

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

LARRY WOODSON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1378 MDA 2011

Appeal from the Order Entered June 30, 2011
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s): CP-40-CR-0002033-2007

BEFORE: OLSON, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.

Filed: March 12, 2013

Larry Woodson appeals from the order entered on June 30, 2011 in the Court of Common Pleas of Luzerne County, which dismissed his petition, filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541–9546. On October 10, 2008, a jury convicted Woodson of three counts each of possession of a controlled substance (cocaine), possession with intent to deliver (cocaine) ("PWID"), and conspiracy PWID (cocaine).¹ A sentencing hearing was held on November 19, 2008 and the court

* Former Justice specially assigned to the Superior Court.

¹ 35 P.S. §§ 780-113(a)(16), 780-113(a)(30), and 18 Pa.C.S. § 903(a)(1), respectively.

imposed an aggregate sentence of 210 to 420 months² incarceration. Woodson's judgment of sentence was upheld by a panel of this Court on April 9, 2010.³ Woodson filed *pro se* a PCRA petition on June 30, 2010. PCRA counsel was appointed on July 27, 2010. Subsequently counsel filed a supplemental petition on August 23, 2010 and memorandum on September 16, 2010. The PCRA court held hearings on December 7, 2010 and February 23, 2011.

The PCRA court aptly summarized the procedural history in its opinion denying the petition and we adopt its recitation. **See** PCRA Court Opinion, 6/30/2011 at 1-3.

On appeal, Woodson claims his trial counsel failed to: 1) argue, at sentencing or in post sentence motions, the theory of sentencing entrapment; and 2) challenge the charges and convictions for conspiracy as a legal nullity.⁴ After review of the record, submissions of Woodson,⁵ and the applicable law, we affirm.

² 17½ to 35 years. The court imposed consecutive 35 months to 70 months sentences on each of the PWID and conspiracy counts. The possession counts merged with the PWID counts for sentencing purposes.

³ 2108 MDA 2008.

⁴ Although the Pa.R.A.P. 1925(b) concise statement raises five issues, Woodson briefed only issues numbers four and five. Issues number one through three are waived. **Commonwealth v. Montalvo**, 956 A.2d 926, 931 (Pa. 2008) (issues raised in Pa.R.A.P. 1925(b) statement were waived because appellant failed to brief them).

"In reviewing the propriety of the PCRA court's dismissal of the petition, we are limited to determining whether the court's findings are supported by the record and whether the order in question is free of legal error." ***Commonwealth v. Holmes***, 905 A.2d 507, 509 (Pa. Super. 2006), *appeal denied*, 917 A.2d 845 (Pa. 2007). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Id.*** "Credibility determinations are the province of the PCRA court. We are bound by that court's credibility determinations where, as in the case at bar, there is support for them in the record." ***Commonwealth v. Battle***, 883 A.2d 641, 648 (Pa. Super. 2005), *appeal denied*, 902 A.2d 1238 (Pa. 2006).

Moreover, it has long been recognized to establish counsel's ineffectiveness, a PCRA petitioner must demonstrate: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action chosen; and (3) counsel's action or inaction prejudiced the petitioner. ***See Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987). "Failure to meet any prong of the test will defeat an

(Footnote Continued) _____

⁵ Because the Commonwealth failed to timely file a brief we will not consider it herein.

ineffectiveness claim." *Commonwealth v. Wright*, 961 A.2d 119, 149 (Pa. 2008).

We first must examine whether counsel's failure to raise the doctrine of sentence entrapment is a claim of arguable merit. Sentencing entrapment "occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped in[to] committing a greater offense subject to greater punishment." *Commonwealth v. Paul*, 925 A.2d 825, 830 (Pa. Super. 2007) (quotation marks omitted). It has been long settled that a defendant seeking sentence reduction based on sentencing entrapment must show the existence of outrageous government conduct or extraordinary government misconduct which is designed to and results in an increased sentence for the defendant. *Commonwealth v. Petzold*, 701 A.2d 1363, 1366 (Pa. Super. 1997).

Simply put, sentencing entrapment/manipulation is difficult to prove; it is not established simply by showing that the idea originated with the government or that the conduct was encouraged by it, . . . **or that the crime was prolonged beyond the first criminal act** . . .or exceeded in degree or kind what the defendant had done before.

Id. at 1367 (quotation marks omitted)(emphasis added).

Woodson claims his trial counsel, Brian Corcoran, Esquire, was ineffective "for failing to raise, during the sentencing and post sentence stages, the doctrine of sentence entrapment. Appellant's Brief at 8. Woodson argues the outrageous or extraordinary conduct by the

Commonwealth is he could have been arrested following his first sale of cocaine but “his crime was prolonged beyond the first criminal act for no other purpose except to add charges to his case.” Appellant’s Brief at 8. ***Petzold***, specifically addresses and precludes this argument. Nonetheless Woodson failed to prove how three rather than one drug buy was outrageous or extraordinary. In our review of the record, we failed to find any facts, which would prove outrageous or extraordinary conduct by the Commonwealth. Because the sentencing entrapment argument lacks arguable merit, Woodson cannot prove the first prong of an ineffectiveness claim and his first issue fails.

In his second issue, Woodson contends trial counsel was ineffective for failing to challenge the charges and convictions for conspiracy on the theory it was a legal nullity. Again, Woodson must prove the three elements for ineffective assistance of counsel as set forth above.

The relevant statutory language for conspiracy is clear and controlling.

(a) Definition of conspiracy.--A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

18 Pa.C.S. § 903.

Woodson asserts a shared criminal intent between two parties is required for there to be a conspiracy. Woodson argues because the

confidential informant ("CI"), was acting as an agent of the government he lacked the requisite intent to commit the crime and therefore could not be part of a conspiracy. Because there are no Pennsylvania appellate opinions on point Woodson reasons "case law in both the Common Pleas level [Crawford County] and in the federal system support such a theory."⁶ Appellant's Brief at 13. We do not agree with Woodson's position. First, this Court is not bound by a decision of a court of common pleas. Second, the Crawford County and federal cases involve conspiracy charges based solely on conversations with a government informant. Woodson however, after agreeing with the CI to deliver cocaine then delivered the cocaine.

Despite a lack of case law there is statutory authority directly on point in 18 Pa.C.S. § 904(a)(2) which states:

(a) General rule.--Except as provided in subsection (b) of this section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(2) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

18 Pa.C.S. § 904.

⁶ *Commonwealth v. Munno*, 24 Pa. D. & C.4th 380 (Pa.Com.Pl. 1993), *Sears v. U.S.*, 843 F.2d 139, 142 (5th Cir. 1965) and *U.S. v. Kelly*, 888 F.2d 732, 740 (11th Cir. 1989). We note the *Munno* case cites the federal cases.

The statute does not require all parties have criminal intent.⁷ It is sufficient to prove that Woodson had the intent to commit or have others engage in criminal activity. The issue of whether there was sufficient evidence to convict Woodson for conspiracy was addressed on direct appeal by a panel of this Court. That panel stated, “we have carefully reviewed the record and conclude that it contains ample evidence with which to form a conclusion beyond a reasonable doubt that Woodson is guilty of the crimes charged.” *Commonwealth v. Woodson*, 998 A.2d 1003 (Pa. Super. 2010)(unpublished memorandum) at 4. As the legal nullity contention lacks arguable merit, Woodson cannot prove the first prong of an ineffectiveness claim and his second issue fails.

Order affirmed.

Fitzgerald, J., files a dissenting statement.

⁷ 18 Pa.C.S. § 904(a)(2) is based upon Section 5.04 of the Model Penal Code which contains the following Explanatory Note: Subsection (1) provides for two contingencies that are made immaterial to liability for solicitation or conspiracy. Paragraph (a) deals with offenses that can be committed only by a person who occupies a particular position or has a particular characteristic. The failure of the actor or the person whom he solicits or with whom he conspires to occupy the position or have the characteristic is immaterial if he believes that one of them does and that the offense will thereby be committed. Paragraph (b) provides a similar result in cases where the person solicited or the person with whom the actor conspires has a defense of irresponsibility or immunity that he can assert. Consistent with the Code approach to conspiracy and solicitation, the actor's liability is not affected by these factors, which are extraneous to his culpability.