

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
TERRY L. LANIER,		
Appellant		No. 121 EDA 2012

Appeal from the PCRA Order November 23, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1007181-2005

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY BENDER, J.:

Filed: February 5, 2013

Appellant, Terry L. Lanier, appeals from the November 23, 2011 order denying his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

The PCRA court set forth the facts of this case as follows:

The Complainant testified that she and her two (2) sisters came to live with their biological mother and [Appellant], her mother's boyfriend, when she was in the fourth grade. She and her sisters had been placed in foster care when they were babies.

In December [of] 1996, when the Complainant was twelve (12) years old, [Appellant] and the Complainant were playing on the floor of the living room. The Complainant's mother and sisters were upstairs asleep. The Complainant was in her pajamas. [Appellant] began touching the Complainant's breasts on top of and underneath her pajama top. [Appellant] went

* Retired Senior Judge assigned to the Superior Court.

upstairs and came back down to the living room. [Appellant] began touching the Complainant's breasts again. [Appellant] took off the bottom part of her pajamas and her underwear. The Complainant was lying on the floor on her back; [Appellant] was on top of her. [Appellant] put his mouth on her vagina.

After that first incident, while the Complainant was still twelve (12) years old until she was thirteen (13) years old, the sexual assaults escalated. [Appellant] progressed from putting one finger or two fingers inside the Complainant's vagina, to taking off his clothes and putting the Complainant's mouth on his penis and finally to sexual intercourse. The incidents occurred when the Complainant's mother was at work or when the Complainant's mother and sisters were sleeping. The Complainant's mother, who had a drug addiction[,] left the Complainant and her two (2) sisters in the house with [Appellant] and failed to return just before the Complainant turned fourteen (14) years old.

The Complainant was impregnated by [Appellant] the first time when she was fifteen (15) or sixteen (16) years old. At that time, [Appellant] took the Complainant for an abortion. [Appellant] told the Complainant that if she told anyone about the pregnancy, he would [be] arrested and she would go back to the foster home. The Complainant was impregnated by [Appellant] a second time when she was seventeen (17) years of age. The Complainant delivered a baby boy. It is undisputed that [Appellant] is the biological father of the Complainant's son.

The Complainant moved out of [Appellant's] house during her pregnancy [and] into a homeless shelter. Eventually she moved into a government subsidized apartment with her son and youngest sister. [Appellant] visited her apartment and continued to have sex with the Complainant. On one occasion, [Appellant] dragged the Complainant into her bedroom against her will and forced the Complainant to perform oral sex on him and raped her vaginally and anally. The Complainant told her youngest sister and a friend.

The Complainant eventually disclosed the abuse in a session with a therapist that her younger sister was seeing and told [the therapist] everything that [Appellant] had done to her. That same day, the Complainant went to the police and gave a statement.

PCRA Court Opinion, 7/31/12, at 3-4 (citations to the record omitted).

Based on these facts, a jury convicted Appellant of rape, involuntary deviate sexual intercourse (IDSI), statutory sexual assault, aggravated indecent assault, endangering the welfare of a child, and corrupting a minor.¹ Appellant was sentenced on June 15, 2007, to an aggregate term of ten to twenty years' incarceration, followed by ten years' probation. Appellant appealed and, after this Court affirmed his judgment of sentence on June 25, 2008, our Supreme Court denied his petition for permission to appeal on February 13, 2009. ***Commonwealth v. Lanier***, 959 A.2d 463 (Pa. Super. 2008) (unpublished memorandum), *appeal denied*, 965 A.2d 245 (Pa. 2009). Thus, Appellant's judgment of sentence became final on May 14, 2009. ***See*** 42 Pa.C.S. § 9545(b)(3) (judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review); ***Commonwealth v. Owens***, 718 A.2d 330, 331 (Pa. Super. 1998) (under the PCRA, petitioner's judgment of sentence becomes final ninety days after our Supreme Court rejects his or her petition for allowance of appeal since petitioner had ninety additional days to seek review with the United States Supreme Court).

On April 23, 2010, Appellant filed a *pro se* PCRA petition. Counsel was appointed and an amended petition was filed. After issuing a Pa.R.Crim.P.

¹ Appellant was also charged with sexually abusing the Complainant's younger sister, but the jury acquitted him of those offenses.

907 notice of its intent to dismiss Appellant's petition, on November 23, 2011, the court issued a formal order dismissing Appellant's PCRA petition without a hearing. Appellant filed a timely notice of appeal, as well as a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, he raises two issues for our review:

- I. Whether the judge was in error in denying [] Appellant's PCRA petition without an evidentiary hearing on the issues raised in the amended PCRA petition regarding trial counsel's ineffectiveness[?]
- II. Whether the judge was in error in not granting relief on the PCRA petition alleging counsel was ineffective[?]

Appellant's Brief at 8.

We begin by noting that "[t]his Court's standard of review from the grant or denial of post-conviction relief is limited to examining whether the lower court's determination is supported by the evidence of record and whether it is free of legal error." *Commonwealth v. Morales*, 701 A.2d 516, 520 (Pa. 1997) (citing *Commonwealth v. Travaglia*, 661 A.2d 352, 356 n.4 (Pa. 1995)). Because our analysis of Appellant's second issue, in which he raises claims of ineffective assistance of counsel (IAC), implicates whether the PCRA court erred in not holding an evidentiary hearing, we will examine Appellant's IAC claims first. Our Supreme Court has stated that:

[A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the "[i]neffective 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."

Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner. To obtain relief, a petitioner must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the petitioner. A petitioner establishes prejudice when he demonstrates "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ... [A] properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel's act or omission.

Commonwealth v. Johnson, 966 A.2d 523, 532-33 (Pa. 2009) (citations omitted).

Appellant first argues that he received ineffective representation at his preliminary hearing. To briefly summarize Appellant's argument, he claims that due to a conflict of interest, the county public defender association refused to represent him. Ostensibly, Appellant informed the court of these circumstances at his preliminary hearing, but the court nevertheless appointed a public defender present in the courtroom to represent Appellant at that hearing. Appellant contends that not only was there still a conflict of interest between Appellant and this public defender, but this attorney also did not have an opportunity to review Appellant's case or speak to Appellant prior to the preliminary hearing. Thus, Appellant maintains that he received IAC at the preliminary hearing stage of his case.

This Court has made clear that "when a claim for PCRA relief relates to stewardship of trial counsel, counsel's actions must implicate the truth-determining process in order to be facially cognizable." ***Commonwealth v.***

Lassen, 659 A.2d 999, 1007 (Pa. Super. 1995) (citing *Commonwealth v. Moody*, 654 A.2d 1120 (Pa. Super. 1995)). “Claims relating to trial counsel’s stewardship at a preliminary hearing are not cognizable since the truth-determining process is not implicated.” *Id.* (citing *Commonwealth v. Lyons*, 568 A.2d 1266 (Pa. Super. 1989) (allegations relating to defective preliminary hearing are not cognizable under PCRA)). Therefore, Appellant’s claim that he received IAC at his preliminary hearing is not a cognizable argument under the PCRA.

Moreover, as the Commonwealth points out, because Appellant was tried and found guilty by a jury, any deficiency in the preliminary hearing procedure was harmless and/or moot. *See Lyons*, 568 A.2d at 1268. Thus, even if this IAC claim were cognizable, we would conclude that the truth-determining process was not impaired by counsel’s alleged ineffectiveness and, thus, the PCRA court did not err in denying Appellant’s petition.

Next, Appellant argues that he received IAC at his trial because his attorney “never discussed the case with him, interviewed witnesses [or] discussed trial strategy.” Appellant’s Brief at 18. Appellant maintains that counsel could have no reasonable strategic basis for his decision not to investigate or consult with Appellant. Additionally, Appellant contends he “was prejudiced because counsel decided not to present a defense,” thus resulting in the jury only hearing the Commonwealth’s evidence with no rebuttal by the defense. *Id.* at 19.

The PCRA court concluded that Appellant's arguments were impermissibly "abstract" and "fail[ed] to identify what course of action by trial counsel would have better served his interest." PCRA Court Opinion, 7/31/12, at 7 (citing *Commonwealth v. Cook*, 952 A.2d 594, 614 (Pa. 2008) ("[t]his Court will not consider abstract allegations of ineffectiveness; a specific factual predicate must be identified to demonstrate how a different course of action by trial counsel would have better served [the petitioner's] interest")). We agree. Appellant does not explain what investigative acts counsel failed to undertake, what an investigation would have revealed, and how it would have changed the outcome of his trial. Furthermore, while Appellant argues that his attorney ineffectively failed to communicate or consult with him, Appellant does not discuss what information he would have provided to counsel that would have impacted his case. Finally, while Appellant alleges that his counsel was ineffective for failing to interview witnesses, he does not name one witness that should have been questioned. Appellant also omits any discussion of what information these unnamed witnesses would have provided.

In light of the fact that Appellant's first IAC claim is not cognizable under the PCRA, and his second IAC issue fails to adequately specify counsel's ineffective conduct and/or what counsel should have done differently, we conclude that Appellant has not presented any genuine issue of material fact warranting an evidentiary hearing. *See Commonwealth v. Johnson*, 945 A.2d 185, 188 (Pa. Super. 2008) (citation omitted) ("a

petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings"). Accordingly, the PCRA court did not err in denying Appellant's petition for post conviction relief.

Order affirmed.