

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

SCOTT D. MEHRING

Appellant

No. 1642 MDA 2012

Appeal from the Order September 6, 2012
In the Court of Common Pleas of Adams County
Criminal Division at No(s): CP-01-CR-0000536-2010

BEFORE: SHOGAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.:

FILED MAY 15, 2013

Appellant, Scott D. Mehring, appeals from the September 6, 2012 order denying his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. Contemporaneously with this appeal, counsel has requested leave to withdraw in accordance with ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), and their progeny. After careful review, we grant counsel leave to withdraw and affirm on the basis of the well-reasoned PCRA court opinion.¹

* Retired Senior Judge assigned to the Superior Court.

¹ In lieu of filing a formal brief, the Commonwealth submitted a one-page letter wherein it agrees with Appellant's counsel that Appellant's claims are (*Footnote Continued Next Page*)

The PCRA court summarized the relevant facts and procedural history of this case as follows.

Appellant was charged with numerous criminal violations related to the illegal delivery of controlled substances on three separate occasions between April 15, 2010 and April 30, 2010. According to the Affidavit of Probable Cause supporting the Criminal Complaint, the separate transactions involved a total of approximately 24 grams of cocaine. During the course of litigation of the charges against Appellant, he apparently entered into an agreement with the Commonwealth to perform cooperative confidential services in exchange for the Commonwealth proposing concurrent sentences of no less than one year nor more than five years in a state correctional institution. Guilty pleas were tendered to the [trial c]ourt, pursuant to the terms of the agreement with the Commonwealth, on January 21, 2011.¹ Prior to presentation of the plea to the [trial c]ourt, Appellant executed a written guilty plea, initialed and signed by Appellant, which indicated that [] Appellant understood, and that counsel has explained to him, that the Judge is not bound to accept the terms of the plea agreement and that the agreement is not binding on the [trial c]ourt until it is accepted by the [trial c]ourt. Following a discussion of the factual background concerning the charges, the [trial c]ourt reserved the decision on whether to accept or reject the plea agreement until further information was provided by the Commonwealth; specifically, the [trial c]ourt requested support for the Commonwealth's representation that Appellant provided significant cooperation to law enforcement authorities. On March 24, 2011, after the [trial c]ourt conducted further proceedings, including the

(Footnote Continued) _____

devoid of merit and avers that it has no objection to counsel's request to withdraw. **See** Commonwealth's Letter in Lieu of Appellee's Brief, 1/22/12, at ¶ 1.

presentation of testimony, the plea agreement as presented was rejected. Thereafter, Appellant was given opportunity to withdraw his pleas of guilty. After privately consulting with [trial] counsel, Appellant reiterated his guilty pleas without any sentencing agreement. Prior to doing so, the [trial c]ourt once again colloquied [] Appellant on his rights and identified the maximum sentences to which Appellant was exposing himself. After acceptance of the guilty pleas, sentencing was scheduled for May 19, 2011. At the time of sentencing, the [trial c]ourt took into account the information in a pre-sentence investigation as well as comments from counsel and [] Appellant. Thereafter, [on June 2, 2011] Appellant was sentenced on the above captioned convictions to an aggregate term of no less than three years nor more than six years in a state correctional institution.²

Appellant filed neither post sentence motions nor a direct appeal to [this Court].

¹ In this case, CP-01-CR-536-2010, Appellant pled guilty to three counts of delivery of cocaine. In a related case, CP-01-CR-668-2010, Appellant pled guilty to one count of delivery of cocaine and a count of possession with intent to deliver cocaine involving an additional weight of 30 grams. Appellant has not appealed from the sentences imposed in CP-01-CR-668-2010. The tendered agreement called for concurrent sentences on all convictions in both CP-01-CR-536-2010 and CP-01-CR-668-2010. Appellant fails to recognize that the plea agreement rejected by the [trial c]ourt involved a comprehensive agreement involving all charges. Moreover, it is important to recognize that the subsequent sentences imposed in CP-01-CR-668-2010 were intricately intertwined in an overall sentencing scheme involving both cases.

² On the two convictions at CP-01-CR-668-2010, Appellant was sentenced to an aggregate term of no less than two years nor more than four years

followed by a consecutive term of six years['] probation. The sentences were imposed concurrently to the sentences in CP-01-CR-536-2010.

PCRA Court Opinion, 11/20/12, at 1-3 (footnotes in original).

On December 7, 2011, Appellant filed a timely *pro se* PCRA petition arguing, *inter alia*, that his trial counsel was ineffective in failing to secure the terms of his plea agreement discussed with the Commonwealth. **See Pro Se PCRA Petition, 12/7/11, at ¶¶ 4A-4B.** On December 13, 2011, the PCRA court appointed Appellant's instant counsel, Thomas R. Nell, Esquire (Attorney Nell), to represent him. The PCRA court conducted pre-hearing conferences on February 13, and June 18, 2012. Thereafter, on June 28, 2012, the PCRA court provided Appellant with notice of its intent to dismiss his petition without a hearing, pursuant to Pa.R.Crim.P. 907. Appellant did not file a response to the PCRA court's Rule 907 notice. On September 6, 2012, the PCRA court dismissed Appellant's petition without a hearing. This timely appeal followed.²

Thereafter, on January 3, 2013, Attorney Nell filed a petition to withdraw as counsel together with a no-merit letter in accordance with **Turner/Finley**. Therein, Attorney Nell stated he independently reviewed the record, conducted legal research on the issues raised by Appellant, and

² Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

concluded that Appellant's claim was devoid of merit. Appellant did not respond to Attorney Nell's motion to withdraw.

On appeal, Attorney Nell raises the following issue on Appellant's behalf.

1. Did the PCRA [c]ourt error in determining that [Appellant's trial counsel] was not ineffective when his [trial counsel] failed to inform him that the [PCRA c]ourt could reject a negotiated plea agreement even after [Appellant] performed his part of the bargain in reliance upon the Commonwealth's representation that [Appellant] would receive a sentence of 1-5 [years' imprisonment] for his cooperation?

Rule 1925(b) Concise Statement, 9/25/12; **see also Turner/Finley** Brief, "Exhibit C," at 2-3.³

"Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the

³ We note that to the extent Attorney Nell raised additional issues in his January 3, 2013 no-merit letter, we deem said claims waived for failure to be included in the Rule 1925(b) concise statement. **See Commonwealth v. Hill**, 16 A.3d 484, 494 (Pa. 2011) (stating, "any issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule's terms; the Rule's provisions are not subject to *ad hoc* exceptions or selective enforcement; appellants and their counsel are responsible for complying with the Rule's requirement[]").

PCRA court level.” **Id.** In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3). “The PCRA court’s credibility determinations, when supported by the record, are binding on this Court.” **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). “However, this Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” **Id.**

Prior to considering Appellant’s argument, we must review Attorney Nell’s request to withdraw from representation. In **Commonwealth v. Pitts**, 981 A.2d 875 (Pa. 2009), our Supreme Court reiterated the level of review necessary to secure permission to withdraw from representation pursuant to **Turner/Finley**. The **Pitts** Court stated the following requirements.

- 1) A “no-merit” letter by PC[R]A counsel detailing the nature and extent of his review;
- 2) The “no-merit” letter by PC[R]A counsel listing each issue the petitioner wished to have reviewed;
- 3) The PC[R]A counsel’s “explanation”, in the “no-merit” letter, of why the petitioner’s issues were meritless[.]

Id. at 876 (citation omitted).

“Counsel must also send to the petitioner: (1) a copy of the ‘no-merit’ letter/brief; (2) a copy of counsel’s petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.” ***Commonwealth v. Wrecks***, 931 A.2d 717, 721 (Pa. Super. 2007) (citation omitted).

[W]here counsel submits a petition and no-merit letter that do satisfy the technical demands of ***Turner/Finley***, the court - trial court or this Court - must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief. By contrast, if the claims appear to have merit, the court will deny counsel’s request and grant relief, or at least instruct counsel to file an advocate’s brief.

Id. (internal citation omitted).

Herein, we conclude that Attorney Nell’s filing with this Court complied with the requirements of ***Turner/Finley***. Specifically, Attorney Nell’s no-merit letter detailed the nature and extent of his review. In preparing the no-merit letter, Attorney Nell addressed the claim Appellant raised in his *pro se* PCRA petition and determined that the issue lacked merit. Thereafter, Attorney Nell provided a discussion of Appellant’s claim, explaining why the issue was without merit. Finally, Attorney Nell served Appellant with a copy of the no-merit letter and advised Appellant that, if he was permitted to withdraw, Appellant had the right to proceed *pro se* or with privately retained counsel. Thus, we conclude that Attorney Nell’s request for leave to withdraw from representation satisfied the constraints of ***Turner/Finley***.

We must now conduct our own independent review as to whether Appellant's contentions are without merit.

The crux of Appellant's argument on appeal is that his trial counsel was ineffective in failing to secure the terms of his plea agreement discussed with the Commonwealth, nor inform Appellant that the trial court could reject a negotiated plea agreement. **Turner/Finley** Brief, "Exhibit C," at 2-3.

To prevail on a claim of ineffective assistance of counsel under the PCRA, a petitioner must plead and prove by a preponderance of the evidence that counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii). A petitioner must establish "(1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission." **Koehler, supra** at 132, citing **Commonwealth v. Pierce**, 527 A.2d 973, 975 (Pa. 1987). "Counsel is presumed to be effective and Appellant has the burden of proving otherwise." **Commonwealth v. Rivers**, 786 A.2d 923, 927 (Pa. 2001) (citations omitted). Furthermore, "[i]f an appellant fails to prove by a preponderance of the evidence any of the ... prongs, the Court need not address the remaining prongs of the test." **Commonwealth v. Fitzgerald**, 979 A.2d 908, 911 (Pa. Super. 2009), *appeal denied*, 990 A.2d 727 (Pa. 2010).

In the instant matter, the PCRA court authored a comprehensive opinion that thoroughly analyzed Appellant's ineffectiveness claim and concluded it was devoid of merit. Specifically, the PCRA court concluded as follows.

Appellant has not only failed to allege that the truth-determining process has been undermined, but the facts contained in his petition cannot possibly support such a claim. Appellant does not question that his guilty plea was intelligently, voluntarily, and knowingly entered. Moreover, he does not exert his innocence. Rather, he alleges that based upon conversations with [trial] counsel, he cooperated with the Commonwealth with the expectation that he would receive a negotiated sentence. Appellant's claim for relief, however, ignores that after the [trial c]ourt rejected the tendered plea agreement, he knowingly and voluntarily entered guilty pleas to the charges for which he was convicted. While Appellant's allegations, if true, may permit relief in other arenas, they do not, in any way, impact the validity of Appellant's convictions and resulting sentences. Hence, the issue is not cognizable under the [PCRA].

Even if it is assumed that the claim is proper under the [PCRA], the claim is patently frivolous without a trace of support in either law or fact.

...

Instantly, the paucity of factual support sufficient to establish any of the [ineffective assistance of counsel] requirements is undisputed. Experience teaches that it is not uncommon for defense counsel to seek a favorable sentencing outcome with the Commonwealth through cooperation when a case is otherwise indefensible. Indeed, it might be argued that the failure to do so constitutes ineffectiveness. [Trial] counsel acted in accordance with his experience by favorably

positioning Appellant for a generous plea offer from the Commonwealth. Ultimately, the Commonwealth honored its discussions with Appellant by presenting the negotiated plea to the [trial c]ourt. While the parties may have not anticipated the [trial c]ourt's rejection of the negotiated plea, there is no question as to the [trial c]ourt's legal right to do so. Perhaps recognizing the futility of trial, Appellant proceeded to enter guilty pleas despite knowledge that the plea agreement negotiated with the Commonwealth was no longer binding on the ultimate sentence imposed by the [trial c]ourt. Importantly, Appellant does not question the validity of his decision to plead guilty nor any actions by [trial] counsel impacting his right to due process or ability to defend the charges against him. Thus, Appellant is unable to show that he has been prejudiced in any way in the guilt-determining process.

PCRA Court Opinion, 11/20/12, at 3-5.

Upon careful review of the record, and in light of this Court's scope and standard of review, we agree with the PCRA court's conclusions. Appellant's trial counsel cannot be deemed ineffective for failing to raise a claim that is devoid of merit. ***See Commonwealth v. Lawrence***, 960 A.2d 473, 478 (Pa. Super. 2008), *appeal denied*, 980 A.2d 606 (Pa. 2009). Moreover, Appellant has failed to demonstrate he was prejudiced by trial counsel's conduct during the guilty plea phase. Accordingly, we adopt the conclusions of the November 20, 2012 PCRA court opinion as our own for purposes of this appellate review.

Order affirmed. Motion for leave to withdraw as counsel granted.

J-S25017-13

Judgment Entered.

Mary A. Graybill
Deputy Prothonotary

Date: 5/15/2013

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

CP-01-CR-536-2010

VS.

SCOTT DAVID MEHRING

2012 NOV 20 P 4: 15

CLERK OF COURTS

FILED

OPINION PURSUANT TO Pa. R.A.P. 1925(a)

Appellant, Scott David Mehring, seeks relief from the P.C.R.A. court's dismissal of his P.C.R.A. Petition without hearing on September 6, 2012. Appellant claims that the Court erred in rejecting his claim that plea counsel was ineffective in failing to advise him that the trial court had the ability to reject a negotiated plea agreement.

Appellant was charged with numerous criminal violations related to the illegal delivery of controlled substances on three separate occasions between April 15, 2010 and April 30, 2010. According to the Affidavit of Probable Cause supporting the Criminal Complaint, the separate transactions involved a total of approximately 24 grams of cocaine. During the course of litigation of the charges against Appellant, he apparently entered into an agreement with the Commonwealth to perform cooperative confidential services in exchange for the Commonwealth proposing concurrent sentences of no less than one year nor more than five years in a state correctional institution. Guilty pleas were tendered to the Court, pursuant to the terms of the agreement with the Commonwealth, on January 21, 2011.¹ Prior to

¹ In this case, CP-01-CR-536-2010, Appellant pled guilty to three counts of delivery of cocaine. In a related case, CP-01-CR-668-2010, Appellant pled guilty to one count of delivery of cocaine and a count of possession with intent to deliver cocaine involving an additional weight of 30 grams. Appellant has not appealed from the sentences imposed in CP-01-CR-668-2010. The tendered

presentation of the plea to the Court, Appellant executed a written guilty plea, initialed and signed by Appellant, which indicated that the Appellant understood, and that counsel has explained to him, that the Judge is not bound to accept the terms of the plea agreement and that the agreement is not binding on the Court until it is accepted by the Court. Following a discussion of the factual background concerning the charges, the Court reserved the decision on whether to accept or reject the plea agreement until further information was provided by the Commonwealth; specifically, the Court requested support for the Commonwealth's representation that Appellant provided significant cooperation to law enforcement authorities. On March 24, 2011, after the Court conducted further proceedings, including the presentation of testimony, the plea agreement as presented was rejected. Thereafter, Appellant was given opportunity to withdraw his pleas of guilty. After privately consulting with counsel, Appellant reiterated his guilty pleas without any sentencing agreement. Prior to doing so, the Court once again colloquied the Appellant on his rights and identified the maximum sentences to which Appellant was exposing himself. After acceptance of the guilty pleas, sentencing was scheduled for May 19, 2011. At the time of sentencing, the Court took into account the information in a pre-sentence investigation as well as comments from counsel and the Appellant. Thereafter,

agreement called for concurrent sentences on all convictions in both CP-01-CR-536-2010 and CP-01-CR-668-2010. Appellant fails to recognize that the plea agreement rejected by the Court involved a comprehensive agreement involving all charges. Moreover, it is important to recognize that the subsequent sentences imposed in CP-01-CR-668-2010 were intricately intertwined in an overall sentencing scheme involving both cases.

Appellant was sentenced on the above captioned convictions to an aggregate term of no less than three years nor more than six years in a state correctional institution.²

Appellant filed neither post sentence motions nor a direct appeal to the Superior Court. However, on December 7, 2011, Appellant filed a *pro se* P.C.R.A. Petition. Counsel was subsequently appointed to represent the Appellant. The single issue raised in the petition was an allegation that trial counsel was ineffective in failing to secure the terms of a plea agreement discussed with the Commonwealth. As previously indicated, the P.C.R.A. court dismissed the petition without hearing.

In order for a claim to be cognizable under the Post Conviction Relief Act ("P.C.R.A."), the petitioner must make a showing that the truth-determining process was so undermined that it prevented a reliable determination of guilt or innocence. ***Commonwealth v. McCord***, 644 A.2d 1206, 1213 (Pa. Super. 1994). Appellant has not only failed to allege that the truth-determining process has been undermined, but the facts contained in his petition cannot possibly support such a claim. Appellant does not question that his guilty plea was intelligently, voluntarily, and knowingly entered. Moreover, he does not exert his innocence. Rather, he alleges that based upon conversations with counsel, he cooperated with the Commonwealth with the expectation that he would receive a negotiated sentence. Appellant's claim for relief, however, ignores that after the Court rejected the tendered plea agreement, he knowingly and voluntarily entered guilty pleas to the charges for which he was convicted. While Appellant's allegations, if true, may permit relief in other arenas,

² On the two convictions at CP-01-CR-668-2012, Appellant was sentenced to an aggregate term of no less than two years nor more than four years followed by a consecutive term of six years probation. The sentences were imposed concurrently to the sentences in CP-01-CR-536-2010.

they do not, in any way, impact the validity of Appellant's convictions and resulting sentences. Hence, the issue is not cognizable under the P.C.R.A.

Even if it is assumed that the claim is proper under the P.C.R.A., the claim is patently frivolous without a trace of support in either law or fact. As such, Appellant is not entitled to a P.C.R.A. hearing. ***Commonwealth v. DuPont***, 860 A.2d 525 (Pa. Super. 2004).

In order for plea counsel to be found ineffective, a P.C.R.A. petitioner must plead and prove that: (1) the underlying claim of ineffective assistance is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) ineffectiveness of trial counsel caused prejudice to the petitioner. ***Commonwealth v. Cook***, 952 A.2d 594, 604 (Pa. 2008). Instantly, the paucity of factual support sufficient to establish any of the ***Cook*** requirements is undisputed. Experience teaches that it is not uncommon for defense counsel to seek a favorable sentencing outcome with the Commonwealth through cooperation when a case is otherwise indefensible. Indeed, it might be argued that the failure to do so constitutes ineffectiveness. Current counsel acted in accordance with his experience by favorably positioning Appellant for a generous plea offer from the Commonwealth. Ultimately, the Commonwealth honored its discussions with Appellant by presenting the negotiated plea to the Court. While the parties may have not anticipated the Court's rejection of the negotiated plea, there is no question as to the Court's legal right to do so. ***Commonwealth v. White***, 787 A.2d 1088 (Pa. Super. 2001). Perhaps recognizing the futility of trial, Appellant proceeded to enter guilty pleas despite knowledge that the plea agreement negotiated with the Commonwealth was no longer binding on the ultimate sentence

imposed by the Court. Importantly, Appellant does not question the validity of his decision to plead guilty nor any actions by counsel impacting his right to due process or ability to defend the charges against him. Thus, Appellant is unable to show that he has been prejudiced in any way in the guilt-determining process.

For the foregoing reasons, it is respectfully requested that the decision of the P.C.R.A. court be affirmed.

BY THE COURT:



MICHAEL A. GEORGE
Judge

Date filed: November 20, 2012

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