NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MARC A. PENNOCK,	:	
	:	
Appellant	:	No. 1607 EDA 2012

Appeal from the Order Entered August 30, 2010,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0408401-2006.

BEFORE: FORD ELLIOTT, P.J.E., BENDER and SHOGAN, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED FEBRUARY 07, 2014**

This matter is again before this Court following remand. Appellant, Marc A. Pennock, appeals *nunc pro tunc* from the order entered on August 30, 2010, dismissing his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The background of this matter was previously set forth by a panel of this Court as follows:

> On January 5, 2006 at approximately 9:00 p.m., Allen Phillips was driving a cab and picked up Pennock and Marcus Dicks. The two men entered the cab with shopping bags. Dicks told Phillips to take them to Greene and Duval Streets in Philadelphia. When Phillips arrived at the location, Dicks instructed Phillips to drive behind a high-rise apartment building because "that's where the VIP's go in at." Phillips drove behind the building. When he turned to the passengers to collect the

cab fare, he saw that Dicks had a gun pointed a foot away from his head. Dicks ordered Phillips to turn over all of his money and Phillips gave him $60.00.

While Dicks was yelling at Phillips, Pennock got out of the car and opened the driver's door. Pennock, with knife in hand, ordered Phillips out of the car. Phillips got out of the car and told Pennock to look up at the windows because people were watching them from above. Phillips then put his hand in his jacket and pretended to be retrieving a weapon. Pennock started to run away. Dicks started to shoot towards Phillips, who hid behind a car. Dicks fired four shots and ran away. Once both assailants had left the scene, Phillips returned to his cab and called his dispatcher, who then called the police.

Officer Jason Branyan received a report of a robbery in the area of his patrol. He saw two males, Pennock and Dicks, who matched the radio description walking about three blocks from the scene of the robbery. As Officer Branyan approached the men he saw Pennock go to a tree and place a dark-colored object next to the tree and then continue walking with Dicks. Officer Branyan asked the two men to stop. He patted down Dicks and found $60.00. A back-up officer went to the tree where Pennock left the dark object and retrieved a gun. A knife was also recovered from Pennock's person. Phillips positively identified Pennock and Dicks as the men who robbed him.

On January 5, 2006 Pennock was charged with attempted murder, criminal conspiracy, aggravated assault, robbery, violations of the Uniform Firearms Act (VUFA) and related charges. At the preliminary hearing, the Philadelphia Municipal Court discharged the attempted murder charge for lack of evidence. The Commonwealth held all the charges, including attempted murder, for trial.

On February 1, 2007, Pennock moved to suppress the identification and the physical evidence, which was denied by the trial court. Before proceeding to a non-jury trial, Pennock's attorney, in an oral motion immediately before trial, moved to quash the attempted murder bill and the trial court denied the motion. Pennock was acquitted of terroristic threats and one VUFA charge and was convicted on all other charges. On April 2, 2007, Pennock was sentenced to 9 to 18 years' imprisonment on

> the aggravated assault charge and a concurrent 9 to 18 years on the criminal conspiracy charge. The trial court imposed no further penalty for the remaining charges. Pennock timely appealed.

Commonwealth v. Pennock, 953 A.2d 836, 1119 EDA 2007 (Pa. Super. 2008) (unpublished memorandum). On March 31, 2008, this Court vacated Appellant's attempted murder conviction and affirmed the balance of his judgment of sentence. ***Id***. On September 17, 2008, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Pennock***, 960 A.2d 839 (Pa. 2008).

On June 9, 2009, Appellant filed a *pro se* PCRA petition, and counsel was appointed. Counsel filed a ***Turner/Finley***[1] letter on December 18, 2009, stating that Appellant's claims were meritless, and on July 12, 2010, the PCRA court notified Appellant of its intent to dismiss the PCRA petition within twenty days pursuant to Pa.R.Crim.P. 907. Nine days later, Appellant filed his objections to counsel's petition to withdraw and the Pa.R.Crim.P. 907 notice. On January 20, 2011, Appellant filed a *pro se* petition with the PCRA court, and on April 11, 2012, the PCRA court issued a Pa.R.Crim.P. 907 notice of intent to dismiss that petition as untimely. On April 26, 2012, Appellant filed a response to the Pa.R.Crim.P. 907 notice. Response, 4/26/12, at 3-5. Therein, Appellant argued that this second

[1] ***See Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*) (setting forth the requirements necessary for counsel to withdraw in collateral proceedings under the PCRA).

petition was not untimely because he never received the PCRA court's order dismissing the first PCRA petition. ***Id***. On May 16, 2012, the PCRA court granted Appellant leave to appeal *nunc pro tunc* from the order denying his first PCRA petition, and on May 31, 2012, Appellant filed his appeal.

In a memorandum filed on March 26, 2013, we concluded that there was no indication in the record that Appellant was afforded notice that his counseled PCRA petition was denied or that counsel had been permitted to withdraw. ***Commonwealth v. Pennock***, 69 A.3d 1301, 1607 EDA 2012 (Pa. Super. 2013) (unpublished memorandum). Additionally, we were unable to determine what review Appellant's counseled PCRA petition received and whether counsel was permitted to withdraw or should have been permitted to withdraw. ***Id***. Accordingly, we remanded this case to the PCRA Court. ***Id***. In that memorandum, we directed the PCRA court to appoint counsel and grant Appellant a counseled *nunc pro tunc* appeal from the denial of PCRA relief. ***Id***.

On remand, the PCRA court appointed counsel, and counsel filed a brief on behalf of Appellant on September 25, 2013.[2] In this appeal, Appellant raises one issue for this Court's consideration:

[2] Despite numerous motions for extensions of time and numerous orders granting those motions thereby delaying the disposition of this appeal, the Philadelphia County District Attorney's Office failed to file a brief in this matter.

> Did the lower court err when it dismissed [Appellant's] Post Conviction Relief Act petition without an evidentiary hearing wherein the issue raised was that he was denied effective assistance of counsel as trial counsel failed to engage in an adequate and timely consultation with him before the filing deadline, of his right to file a motion for reconsideration of sentence?

Appellant's Brief at 2 (full capitalization omitted).

Our standard of review for an order denying PCRA relief is whether the record supports the PCRA court's determination and whether that determination is free of legal error. ***Commonwealth v. Berry***, 877 A.2d 479, 482 (Pa. Super. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001). Moreover, it is well established that counsel cannot be deemed ineffective for failing to raise a meritless claim. ***Commonwealth v. Lawrence***, 960 A.2d 473, 478 (Pa. Super. 2008) (citing ***Commonwealth v. Daniels***, 947 A.2d 795, 798 (Pa. Super. 2008)).

Appellant's issue presents a claim of ineffective assistance of trial counsel. Generally, "[t]he standard for proving ineffective assistance of counsel is well settled. Appellant must prove that: (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused him prejudice." ***Commonwealth v. Pierce***, 786 A.2d 203, 213 (Pa. 2001). Prejudice requires proof that there is a reasonable probability that, but for counsel's

error, the outcome of the proceedings would have been different. ***Id***. Counsel is presumed to be effective, and it is the petitioner's burden to demonstrate otherwise. ***Commonwealth v. Williams***, 846 A.2d 105, 111 (Pa. 2004). If the petitioner fails to satisfy any prong of the ineffectiveness inquiry, his claim will be rejected. ***Commonwealth v. Sattazahn***, 952 A.2d 640, 652-653 (Pa. 2008) (citations omitted). Moreover, it is well settled that an appellate court is bound by the credibility determinations of the PCRA court where those determinations are supported by the record. ***Commonwealth v. White***, 734 A.2d 374 (Pa. 1999).

Additionally, we point out that the right to an evidentiary hearing on a PCRA petition is not absolute. ***Commonwealth v. Wah***, 42 A.3d 335, 338 (Pa. Super. 2012) (citation omitted). "It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence." ***Id***.

Here, Appellant argues that he had a viable challenge to the discretionary aspects of his sentence but that trial counsel failed to file a post-sentence motion. Appellant's Brief at 12-13. Appellant correctly points out that, if a petitioner fails to present a challenge to the discretionary aspects of his sentence in a timely-filed post sentence motion, that issue is waived on appeal. ***Id***. at 11 (citing ***Commonwealth v. McAfee***, 849 A.2d 270 (Pa. Super. 2004)). However, Appellant goes on to assert that this

default may, pursuant to ***Commonwealth v. Lantzy***, 736 A.2d 564 (Pa. 1999), amount to ineffectiveness *per se*.[3] Appellant's Brief at 9. We disagree.

In ***Commonwealth v. Reaves***, 923 A.2d 1119 (Pa. 2007), our Supreme Court rejected a similar argument. In ***Reaves***, the appellant argued that counsel was ineffective *per se* for failing to object when the trial court failed to state on the record its reasons for the sentence imposed following the revocation of probation, thus, waiving that issue on appeal. ***Id***. at 1122. The Supreme Court explained the concept of *per se*, or presumed, prejudice as follows:

> [T]he defining feature of all of these cases is that the acts or omissions of counsel were of the type that are virtually certain to undermine confidence that the defendant received a fair trial or that the outcome of the proceedings is reliable, primarily because they remove any pretension that the accused had counsel's reasonable assistance during the critical time frame. In this regard, it is worth noting that the portion of the [decision in ***United States v. Cronic***, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)] explaining the theory underlying the concept of presumptive prejudice begins by observing that effective assistance is constitutionally guaranteed not for its own sake, but because of its effect upon the accused's ability to receive a fair trial.

[3] ***Lantzy*** held that there are instances where ineffectiveness will be presumed without the necessity to show actual prejudice pursuant to ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Lantzy***, 736 A.2d at 572.

Id. at 1128 (quoting ***Commonwealth v. Cousin***, 888 A.2d 710, 718 (Pa. 2005)). The Court in ***Reaves*** went on to explain:

> This Court has extended the presumption in Pennsylvania to instances where counsel's lapse ensured the total failure of an appeal requested by the client. [***Cousin***] at 718 n. 12 (citing ***Lantzy***, 736 A.2d at 571 (counsel failed to file requested direct appeal); [***Commonwealth v. Halley***, 870 A.2d 795, 801 (Pa. 2005)] (counsel failed to file statement of matters complained of on appeal, leading to "waiver of all claims asserted on direct appeal")). ***Accord*** [***Commonwealth v. Liebel***, 573 Pa. 375, 825 A.2d 630, 635 (2003)] (counsel failed to file requested petition for allowance of appeal, thereby depriving client of right to seek discretionary review). In ***Halley***, this Court stressed the fundamental difference between a lapse by counsel which leads to no review at all and one which merely narrows the review made available: "The difference in degree between failures that completely foreclose appellate review, and those which may result in narrowing its ambit, justifies application of the presumption [of prejudice] in the more extreme instance." 870 A.2d at 801.

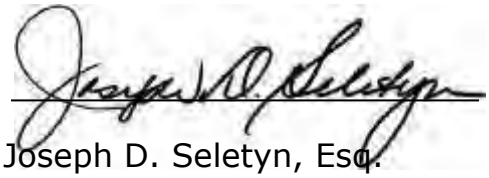
Reaves, 923 A.2d at 1128.

Here, counsel did not file a motion for reconsideration. While this precluded challenging the discretionary aspects of his sentence and narrowed the ambit of issues Appellant could challenge on appeal, Appellant was not completely denied the assistance of counsel. ***Reaves***, 923 A.2d at 1128. Therefore, we conclude that an analysis under a presumed prejudice standard is improper, and we must evaluate Appellant's issue pursuant to the actual prejudice standard set forth in ***Pierce*** above, *i.e.*, there is a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different.

In the argument portion of his brief, Appellant argues cursorily that the sentencing court did not follow the Pennsylvania Sentencing Guidelines. Appellant's Brief at 12. However, Appellant never claims that the result of the proceeding would have been any different if a post-sentence motion had been filed. Thus, because Appellant has failed to assert, much less prove, that the result of the proceedings would have been different if a post-sentence motion had been filed, we conclude that he has failed to establish prejudice. ***Pierce***, 786 A.2d at 213. Accordingly, we affirm the order denying Appellant's PCRA petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/7/2014