

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

NAFIS ANTUAN FAISON,  
*Appellant*

Superior Court Docket No:  
**1423 MDA 2017**

Lower Court Docket No:  
CP-41-CR-0000126-2014

PCRA – APPEAL - 1925(a)

OPINION IN SUPPORT OF ORDER  
Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This Court issues the following supplemental opinion in support of Order pursuant to P.R.A.P. 1925(a) with respect to Nafis Faison’s appeal from an Order dated July 13, 2017 denying his petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546. On appeal, Mr. Faison raised three issues involving ineffective assistance of trial counsel for the failure to file pre-trial motions to suppress when Mr. Faison himself directed his attorney not to pursue pre-trial motions to suppress and instead hoped to become eligible for relief pursuant to Rule 600.<sup>1</sup> Mr. Faison should not be permitted to strategically direct his attorney not to file pre-trial motions and then seek the same relief post-conviction.

The reasons for denying relief, and for the rulings on the issues raised on appeal, may be found in this Court’s Opinion and Order entered on June 22, 2017. This Court respectfully relies on that opinion.<sup>2</sup> As further background, this Court references the affirmance of the conviction

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<sup>1</sup> The three issues raised on appeal are stated here verbatim.

1. Trial counsel was constitutionally deficient for failing to file motion to suppress evidence obtained in violation of Petitioner’s constitutional right where affidavit of probable cause to obtain pen register and trap and trace device was insufficient as a matter of law and all evidence obtained as a result was illegally obtained.

2. Trial counsel was constitutionally defective for failing to investigate and file a motion to suppress evidence seized in second floor apartment as it was procured as result of illegal search without search warrant.

3. Trial counsel was constitutionally deficient for failing to investigate/file motion to suppress affidavit of probable cause to arrest based on false averments contained within.”

<sup>2</sup> The Opinion and Order dated June 22, 2017 sets forth the relevant factual and procedural history, provides notice and reasons of intent to dismiss, and court-appointed counsel’s petition to withdraw pursuant to the mandates of Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988), and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988).

by the Superior Court dated May 17, 2016, Commonwealth v. Faison, No. 2037 MDA 2015 (Pa. Super. May 17, 2016) J-S39022-16, this Court's opinion in support of order in the direct appeal filed pursuant to Pa. R.A.P. 1925(a) on January 28, 2016, and this Court's opinion and order entered July 13, 2015 denying Mr. Faison's post sentence motion. In addition, the Court respectfully submits the following supplemental opinion with respect to the issues on appeal and in support of the Order dated July 13, 2017.

Preliminarily, the Court concluded Mr. Faison is not eligible for relief pursuant to Section 9543(a) (3) and (4) as the alleged errors were waived and could have been (and were) the result of a rational, strategic or tactical decision by counsel and that the claims were waived. All of the issues on appeal could have been raised pre-trial except that Mr. Faison himself directed his attorney not to pursue pre-trial motions and instead focus on trying to obtain relief pursuant to Rule 600. In his multiple pro se filings Mr. Faison has not disputed that he instructed trial counsel not to file pre-trial motions to suppress in order to seek Rule 600 relief. Similarly, Mr. Faison has not disputed that his trial strategy included disclaiming ownership of the belongings and the apartment.<sup>3</sup> As a result, the Court found that no purpose would be served by conducting any further evidentiary hearing regarding this matter, and that there were no issues of material fact in dispute, citing, Pa.R.Crim.P. 909(B)(2); Commonwealth v. Walker, 36 A.3d 1, 17 (Pa. 2011) and Commonwealth v. McLaurin, 45 A.3d 1131, 1135-36 (Pa. Super. 2012).

In addition to the claims being waived, this Court also concluded that the claims lacked merit and do not satisfy the requirements for relief for ineffective assistance of counsel.<sup>4</sup> As to the first ineffective assistance issue on appeal, there is no merit to the claim of ineffectiveness for

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<sup>3</sup> See, letter by attorney Gardner dated May 9, 2017, and multiple pro se filings by Faison.

<sup>4</sup> Claims for ineffective assistance of counsel must meet all three requirements: "(1) Petitioner's underlying claim has arguable merit, (2) trial counsel had no reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Petitioner." Commonwealth v. Chmiel, 612 Pa. 333, \_\_\_, 30 A.3d 1111, 1127 (Pa. 2011).

failing to pursue a motion to suppress evidence obtained from a pen register and trap and trace device in this case. Mr. Faison cites Commonwealth v. Melli, 521 Pa. 405, 555 A.2d.1254 (Pa. 1989) to support his claim, but unlike Melli, in the present case, there was no reasonable basis to suppress the evidence because it fell squarely within the requirements required to lawfully obtain evidence from a pen register and trap and trace device.

In Mr. Faison's case, the District Attorney of Lycoming County submitted an application with supporting affidavits prior to obtaining an Order of Court authorizing the pen register and trap and trace device. (The application was attached to Mr. Faison's pro se motion filed on December 1, 2017.) The Honorable Judge Nancy L. Butts, President Judge of the Court of Common Pleas of Lycoming County, reviewed the application and affidavits and found that there was sufficient probable cause. The Court specifically found the following.

there was probable cause to believe that information relevant to an ongoing criminal investigation, and that will enable investigators to track or otherwise ascertain the physical location of the mobile cellular telephone will be obtained through the disclosure of Mobile Communication Tracking Information, the installation and use of a Pen Register and Trap and Trace Device and Telecommunications identification interception device, {...} bearing number 570-692-0882 and/or any replacement telephone number(s) billed to the same subscriber or determined to be used by the same suspect during the period covered by this Court Order.

There was substantial basis for the Court to conclude that evidence of a crime would be found from the Pen Register and Trap and Trade Device from the number, scope and time period authorized. There was a substantial basis to conclude that the Pen Register and Trap and Trade Device of the cellular number would reveal the location of a fugitive, and evidence of violations of the Controlled Substance Drug Device Cosmetic Act. Law enforcement obtained reliable information from a known parolee, identified in the affidavit, who established Mr. Faison's cellular telephone number. Mr. Faison was a fugitive who police had been unable to locate.

Law enforcement positively identified Mr. Faison as an individual who sold presumptive positive heroin to a confidential informant known to law enforcement during four controlled drug purchases. The confidential informant was a reliable part of the law enforcement controlled purchases and known to law enforcement.

The application contained an affidavit of probable cause sworn to by Trooper Lombardo, who was assigned to the Bureau of Criminal Investigation Division in the Fugitive Apprehension Unit with the Pennsylvania State Police. The affidavit by Trooper Lombardo contained the following in pertinent part.

Between July 7, 2009 to August 21, 2009, members of the Pennsylvania State – Montoursville barracks Vice Unit had arranged four (4) controlled drug purchases between a confidential informant and a black male known as “Mickey”. During each buy, said male had sold the confidential informant heroin for money. After each buy, the white powdery substance (suspected heroin) was tested and resulted in a presumptive positive as heroin. Troopers have positively identified the black male known as Mickey as Naifis FAISON B/N-M DOB: 01/30/85 by his Pennsylvania driver’s license. As a result, Tpr. WHIPPLE had prepared a criminal complaint and has obtained a valid arrest warrant for the arrest of Nafis FAISON B/N-M DOB: 01/03/85. Currently, FAISON is entered into NCIC/CLEAN as a wanted person and a copy of his warrant is on file with the Pennsylvania State Police Montoursville, FAISON knows he is wanted and attempts to locate him since the incident have been unsuccessful.

11/18/2013 at 1020 hours, Pennsylvania State Probation and Parole Agent Tracy GROSS interviewed one of his parolees, Steven WILLIAMS, regarding the whereabouts of Nafis Antuan FAISON. During the interview, WILLIAMS informed Agent GROSS that FAISON is in the Lycoming area and using the street name of Mike. WILLIAMS provided Agent GROSS with a cellular number for FAISON as being 570-692-0882.

An inquiry utilizing Lexis Nexus and CLEAR, investigative platforms, indicates that the telephone number 570-692-0882 is that of a AT&TWIRELESS device.

Based upon the information, a GPS location on FAISON’S CELL phone is being requested to determine his location/whereabouts as well as to obtain from AT&T WIRELESS any and all historical data that would assist in this investigation. Therefore, I am respectfully requesting this Order authorizing the installation and use of Pen Register and Trap and Trace Devices on telephone number 570-692-0882, the telephone believed to be utilized by Nafis Antuan FAISON.

As can be seen from the affidavit, the affiant relies on reasonably reliable information to establish probable cause and the Court made a specific finding of probable cause prior to authorizing the Pen Register and Trap and Trade Device. An individual, specifically identified and known to law enforcement, who could be held accountable for false information provided to law enforcement, provided Mr. Faison's cellular telephone number to his parole officer. The parolee's name is stated in the affidavit.

As to the second ineffective assistance issue on appeal, there is no merit to the claim of ineffectiveness for failing to pursue a motion to suppress evidence obtained from the second floor apartment. Police were lawfully at Mr. Simpson's second floor apartment where Mr. Faison, a fugitive, had spent the night. Prior to entering the second floor apartment that day, law enforcement stopped a witness who purchased drugs at the apartment and identified Mr. Faison as being there. When Mr. Simpson opened the door for law enforcement, Mr. Faison, a fugitive, ran towards the back and was caught after jumping out the window. See, N.T. Trial, 1/21/15 at 36. Mr. Simpson was arrested. Id. Law enforcement had good reason to secure the apartment. A fugitive was seen there, a witness just purchased drugs from the apartment, and a runner jumped out the second floor window. Mr. Simpson was arrested.<sup>5</sup> Id. Until the apartment was secure, police would be uncertain as to who was at the apartment, and not all of law enforcement would immediately know whether the fugitive was the runner or not. Lastly, the large quantity of cocaine could be seen and was seen in plain view in a partially unzipped backpack on the couch. Id. at 93-94, 108,147. While police were still securing the residence, Trooper Thomas noticed a little boy in shorts and a T-shirt shivering outside in the cold of December. After the

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<sup>5</sup> Trooper Kenneth Fishel prepared the affidavits of probable cause for the search warrants, including the apartment and third floor. Id. at 77.

apartment was secure, the Trooper helped the boy collect his clothes and things from the apartment when the backpack was noticed. Id. at 104-106.

As to the third and last ineffective assistance issue raised on appeal, there is no merit to the claim of ineffectiveness for failing to pursue a “motion to suppress an affidavit of probable cause to arrest based on false averments contained within.” Mr. Faison has not established false averments in the affidavit of probable cause or that failure to file a motion to suppress an affidavit of probable cause for arrest his arrest could have prejudiced him.

For these reasons, and those stated in this Court’s Opinion and Order entered on June 22, 2017, and as further background, the affirmance of the conviction by the Superior Court dated May 17, 2016, Commonwealth v. Faison, No. 2037 MDA 2015 (Pa. Super. May 17, 2016) J-S39022-16, and this Court’s opinion in support of order in the direct appeal filed pursuant to Pa. R.A.P. 1925(a) on January 28, 2016, this Court’s opinion and order entered July 13, 2015 denying Mr. Faison’s post sentence motion, this Court respectfully requests that its an Order dated July 13, 2017, denying Mr. Faison’s petition for post-conviction relief be affirmed.

BY THE COURT,

**October 20, 2017**  
Date

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Richard A. Gray, J.

c: DA (KO)  
Nafis A. Faison, Inmate # LZ - 1119  
SCI – Smithfield, PO Box 999, 1120 Pike Street, Huntingdon, PA 16652  
**Prothonotary (SF)**  
**(Superior & 1)**