

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

THEODORE BYARD

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1612 EDA 2012

Appeal from the PCRA Order May 4, 2012  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-1300286-2006;  
CP-51-CR-1300494-2006

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, J.:

Filed: January 25, 2013

Appellant, Theodore Byard, appeals from the order entered in the Philadelphia County Court of Common Pleas, denying his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").<sup>1</sup> We affirm.

The PCRA court opinion set forth the relevant facts and procedural history as follows:

**PROCEDURAL HISTORY**

On January 4, 2008, after the start of a bench trial before the Honorable Renee Cardwell Hughes, [Appellant] entered into a negotiated guilty plea to two counts of first-degree murder (H-1), burglary (F-1), and firearms not to be carried without a license (F-3). That same day, [Appellant] was sentenced on each first-degree murder

---

<sup>1</sup> 42 Pa.C.S.A. §§ 9541-9546.

charge to the mandatory term of life imprisonment, to be served concurrently. [Appellant] did not file post sentence motions or a notice of appeal. On November 12, 2008, [Appellant] filed a *pro se* petition pursuant to the [PCRA]. PCRA counsel was appointed and, on June 30, 2009, filed an amended petition on [Appellant]'s behalf. The Commonwealth agreed to an evidentiary hearing as to [Appellant]'s claim that his right to a direct appeal should be reinstated *nunc pro tunc* but did not agree as to his request to reinstate his right to file post-sentence motions *nunc pro tunc*. After a number of continuances, a supplemental amended PCRA petition was filed on March 3, 2011. On January 6, 2012, this Court held an evidentiary hearing on both of [Appellant]'s *nunc pro tunc* claims, and [Appellant] and trial counsel testified. On January 11, 2012, a second supplemental amended PCRA petition was filed. A third supplemental amended petition was filed on February 3, 2012, and the Commonwealth filed a response on March 15, 2012.

\* \* \*

## **FACTS**

On January 4, 2008, after the luncheon recess on the first day of the bench-trial before Judge Hughes, the [c]ourt was informed that [Appellant] desired to enter into a negotiated guilty plea rather than continue with the trial. Notes of Testimony (N.T.) 1/4/08 at 21. An extensive colloquy was conducted by the [c]ourt with [Appellant] where he indicated to the [c]ourt that he was pleading guilty because he was guilty. *Id.* at 23. He informed the [c]ourt that he discussed his decision with his trial counsel and that he understood the rights he was giving up. *Id.* at 26. Judge Hughes explained to [Appellant] that this was an extremely serious decision and he could appeal the decision but that he would lose and would spend the rest of his life in prison. *Id.* at 27. Judge Hughes told [Appellant] that there were limited issues he could raise in an appeal and [Appellant] responded that if he could be placed on death row and have an immediate death he would, but if not he would take life and that he knew what he was saying. *Id.* at 30. [Appellant] was also asked whether he was on any medicine or if he had taken any

drugs, illegal drugs, or alcohol in the last two days, to which he responded that he had not. *Id.* at 33. After the prosecutor relayed the facts of the case and the testimony that would have been presented had [Appellant] continued with the bench trial, [Appellant] informed the [c]ourt that the prosecutor's recitation of the facts was substantially accurate. *Id.* at 55-56. [Appellant] explained to the [c]ourt that the events surrounding the case occurred because he was going through a lot and began using street drugs, which made him paranoid. *Id.* at 75. As far as his decision not to go forward with the trial, [Appellant] stated that he did not want it to drag on and did not want him or his family to see the pictures nor did he want anyone thinking that he was trying to beat the case. *Id.* at 76. [Appellant] stated that this decision was his decision. *Id.* at 78-79.

## EVIDENTIARY HEARING

On January 6, 2012, an evidentiary hearing was held before this Court as to [Appellant]'s claim that he was entitled to have his direct appeal and post-sentence motions rights reinstated *nunc pro tunc*. [Appellant] testified that he entered into a guilty plea because trial counsel told him that the events that had taken place were "too fresh" in people's minds and that he (counsel) would file an appeal and get him back in court at a later time. N.T. 1/6/12 at 13, 51. [Appellant] also stated that he was unable to recall what had taken place on the day he entered into a guilty plea because he was on medication and illegal drugs, including PCP, Xanax, Remeron, and Percocet, and that he had lied to Judge Hughes about his drug use. *Id.* at 14, 67, 108. [Appellant] also asserted that he was innocent of the charges that were brought against him because he shot the two individuals in self-defense. *Id.* at 27-28, 29, 34.

The prosecutor introduced a letter [Appellant] had written to Judge Hughes, dated February 26, 2008, regarding trial counsel. *Id.* at 85. In the letter, [Appellant] indicated to Judge Hughes that he had wanted to file a motion for reconsideration but had been hindered in doing so because he did not have access to the law library. In that letter, he also stated that he was told by trial counsel that his appeal

had already been filed, however, [Appellant] had not heard anything about it. The prosecutor also introduced a letter from trial counsel to [Appellant], dated March 20, 2008, stating that [Appellant] had never requested that a motion for reconsideration be filed and that he never told [Appellant] that an appeal had been filed. *Id.* at 89.

Trial counsel also testified at the evidentiary hearing. Trial counsel stated that he never informed [Appellant] that if he pled guilty he would file some paperwork and get him back into court. *Id.* at 124-25. Trial counsel indicated that, had [Appellant] requested that he file a motion to withdraw his guilty plea, he would have filed the motion. *Id.* at 125-26. Trial counsel did not have any knowledge of any communications [Appellant] claimed to have had with him, or his office, requesting that he file an appeal. *Id.* at 126. This [c]ourt credited trial counsel's testimony and found preposterous [Appellant]'s claim that trial counsel, after the sentencing, agreed to file an appeal to get a trial scheduled for a later time.

(PCRA Court Opinion, filed July 16, 2012, at 1-4) (footnotes omitted). Based on its review, the PCRA court found Appellant's claims were meritless and dismissed the petition on May 4, 2012. Appellant timely filed a notice of appeal on Monday, June 4, 2012. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b); Appellant timely complied.

Appellant presents one issue for our review:

DID THE HONORABLE PCRA COURT ERR WHEN IT DENIED [APPELLANT] RELIEF PURSUANT TO HIS AMENDED PCRA PETITION AND SUPPLEMENTAL PETITIONS AND WHERE THE RECORD REFLECTS THAT [APPELLANT] WAS ENTITLED TO RELIEF AS HE REQUESTED THAT HIS ATTORNEY FILE A MOTION TO WITHDRAW PLEA AND NECESSARY APPEAL BUT ALL WHERE DEFENSE COUNSEL FAILED AND REFUSED TO DO SO?

(Appellant's Brief at 3).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable M. Teresa Sarmina, we conclude Appellant's issue merits no relief. The PCRA court opinion properly disposes of the question presented. (**See** PCRA Court Opinion at 5-7) (finding: Appellant failed to show he had asked counsel to file motion to withdraw guilty plea; assertion that Appellant never wanted to plead guilty is unavailing and contradicted by Appellant's own statements at plea colloquy, where he unequivocally expressed desire to plead guilty; Appellant cannot establish he requested counsel to file direct appeal on his behalf, and Appellant's testimony on this subject was not credible). The record supports the court's conclusions. We add that the record from the guilty plea hearings contains no indication Appellant wanted to appeal or communicated his desire to counsel. Based on the events at the guilty plea hearing, including Appellant's confession of guilt and his willingness to accept a life sentence, Appellant cannot show he "reasonably demonstrated to counsel that he was interested in appealing." **See *Roe v. Flores-Ortega***, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); ***Commonwealth v. Touw***, 781 A.2d 1250 (Pa.Super. 2001). The PCRA court rejected as incredible Appellant's self-serving PCRA testimony that counsel convinced Appellant to plead guilty only because counsel promised to get Appellant back into court at some later date. Appellant's subsequent

change of heart regarding an appeal occurred nearly two months after sentencing and does not render trial counsel ineffective. Accordingly, we affirm on the basis of the PCRA court opinion.

Order affirmed.

PHILADELPHIA COURT OF COMMON PLEAS  
CRIMINAL TRIAL DIVISION

COMMONWEALTH

v.

THEODORE BYARD

Sarmina, J.

July 16, 2012

:

:

:

:

:

CP-51- CR-1300286-2006  
CP-51-CR-1300494-2006

Superior Court No.  
1612 EDA 2012

FILED

JUL 16 2012

FILED Post Trial Unit

JUL 16 2012

Criminal Appeals Unit  
First Judicial District of PA

OPINION

PROCEDURAL HISTORY

On January 4, 2008, after the start of a bench trial before the Honorable Renee Cardwell Hughes, petitioner entered into a negotiated guilty plea to two counts of first-degree murder (H-1), burglary (F-1), and firearms not to be carried without a license (F-3).<sup>1</sup> That same day, petitioner was sentenced on each first-degree murder charge to the mandatory term<sup>2</sup> of life imprisonment, to be served concurrently.<sup>3</sup> Petitioner did not file post-sentence motions or a notice of appeal. On November 12, 2008, petitioner filed a *pro se* petition pursuant to the Post-Conviction Relief Act (PCRA).<sup>4</sup> PCRA counsel was appointed and, on June 30, 2009 filed an amended petition on petitioner's behalf. The Commonwealth agreed to an evidentiary hearing as to petitioner's claim that his right to a direct appeal should be reinstated *nunc pro tunc* but did not agree as to his request to

<sup>1</sup> 18 Pa.C.S. §§ 2502(a), 3502(a), and 6106(a)(1), respectively.

<sup>2</sup> 18 Pa.C.S. § 1102(a)(1).

<sup>3</sup> As to the charge of burglary, petitioner was sentenced to a term of not less than 10 years nor more than 20 years confinement, to run concurrent to the first first-degree murder charge. As to the charge of firearms not to be carried without a license, petitioner was sentenced to not less than 3 ½ years nor more than 7 years, to run concurrent with the first first-degree murder charge.

<sup>4</sup> 42 Pa.C.S. § 9541 *et seq.*

reinstate his right to file post-sentence motions *nunc pro tunc*. After a number of continuances, a supplemental amended PCRA petition was filed on March 3, 2011.<sup>5</sup> On January 6, 2012, this Court held an evidentiary hearing on both of petitioner's *nunc pro tunc* claims, and petitioner and trial counsel testified. On January 11, 2012, a second supplemental amended PCRA petition was filed. A third supplemental amended petition was filed on February 3, 2012 and the Commonwealth filed a response on March 15, 2012. After conducting its own independent review, this Court found that petitioner's claims were all without merit and, on May 4, 2012, dismissed the PCRA petition as being without merit. On June 4, 2012, a timely counseled notice of appeal was filed.

## FACTS

On January 4, 2008, after the luncheon recess on the first day of the bench trial before Judge Hughes, the Court was informed that petitioner desired to enter into a negotiated guilty plea rather than continue with the trial. Notes of Testimony (N.T.) 1/4/08 at 21. An extensive colloquy was conducted by the Court with petitioner where he indicated to the Court that he was pleading guilty because he was guilty. *Id.* at 23. He informed the Court that he discussed his decision with his trial counsel and that he understood the rights he was giving up. *Id.* at 26. Judge Hughes explained to petitioner that this was an extremely serious decision and he could appeal the decision but that he would lose and would spend the rest of his life in prison. *Id.* at 27. Judge Hughes told petitioner that there were limited issues he could raise in an appeal and petitioner responded that if he could be placed on death row and have an immediate death he would, but if not he would take life and that he knew what he was saying. *Id.* at 30. Petitioner was also asked whether he was on any medicine or if he had taken any drugs, illegal drugs, or alcohol in the last two days, to which he responded that he had not. *Id.* at 33. After the prosecutor relayed the facts of the case and the testimony that would have been presented had petitioner continued with the bench trial, petitioner informed the

---

<sup>5</sup> This case was transferred to this Court on June 13, 2011, Judge Hughes having retired.



Court that the prosecutor's recitation of the facts was substantially accurate. Id. at 55-56. Petitioner explained to the Court that the events surrounding the case occurred because he was going through a lot and began using street drugs, which made him paranoid. Id. at 75. As far as his decision not to go forward with the trial, petitioner stated that he did not want it to drag on and did not want him or his family to see the pictures nor did he want anyone thinking that he was trying to beat the case. Id. at 76. Petitioner stated that this decision was his decision. Id. at 78-79.

### EVIDENTIARY HEARING

On January 6, 2012, an evidentiary hearing was held before this Court as to petitioner's claim that he was entitled to have his direct appeal and post-sentence motions rights reinstated *nunc pro tunc*. Petitioner testified that he entered into a guilty plea because trial counsel told him that the events that had taken place were "too fresh" in people's minds and that he (counsel) would file an appeal and get him back in court at a later time.<sup>6</sup> N.T. 1/6/12 at 13, 51. Petitioner also stated that he was unable to recall what had taken place on the day he entered into a guilty plea because he was on medication and illegal drugs, including PCP, Xanax, Remeron, and Percocet, and that he had lied to Judge Hughes about his drug use. Id. at 14, 67, 108. Petitioner also asserted that he was innocent of the charges that were brought against him because he shot the two individuals in self-defense. Id. at 27-28, 29, 34.

The prosecutor introduced a letter petitioner had written to Judge Hughes, dated February 26, 2008, regarding trial counsel.<sup>7</sup> Id. at 85. In the letter, petitioner indicated to Judge Hughes that he had wanted to file a motion for reconsideration but had been hindered in doing so because he did not have access to the law library. In that letter, he also stated that he was told by trial counsel that

---

<sup>6</sup> PCRA counsel clarified during argument at the evidentiary hearing that he was not arguing that trial counsel told petitioner to plead guilty and that he would file paperwork to get him back into court. N.T. 1/06/12 at 146-47.

<sup>7</sup> See "Attachment A."

his appeal had already been filed, however, petitioner had not heard anything about it. The prosecutor also introduced a letter from trial counsel to petitioner,<sup>8</sup> dated March 20, 2008, stating that petitioner had never requested that a motion for reconsideration be filed and that he never told petitioner that an appeal had been filed. Id. at 89.

Trial counsel also testified at the evidentiary hearing. Trial counsel stated that he never informed petitioner that if he pled guilty he would file some paperwork and get him back into court. Id. at 124-25. Trial counsel indicated that, had petitioner requested that he file a motion to withdraw his guilty plea, he would have filed the motion. Id. at 125-26. Trial counsel did not have any knowledge of any communications petitioner claimed to have had with him, or his office, requesting that he file an appeal. Id. at 126. This Court credited trial counsel's testimony and found preposterous petitioner's claim that trial counsel, after the sentencing, agreed to file an appeal to get a trial scheduled for a later time.

## LEGAL ANALYSIS

On appeal petitioner raises the following issue:

1. The PCRA Court erred when it did not award petitioner his appellate rights restored, *nunc pro tunc*, together with the right to file a motion to withdraw his plea, *nunc pro tunc*, as petitioner properly pled the same and actually proved the same before the Court at an evidentiary hearing. The evidence proved that petitioner requested an appeal and that counsel failed and refused to honor that request. The evidence also proved that petitioner was ignored by counsel after the trial ended and that counsel did not meaningfully consult with petitioner regarding an appeal. Petitioner should be awarded his *nunc pro tunc* rights at this point or the matter should be remanded to the PCRA Court with instructions to do so.

---

<sup>8</sup> See "Attachment B."

### *Nunc Pro Tunc Relief*

Petitioner's sole claim is that this Court erred in failing to reinstate petitioner's right to file a motion to withdraw his guilty plea and a direct appeal *nunc pro tunc* where trial counsel was ineffective for failing to file these where petitioner requested that he do so. Trial counsel, petitioner argues, was also ineffective for failing to consult with petitioner regarding his appeal. Petitioner is not entitled to relief.

Petitioner asserts that he is entitled to have his right to file a motion to withdraw his guilty plea and right to file a direct appeal reinstated *nunc pro tunc* since trial counsel had a duty to consult with petitioner regarding his appellate rights because petitioner demonstrated, through his letter to Judge Hughes, that he wanted an appeal. Moreover, trial counsel should have consulted with petitioner about his appellate rights in light of the fact that petitioner had been expressing his desire to take the case to trial until he suddenly changed course for reasons unknown from the record at trial.

In order to obtain relief on a claim alleging ineffective assistance of counsel for failure to file a post-sentence motion, the petitioner must meet the traditional test for establishing ineffective assistance of counsel. Commonwealth v. Liston, 977 A.2d 1089, 1092, n. 8 (Pa. 2009), *citing* Commonwealth v. Reaves, 923 A.2d 1119, 1128-30 (Pa. 2007). A petitioner "must prove (1) that the underlying claim has arguable merit, (2) that counsel's conduct was without a reasonable basis designed to effectuate his or her client's interest, and (3) that counsel's ineffectiveness prejudiced the appellant." Commonwealth v. Allen, 833 A.2d 800, 802 (Pa.Super. 2003) (citations omitted). Furthermore, "All three prongs of this test must be satisfied. If [a petitioner] fails to meet even one prong of the test, his conviction will not be reversed on the basis of ineffective assistance of counsel." Commonwealth v. O'Bidos, 849 A.2d 243, 249 (Pa.Super. 2004).

Initially, this Court notes that petitioner has failed to show that he requested to have a post-sentence motion to withdraw his guilty plea filed on his behalf. Although petitioner wrote to Judges Hughes and expressed in that letter that he had wanted a motion for “reconsideration” to be filed, he never stated that he informed trial counsel of this nor does he state anywhere that he wanted to withdraw his guilty plea. All petitioner states in the letter is that he wanted to file a motion for reconsideration. Moreover, even if petitioner’s communication at that juncture could be construed as wanting to file a motion to withdraw his guilty plea, by that point the time period for filing this motion, as well as an appeal, had long since expired. Petitioner’s argument that he had also demonstrated his desire to withdraw his guilty plea by the fact that he had suddenly changed his mind and he did not want a trial, despite the fact that he had all along wanted a trial, is equally unavailing. A defendant is bound by the statements he makes during the guilty plea colloquy. Commonwealth v. Stork, 737 A.2d 789, 790-91 (Pa.Super. 1999).

Petitioner was extensively colloquied about his decision and told the Court himself that he wanted to plead because he was guilty and wanted to save himself and his family from going through the pain of trial. During the colloquy, petitioner made it abundantly clear that this was his decision; there was nothing about what he said that would have demonstrated to the Court or his to his counsel that pleading guilty was not in fact what he wanted to do. Therefore, despite petitioner’s argument that he had demonstrated his desire to have a motion to withdraw his guilty plea filed and thus, trial counsel should have consulted with him regarding this, petitioner failed to prove this. Therefore, petitioner is not entitled to have his right to file a motion to withdraw his guilty plea reinstated *nunc pro tunc*.

Petitioner also asserts that he is entitled to have his direct appeal rights reinstated *nunc pro tunc* since trial counsel was ineffective for failure to consult with him regarding an appeal in light of the fact that petitioner had demonstrated to counsel that he was interested in appealing. Pursuant to

Roe v. Flores-Ortega, 528 U.S. 470 (2000),<sup>9</sup> counsel has a constitutionally imposed duty to consult with a defendant about an appeal where there is reason to think either (1) that a rational defendant would want an appeal or (2) that this particular defendant demonstrated to counsel that he was interested in appealing. In petitioner's third supplemental PCRA petition, petitioner argued that the latter applies, since he demonstrated to counsel that he wanted to appeal. Once again, petitioner cites to the letter he wrote Judge Hughes and to his sudden decision to enter into a plea to support his argument that he demonstrated to counsel his desire to pursue an appeal. For the same reasons as stated *supra*, petitioner's decision to enter into a guilty plea after the start of trial would not have put counsel on notice that petitioner was interested in filing an appeal. This Court also did not find it credible that trial counsel told petitioner that he would file an appeal or that petitioner had informed trial counsel of his desire to have him file one on his behalf.<sup>10</sup> Even if trial counsel was first placed on notice of petitioner's desire to pursue an appeal once he saw the letter petitioner wrote to Judge Hughes, by then the time for filing an appeal had run. Accordingly, this Court finds that petitioner is also not entitled to *nunc pro tunc* reinstatement of his right to file a direct appeal.

For the foregoing reasons, the dismissal of the PCRA petition as being without merit should be affirmed.

BY THE COURT:

  
M. TERESA SARMINA, J.

---

<sup>9</sup> Roe v. Flores-Ortega has been followed by the Pennsylvania courts. See Commonwealth v. Bennett, 930 A.2d 1264 (Pa. 2007); see also, Commonwealth v. Halley, 870 A.2d 795 (Pa. 2005).

<sup>10</sup> See Commonwealth v. Cox, 983 A.2d 666, n. 25 (Pa. 2009) (holding that when presiding over PCRA evidentiary hearings, the PCRA Court is required to make credibility determinations to ensure the administration of justice).