

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

J.T.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1314 EDA 2012

Appeal from the PCRA Order November 5, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0205631-2005, CP-51-CR-0703621-
2004

BEFORE: BENDER, BOWES, and LAZARUS, JJ.

MEMORANDUM BY BOWES, J.:

FILED MAY 08, 2013

J.T. appeals from the November 5, 2010 order denying him PCRA relief. We affirm.

The present appeal involves two criminal actions. On January 24, 2008, Appellant entered a *nolo contendere* plea at both actions to two counts of involuntary deviate sexual intercourse ("IDSI"). The transcript of the plea proceeding is not contained in the certified record, but we have ascertained the underlying facts from the complaints. At CP-51-CR-0703621-2004, the criminal complaint indicates the following. On November 26, 2002, a social worker from the Philadelphia Department of Human Services, took then-ten-year-old complainant S.M. to police. S.M. reported that Appellant, her stepfather, had repeatedly placed his penis

against her buttocks, attempted to enter it, and ejaculated. Appellant also placed his penis against her legs. That behavior had been occurring since S.M. was eight years old. At CP-51-CR-0205631-2005, the seven-year-old victim was D.W., a relative of Appellant. She reported to police that on numerous occasions, Appellant placed his penis inside her anus. After tendering the no-contest plea to two counts of IDSI, Appellant was sentenced to two concurrent terms of confinement of five to ten years followed by concurrent terms of ten years probation. The trial court and Appellant indicate that Appellant was adjudicated a sexually violent offender at the sentencing hearing that immediately followed entry of the plea.

Appellant filed a *pro se* PCRA petition on September 5, 2008 alleging that he asked counsel to file an appeal from the Megan's Law registration requirements and the "duplicitously [sic] charged offenses." PCRA Petition, 9/5/08, at 3. Counsel was appointed and filed an amended PCRA petition that reiterated the allegations that Appellant told plea counsel to "challenge his sentence and to take an appeal from the **Megan's Law** finding. He also requested that counsel take an Appeal from the alleged conviction for 'Duplicitous [sic] Offenses.'" Amended PCRA Petition, 3/31/10, at ¶ 11.

A hearing was held on the petition on November 5, 2010. At that time, Appellant did not state that he asked his plea counsel to file an appeal. The entirety of Appellant's direct examination at the PCRA hearing was as follows:

Q. Keep your voice up. At some point in the past, were you charged with sex offenses and come to be represented by Murray Dolfman, Esquire?

A. Yes, I did.

Q. Was your case assigned to the Court by the Honorable Steven Geroff?

A. Yes, I was.

Q. Eventually did you enter pleas on both cases?

A. Yes, I did.

Q. Eventually, were you sentenced?

A. Yes, I was.

Q. Do you remember the term of years you were sentenced to?

A. Yes. Both terms were 5 to 10, 5 years to 7 months to 10 years, 7 months.

Q. Were you also determined to be a sexually violent predator?

A. Yes.

Q. What, if anything, did you do to bring to the attention of Mr. Dolfman that you might want to seek further relief?

A. During the day of sentencing I sat beside Mr. Dolfman and asked him to file post sentence motions before I was taken out and he told me he would see to it. Two [sic] later I called him as well as sent him a letter, I don't have a copy.

I did speak to the secretary. He was not available at the time and I called again one day before being taken into State custody. And once again I was told by the secretary he is not available.

Q. What was the purpose of your wishing to proceed with the post sentence motion?

A. The first thing was because of the fact that I felt the charges were duplicate. I felt that was not the criminal [sic] I committed.

Q. Were you seeking any other relief?

A. Yes, the terms of the Megan's Law Registration.

Q. Were you seeking any other relief?

A. Other than that, no.

Q. And did you ever hear back from Mr. Dolfman?

A. No, I have not.

Q. When were you originally incarcerated after being taken out of Judge Geroff's courtroom?

A. In the Philadelphia County prison system at Philadelphia Detention Center.

Q. Sitting here right now, do you recollect the dates that you may have moved out of the Detention Center?

A. Yes, January 29.

Q. Did you ever see a letter from Mr. Dolfman dated January 29?

A. No, nor before then.

Q. What, if anything, did you do after you were moved out of Philadelphia County to a State prison?

A. Repeat that question again, please?

Q. After you were moved from the County prison onto the State prison, what if anything did you do regarding Mr. Dolfman or a possible motion or appeal?

A. At that time I didn't do anything until later in the year I did more research as far as, you know, the charges and everything. And I decided to file the PCRA.

N.T. Hearing, 11/5/10, at 4-6.

To summarize, Appellant indicated that, "During the day of sentencing[,] I sat beside [plea counsel] and asked him to file post sentence motions before I was taken out and he told me he would see to it." *Id.* at 5. Appellant delineated that he wanted counsel to raise "the fact that I felt the charges were duplicate," and that he wanted relief from "the terms of the Megan's Law Registration" in the form of a reduction of reporting time. *Id.*

At the end of the hearing, Appellant asked for reinstatement of his appellate rights *nunc pro tunc*. This request was denied on the ground that the trial court did not have the power to accord Appellant relief from the reporting requirements of Megan's Law. The court entered the order denying Appellant's PCRA petition on November 5, 2010. Since proper notice of that order was not disseminated, Appellant was granted the right to appeal *nunc pro tunc* from the November 5, 2010 order denying him PCRA relief.

In this ensuing appeal, Appellant asks, "Did the Honorable Post Conviction Relief Act (PCRA) Court legally err or abused [sic] its discretion in dismissing the Defendant's Amended PCRA Petition after hearing, and where the Defendant demonstrated that he had asked previous counsel to file a post sentence motion and a notice of appeal, but where counsel failed and

refused to do so?" Appellant's brief at 3. Our standard of review in this appeal is settled. "In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination is supported by the evidence and free of legal error." ***Commonwealth v. Thomas***, 44 A.3d 12, 16 (Pa. 2012).

Initially, we must dissect Appellant's position into two distinct aspects: first, whether a direct appeal was requested; and second, whether Appellant sought the filing of a post-sentence motion. Appellant suggests that he asked plea counsel to file both a post-sentence motion and a direct appeal. Appellant's brief at 8. However, there was no testimony to the latter effect at the PCRA hearing.

Appellant distinctly testified that he asked plea counsel to file a post-sentence motion. However, as the above-quoted transcript indicates, Appellant never mentioned a direct appeal. This distinction is critical because when counsel fails to file a requested direct appeal, that default is considered ineffectiveness *per se* and entitles a defendant to reinstatement of his appellate rights *nunc pro tunc*. ***Commonwealth v. Lantzy***, 736 A.2d 564 (Pa. 1999); ***see also Commonwealth v. Markowitz***, 32 A.3d 706 (Pa.Super. 2011). Hence, as Appellant notes in his brief, if plea counsel failed to file a requested direct appeal, Appellant would automatically be entitled to an appeal *nunc pro tunc* and would not have to establish the merits of any claim that he would have presented during that appeal.

Meanwhile, as discussed *infra*, a request that counsel file a post-sentence motion is analyzed under the standard ineffectiveness rubric.

We do make the following observation. In light of the procedural history of this matter, it would have been critical, in order to have the benefit of a merits review on direct appeal, that a post-sentence motion be filed. This conclusion flows from the fact that Appellant simultaneously entered a guilty plea and was sentenced. Unless some objection was made at the plea/sentencing, Appellant would have no viable issue on appeal because, absent the filing of a post-sentence motion, he would not have preserved any issues for purposes of appeal. Further, Appellant makes no allegation herein that any issues were preserved during that proceeding.

Thus, even if Appellant was successful in obtaining reinstatement of direct appeal, as requested in this appeal, all of Appellant's claims would be deferred to collateral review in that appeal since all of Appellant's allegations would have to be presented under the auspices of ineffective-assistance-of-counsel due to plea counsel's failure to preserve any issues for review through the filing of a post-sentence motion. ***See Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002). Indeed, it is this concern that generated our subsequently overruled decision in ***Commonwealth v. Liston***, 941 A.2d 1279 (Pa.Super. 2008) (*en banc*), *rev'd*, 977 A.2d 1089 (Pa. 2009), wherein we held that if a defendant establishes that counsel ignored the defendant's request for a direct appeal, then the defendant is entitled to both

reinstatement of his direct appeal rights and reinstatement of his ability to file a post-sentence motion *nunc pro tunc*.

We are aware that, in his PCRA petition, Appellant stated that he asked plea counsel to file a direct appeal. However, Appellant failed to testify at the PCRA hearing to this effect. This omission is critical in that, under the PCRA, to be eligible for relief, the petitioner “must plead **and prove** by a preponderance of the evidence” that he is entitled to PCRA relief. 42 Pa.C.S. § 9543(a) (emphasis added).

While Appellant pled that he asked for a direct appeal, he did not prove it. Moreover, since Appellant bears the burden of proof in the PCRA setting, we discount his suggestion that he is entitled to a direct appeal merely because the Commonwealth failed to present the testimony of Appellant’s plea counsel to rebut Appellant’s testimony. The Commonwealth did not bear any burden in these proceedings. It was incumbent upon Appellant to make the correct proffer, and Appellant failed to do so. While Appellant attempts to muddle the issue by intermixing his positions that he asked for a post-sentence motion and a direct appeal, he did not testify that he asked that a direct appeal be filed. Moreover, as noted, unless Appellant can obtain reinstatement of his right to file a post-sentence motion, a direct appeal would appear to be an exercise in futility.

We thus examine the second aspect of Appellant’s claim for relief in this appeal, which is that he should be accorded the right to file a post-

sentence motion *nunc pro tunc*. In this connection, Appellant is not entitled to automatic relief, counsel is not considered ineffective *per se*, and Appellant must establish all three aspects of an ineffectiveness claim. ***Commonwealth v. Liston***, 977 A.2d 1089 (Pa. 2009); ***Commonwealth v. Reaves***, 923 A.2d 1119 (Pa. 2007); and ***Commonwealth v. Fransen***, 986 A.2d 154 (Pa.Super. 2009).

Thus, in order to establish that plea counsel was ineffective for neglecting to file a post-sentence motion, Appellant must establish “(1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act.” ***Commonwealth v. Rykard***, 55 A.3d 1177, 1189-90 (Pa.Super. 2012). As noted, Appellant was disgruntled due to the length of his registration requirements and the purported duplication of criminal charges, and he wanted plea counsel to seek post-sentence relief on these two bases.

Neither issue presented has merit. Under 42 Pa.C.S. § 9795.1(b) (2) (i) and (b)(3), “The following individuals shall be subject to lifetime registration . . . [i]ndividuals convicted in this Commonwealth of . . . 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse) [and] . . . [s]exually violent predators.” Appellant was subject to lifetime registration both due to his conviction of IDSI and based upon his adjudication as a sexually violent predator. He could not obtain relief from

the lifetime registration requirements of Megan's Law. Additionally, the charges herein were not duplicate. Appellant pled guilty at two different criminal action numbers with two different victims. Thus, Appellant would not have obtained relief based on either contention in a post-sentence motion. Therefore, plea counsel was not ineffective for failing to litigate such a motion in this case.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambetta", written over a horizontal line.

Prothonotary

Date: 5/8/2013