NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JAMES JOSEPH JOHNSON,	:	
	:	
Appellant	:	No. 1144 MDA 2012

Appeal from the Order Entered June 8, 2012,
In the Court of Common Pleas of Mifflin County,
Criminal Division, at No. CP-44-CR-0000544-2002.

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JAMES JOSEPH JOHNSON,	:	
	:	
Appellant	:	No. 1146 MDA 2012

Appeal from the PCRA Order Entered June 8, 2012,
In the Court of Common Pleas of Mifflin County,
Criminal Division, at No. CP-44-CR-0000545-2002.

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: February 15, 2013

Appellant, James Joseph Johnson, appeals from the order denying his petition for collateral relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court summarized the history of this case as follows:

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*Retired Senior Judge assigned to the Superior Court.

> The facts that led the Commonwealth to charge [Appellant] in both actions took place in 2001.
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> In Criminal Action Number 544, the victim testified she, her sister and her friend went swimming in the Juniata River when [Appellant] came over and placed her in his lap. He then placed his finger in her vagina. The second incident occurred a month later in their home when the victim was using her computer. She testified she sat on [Appellant's] lap and he again placed his fingers in her vagina.
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> The facts prompting the Commonwealth to charge [Appellant] in Criminal Action Number 545 also took place during the summer of 2001. The victim in that case testified [Appellant] made plans with her and two of her friends to go bowling. However, [Appellant] took them to buy beer and then to a secluded area. He gave them beer which they drank before he took the victim's friends home. The victim indicated [Appellant] locked the car door and drove off with her. He drove her to an abandoned motel parking lot and began to take off her pants. [Appellant] then penetrated her vagina with his penis while she objected and tried to push him away.
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> On April 22, 2003, as part of a plea agreement, [Appellant] pled nolo contendere to two counts of aggravated indecent assault. The plea agreement required the Commonwealth not to comment at sentencing. At sentencing, the District Attorney commented as to his belief that a standard range sentence was appropriate.
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> [Appellant] subsequently filed a Petition for relief under the Post Conviction Relief Act ("PCRA") asking the PCRA court to set aside his plea.[1] The PCRA court denied [Appellant's] Petition,

[1] In his first PCRA petition, Appellant complained that the district attorney violated the plea agreement by proffering a sentence recommendation despite his promise to remain silent at sentencing. PCRA Petition, 6/8/04, at ¶ 10. Therefore, Appellant sought relief in the form of vacating his sentence and imposing a lower sentence. ***Id.*** at ¶ 11. According to the PCRA court, Appellant "was shocked by the sentence" because "he wanted a sentence of probation." PCRA Court Opinion and Order, 10/28/04, at 3. Nevertheless, the PCRA court denied Appellant relief because "the district attorney's sentencing comments [did not have] any measurable effect on

after which [Appellant] filed an appeal to the Superior Court. The Superior Court reversed the Order of the PCRA court and permitted [Appellant] to withdraw his plea.[5]

[5] Nos. 1895, 1896 MDA 2004, judgment order filed June 28, 2005.

On November 17, 2005, the trial court accepted the withdrawal of [Appellant's] plea and set bail in the amount of $10,000. [Appellant] filed an omnibus pre-trial Motion on June 22, 2006. In that Motion, [Appellant] asked the trial court to dismiss the charges against him based upon a violation of Pennsylvania Rule of Criminal Procedure 600. In addition, [Appellant] sought the suppression of certain statements made by him at the police station. Finally, [Appellant] sought permission to introduce evidence of the victim's prior sexual conduct. On November 6, 2006, the trial court entered an Order denying [Appellant's] Motion. [Appellant] appealed that Order to the Superior Court, which dismissed the appeal on September 18, 2007. ***Commonwealth v. Johnson***, 938 A.2d 1115 (Pa. Super. 2007) (unpublished memorandum). The Pennsylvania Supreme Court denied allowance of appeal on March 26, 2008. ***Commonwealth v. Johnson***, 945 A.2d 168 (Pa. 2008).

Separate jury trials were held on May 15, 2008, for CR-544-2002, and on July 24, 2008 for CR-545-2002. At CR 545-2002, [Appellant] was convicted of one count each of rape, statutory sexual assault, sexual assault and furnishing liquor to minors, and two counts each of aggravated indecent assault and indecent assault. At CR 544-2002, he was convicted of two counts each of aggravated indecent assault, indecent assault and corruption of minors. The trial court sentenced [Appellant] to prison terms totaling seven to fourteen years. Thereafter, [Appellant] filed a timely appeal to the Pennsylvania Superior Court which denied his claims and affirmed the trial court[6]. On August 3, 2010, [Appellant's] Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied[7].

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the Court's sentencing decision" and a sentence of probation was not warranted "[g]iven the serious nature of the offenses and the sentencing guidelines for the standard range." ***Id.*** at 3-4.

[6] Nos. 2054, 2055 MDA 2008, filed November 18, 2009

[7] Nos. 176, 177 MAL 2010

> [Appellant's] motion for post conviction relief was timely filed on December 29, 2010, and following the appointment of counsel, the amended petition was docketed March 23, 2011. An evidentiary hearing was held on August 12, 2011.

PCRA Court Opinion, 6/7/12, at 1-3 (footnote 4 omitted).

The PCRA court denied Appellant's second petition on June 8, 2012. This appeal followed. Both Appellant and the PCRA court have complied with Pennsylvania Rule of Appellate Procedure 1925.

On appeal, Appellant presents two issues for our consideration:

> I. Did the PCRA Court err in holding that Plea Counsel Anthony Thomas effectively represented Defendant?
>
> II. Did the PCRA Court err in holding that Attorney Justin McShane provided effective assistance of counsel to Defendant?

Appellant's Brief at 4.

The standard of review applied in an appeal from the denial of PCRA relief is whether the findings of the PCRA court are supported by the record and free of legal error. ***Commonwealth v. Johnson***, 27 A.3d 244, 247 (Pa. Super. 2011). Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. ***Commonwealth v. Wilson***, 824 A.2d 331, 333 (Pa. Super. 2003), *appeal denied*, 576 Pa. 712, 839 A.2d 352 (2003). It is the PCRA petitioner's burden to prove, by a preponderance of the evidence, that

his conviction or sentence resulted from one or more of the enumerated circumstances found in 42 Pa.C.S.A. § 9543(a)(2). ***Johnson***, 27 A.3d at 247.

Here, Appellant asserts the ineffective assistance of two prior counsel pursuant to 42 Pa.C.S.A. § 9543(a)(2)(ii). There exists a presumption that counsel is effective, and the petitioner bears the burden of proving ineffectiveness. ***Johnson***, 27 A.3d at 247 (citation omitted). To prevail on an ineffective assistance of counsel claim, a petitioner must establish "(1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his client's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different." ***Id***. (citation omitted); ***see Commonwealth v. Pierce***, 515 Pa. 153, 527 A.2d 973 (1987) (outlining three-prong test for determining the effectiveness of an attorney's representation). Counsel cannot be deemed ineffective for failing to raise a meritless claim. ***Commonwealth v. Harris***, 578 Pa. 377, 387, 852 A.2d 1168, 1173 (2004). A petitioner's failure to satisfy any prong of the test for ineffectiveness requires rejection of the claim. ***Johnson***, 27 A.3d at 247.

Appellant alleges that two prior attorneys were ineffective in failing to communicate to him the foolishness of risking a greater sentence by

pursuing PCRA relief, withdrawing his guilty pleas, going to trial in both cases, and being convicted. Appellant's Brief at 13, 16. First, Appellant challenges the representation of plea counsel, Attorney Anthony Thomas:

> Attorney Thomas' ineffectiveness lies not in the result he achieved for [Appellant], but rather in his failure to educate [Appellant] concerning the spectrum of possible outcomes from wonderfully good to horribly bad, as well as the likelihood of possible outcomes along this spectrum.
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> * * *
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> Attorney Thomas' failure to educate [Appellant] as to the realistic expected outcomes to his cases led [Appellant] to take steps to withdraw his pleas and proceed to trial. Ultimately, this led to [Appellant] exchanging a two to four year aggregate sentence for a seven to 14 year aggregate sentence.
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> * * *
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> Keeping [Appellant] uninformed of the possible outcomes to his case, as well as what would be considered a good, bad or average outcome was not designed to advance [Appellant's] interests.
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> * * *
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> Had [Appellant] realized on the day of sentencing just how favorable his outcome was, he would [not have tried] . . . to undo what he believed was a very damaging and unexpected development.

Appellant's Brief at 14-16.

The PCRA court disposed of Appellant's claim against Attorney Thomas as follows:

> Although Attorney Thomas did not testify at the PCRA Hearing held on August 12, 2011, the Court finds that Appellant did not prove by a preponderance of the evidence that his representation was ineffective. Mr. Thomas assisted Appellant in

> receiving a two to four year sentence in exchange for nolo contendere pleas to two counts of aggravated indecent assault. The Court submits that this in no way prejudiced Appellant. In fact, after Appellant, with the assistance of different counsel, withdrew these pleas, he was convicted at trial and received a sentence of seven to fourteen years. Due to the circumstances surrounding this case, the Court believes that Attorney Thomas appropriately and effectively assisted Appellant in cooperating with the Commonwealth by entering into a plea agreement.

PCRA Court Opinion, 7/12/12, at 1.

Upon review, we conclude that the record supports the PCRA court's findings. Appellant baldly asserts that Attorney Thomas was ineffective in failing to "advise[] him of what a realistic outcome" could be. N.T., 8/12/11, at 56. Contrarily, the record indicates that Appellant signed a written plea colloquy in which he affirmed that he "discussed with [his] attorney the permissible range of sentences and/or fines that can be imposed for the offense or offenses" to which he pleaded *nolo contendere*. Nolo Contendere Plea Colloquy, 4/23/03, at ¶ 23. Furthermore, Appellant acknowledged at the PCRA hearing that he told "all these lawyers . . . even from day one with Anthony Thomas" that he was "factually innocent" of the charges; he also agreed that he was "the one that makes [the] decision." N.T., 8/12/11, at 68, 69. Moreover, Appellant acknowledged that Attorney Ferguson, the PCRA court, and the district attorney all advised him before he withdrew his plea that he risked a greater sentence if he went to trial. ***Id.*** at 59-63.

In sum, Appellant's adamant statements of innocence, along with cautionary advice from counsel, the district attorney, and the PCRA court

indicate that, despite the risk, Appellant was determined to vindicate his innocence and obtain an even lower sentence.[2] Having failed, Appellant blamed Attorney Thomas for not informing him, like current PCRA counsel, "that it would have been beyond foolish to withdraw a 2 to 4 plea [when] you are looking to at least get maybe 10." N.T., 8/12/11, at 60. However, Appellant has not demonstrated that, but for Attorney Thomas' failure to speak as concretely as current PCRA counsel did, the outcome of his case would have been different. Accordingly, we discern no error in the PCRA court's legal conclusion that Attorney Thomas provided effective representation.

In his second issue, Appellant contends that his first PCRA counsel, Attorney Justin McShane, also provided ineffective assistance:

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[2] Although Appellant has not challenged Attorney Ferguson's representation on appeal, the latter's testimony provides relevant information about Appellant's intention to proceed with a new trial:

> If I do recall [Appellant's] conversation, it was one of there [sic] was some degree of adamancy that he felt he could win at trial. And if that is the case, I am not going to dissuade someone who is asserting their innocence, despite whatever the facts may have been. Maybe he had some defenses to the [confessions].
>
> * * *
>
> I know that my conversation with [Appellant], that he was quite clear as to what his decision was; that he wanted to have a trial of the matter. And -- I was not going to dissuade someone from a trial, if that was what their position is.

N.T., 8/12/11, at 18, 20.

> [R]ather than advising [Appellant] that he had received a dream outcome, Attorney McShane . . . advised [Appellant] that Attorney McShane had the knowledge and skills, which would allow [Appellant] to win at trial.
>
> * * *
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> Given all the factors in this case, Attorney McShane should have informed [Appellant] that it was in his best interests to maintain the status quo.
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> * * *
>
> Were it not for Attorney McShane's actions and inactions, [Appellant] would have long ago maxed out his far more lenient, original two to four year aggregate sentences. Accordingly, [Appellant] suffered prejudice. . . .

Appellant's Brief at 17, 20, 22.

The PCRA court disposed of Appellant's claim against Attorney McShane as follows:

> [Appellant's] claims against Attorney McShane do not satisfy the three-part test established by the Pennsylvania Supreme Court for ineffective assistance of counsel. *Pierce*, 527 A.2d at 975-76. First, his claims do not have arguable merit. Mr. McShane's testimony at the PCRA hearing established he did not "all but guarantee" trial victories in both cases. In fact, Mr. McShane produced handwritten notes (Commonwealth's Exhibit No. 1) at the hearing establishing otherwise. April Johnson, [Appellant's] wife, provided these notes to Mr. McShane during a face-to-face meeting she had with him regarding her husband's case. Confirming Mr. McShane's contention that he explicitly told Mrs. Johnson that here are ***no*** guarantees, she wrote on her note, "no guarantee," and "11/19/04, submitting appeal to Supreme Court." This court finds Mr. McShane did not express any guarantees to [Appellant] or his wife, and thus [Appellant's] claim has no arguable merit.
>
> Second, Mr. McShane's testimony indicated his trial strategy was designed at advancing [Appellant's] goals and

> interests. He had the "very limited goal" that was first requested by [Appellant's] family and later confirmed by [Appellant]. That goal was to secure [Appellant] a new trial. (PCRA Hearing Tr. 25:19-21). Mr. McShane disclosed the risk of going to trial to [Appellant] and explained that things "could be much worse in terms of a sentence if he were to lose completely at trial because he had gotten a negotiated plea…" (PCRA Hearing Tr. 35: 24-25; 36:1). That being said, [Appellant's] continuous assertion of his factual innocence, along with his contention that he was coerced into giving a statement to the police, resulted in Mr. McShane's strategy.
>
> Mr. McShane explained that part of his strategy at trial would be to "poke holes" in the confessions given by [Appellant] to the police to show that they weren't genuine or voluntary. (PCRA Hearing Tr. 28: 1-2). As he described his experience with cases involving a confession like [Appellant's], Mr. McShane asserted he was confident he could effectively represent [Appellant] at trial. Mr. McShane did not end up representing [Appellant] in his trial, however the Court finds he did achieve [Appellant's] goals and effectively represent his interests leading up to the trial. Unlike in *Lafler v. Cooper*, [132 U.S. 1376 (2012),[3]] [Appellant] had already accepted a negotiated plea prior to Mr. McShane's representation. He had been incarcerated for close to the minimum length of his sentence. Although Mr. McShane did not explicitly tell [Appellant] he received a "dream outcome" with his plea, he did explain there was no guarantee [Appellant] would be successful at trial, and that there was a possibility of a harsher sentence. After

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[3] Appellant relies on ***Lafler v. Cooper***, 132 U.S. 1376 (2012), for the proposition that Attorney McShane was ineffective. Appellant's Brief at 17. Like the PCRA court, we consider ***Lafler*** factually distinguishable from Appellant's situation. In ***Lafler***, defense counsel erroneously informed the defendant that he could not be convicted of attempted murder for shooting the victim in the buttocks. Hence, counsel advised the defendant to reject a plea offer. At trial, the district attorney successfully argued that the defendant was simply a bad shot. A jury convicted the defendant, who then received a harsher sentence than he would have under the plea offer. Here, Attorney McShane's representation post-dated the highly favorable negotiated plea. Moreover, Appellant acknowledges that Attorney McShane "did not directly advise [him] to seek to withdraw his pleas and proceed to trial." Appellant's Brief at 18.

> considering these risks, [Appellant] still decided to withdraw his plea and communicated that decision to Mr. McShane, who then succeeded in obtaining a new trial.
>
> Lastly, [Appellant] was not prejudiced by Mr. McShane's representation. As [Appellant] maintained his innocence, he was afforded a full jury trial and all of his guaranteed rights were protected. [Appellant] was fully aware of the risks of proceeding with a trial and chose to withdraw his plea agreement notwithstanding the possible consequences of that decision. Mr. McShane's representation did not prejudice [Appellant]. He obtained a fair []trial for a client who desired to have a jury decide his fate.

PCRA Court Opinion, 6/7/12, at 5-6.

Upon review, we conclude that the record supports the PCRA court's findings. N.T., 8/12/11, at 22-23, 25-32, 34-36, 39, 43, 47-48, 51-52. Notably, Appellant acknowledged telling Attorney McShane that he was "factually innocent" of the charges. N.T., 8/12/11, at 57. Appellant also acknowledged Attorney McShane's advice that a jury could find him guilty; there were no guarantees. ***Id.*** at 58. Then Appellant testified that, when he was in court to announce a decision about withdrawing his plea, the judge explained he could get more time and what his legal position would be if he withdrew the plea. ***Id.*** at 59-60. After additional questioning by the district attorney and the PCRA court, Appellant finally conceded that Attorney Ferguson, the district attorney, and the PCRA court all told him he could face more time if convicted at trial. ***Id.*** at 60-67. He also agreed that he is "the one that makes [the] decision." ***Id.*** at 69.

Based on the foregoing, we repeat that Appellant's adamant statements of innocence, along with cautionary advice from counsel, the district attorney, and the PCRA court indicate that, despite the risk, Appellant was determined to vindicate his innocence and obtain an even lower sentence. Having failed, Appellant blamed Attorney McShane for not "disabus[ing] [him] of his belief that he had received an unjustly harsh result and inform[ing] [Appellant] that he was lucky to receive the outcome he did." Appellant's Brief at 18. However, Appellant has not demonstrated that, but for Attorney McShane's failure to follow Appellant's script, the outcome of his case would have been different. Accordingly, we discern no error in the PCRA court's legal conclusion that Attorney McShane provided effective representation.

Order affirmed.