J-S22040-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DAVID LEE KILGUS,	:	
	:	
Appellant	:	No. 1632 MDA 2012

Appeal from the Order August 22, 2012,
Court of Common Pleas, Lycoming County,
Criminal Division at Nos. CP-41-CR-0001213-2009
and CP-41-CR-0001713-2009

BEFORE: DONOHUE, ALLEN and PLATT*, JJ.

DISSENTING MEMORANDUM BY DONOHUE, J.: **FILED MAY 07, 2013**

I disagree with the Majority's decision to find that Kilgus has waived the issues he presents on appeal for failure to properly develop his argument. The Majority concludes that Kilgus failed to provide "any argument about [the three prongs of the ineffective assistance of counsel standard] and their applicability to this case." Maj. Op. at 4-5. I disagree with this conclusion. Kilgus' appellate counsel ("Counsel") set forth the familiar three-pronged test for claims of ineffective assistance of counsel,[1] and provided argument as to the first prong for both issues raised on appeal.

[1] "To prevail on a claim alleging counsel's ineffectiveness under the PCRA, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness[.]" ***Commonwealth v. McLaurin***, 45 A.3d 1131, 1136 (Pa. Super. 2012).

*Retired Senior Judge assigned to the Superior Court.

Appellant's Brief at 12-17.[2] Furthermore, the issues raised by Kilgus question his competency to enter a guilty plea and waive his ***Miranda*** rights. As opposed to a situation where the basis for an ineffectiveness claim is an error related to counsel's performance, such as the failure to make an objection or to file a motion, from the very nature of the claims raised here, it is evident that there could be no "reasonable basis designed to effectuate [Kilgus'] interest" in failing to seek a competency examination, and that Kilgus was prejudiced by his counsel's failure to seek a determination of his competency. ***McLaurin***, 45 A.3d at 1136. I would therefore decline to find these issues waived on the technicality that Counsel did not provide a more robust argument in Kilgus' appellate brief.

I am also troubled with the Majority's alternative in reliance on the PCRA court's opinions as dispositive of the merits of Kilgus' claims. In its Rule 907 Opinion, the PCRA court makes numerous factual findings *en route* to its determination that Kilgus is not entitled relief on his claims. My review of the record reveals that many of these findings are based solely on information not of record. For example, the PCRA court based its determination that there is no merit to Kilgus' claim that he was incompetent to enter a guilty plea upon, *inter alia*, findings regarding the nature of a neurological disorder from which Kilgus suffers and side effects of a drug

[2] Counsel apparently limited the argument to this aspect of the relevant test upon belief that the PCRA court denied the PCRA petition for failure to establish this prong alone. ***See*** Appellant's Brief at 12.

Kilgus had been prescribed in conjunction with that disorder. Rule 907 Opinion, 7/2/12, at 9-10. The PCRA court based these finding on information wholly beyond the record – specifically, information posted on the "Genetic Home Reference" and the "National Center for Biotechnology Information" webpages. ***Id.*** No reference to these sources, much less content from these sources, can be found in the certified record on appeal. More perplexingly, in addressing Kilgus' challenge to the waiver of his ***Miranda*** rights, the trial court finds that Kilgus "was advised of his rights" upon his arrest, but that he then "stated that he wanted to talk about the incident." ***Id.*** at 12. The PCRA court concludes that "[t]here is no evidence to suggest that [Kilgus] was intimidated by the officers, coerced, or deceived. The information provided by [Kilgus] was voluntarily conveyed to the officers." ***Id.*** I am at a loss as to how the trial court could have come to such conclusions when the issue of suppression was not raised below and therefore there was never an evidentiary hearing regarding the circumstances surrounding Kilgus' arrest and statement to the police.[3] As

[3] In combing the record, I have located what appear to be interview summaries created by officers of the Williamsport Bureau of Police, one of which refers to a conversation between an officer and Kilgus. These summaries were found out of order, in the midst of Kilgus' initial *pro se* PCRA filing. In any event, they only contain a police officer's statement that Kilgus waived his rights and said he wanted to talk to the police; they in no way shed light on the circumstances surrounding Kilgus' interview with the police, such as whether Kilgus faced coercion, intimidation, or deception by the police in connection with the decision to waive his rights.

there is no basis for these conclusions, I cannot join the Majority's reliance thereupon.

It is my view that this case should be remanded for a hearing. When a PCRA petitioner establishes a genuine issue of material fact, an evidentiary hearing on the issue is proper. ***Cf. Commonwealth v. Springer***, 961 A.2d 1262, 1264 (Pa. Super. 2008). I conclude that the allegations in Kilgus' PCRA petition have presented genuine issues of material fact regarding his plea counsel's effectiveness and, more fundamentally, Kilgus' competency to enter a guilty plea and waive his ***Miranda*** rights; therefore, I conclude that a hearing in this matter would be proper to determine whether, in fact, Kilgus was competent in these critical respects.