

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DAVID HUGHES,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
SCOTT KRAMER, ESQ.,	:	
	:	
Appellee	:	No. 177 EDA 2012

Appeal from the Order Entered December 7, 2011
In the Court of Common Pleas of Delaware County
Civil Division No(s): 2009-000037

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

Filed: January 11, 2013

Pro se Appellant, David Hughes, appeals from the order entered in the Delaware County Court of Common Pleas granting summary judgment in favor of Appellee, Scott Kramer, Esq., in this criminal malpractice action. He contends the court erred in applying the doctrine of collateral *estoppel*. We affirm.

We state the facts as set forth in *Commonwealth v. Hughes*, 291 EDA 2010 (Pa. Super. Oct. 4, 2010) [hereinafter *Hughes II*], which underlie the instant action:

On January 26, 2005, Appellant was arrested and charged with various offenses for inappropriate sexual

* Former Justice specially assigned to the Superior Court.

contact with a minor child (“the victim”), who was the daughter of his former paramour. The victim had reported to her father and stepmother that Appellant had abused her in or about 1994-1995. Appellant denied having inappropriate sexual contact with the victim, but, during a police interview, admitted that the victim had seen him naked and grabbed and squeezed his penis.

Id. at 1. At trial, Appellant was represented by Appellee. Appellant was convicted of multiple counts of, *inter alia*, aggravated indecent assault and sentenced to ten to twenty years in prison and ten years’ probation. *Id.* at 2. Appellant appealed, and this Court affirmed. ***Commonwealth v. Hughes***, 1700 EDA 2007 (Pa. Super. June 8, 2008).

On August 11, 2008, Appellant filed a timely Post Conviction Relief Act¹ (“PCRA”) petition raising several allegations that Appellee provided ineffective assistance of counsel. After an evidentiary hearing on September 22, 2009, the PCRA court denied Appellant’s PCRA petition. Appellant appealed, and this Court affirmed. ***See Hughes II, supra***, at 8. Appellant filed a petition for *allocatur* with our Supreme Court, which denied same on March 16, 2011. ***Commonwealth v. Hughes***, 759 MAL 2010 (Pa. March 16, 2011).

Meanwhile, during the pendency of Appellant’s PCRA appeal before this Court, Appellant initiated the instant legal malpractice action against Appellee on January 5, 2009. Appellant’s claim sounded in trespass.

¹ 42 Pa.C.S. §§ 9541-9546.

Appellant's Compl., 12/30/08, at ¶ 17. Appellant filed a motion to stay the action, which the court granted on March 9, 2010.

On April 6, 2011—following our Supreme Court's denial of *allocatur*—Appellee filed a motion to lift the stay and amend the answer to include a defense of collateral *estoppel*. Appellee alleged that because Appellant's claims in the legal malpractice action were identical to his PCRA allegations of ineffective assistance of counsel, the court should permit Appellee to invoke collateral *estoppel*. Appellee's Mem. of Law in Support of the Mot. of Appellee to Lift the Stay and Amend New Matter, at 7 (citing ***Alberici v. Tinari***, 542 A.2d 127 (Pa. Super. 1988)). Appellant opposed, reasoning that unlike the procedural posture in ***Alberici***, an outstanding federal *habeas* petition exists before the United States District Court for the Eastern District of Pennsylvania, docketed at 12-cv-276. The court granted Appellee's motion on June 13, 2011.

On October 3, 2011, Appellee moved for summary judgment. The certified record does not reflect Appellant's opposition to the summary judgment motion. Appellant's appellate brief, however, includes a copy of his opposition and documentation purportedly establishing timely service.²

² As discussed further below, we give Appellant the benefit of the doubt and assume he properly served and attempted to file his opposition. Appellee does not deny receiving Appellant's opposition.

The court granted summary judgment on December 7, 2011. Appellant filed a timely appeal on January 5, 2011.³

Appellant raises the following issue on appeal:

Did the lower court err by dismissing Appellant's legal malpractice action when he can still prevail in overturning his criminal conviction based on attorney ineffectiveness of counsel in the federal courts?

Appellant's Brief at 1.

Appellant initially contends that *Alberici* is inapposite because in the instant matter, there is a pending federal petition for *habeas corpus*. *Alberici* is further distinguishable, Appellant argues, because that case involved a federal conviction and the defendant could not obtain relief from the courts of this Commonwealth. He argues that it is well-settled that federal courts overturn state criminal convictions on the basis of ineffective counsel and thus the instant trial court acted prematurely by granting relief. Appellant argues that no Pennsylvania case is on point, but refers this Court to *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993), in which our Supreme Court purportedly held that a legal malpractice action should be suspended until

³ The trial court insisted that it received Appellant's notice of appeal on January 10, 2011, and thus Appellant's appeal was untimely. The trial court overlooked the prisoner mailbox rule. *See Commonwealth v. Wilson*, 911 A.2d 942, 944 n.2 (Pa. Super. 2006) (discussing prisoner mailbox rule). The record establishes, and Appellee concedes, *see* Appellee's Brief at 5, that Appellant timely appealed. We acknowledge that the certificate of service was dated January 5, 2011, and the envelope was postmarked January 6, 2011. Appellant's notice of appeal would be timely under either date.

the conclusion of post-conviction criminal proceedings. Appellant's Brief at 5 (citing *Bailey*, 621 A.2d at 115 n.13). He suggests that a federal *habeas* proceeding is a post-conviction proceeding and thus the trial court erred. We hold Appellant is not entitled to relief.

The standard of review follows:

Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Thus, summary judgment is proper only when the uncontr[O]verted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. In sum, only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment. . . .

With regard to questions of law, an appellate court's scope of review is plenary. The Superior Court will reverse a grant of summary judgment only if the trial court has committed an error of law or abused its discretion. . . .

Gutteridge v. A.P. Green Servs., Inc., 804 A.2d 643, 651 (Pa. Super. 2002) (citations omitted).

In *Alberici*, Nino Tinari, Esq., and Timothy Gorby, Esq., represented Joseph Alberici, who was indicted for mail fraud in federal court. **See** *Alberici*, 542 A.2d at 127. A federal jury convicted Mr. Alberici, who then

discharged Attorneys Tinari and Gorby and obtained new counsel. *Id.* at 128. New counsel, in a motion to vacate or set aside Mr. Alberici's sentence, alleged Attorneys Tinari and Gorby provided ineffective assistance of counsel. *Id.* The federal district court denied the motion. Mr. Alberici appealed, and the Court of Appeals for the Third Circuit affirmed.

Meanwhile, Mr. Alberici sued Attorneys Tinari and Gorby in the courts of this Commonwealth for legal malpractice. *Id.* The attorneys filed, and the court granted, a summary judgment motion. *Id.* Mr. Alberici appealed, and the *Alberici* Court held that the doctrine of collateral *estoppel* barred Mr. Alberici's civil suit for legal malpractice:

The doctrine of collateral estoppel as applied in Pennsylvania requires that: (1) the issue decided in the prior litigation was identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication and (4) the party against whom it was asserted had a full and fair opportunity to litigate the issue in question in a prior action.

* * *

The troublesome part in our application of the doctrine of collateral estoppel is whether the federal court finally adjudicated the same issues raised in the civil action commenced in the court below. We conclude that the issues were finally determined. The central theme in the various post-trial proceedings in the federal court was that trial counsel in the federal criminal trial were ineffective.

* * *

The necessary elements to prove a cause of action based on legal malpractice are: (1) the employment of the

attorney or other basis for a duty on the part of the attorney; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) negligence by the attorney which was the proximate cause of damage to the plaintiff. In the case before us, the appellant has unsuccessfully raised the question of ineffectiveness of counsel at three levels in the federal judicial system and it has been definitively determined that counsel was not ineffective. Accordingly, his conviction in the federal district court has been affirmed. The second element of the tri-partite test has not been met.

Id. at 131-32 (footnotes and citations omitted).

In *Bailey*, a federal criminal defendant successfully obtained a ruling from the United States Court of Appeals for the Third Circuit that his trial counsel was ineffective. *See Bailey*, 621 A.2d at 111. Subsequently, that defendant sued his trial counsel in the courts of this Commonwealth for legal malpractice. *Id.* at 112. Trial counsel filed a motion for judgment on the pleadings based on the statute of limitations. *Id.* The trial court granted that motion, this Court affirmed, and our Supreme Court granted *allocatur* to inquire when the statute of limitation should run. *Id.* In resolving that inquiry, the *Bailey* Court elaborated on the elements necessary to establish a claim of criminal malpractice:

- (1) The employment of the attorney;
- (2) Reckless or wanton disregard of the defendant's interest on the part of the attorney;
- (3) the attorney's culpable conduct was the proximate cause of an injury suffered by the defendant/plaintiff, i.e., "but for" the attorney's conduct, the defendant/plaintiff would have obtained an a[c]quittal or a complete dismissal of the charges.

(4) As a result of the injury, the criminal defendant/plaintiff suffered damages.

(5) Moreover, a plaintiff will not prevail in an action in criminal malpractice unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error;¹³ additionally, although such finding may be introduced into evidence in the subsequent action it shall not be dispositive of the establishment of culpable conduct in the malpractice action.

¹³ This requirement does not, however, relieve the plaintiff of his duty to initiate this cause of action within the statute of limitations period as hereinafter discussed, but it does raise a procedural question, to wit: what is to be done with a civil action filed prior to the completion of the post-conviction process? The answer is that an attorney defendant who is served with a complaint alleging professional malpractice for the handling of a criminal matter may interpose a preliminary objection on the grounds of demurrer. **See** Pa.R.C.P. No. 1017(b)(4). The trial court shall then reserve its ruling on said objection until the resolution of the post-conviction criminal proceedings.

Bailey, 621 A.2d at 115 & n.13 (some footnotes omitted).⁴

In **Shaffer v. Smith**, 673 A.2d 872 (Pa. 1996), our Supreme Court identified “the point at which a criminal conviction is considered final in order to serve as a basis for collateral estoppel in a civil trial.” **Id.** at 873. In this

⁴ We observe that the **Bailey** Court distinguished the factors relied on by the **Alberici** Court. **See Bailey**, 621 A.2d at 112 (discussing factors identified in **Alberici** and concluding that “in situations where a criminal defendant attempts to state a cause of action with respect to alleged negligent representation in a criminal proceeding, there are substantial differences which warrant distinct treatment of this cause of action.”). Thus, we defer, as we must, to the elements announced by our Supreme Court in **Bailey**.

case, the defendant assaulted the victim, and the victim “filed a civil action for damages caused by the assault.” *Id.* Meanwhile, the defendant was convicted of, *inter alia*, aggravated assault and sentenced to prison. *Id.* This Court affirmed the conviction and our Supreme Court denied review. *Id.*

In the civil suit, the victim subsequently “moved for partial summary judgment as to liability based on [the defendant’s] criminal conviction.” *Id.* Before the court ruled on the victim’s motion, the defendant “filed a PCRA petition alleging ineffective assistance of counsel.” *Id.* at 873-74. The court granted partial summary judgment, and the defendant filed a motion “to vacate the partial summary judgment on the basis of his pending PCRA petition.” *Id.* at 874. The court denied the motion, the case went to trial on damages, and the victim was awarded compensatory and punitive damages. *Id.*

The defendant appealed the order denying the motion to vacate the partial summary judgment because of the outstanding PCRA petition on the underlying conviction. *Id.* This Court affirmed, and our Supreme Court granted allowance of appeal. *Id.* Our Supreme Court affirmed the denial of the motion:

The precise question of whether the pendency of a collateral appeal of a criminal conviction deprives a party of the right to invoke the doctrine of collateral estoppel is a case of first impression in this Commonwealth. However, the related question of what effect a civil appeal has on an otherwise final judgment has been answered. A judgment

is deemed final for purposes of *res judicata* or collateral estoppel unless or until it is reversed on appeal. We see no reason to deviate from this line of reasoning as it applies to an underlying criminal conviction. Thus, we hold that the pendency of an appeal of a criminal conviction does not deprive a party of the right to invoke collateral estoppel in a civil proceeding unless or until that conviction is reversed on appeal.

Id. at 874-75 (citations and footnote omitted). In reaching its holding, the *Shaffer* Court acknowledged:

Although a criminal defendant may have to institute another proceeding to set aside a civil judgment which was predicated exclusively on his criminal conviction when it is later reversed, we find this result to be more desirable. For purposes of finality, we believe that holding a criminal conviction in abeyance until appellate review is completed would result in hardship to the party seeking to invoke collateral estoppel. If this Court were to hold to the contrary, the party seeking to invoke collateral estoppel would be forced to duplicate the effort and expense of litigating the same issue in the second action. In the alternative, that party would have to postpone the second action for some indefinite period until the criminal defendant's appeals were exhausted.

Id. at 875.

Instantly, *Shaffer* stands for the proposition that a judgment of sentence renders a criminal conviction final for purposes of collateral estoppel only. *See id.* at 874-75. Thus, in this case, Appellee may rely on Appellant's judgment of sentence and invoke collateral estoppel in a related civil lawsuit. *See id.* The existence of a federal collateral criminal proceeding implicating Appellant's conviction in this Commonwealth does not alter the application of *Shaffer*: Appellant's judgment of sentence renders

his criminal conviction final and permits a civil litigant to invoke collateral *estoppel* regardless of the pendency of (1) any direct appeal or (2) state or federal collateral proceeding. **See id.** To the extent the **Bailey** Court may have suggested a stay in *dicta*, **see Bailey**, 621 A.2d at 115 n.13, the **Shaffer** Court subsequently indicated to the contrary. **See Shaffer**, 673 A.2d at 875 (rejecting stay of civil action until completion of direct and collateral review).

Moreover, Appellant has raised claims of ineffective assistance of counsel sounding in trespass that were resolved by the **Hughes II** Court. **See Hughes II, supra.** Appellant, similar to the defendant in **Alberici**, raised claims of criminal malpractice before three levels of the courts of this Commonwealth, which all denied relief. **Cf. Alberici**, 542 A.2d at 131-32. Appellant has not established that “but for” the attorney’s conduct, he would have obtained an acquittal or dismissal of the charges against him. **See Bailey**, 621 A.2d at 115. Absent fulfillment of the third element, Appellant cannot establish criminal malpractice. **See id.** After viewing the record in the light most favorable to Appellant, we discern no abuse of discretion or error of law. **See Gutteridge**, 804 A.2d at 651. Accordingly, we affirm the order.

Order affirmed.