth Amendment privilege is reversible error on appeal. Trial counsel's failure to object during trial also denied Petitioner a meaningful appeal on this issue. Had trial counsel objected during trial and the court sustained the objection, Ms. Golding would not have been permitted to invoke her Fifth Amendment right in front of the jury.

Had trial counsel objected during trial and the court overruled the objection, trial counsel could have raised the issue in a post-sentence motion and/or on appeal.

The Commonwealth relies on *Commonwealth v. Greene* for the proposition that there is a reasonable basis for allowing a co-defendant to invoke their Fifth Amendment right as a trial strategy. 285 A.2d 865 (Pa. 1971). In *Greene*, defense counsel's strategy involved shifting criminal responsibility from the defendant to the co-defendant. Here, trial counsel did not attempt to shift guilt to Ms. Golding in the opening or closing statement, or when questioning the witnesses. The defense theory of the case was not to place guilt on Ms. Golding; rather, Petitioner's position was that he had the television in his possession because he innocently purchased it from another resident in his apartment complex. Therefore, even if the *Greene* strategy is reasonable, such strategy was not utilized in this case.

Further, the co-defendant in *Greene* was questioned outside the presence of the jury. *Id.* at 866. The court explained:

Reviewing the principle that the jury may not draw any inference from a witness' exercise of his constitutional rights whether the inference be favorable to the prosecution [o]r the defense, the court applied the corollary to this rule that a witness should not be placed on the stand for the purpose of having him exercise his privilege before the jury.

*Greene*, 285 A.2d at 867. Even pursuant to *Greene*, Ms. Golding was improperly questioned in the presence of the jury. As such, trial counsel's inaction lacked any objectively reasonable basis designed to effectuate Petitioner's interest.

#### **IV. Prejudice**

Lastly, Petitioner must plead and prove prejudice, to the extent that there was a reasonable probability of a different outcome if not for counsel's error. "[T]o establish prejudice, a petitioner must demonstrate that 'but for the act or omission in question, the outcome of the

proceedings would have been different.” *Steele*, 961 A.2d at 797 (citation omitted). “[I]t is prejudicial error for a prosecutor to summon a witness to the stand in a criminal trial with foreknowledge that the witness intends to invoke a privilege against self-incrimination.” *DuVal*, 307 A.2d at 231-32 (citing *Commonwealth v. Terenda*, 301 A.2d 625 (Pa. 1973)).

The jury could easily have inferred that the witnesses were invoking the Fifth Amendment because they were guilty and transferred this inference to the appellant. Other prosecution testimony indicated that the appellant and co-indictees were acting in concert on the night of the killing. The possibility that the jury may have reasonably inferred an admission of guilty through a transfer process to the appellant is highly prejudicial.

*Terenda*, 301 A.2d at 629.

Here, the Commonwealth’s theory of the case was that Petitioner and Ms. Golding acted in concert to pull off a distraction burglary. Ms. Golding, and her association with Petitioner, was known to the jury. Assistant District Attorney Nathan Boob argued in his opening and closing statement that Ms. Golding and Petitioner acted together to pull off a distraction burglary. This theory was expanded upon by the testimony. The victim, George Ruff, testified that a young lady approached him on his porch and asked to use his phone because she was having car trouble. Tony L. Walczak testified that he was driving in the neighborhood and saw a woman on Mr. Ruff’s porch and then saw Petitioner run through the yard of Mr. Ruff’s neighbor. Detective Ralph Ralston testified that he is familiar with distraction burglaries and had that theory in mind during the investigation. Detective Ralston determined that the woman on Mr. Ruff’s porch was Ms. Golding, and that she lived with Petitioner. After obtaining a search warrant, Petitioner’s bedroom was searched and Mr. Ruff’s television was discovered under some items in the closet.

Having Ms. Golding invoke her Fifth Amendment right in front of the jury served only to allow the jury to make an improper inference from the refusal of the witness to testify. *See DuVal*, 307 A.2d at 232. The improper inference prejudiced Petitioner as Ms. Golding’s refusal

to testify supported the prosecution's theory of the case. Petitioner was ultimately found guilty of not only burglary but also criminal conspiracy to commit burglary. Therefore, trial counsel's failure to object to calling Ms. Golding as a witness prejudiced Petitioner. Accordingly, Petitioner has satisfied his burden and the Court GRANTS relief on this claim.

**V. Failure to raise *DuVal* error in the post-sentence motion or on appeal**

Petitioner argues he was deprived of the effective assistance of counsel when trial counsel failed to raise the *DuVal* error in the post-sentence motion. Counsel's failure to object during trial waived Petitioner's *DuVal* issue. *See Commonwealth v. Baumhammers*, 906 A.2d 59, 73 (Pa. 2008) ("[I]t is axiomatic that issues are preserved when objections are made timely to the error or offense."). As such, trial counsel was not ineffective for failing to raise an issue which had already been waived.

Similarly, Petitioner argues he was deprived of the effective assistance of counsel when trial counsel failed to file a docketing statement with the Superior Court as per Pa.R.A.P. 3517, thereby denying a meaningful review of Petitioner's appeal. Pursuant to Pennsylvania Rule of Appellate Procedure 302(a), "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." By failing to object during trial, the *DuVal* error was not properly preserved for appeal. Though not preserved for direct appeal, the underlying failure to object based on the *DuVal* error is a proper basis for a PCRA Petition. *See Commonwealth v. Grant*, 813 A.2d 726, 738 ("a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review."). Accordingly, Petitioner has not satisfied his burden as to these two issues and the Court DENIES relief on these claims.

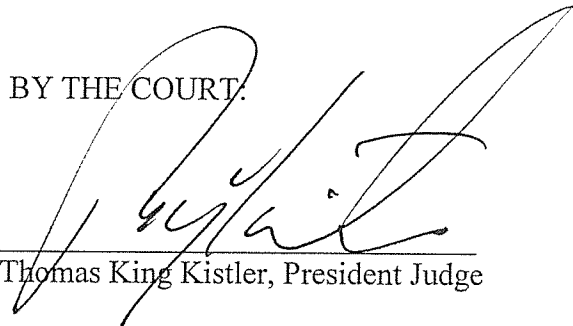
Accordingly, the following ORDER is entered:



**ORDER**

AND NOW, this 28<sup>th</sup> day of June, 2016, Petitioner's Amended Post Conviction Relief Act Petition is hereby **GRANTED** in part and **DENIED** in part, and the Commonwealth's Motion to Dismiss Without Hearing is **DENIED**. Petitioner's March 22, 2010 conviction, and May 11, 2010 sentence are hereby **VACATED**. Petitioner shall appear for pre-trial conferences on July 19, 2016.

BY THE COURT.



Thomas King Kistler, President Judge