NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ALLEN ANTHONY MCCARTHY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1709 WDA 2011

Appeal from the PCRA Order September 27, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0017142-2007

BEFORE: STEVENS, P.J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J. Filed: January 10, 2013

This is an appeal from the order of the Court of Common Pleas of Allegheny County denying Appellant Allen Anthony McCarthy's petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Appellant claims the PCRA court erred in refusing to find his trial counsel was ineffective in failing to adequately advise Appellant to enter a guilty plea in light of the overwhelming evidence against him. We affirm.

Appellant was charged with robbery,[1] false identification to law enforcement,[2] resisting arrest,[3] and possession of a small amount of

---

* Former Justice specially assigned to the Superior Court.
[1] 18 Pa.C.S.A. § 3701(a)(1)(i),(ii).
[2] 18 Pa.C.S.A. § 4914.
[3] 18 Pa.C.S.A. § 5104.

marijuana.[4] This Court summarized the factual background and procedural history of this case on direct appeal:

> On November 5, 2007, the victim, M.S., a wheelchair-bound young man, and Appellant had a happenstance meeting. They had been friends in school and then gone their separate ways. N.T. Trial, 5/27/09, at 36-37. After conversing for a few minutes, Appellant asked M.S. for a ride, and M.S. obliged. M.S. had approximately $200 in rent money in the center console of his vehicle that was visible to Appellant. ***Id***. at 37-38. M.S. transported Appellant to his destination without incident.
>
> M.S. subsequently went out with his girlfriend. Upon their return, no one was available to assist her in removing M.S. from the car, so the girlfriend entered the house and M.S. remained in the vehicle. ***Id***. at 38. He dozed off while listening to a Steeler game on the radio. ***Id***. at 39.
>
> M.S. awoke some time later to Appellant peering in through the driver's side rear door of the vehicle. ***Id***. at 36. The door opened and Appellant climbed over the front seat. Appellant had a gun in his hand and used it to poke M.S. in the stomach, telling him to "give it up." ***Id***. at 39. M.S. realized that Appellant wanted the rent money that had been in the console, which he had subsequently put in his pocket. M.S. refused Appellant's demand and advised him, "[Y]ou are going to have to kill me if you want anything off me." ***Id***. at 40. They struggled, and M.S. succeeded in knocking the gun out of Appellant's hand. Appellant tried to start the car, but M.S. removed the keys from the ignition. M.S. screamed for help. M.S.'s brother was walking down the street, heard him screaming, and intervened. As he pulled Appellant from the driver's seat of the vehicle, Appellant honked the horn. ***Id***. at 41-42.
>
> The victim's aunt and girlfriend were awakened by the horn and they came out of the house. Initially, Appellant was on the ground but then he ran. M.S. advised them that Appellant had taken his "stuff," so the girlfriend chased after Appellant with a hammer, eventually apprehending him and retrieving M.S.'s cell phone and money. ***Id***. at 68. Appellant fled and police were summoned.

---

[4] 35 P.S. § 780-113(a)(31).

> Pittsburgh Police Officer Keith Stover responded to the call and found M.S. sitting in his car, holding his chest and gasping for breath. He called paramedics. Officer Stover retrieved the weapon used in the robbery, which turned out to be a toy pistol or replica.
>
> The next day, Officer Stover recognized Appellant based on M.S.'s description, and he attempted to arrest him. Appellant resisted and several officers were required to subdue him. At the time of his arrest, Appellant was in possession of marijuana and gave a false name to police. ***Id***. at 30-31.
>
> At trial, M.S., as well as his girlfriend, aunt, and brother identified Appellant as the assailant. Appellant offered the alibi testimony of his sister to the effect that on the night of the robbery, she saw Appellant laying in the middle of the street around midnight, she took him home, and stayed with him until three or four a.m. ***Id***. at 100. She described him as "highed up, acting crazy, drunk," and she was afraid that he might steal from her because he was an addict. ***Id***. at 102. The jury convicted Appellant of all charges.
>
> Prior to the commencement of trial, the trial court conducted a colloquy regarding a plea offer that the Commonwealth made to Appellant. N.T. Trial, 5/27/09, at 3-4. The Commonwealth offered a mitigated-range sentence of thirty to sixty months on the robbery charge, with a waiver of the mandatory five-to-ten year sentence for use of firearm, and in addition, to withdraw the remaining counts. ***Id***. Appellant acknowledged that he understood the mandatory five-to-ten year sentence, that he discussed the offer with his counsel, and stated that he would proceed to trial. ***Id.*** On the record, defense counsel related that Appellant's mother discussed the plea with him, but Appellant remained resolute in his desire to go to trial. ***Id***.

Commonwealth v. McCarthy, 549 WDA 2010 (Pa. Super. November 4, 2010) (unpublished memorandum). After the jury convicted Appellant of all the charges, the trial court sentenced Appellant to five to ten years imprisonment with credit for two years Appellant had already served. Appellant filed a timely appeal in which he claimed trial counsel was ineffective. On November 4, 2010, this Court dismissed Appellant's

ineffectiveness claim without prejudice pursuant to ***Commonwealth v. Grant***, 572 Pa. 48, 813 A.2d 726 (2002), and affirmed Appellant's sentence.

On November 15, 2010, Appellant filed this timely PCRA petition.[5] The PCRA court appointed Appellant new counsel, who indicated that the sole claim Appellant wished to raise in his petition was trial counsel's alleged ineffectiveness in failing to advise Appellant to accept the Commonwealth's plea offer. After the PCRA court held an evidentiary hearing, it denied Appellant's petition on September 27, 2011. This timely appeal followed.

Our standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa. Super. 2012). In order to be eligible for PCRA relief, the petitioner must prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated circumstances found in 42 Pa.C.S.A. § 9543(a)(2), which includes the ineffective assistance of counsel.

"It is well-established that counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him."

---

[5] Generally, a PCRA petition must be filed within one year of the date the judgment is final unless the petitioner pleads and proves one of the exceptions enumerated in 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

Commonwealth v. Koehler, ---Pa.---, 36 A.3d 121, 132 (Pa. 2012) (citing ***Strickland v. Washington***, 466 U.S. 688, 687-691 (1984)). To prevail on an ineffectiveness claim, the petitioner has the burden to prove that "(1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance." ***Commonwealth v. Sneed***, ---Pa.---, 45 A.3d 1096, 1106 (Pa.,2012) (quoting ***Commonwealth v. Pierce***, 567 Pa. 186, 786 A.2d 203, 213 (2001)).

The trial court, in its 1925(a) opinion found Appellant was not a credible witness in testifying that he did not understand the likelihood of his conviction in the case when the victims and witnesses knew Appellant well and could clearly identify him as the robber. In addition, Appellant stated on the record in a colloquy before proceeding to trial that he was fully aware of the mandatory sentence he was faced if convicted, had discussed the plea offer with his attorney, and fully understood the plea agreement he was rejecting. The PCRA court found trial counsel testified credibly when he claimed that he told Appellant that he should take the plea offer as the likelihood of conviction was high, but Appellant insisted on going to trial. We agree with the trial court's thorough analysis in its July 19, 2012 opinion, which we adopt as our own for purposes of further appellate review.

Accordingly, we find the trial court did not err in denying Appellant collateral relief.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	)	CRIMINAL DIVISION
	)	
	)	
v.	)	NO: CC 200717142
	)	
ALLEN ANTHONY McCARTHY,	)	Appeal
	)	
Petitioner	)	
	)	

July 19, 2012

TODD, J.

OPINION

This is an appeal by Petitioner, Allen Anthony McCarthy, from an Order entered on September 27, 2011 dismissing his PCRA Petition after an evidentiary hearing held on September 20, 2011. On October 26, 2011, Petitioner filed a Notice of Appeal with the Superior Court of Pennsylvania. On November 3, 2011 an Order was entered directing Petitioner to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. § 1925(b)(4). On November 3, 2011 an Order was entered granting leave for Petitioner to proceed in *forma pauperis.* On November 28, 2011 Petitioner filed his Concise Statement of Matters Complained of on Appeal, which set forth the following:

> "(1) TRIAL COUNSEL WAS INEFFECTIVE- - IN VIOLATION OF ARTICLE I, SECTION 9 OF THE PENNSYLVANIA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNTED STATES CONSTITUTIONS - - FOR FAILING TO ADEQUATELY ADVISE DEFENDANT ON WHETHER TO ACCEPT OR REJECT THE PLEA OFFER."

BACKGROUND

This matter arises out of a robbery which occurred on November 5, 2007, which resulted in Petitioner being charged with robbery, false identification to a law enforcement officer, resisting arrest and possession of a controlled substance. After a jury trial on May 26, 2009, Petitioner was found guilty of all charges. This Court entered a § 1925(b) Opinion on July 15, 2010, which reviewed the facts of the case and which is incorporated herein in its entirety. Petitioner subsequently filed an appeal and raised three issues including a claim that his trial counsel was ineffective in failing to adequately advise Petitioner on whether or not to accept or reject the plea offer. This claim was noted to be premature pursuant to *Commonwealth v. Grant,* 813 A.2d 726 (Pa. 2002). On November 4, 2010, the Superior Court of Pennsylvania entered a Memorandum Opinion and Order affirming the judgment of sentence against Petitioner. On November 15, 2010, Petitioner filed a Post Conviction Relief Act Petition and Motion for Appointment of Replacement Counsel as Petitioner could not afford counsel. On November 23, 2010, an Order was entered granting private counsel leave to withdraw and appointing counsel to represent Petitioner in his PCRA Petition and any related appeal. Petitioner was granted leave to file any necessary or supplemental PCRA Petitions within forty-five (45) days. On January 21, 2011, counsel for Petitioner filed a Notice indicating that the sole issue would be whether or not trial counsel was ineffective in not advising Petitioner that his conviction was a likely outcome of his jury trial and counsel was ineffective in failing to advise Petitioner to accept the plea bargain offered by the Commonwealth. On February 22, 2011, the Commonwealth filed an Answer to Petitioner's PCRA Petition. On June 6, 2011 an Order was entered scheduling a hearing to take place on July 27, 2011. A hearing was held on September 22, 2011. On September 27, 2011 an Order was entered dismissing Petitioner's PCRA.

DISCUSSION

In this appeal Petitioner asserts that trial counsel was ineffective in failing to properly advise him related to the likelihood of his conviction and in failing to advise him that he should have accepted the plea bargain offered by the Commonwealth. Initially it should be noted that the following exchange took place on May 27, 2009 prior to the beginning of the trial:

> "(Court is in session at 9:47 a.m.)
>
> THE COURT: Mr. Schupansky, let me see if I understand this. Count one, robbery, a felony one. You offered a mitigated sentence of 30 to 60 months?
>
> MR. SCHUPANKSY: That's correct. ***We waived the mandatory five to ten years.***
>
> THE COURT: And he has 18 months in?
>
> MR. SCHUPANSKY: Yes. And we would withdraw the remaining counts.
>
> THE COURT: **Do you understand the offer?**
>
> THE DEFENDANT: **Yes, sir.**
>
> THE COURT: ***Do you understand if you are convicted, you are looking at a mandatory five to ten years?***
>
> THE DEFENDANT: ***Yes.***
>
> THE COURT: ***Has you attorney reviewed the offers with you?***
>
> THE DEFENDANT: ***Yes.***
>
> THE COURT: ***Now, have you discussed this with your attorney?***
>
> THE DEFENDANT: ***Yes.***
>
> THE COURT: It is your intention to turn this down and proceed to trial?
>
> THE DEFENDANT: Proceed to trial.
>
> THE COURT: ***I just want to put it on the record. You are satisfied?***
>
> THE DEFENDANT: ***Yes, sir.***
>
> THE COURT: Do you understand that once we swear the jury in and begin, I assume once it starts, that offer is gone, is that correct?
>
> MR. SCHUPANSKY: ***It is, Your Honor. And again, we are seeking the mandatory five to ten years.***
>
> THE COURT: I just want you to be fully aware of that. ***You have 18 months in.*** I want you to fully understand this before I bring the jury in. Once they are sworn in, the offer is gone.
>
> ***Do you understand that?***
>
> THE DEFENDANT: ***Yes.***
>
> THE COURT: ***Have you explained this to him, counselor?***
>
> MR. HAFT: ***Yes.***
>
> THE COURT: We will bring the jury down.
>
> (Recess is taken at 9:52 a.m.)" (T. 5/27/09, pp. 3-4)(Emphasis added)

The charges for which the Petitioner was being tried included Robbery related to an incident which occurred on November 5, 2007 in which it is alleged that Petitioner robbed the victim, Maurice Sampson, while Sampson was sitting in a vehicle outside of his home at 73 Allen Street, Pittsburgh, Pennsylvania. The evidence clearly established that Sampson had known the Petitioner for years, having gone to school with him. An additional Commonwealth witness, Tracey Schulter, confirmed that after the robbery she recovered the victim's cell phone and money from Petitioner. Schulter knew Petitioner very well, having actually dated him. It is clear from the underlying case that Petitioner knew full well that the victim and additional Commonwealth witnesses were going to provide credible identification testimony at the time of the trial. Therefore, it is incredible for Petitioner to assert that he did not understand that the likelihood of his conviction was high. In addition, the victim in the case was paralyzed from the waist down as a result of an automobile accident and was unable to walk without assistance or a brace.

As noted above, this Court conducted a colloquy with the Petitioner prior to the commencement of the proceedings in which Petitioner was specifically advised of the potential mandatory five to ten year sentence. A proposed plea of 30 to 60 months was discussed with Petitioner. An inquiry was made as to whether or not the Petitioner had reviewed the offer with his counsel. Petitioner expressed no hesitation concerning his decision to reject the plea offer and proceed to trial.

At the PCRA hearing held on September 22, 2011, Petitioner's trial counsel testified concerning his discussions with Petitioner before trial. Attorney Haft testified:

> "If I recall, I spoke with him on several occasions at the jail. I explained to him that there was a victim that was going to testify and positively identify him and we didn't have a reason to show he was lying. Also there was four or five other

witnesses. ***I told him that we should plea it and he insisted on trying it.*** (T. 9/22/11, p. 4)(Emphasis added)

In discussing the possibility of conviction, Attorney Haft, an experienced criminal lawyer, indicated that it was his opinion that the likelihood of his client's conviction was very good. (T. 9/22/11, p. 5) He further noted that his client insisted on calling his sister as an alibi witness but that, in fact, her testimony gave the jury the motive for the crime. (T. 9/22/11, p. 5) Petitioner's sister, who was called as an alibi witness, stated that he was a drug user and that he stole for drugs, which provided a motive. A review of the trial transcript indicates that rather than being an effective alibi witness, the sister's testimony was extremely damaging. It is noted in this Court's 1925(b) Opinion that she also testified that she was concerned because he was "highed up, acting strange, drunk" and that she stayed awake while he was in the house because she was afraid that he might steal from her because he was an addict. (1925(b) Opinion of 7/15/10) Petitioner's trial counsel testified that it was his opinion that Petitioner should have taken the plea bargain and that he advised Petitioner that it would be in his best interest to take the plea. (T. 9/22/11, p. 9)

Petitioner testified at the PCRA hearing that trial counsel told him at the beginning of the trial that they had a good chance of acquittal due to the inconsistent statements made at the preliminary hearing. (T., 9/22/11, p. 11) This Court finds credible the testimony of Attorney Haft that he clearly advised Petitioner that the likelihood of Petitioner's conviction was high. Any assertion to the contrary by Petitioner is simply not credible.

Petitioner also asserts that he did not understand that he was facing a five to ten year mandatory sentence in the event of his conviction. However, Petitioner's testimony was inconsistent regarding what he was advised by trial counsel. Petitioner stated "No, Mr. Haft never told me there was a five to ten year mandatory. He told me it was a five year mandatory."

(T. 9/22/11, p. 12) He testified that trial counsel did not render an opinion concerning the plea bargain but "he just told me to trust him and let him do his job." (T. 9/22/11, p. 14)

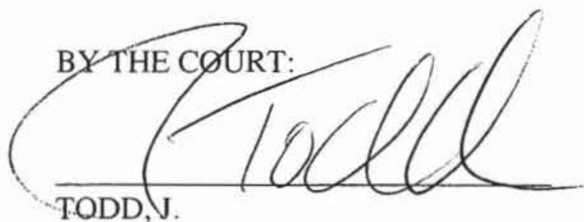
Again, reference is made to the colloquy prior to beginning of trial. Petitioner was repeatedly advised that it was a five to ten year mandatory sentence if convicted. Petitioner contends that Attorney Haft instructed him, upon inquiry by the Court, to simply say yes. (T. 9/22/11, pp. 18-19) This testimony was not credible. Even assuming there was some discrepancy between what Petitioner was advised by his counsel and what he was advised by the Court during the colloquy, it is clear that Petitioner never raised any questions or objections. In *Commonwealth v. Chazin*, 873 A.2d. 732 (2005) the following was discussed regarding ineffective assistance of counsel claims as it relates to plea agreements:

> "Consequently, in assessing claims of IAC, the court's evaluation of counsel's performance must be "highly deferential," its determination based not upon "the distorting effects of hindsight," *Commonwealth v. Basemore,* 560 Pa. 258, 744 A.2d 717, 735 (2000), but upon a preponderance of the evidence in each of three categories. Thus, claims of IAC may provide grounds for relief only where the petitioner establishes that: 1) his underlying claim is of arguable merit, 2) counsel lacked any reasonable basis for the act or omission alleged, and 3) that the petitioner was prejudiced as a result, *i.e.*, "that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different." *Rivers,* 786 A.2d at 927; *see also Commonwealth v. Shaffer,* 763 A.2d 411, 415 (Pa.Super.2000). "Ordinarily, a claim of ineffectiveness may be denied by a showing that the petitioner's evidence fails to meet a single one of these prongs." *Basemore,* 744 A.2d at 738 n. 23.
>
> In this case, the trial court found counsel ineffective and granted Chazin a new trial based on our holding in *Copeland,* requiring counsel to advise his client specifically on "the risks, hazards and prospects of the case" as a foundation for a knowing and voluntary plea. 554 A.2d at 61. We recognized there that:
>
> The decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. This decision must finally be left to the client's wishes; counsel cannot plead a man guilty, or not guilty, against his will. But counsel may and must give the client the benefit of his professional advice on this crucial decision, and often he can protect the client adequately only by using a considerable amount of persuasion to convince the client that one course or the other is in the client's best interest. Such persuasion is most often needed to convince the client to plead guilty in a case where a not guilty plea

would be totally destructive." *Commonwealth v. Chazin*, 873 A.2d 732, 735 (Pa. Super. 2005)

It is clear from both the trial record and the PCRA evidentiary hearing that the benefits of accepting or rejecting a guilty plea were discussed. This Court does not find Petitioner's testimony credible that he was not fully advised by trial counsel. There is no evidence that trial counsel was ineffective and, therefore, Petitioner's PCRA Petition was appropriately dismissed.

BY THE COURT:



TODD, J.