

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

CHRISTIAN DAVIS A/K/A
CHRISTIAN DAVID

Appellant

No. 1547 WDA 2012

Appeal from the Order October 5, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0012479-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and OTT, J.

MEMORANDUM BY LAZARUS, J. FILED: December 17, 2013

Christian Davis appeals from the order of the Court of Common Pleas of Allegheny County dismissing his petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ After our review, we affirm.

On October 6, 2011, Davis was charged by criminal information filed at CP-02-CR-0012479-2001 with escape² for leaving, without permission, Allegheny County Treatment Alternative (ACTA). Davis was at ACTA serving sentences for burglary³ imposed by the Honorable John A. Zottola at CP-02-CR-0007549-2010 and CP-02-CR-0012737-2010.

¹ 42 Pa.C.S. §§ 9541-9546.

² 18 Pa.C.S. § 5121(a).

³ 18 Pa.C.S. § 3502(a).

On that same day, Davis appeared before the trial court with counsel, Allegheny County Assistant Public Defender, Karen Avery, Esquire, and pled guilty pursuant to a negotiated plea agreement. The court sentenced Davis to three to six months' incarceration with a consecutive sentence of three years' probation. No post-sentence motions or appeals were filed.

On November 9, 2011, Davis filed a *pro se* PCRA petition, and by order filed December 1, 2011, the court appointed Joseph V. Luvara, Esquire, to represent him. An amended PCRA petition was filed on March 13, 2012. On June 22, 2012, the PCRA court issued a notice of intention to dismiss pursuant to Pa.R.Crim.P. 907(a). Davis filed a response to the Rule 907 notice on June 28, 2012, and, on October 5, 2012, the PCRA court denied relief. This timely appeal followed.

Davis raises three issues on appeal:

1. Whether plea and sentencing counsel was ineffective for failing to preserve the claim that the conviction was unsupported by sufficient evidence and otherwise unlawful where [Davis] was on parole on the offense date and, thus, was not subject to "official detention" which is defined under 18 Pa.C.S.A. § 5121(e) as excluding persons on parole?
2. Whether plea and sentencing counsel was ineffective—and [Davis] was deprived of his right of appeal—when said counsel failed to consult with [Davis] on filing an appeal and/or failed to file an appeal when said counsel know [sic] or should have known an arguably meritorious claim existed that the conviction was unlawful and the sentence exceeded the lawful maximum?
3. Whether the Court of Common Pleas erred and/or abused its discretion in denying PCRA relief without an evidentiary hearing?

Appellant's brief, at 3.

Our standard of review for an order denying post-conviction relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Franklin***, 990 A.2d 795, 797 (Pa. Super. 2010). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

Moreover, as Davis's first two issues on appeal concern claims of ineffective assistance of counsel, he is required to make the following showing in order to prevail: (1) that the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Rivera***, 10 A.3d 1276, 1279 (Pa. Super. 2010). The failure to satisfy any prong of this test will cause the entire claim to fail. ***Commonwealth v. Daniels***, 947 A.2d 795, 798 (Pa. Super. 2008). Finally, counsel is presumed to be effective and appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa. Super. 2003).

Davis first alleges that counsel was ineffective for failing to preserve a sufficiency of the evidence claim. Generally, a plea of guilty amounts to a waiver of all defects and defenses except those concerning the jurisdiction of the court, the legality of the sentence, and the validity of the guilty plea.

Commonwealth v. Reichle, 589 A.2d 1140, 1411 (Pa. Super. 1991). The Commonwealth correctly notes that when Davis pled guilty, he waived his right to challenge the sufficiency of the evidence supporting his conviction. Accordingly, had a sufficiency claim been raised on appeal after Davis pled guilty, this Court would have found the issue waived. Attorney Avery cannot be found ineffective for failing to preserve a claim that has been waived. Since the underlying claim is without merit, Davis's allegation of ineffective assistance of counsel must fail.

Davis's second claim concerns Attorney Avery's failure to file an appeal, or at least consult about filing an appeal, when she knew or should have known that Davis's conviction was unsupported by sufficient evidence, or otherwise unlawful, and exceeded the lawful maximum. Like his allegation that Attorney Avery was ineffective for failing to preserve a sufficiency of the evidence claim, Davis's argument that counsel was ineffective for failing to file an appeal when she knew the evidence was insufficient to support his conviction must also fail.

However, Davis's entry of a negotiated plea does not preclude him from asserting that Attorney Avery was ineffective for failing to appeal an unlawful sentence. ***See Reichle, supra***. Counsel has a duty to "consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant

reasonably demonstrated to counsel that he was interested in appealing.”

Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

In making this determination, courts must take into account all the information counsel knew or should have known. Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.

Id.

In his amended PCRA petition, Davis did not allege that he asked Attorney Avery to file an appeal on his behalf and counsel ignored the request. Rather, Davis argued that he was entitled to relief under **Flores-Ortega** based on Attorney Avery’s failure to consult with him about filing an appeal. We disagree.

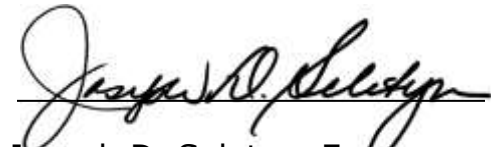
Attorney Avery had no duty under **Flores-Ortega** to consult with Davis about filing an appeal, or to file an appeal, on his behalf because there was no reason to think that Davis would want to appeal his sentence as unlawful. Prior to sentencing, Davis completed a negotiated plea colloquy in which he admitted to committing the charged offense and averred that he understood the elements of the crime and the facts of his case. Furthermore, it was not until Davis was already serving his sentence that he was informed by a private attorney that his conviction was unlawful because he was on parole when he left ACTA. Accordingly, the record supports the PCRA’s determination and is free from legal error. **Franklin, supra.** Therefore, Davis’s claim must fail.

In his third claim, Davis argues that the trial court erred when it denied his PCRA petition without an evidentiary hearing. Since the “right to an evidentiary hearing on a post-conviction petition is not absolute,” a reviewing court on appeal “must examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and denying relief without an evidentiary hearing.” ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa. Super. 2001). The PCRA court can decline to hold a hearing and dismiss a petition after determining that the claim is patently frivolous or is without any support. ***See Commonwealth v. Springer***, 961 A.2d 1262, 1264 (Pa. Super. 2008). Accordingly, when the PCRA court correctly determined that the claims in Davis’s PCRA petition lacked merit, it appropriately exercised its discretion in denying relief without an evidentiary hearing.

Because the record supports the PCRA court’s determination and its conclusions are free of legal error, we affirm the order of the court denying Davis’s PCRA petition.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013