

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
V.	:	
	:	
MARK ANTHONY ELLIS,	:	
	:	
Appellant	:	No. 1106 WDA 2012

Appeal from the Order of October 25, 2011,
Court of Common Pleas, Beaver County,
Criminal Division at Nos. CP-04-CR-0000003-2010,
CP-04-CR-0000005-2010, CP-04-CR-0000006-2010,
CP-04-CR-0000432-2010 and CP-04-CR-0002115-2009

BEFORE: FORD ELLIOTT, P.J.E, BOWES and DONOHUE, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: February 11, 2013

Mark Anthony Ellis ("Ellis") appeals from the order of court denying his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"). Following our review, we affirm.

On May 12, 2010, Ellis entered negotiated pleas on four charges of driving while under the influence ("DUI") and one charge of corruption of minors. The plea agreement provided that Ellis would plead guilty to the four DUI charges and *nolo contendere* to the corruption of minors charge. In exchange for these pleas, Ellis would receive an aggregate term of 21 to 42 months of incarceration on the DUI charges and a probationary sentence on the corruption of minors charge, the length of which was left to the trial court's discretion. On June 9, 2010, Ellis was sentenced in accordance with

the plea agreement. With regard to the corruption of minors plea, the trial court imposed a sentence of two years of probation, to run concurrently with the sentences imposed on the DUI offenses. Ellis did not file a post-sentence motion or direct appeal.

On September 28, 2010, Ellis filed a *pro se* PCRA petition alleging that counsel was ineffective because Ellis was intoxicated "throughout the entire process" and because he was not aware of the length of incarceration he would receive for his pleas. PCRA Petition, 9/28/10, at 3. PCRA counsel was appointed, but no amended petition was filed. A hearing was held on April 7, 2011, and on October 25, 2011, the PCRA court denied the petition.

Ellis subsequently filed this appeal, in which he challenges the PCRA court's denial of his petition "given the evidence at the PCRA hearing of counsel's ineffectiveness in inducing the guilty pleas[.]" Appellant's Brief at 6. We begin with our standard of review:

Our review of a PCRA court's grant or denial of relief is limited to examining whether the court's determination is supported by the evidence and whether it is free of legal error. This Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. The findings of a post-conviction court will not be disturbed unless they have no support in the record.

Commonwealth v. Hickman, 799 A.2d 136, 140 (Pa. Super. 2002) (internal citations omitted).

On appeal, Ellis raises two claims of ineffective assistance of counsel in connection with the entry of his guilty pleas. "A criminal defendant has the right to effective counsel during a plea process as well as during trial. Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea." ***Commonwealth v. Moser***, 921 A.2d 526, 531 (Pa. Super. 2007) (citations omitted).

"We conduct our review of [claims alleging ineffective assistance of counsel in connection with a guilty plea] in accordance with the three-pronged ineffectiveness test under section 9543(a)(2)(ii) of the PCRA, 42 Pa.C.S.A. § 9543(a)(2)(ii)." ***Commonwealth v. Rathfon***, 899 A.2d 365, 369 (Pa. Super. 2006). To be successful on such a claim, the appellant must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) but for counsel's errors or omissions, there is a reasonable probability that the outcome of the proceedings would have been different. ***Id.*** To meet this third prong, "the [appellant] must show that it is reasonably probable that, but for counsel's errors, he would not have pleaded guilty and would have gone to trial." ***Id.*** at 369-70. If the claimant fails to establish any one of these three prongs, his challenge must fail. ***Commonwealth v. O'Bidos***, 849 A.2d 243, 249 (Pa. Super. 2004).

Ellis first argues that his trial counsel, Stanley Booker, was ineffective for allowing him to enter guilty pleas when trial counsel knew that Ellis was intoxicated at the time of the plea hearing. Ellis contends that Attorney Booker should have disclosed Ellis' state of intoxication to the trial court at the plea hearing so that the trial court could assess whether Ellis possessed the capacity to knowingly and voluntarily enter the pleas at issue. Appellant's Brief at 12-14.

To establish the first prong of the ineffectiveness test - that the underlying claim is of arguable merit - Ellis would have to first prove that he was intoxicated at the time he entered the pleas. The PCRA court found that "[n]either the record of the plea and sentencing hearings nor the evidence submitted at the PCRA hearing supports [Ellis'] claim that was intoxicated at the time he entered the pleas . . ." PCRA Court Opinion, 10/25/11, at 17. Our review of the record supports this determination. At the PCRA hearing, Attorney Booker testified that upon meeting with his client on the day of the plea hearing, he detected the odor of alcohol on Ellis but did not observe any other indicia of intoxication, such as bloodshot eyes or a staggering gait. N.T., 4/7/11, at 10, 20. Attorney Booker stated that Ellis denied drinking that day but indicated that he had been drinking the night before. *Id.* Through his conversations with and observations of Ellis, Attorney Booker concluded that Ellis understood what was occurring at the time of the plea hearing and that Ellis could knowingly, intelligently and voluntarily enter the

pleas of guilty and *nolo contendere*. *Id.* at 10, 13. Attorney Booker testified that if he believes a client is intoxicated to such a point that he does not know what he is doing, it is his usual practice "to stop the proceedings at that point, either address it in court or try to postpone it in [sic] some degree." *Id.* at 13-14. Moreover, when the pleas were entered, Ellis indicated on written colloquy forms that he had not consumed drugs or alcohol within the previous 24 hours and he testified to the same when colloquied orally before the trial court. *Id.* at 19; N.T., 5/12/10, at 15-16. As the record supports the trial court's determination that Ellis was not intoxicated at the time he entered into the plea agreements, we are bound thereby. *Hickman*, 799 A.2d at 140. We therefore conclude that Ellis failed to establish that there is merit to his underlying claim, and this failure defeats his claim of ineffectiveness. *O'Bidos*, 849 A.2d at 249.

Ellis also claims that trial counsel was ineffective because Ellis did not want to enter a plea to the corruption of minors charge, but that he did so because trial counsel "push[ed] [him] into [it] while he was not of a clear mind." Appellant's Brief at 13, 16. Like the first claim of ineffectiveness, the viability of this claim requires that Ellis establish that he was intoxicated at the time he entered into the plea agreements. As we have set forth above, the record supports the trial court's determination that Ellis failed to do so. Accordingly, Ellis' claim cannot succeed.

Order affirmed.