J. S76032/09

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
ALAN R. BELL,	:	
Appellant	:	No. 657 WDA 2009

Appeal from the PCRA Order of March 23, 2009,
in the Court of Common Pleas of Crawford County,
Criminal Division at No. CP-20-CR-0001014-2004

BEFORE: MUSMANNO, GANTMAN and COLVILLE*, JJ.

MEMORANDUM: FILED: December 14, 2009

This case is an appeal from the order denying Appellant's petition for relief under the Post Conviction Relief Act ("PCRA"). Appellant claims the PCRA court erred in not finding his plea counsel ineffective with respect to Appellant's sentence. We affirm the order denying PCRA relief.

The record reveals the following facts. Appellant faced numerous criminal charges, including seventeen counts of delivering a controlled substance in violation of 35 P.S. § 780-113(a)(30). The controlled substance was cocaine; the multiple deliveries occurred over a period of some eight months.

The Commonwealth and Appellant entered a plea agreement under which the Commonwealth agreed to *nolle prosse* all charges except for three drug deliveries, each of which involved a quantity of cocaine exceeding ten

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*Retired Senior Judge assigned to the Superior Court.

grams. In light of the drug quantities, the Commonwealth would seek mandatory minimum penalties. ***See*** 18 Pa.C.S.A. § 7508(a)(3)(ii) (setting forth mandatory penalties based on drug quantities and number of convictions at time of sentencing).[1] During the plea hearing, Appellant's

[1] The provision in question reads as follows:

> **(a) General rule.--**Notwithstanding any other provisions of this or any other act to the contrary, the following provisions shall apply:
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> *******
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> (3) A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance is coca leaves or is any salt, compound, derivative or preparation of coca leaves or is any salt, compound, derivative or preparation which is chemically equivalent or identical with any of these substances or is any mixture containing any of these substances except decocainized coca leaves or extracts of coca leaves which (extracts) do not contain cocaine or ecgonine shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:
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> *******
>
> (ii) when the aggregate weight of the compound or mixture containing the substance involved is at least ten grams and less than 100 grams; three years in prison and a fine of $15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: five years in prison and $30,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; . . .

18 Pa.C.S.A. § 7508(a)(3)(ii).

counsel placed the foregoing terms of the agreement on the record. Appellant indicated he understood the plea agreement.

Appellant pled guilty and proceeded to sentencing. During the sentencing hearing, Appellant's counsel reiterated that the three offenses for which Appellant was convicted each involved quantities exceeding ten grams. The court then determined that, at one count, Appellant was subject to a mandatory minimum penalty of three years in prison and a fine of fifteen thousand dollars. Consistent with that determination, the court imposed a sentence of not less than three and not more than ten years' imprisonment along with the aforesaid fine. At each of the remaining two counts, the court found Appellant was subject to a mandatory minimum incarceration of five years and, accordingly, sentenced him to imprisonment of not less than five and not more than ten years for each offense. The court also imposed a mandatory fine of thirty thousand dollars for each of those two convictions. The court ran the latter two periods of incarceration concurrent with each other and consecutive to the first penalty. Appellant's aggregate penalty therefore included imprisonment of not less than eight and not more than twenty years and fines of seventy-five thousand dollars.

On direct appeal to this Court, Appellant argued the sentencing court, while proceeding under 18 Pa.C.S.A. § 7508, erred in imposing enhanced sentences at two counts (*i.e.*, sentences of not less than five and not more

than ten years in prison and fines of thirty thousand dollars) because his conviction at the other count had not resulted in a prior sentence. However, this Court explained that, pursuant to the plain language of Section 7508(a)(3)(ii), the enhanced penalties were not contingent on the existence of a prior sentence but, rather, on the existence of a prior conviction—*e.g.*, Appellant's guilty plea and conviction at other counts. ***Commonwealth v. Bell***, 901 A.2d 1033, 1037 (Pa. Super. 2006). As such, we affirmed the judgment of sentence. ***Id.***[2] The Pennsylvania Supreme Court subsequently denied Appellant's petition for allowance of appeal. ***Commonwealth v. Bell***, 923 A.2d 409 (Pa. 2007).

Appellant thereafter filed a *pro se* PCRA petition. Current counsel, having been appointed to represent Appellant, filed an amended PCRA petition. Therein, Appellant alleged plea counsel was ineffective in not objecting to the Commonwealth's failure to establish the drug quantities during sentencing so as to trigger the mandatory penalties of 18 Pa.C.S.A.

[2] In reaching our result, this Court seemed to accept the notion that a non-enhanced mandatory minimum of three years' incarceration should apply to one of Appellant's convictions and the enhanced mandatory minimum of five years in prison only applied to the other two convictions. ***Id.*** at 1034, 1037. Such is the law of this particular case. However, we note that, at the time of sentencing for each of his three offenses, Appellant already had convictions for the other two. Accordingly, under the plain language of 18 Pa.C.S.A. § 7508(a)(3)(ii), Appellant could have been subject to mandatory minima of five years on all three counts. Indeed, case law subsequent to our decision has clarified this point. ***See Commonwealth v. Rush***, 959 A.2d 945, 951-53 (Pa. Super. 2008).

§ 7508(a)(3)(ii). Appellant also alleged plea counsel was ineffective for not seeking a sentence reduction based on the theory of sentencing manipulation. More specifically, Appellant asserted police exposed him to increased sentencing possibilities by delaying his arrest, initiating subsequent, numerous drug purchases from him, and manipulating the amount of drugs requested from him during controlled purchases. The PCRA court denied relief after a hearing.

Appellant then filed the instant appeal in which he argues the PCRA court erred in denying him relief on the aforementioned ineffectiveness claims.

With respect to both of Appellant's issues, we note that, when reviewing orders denying PCRA relief, our standard is to determine whether the PCRA court's ruling is free of legal error and is supported by the record. ***Commonwealth v. Boyer***, 962 A.2d 1213, 1215 (Pa. Super. 2008). As we apply the foregoing standard, we keep in mind it is the appellant's burden to persuade us that the court erred. ***Commonwealth v. Wrecks***, 931 A.2d 717, 722 (Pa. Super. 2007). Thus, the appellant must convince us the PCRA court's ruling was legally erroneous or unsupported by the record. ***Wrecks***, 931 A.2d at 722; ***Boyer***, 962 A.2d at 1215. An appellant who does not convince us the court erred is not entitled to relief. ***Wrecks***, 931 A.2d at 722.

Additionally, we recall that, to establish ineffectiveness of counsel, an appellant must show the following: (1) the appellant's underlying claim has arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) counsel's conduct prejudiced the appellant. ***Boyer***, 962 A.2d at 1214. Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different. ***Id.*** A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. ***Id.***

Appellant first contends the evidence at sentencing did not establish the drug quantities were at least ten grams and less than one hundred grams and, as such, his counsel was ineffective for not objecting to the application of 18 Pa.C.S.A. § 7508(a)(3)(ii). He then argues the PCRA court should have found counsel ineffective in this regard.

The applicability of 18 Pa.C.S.A. § 7508(a)(3)(ii) is to be determined by the court at the time of sentencing. 18 Pa.C.S.A. § 7508(b). In so doing, the court shall consider evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present necessary evidence. ***Id.*** The court shall then decide by a preponderance of the evidence if Section 7508(a)(3)(ii) applies. 18 Pa.C.S.A. § 7508(b).

When setting forth the plea agreement, Appellant's counsel stated the cocaine quantities exceeded ten grams for each delivery. After discussing

the mandatory minimum sentence associated with one of those counts, the Commonwealth then began to discuss the remaining two counts and, when doing so, stated, "These also are alleged to be deliveries in excess of ten grams." N.T.,06/09/05, at 27. The use of the word "also" made clear that all three counts involved drug amounts exceeding ten grams. When questioned by the court, Appellant indicated he understood the plea agreement. Additionally, at sentencing, Appellant's counsel recited the precise amount of each delivery, *to wit*, 11.8 grams, 15.4 grams and 13.3 grams.

We recognize statements by counsel are not normally evidence. ***Commonwealth v. Jones***, 811 A.2d 994, 1006 (Pa. 2002). However, we also recognize that, at least during plea hearings, case facts are routinely placed into the record through statements of counsel, albeit usually the Commonwealth. ***See Commonwealth v. Pitner***, 928 A.2d 1104, 1108 (Pa. Super. 2007). Moreover, the rules of criminal procedure specifically direct that the terms of plea agreements be placed by counsel on the record. Pa.R.Crim.P. 590(B)(1).

In this case, the plea agreement indicated that the cocaine amounts were at least ten grams. Appellant stated that he understood the agreement. The precise drug amounts were then specified at sentencing. While Section 7508(b) allows the sentencing court to rely on facts

established at trial and sentencing, surely the court may also rely on facts established during a plea and sentencing. In short, there were sufficient facts of record from which the sentencing court could find by a preponderance of the evidence that the cocaine quantities were at least ten grams and less than one hundred grams. Therefore, there is no merit to Appellant's claim that the record did not establish the requisite drug amounts. There being no merit to this claim, plea counsel was not ineffective in failing to raise it. Because counsel was not ineffective, the PCRA court did not err in denying Appellant's petition. Accordingly, Appellant is not entitled to relief on this issue.

Appellant next contends the PCRA court should have found plea counsel ineffective for not requesting sentence reduction based on sentencing manipulation.

Sentencing entrapment or manipulation occurs where a defendant, although predisposed to commit a crime, is entrapped into committing a greater offense or offenses and is thereby exposed to greater sentences. ***Commonwealth v. Paul***, 925 A.2d 825, 830 (Pa. Super. 2007). Such a claim can arise in narcotics cases where police manipulate the amount of drugs purchased. ***Id.*** A successful sentencing manipulation claim may warrant a reduction in sentence. ***Id.***

To prove sentencing manipulation, however, it is not sufficient for an appellant to show merely that the criminal incident was encouraged by police (*e.g.*, through undercover or controlled buys) or was prolonged beyond an initial criminal act such as an initial drug purchase. ***Id.*** Rather, the appellant must persuade us there was some type of over-involvement by the police evidencing extraordinary misconduct on their part. ***Id.***

In his brief, Appellant argues the police engineered the numerous drug deliveries by initiating them with a confidential informant. He also complains the police conduct became outrageous when, because the police orchestrated an ongoing set of drug transactions over a period of time, Appellant became drug addicted and needed to continue selling drugs to support his own habit.

Other than making a general statement concerning the law of sentencing manipulation and citing one case, Appellant does not provide legal authority demonstrating that sentencing manipulation occurs in cases factually similar to his. Consequently, he does not provide a persuasive legal or factual analysis showing that the police conduct in this matter constituted over-involvement or outrageous misconduct. He also provides no real analysis of how the police inappropriately manipulated the drug quantities in question. Moreover, we note Appellant was not sentenced for seventeen deliveries but, rather, for three. Unless he can demonstrate

sentencing manipulation with respect to the three offenses for which he was sentenced, we fail to see how he is entitled to relief.

In short, we are not convinced in this case that a total of three drug transactions constitutes outrageous police conduct. Similarly, we are unpersuaded the police manipulated the subject drug amounts in some inappropriate fashion so as to warrant a finding of sentencing manipulation. Thus, we find no merit to Appellant's claim. Because Appellant has not established merit to his claim of sentencing manipulation, he has likewise failed to show his plea counsel was ineffective in not raising the issue. Consequently, Appellant has not shown the PCRA court erred in denying relief.

Based on the foregoing discussion, we affirm the PCRA court's order.

Order affirmed.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

DATE: DECEMBER 14, 2009