

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHAD ALAN BLANCHARD,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1033 MDA 2012

Appeal from the Order entered May 11, 2012,
in the Court of Common Pleas of Tioga County,
Criminal Division, at No(s): CP-59-CR-0000375-2006.

BEFORE: FORD ELLIOTT, P.J.E., PANELLA and ALLEN, JJ.

MEMORANDUM BY ALLEN, J.:

Filed: January 7, 2013

Chad Alan Blanchard ("Appellant") appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. sections 9541-9546. We affirm.

The pertinent facts and procedural history are as follows: On August 23, 2007, Appellant pled guilty to three counts of delivery of a controlled substance. On December 11, 2007, the trial court sentenced him to an aggregate sentence of five to ten years of imprisonment. The trial court denied Appellant's timely filed post-sentence motion. Appellant filed a timely appeal to this Court, in which he raised several challenges to his sentence. Finding no merit to any of Appellant's claims, this Court, in an unpublished memorandum filed on June 26, 2009, affirmed Appellant's judgment of sentence. *Commonwealth v. Blanchard*, 981 A.2d 912 (Pa.

Super. 2009). Our Supreme Court denied Appellant's petition for allowance of appeal on September 8, 2010. *Commonwealth v. Blanchard*, 5 A.3d 818 (Pa. 2010).

On March 22, 2011, Appellant filed a counseled PCRA petition, in which he raised a claim regarding his eligibility for evaluation for a State Intermediate Punishment "SIP") sentence. The Commonwealth filed its response on May 3, 2011. Appellant filed an amended PCRA petition on December 14, 2011. In this amended petition, Appellant asserted that the Commonwealth's conduct in arresting him for multiple drug sales constituted "inappropriate and unlawful sentencing entrapment and/or sentencing manipulation." Amended PCRA Petition, 12/14/11, at 2. In addition, PCRA counsel, who was also trial and appellate counsel, raised a claim of his own ineffectiveness for not ensuring that an additional plea agreement was not reduced to writing. The Commonwealth filed its response on February 21, 2012. By order dated May 11, 2012, the PCRA court dismissed Appellant's PCRA petition on the basis that Appellant's claims were previously litigated in Appellant's direct appeal.¹ This timely appeal followed. The PCRA court did not require Pa.R.A.P. 1925 compliance.

Appellant raises the following issue:

¹ The PCRA court also dismissed Appellant's subsequent motion for reconsideration.

Does a [PCRA] court err in denying a PCRA Motion without [a] hearing when significant issues are raised with regard to sentencing enhancement and ineffective assistance of counsel with regard to failure to reduce a plea agreement to writing?

Appellant's Brief at 4.

When examining a post-conviction court's grant or denial of relief, we are limited to determining whether the court's findings were supported by the record and whether the court's order is otherwise free of legal error. ***Commonwealth v. Quaranibal***, 763 A.2d 941, 942 (Pa. Super. 2000). We will not disturb findings that are supported in the record. ***Id.*** The PCRA provides no absolute right to a hearing and the post-conviction court may elect to dismiss a petition after thoroughly reviewing the claims presented and determining that they are utterly without support in the record. ***Id.***

To be entitled to relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the errors enumerated in section 9543(a)(2) of the PCRA. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). Additionally, the petitioner must establish that the issues he raises have not been previously litigated. ***Commonwealth v. Carpenter***, 725 A.2d 154, 160 (Pa. 1999). An issue has been "previously litigated" if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or if the issue has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

Carpenter, 725 A.2d at 160; 42 Pa.C.S.A. § 9544(a)(2), (3). If a claim has not been previously litigated, the petitioner must then prove that the issue was not waived. **Carpenter**, 725 A.2d at 160. An issue will be deemed waived under the PCRA “if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding.” 42 Pa.C.S.A. § 9544(b).

Because Appellant’s issue challenges the stewardship of prior counsel, we apply the following principles. Counsel is presumed to be effective, and Appellant has the burden of proving otherwise. **Commonwealth v. Pond**, 846 A.2d 699, 708 (Pa. Super. 2004).

In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, 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. **Commonwealth v. Kimball**, 555 Pa. 299, 724 A.2d 326, 333 (1999). Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. **Id.** The petitioner bears the burden of proving all three prongs of the test. **Commonwealth v. Meadows**, 567 Pa. 344, 787 A.2d 312, 319-20 (2001).

Commonwealth v. Johnson, 868 A.2d 1278, 1281 (Pa. Super. 2005). In assessing a claim of ineffectiveness, when it is clear that appellant has failed to meet the prejudice prong, the court may dispose of the claim on that basis alone, without a determination of whether the first two prongs have

been met. *Commonwealth v. Travaglia*, 661 A.2d 352, 357 (Pa. 1995). Counsel cannot be deemed ineffective for failing to pursue a meritless claim. *Commonwealth v. Loner*, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*), *appeal denied*, 852 A.2d 311 (Pa. 2004).

In support of his issue, Appellant asserts that he “is seeking relief for ineffective counsel for failure to secure a written guilty plea agreement, failure to raise the issue of sentencing enhancement, and failure to raise the issue of necessity of a hearing with regard to [Appellant’s] request for Consideration of SIP.” Appellant’s Brief at 9. According to Appellant, “certainly, sufficient facts and assertions were pled to trigger a legal requirement for [a] hearing.” *Id.* We disagree.

We consolidated Appellant’s direct appeal with an appeal filed by a co-defendant. This Court affirmed the trial court’s determination that the parties had not entered into an “overriding agreement” as follows:

The transcript of the plea agreement hearings, the written guilty plea statements, the addenda, the SIP Petitions, and the representations made by counsel at the November 7, 2007 hearing [to enforce plea agreement] do not support Appellants’ claim. The plea agreements are clear and unambiguous and Appellants received “exactly” what they bargained for according to the terms of the agreements as presented to the trial court. The overriding agreement was in fact no more than an expectation, not backed up by a promise from the Commonwealth, which Appellants never mentioned at the time of the plea agreements, in the guilty plea statements, in the addenda, in the SIP petitions or at any time before the filing of their Petition for the Enforcement of Plea Agreement. When Appellants realized the minimum sentences to be imposed on them would be no less than the minimum sentence

imposed on [a third co-defendant], at that time, and only then, Appellants argued the parties had an overriding agreement which had not been disclosed up to that point.

In light of the foregoing, we conclude, therefore, the trial court did not err or abuse its discretion in not enforcing the overriding agreement as Appellants failed to prove such an agreement had been reached.

Blanchard, unpublished memorandum at 20. In light of the trial court's determination that an "overriding" agreement did not exist, trial counsel cannot be found ineffective. **Loner, supra**.

Before an evidentiary hearing will be granted, a PCRA petitioner "must set forth an offer to prove at an appropriate hearing sufficient facts upon which a reviewing court can conclude that trial counsel may have, in fact, been ineffective." **Commonwealth v. Begley**, 780 A.2d 605, 635 (Pa. 2001) (quoting **Commonwealth v. Pettus**, 424 A.2d 1332, 1335 (Pa. 1981)). In Appellant's remaining two claims of ineffectiveness, Appellant made no such proffer.

Appellant first asserts that trial counsel was ineffective for failing to pursue his claim of sentencing entrapment. This claim is inappropriately being raised for the first time on appeal. **See generally**, Pa.R.A.P. 302. Thus, it is waived under the PCRA. **Carpenter, supra**. Although Appellant claimed in his amended PCRA petition that the multiple sales for which he was arrested unlawfully enhanced his potential sentence, he did not challenge trial counsel's ineffectiveness for failing to raise this claim. Nevertheless, other than referring to his multiple arrests, Appellant has

failed to proffer any evidence that the Commonwealth engaged in misconduct. Given these circumstances, the PCRA court did not err in dismissing Appellant's petition without first holding an evidentiary hearing. ***See Commonwealth v. Clark***, 961 A.2d 80, 94 (Pa. 2008) (explaining that, in the absence of a sufficient proffer, a petitioner's bare assertions would inappropriately convert an evidentiary hearing into a "fishing expedition" for possible exculpatory evidence).

In his final claim, Appellant asserts that trial counsel was ineffective for failing to raise the issue of the necessity of a hearing regarding an SIP sentence. This claim is also waived under the PCRA because it was raised for the first time on appeal. ***See infra***. In his PCRA petition, Appellant stated:

8. [Appellant] has not heretofore specifically raised the issue of his entitlement to a factual hearing with regard to the Commonwealth's refusal to recommend him for SIP sentencing.

9. [Appellant] believes and therefore avers that, at a minimum, a factual hearing is required wherein the Commonwealth would carry the burden of establishing some reasonable grounds for not recommending [Appellant] for SIP treatment given the fact that [Appellant] meets all of the criteria set forth in the Act.

PCRA Petition, 3/22/11, at 2.

In his direct appeal, Appellant asserted that the trial court abused its discretion in failing to direct the Commonwealth to recommend him for SIP consideration. In rejecting this claim, this Court noted that the SIP statute

“clearly requires a motion from the Commonwealth to trigger a referral to SIP.” **Blanchard**, unpublished memorandum at 4. In addition, we noted that Appellant “provide[d] no analysis of any sort or citation to any authority to support [his] claim[.]” **Id.** Thus, this Court found Appellant’s undeveloped claim to be waived. We further noted that the Commonwealth explained at the hearing on Appellant’s petition to enforce the plea agreement that it would not recommend SIP consideration because Appellant’s “conduct was simply too pervasive and there’s too much cocaine involved in this matter[.]” **Id.** at 5.

Appellant’s present assertion that trial counsel was ineffective for failing to insist on a factual hearing is also unsupported by any citation to case law or citation to any authority. Moreover, Appellant has failed to establish how a factual hearing would provide any information beyond the reasons previously given by the Commonwealth. **See Clark, supra.**

In sum, because Appellant’s claims of ineffectiveness are without merit, previously litigated, or waived, we affirm the PCRA court’s order dismissing Appellant’s PCRA petition.

Order affirmed.