J. S56007/12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TERRY NELSON,	:	No. 1841 EDA 2011
Appellant	:	

Appeal from the PCRA Order, June 30, 2011,
in the Court of Common Pleas of Delaware County
Criminal Division at No. CP-23-CR-0002804-2003

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND COLVILLE,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 15, 2013

Terry Nelson appeals, ***pro se***, from the order of June 30, 2011, denying his post-conviction petition for collateral relief. We affirm.

On direct appeal, a panel of this court described the history of this case as follows:

> In December of 2002, Appellant taped his picture over Mark Abrams' driver's license and used the altered identification to obtain a credit card from Kohl's Department Store.[Footnote 1] The clerk who processed the application suspected the identification was false and alerted security. Meanwhile, the store manager issued a credit card under Mr. Abrams' name. Appellant used the card to purchase over $700 worth of merchandise, and was apprehended upon departure from the store.
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> On January 30, 2004, Appellant was convicted of forgery, access device fraud, and theft by deception.[Footnote 2] The trial court ordered a pre-sentence investigation report and scheduled

* Retired Senior Judge assigned to the Superior Court.

sentencing for March 22nd. On that date, Appellant's counsel advised the court that Appellant had requested new counsel, and the court deferred sentencing to March 25th. Meanwhile, on March 23rd, counsel filed a petition for the appointment of new counsel on Appellant's behalf. After a hearing on April 22nd, the court denied the petition.

A sentencing hearing commenced on April 29th, in which Appellant disputed the calculation of his prior record score based on his 1983 conviction in federal court of conspiracy to commit bank robbery, bank robbery, and assaulting and jeopardizing lives during a bank robbery[footnote 3] in New Jersey, for which he was sentenced to an aggregate ten years.[Footnote 4] (Trial Court Opinion, filed 11/30/05, at 5). Appellant was also separately convicted in New Jersey state court of receiving stolen property and three counts of aggravated assault for the same incident. He was sentenced to an aggregate term of seven years, to be served consecutively to his federal sentence. After hearing testimony from Appellant and the probation officer who prepared his pre-sentence report, the court postponed the hearing to obtain Appellant's federal and New Jersey sentencing records.

Meanwhile, on June 4th, Appellant filed a petition for discharge, alleging a violation of his right to speedy sentencing under Pennsylvania Rule of Criminal Procedure 704. The court denied it after receiving Appellant's previous records and sentencing recommenced on August 31st. In calculating Appellant's prior record score, the court treated his federal and New Jersey crimes as separate convictions. It sentenced him to 22 to 72 months' incarceration for forgery and a consecutive 24 to 84 months for access device fraud, for an aggregate term of [3] years and 10 months' to 13 years' imprisonment. The court also imposed five years' probation for theft by deception. Appellant filed a motion for reconsideration of sentence, which was denied.

> [Footnote 1] Mr. Abrams lost his wallet prior to the incident and was not a party to the crime.
>
> [Footnote 2] 18 Pa.C.S.A. §§ 4104(a)(2), 4106, 3922.
>
> [Footnote 3] 18 U.S.C. §§ 371, 2113(a), 2133(d), 2.
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> [Footnote 4] Appellant was originally sentenced in 1983 to an aggregate twenty-five years, but his sentence was reduced to ten years in 1985 for cooperation with federal authorities. (Trial Court Opinion at 6).

Commonwealth v. Nelson, 2952 EDA 2004 at 1-3 (Pa.Super. filed November 13, 2006) (unpublished memorandum).

Appellant filed a timely direct appeal, and this court affirmed the judgment of sentence on November 13, 2006. Our supreme court denied appellant's petition for allowance of appeal ***nunc pro tunc*** on February 24, 2009. ***Commonwealth v. Nelson***, 915 A.2d 147 (Pa.Super. 2006), ***appeal denied***, 600 Pa. 755, 966 A.2d 571 (2009).

On November 17, 2009, appellant filed a timely ***pro se*** PCRA[1] petition. Counsel was appointed, but was permitted to withdraw at appellant's specific request. Following a ***Grazier***[2] hearing, it was determined that appellant knowingly, intelligently and voluntarily waived his right to counsel and wished to represent himself. On December 30, 2010, the PCRA court issued

[1] Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

[2] ***Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998).

notice of intent to dismiss the petition without a hearing within 20 days pursuant to Pa.R.Crim.P., Rule 907, 42 Pa.C.S.A. Appellant filed a ***pro se*** response to Rule 907 notice on January 7, 2011. On June 30, 2011, appellant's petition was dismissed. On July 11, 2011, appellant filed a timely ***pro se*** notice of appeal. Appellant complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the PCRA court has filed an opinion.[3]

Appellant has raised the following issues for this court's review:

1. Whether the trial court erred in dismissing appellant's PCRA petition without a hearing?

2. Whether defense and appellate counsel was [sic] ineffective for failing to properly present the claim?

3. Whether the trial judge erred in imposing a sentence above the aggravated range?

4. Whether the trial judge erred in imposing each sentence consecutive?

5. The trial judge failed to give adequate reasons for the sentence imposed?

6. Whether the retroactive application of the 1997 amendments of the sentencing guidelines is a ***per se*** violation of the ***ex post facto*** clause?

[3] On December 20, 2011, appellant was ordered to file a Rule 1925(b) statement within 21 days. (Docket #73.) Appellant filed a motion for extension of time on January 5, 2012, which was granted on January 20, 2012. (Docket #74, 75.) In the order filed January 20, 2012, the PCRA court granted appellant an additional 90 days in which to file his Rule 1925(b) statement. (***Id.***) Appellant complied on April 2, 2012, and the PCRA court filed a Rule 1925(a) opinion on April 20, 2012. (Docket #77, 79.)

Appellant's brief at 4.

Initially, we recite our standard of review:

> This Court's standard of review regarding an order denying 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. Halley***, 582 Pa. 164, 870 A.2d 795, 799 n. 2 (2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa.Super.2001).

Commonwealth v. Turetsky, 925 A.2d 876, 879 (Pa.Super. 2007), ***appeal denied***, 596 Pa. 707, 940 A.2d 365 (2007).

> [T]he right to an evidentiary hearing on a post-conviction petition is not absolute. ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa.Super.2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. ***Id.*** It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing. ***Commonwealth v. Hardcastle***, 549 Pa. 450, 454, 701 A.2d 541, 542-543 (1997).

Id. at 882, quoting ***Commonwealth v. Khalifah***, 852 A.2d 1238, 1239-1240 (Pa.Super. 2004).

We turn to appellant's discretionary aspects of sentencing claims first. Ordinarily, of course, discretionary sentencing claims are not cognizable under the PCRA. 42 Pa.C.S.A. § 9543(a)(2)(vii). However, appellant has

framed his claims in terms of counsel ineffectiveness. ***See Commonwealth v. Whitmore***, 860 A.2d 1032, 1036 (Pa.Super. 2004), ***reversed in part on other grounds***, 590 Pa. 376, 912 A.2d 827 (2006) ("a claim that counsel was ineffective for failing to perfect a challenge to the discretionary aspects of sentencing is cognizable under the PCRA") (citations omitted); ***Commonwealth v. Watson***, 835 A.2d 786, 801 (Pa.Super. 2003) ("a claim regarding the discretionary aspects of [the defendant's] sentence, raised in the context of an ineffectiveness claim, would be cognizable under the PCRA"), discussing ***Commonwealth ex rel. Dadario v. Goldberg***, 565 Pa. 280, 773 A.2d 126 (2001) (footnote omitted).

> "To prevail on a claim alleging counsel's ineffectiveness, 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. Wallace***, 555 Pa. 397, 407, 724 A.2d 916, 921 (1999), citing ***Commonwealth v. Howard***, 538 Pa. 86, 93, 645 A.2d 1300, 1304 (1994) (other citation omitted). In order to meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a "'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Commonwealth v. Kimball***, 555 Pa. 299, 308, 724 A.2d 326, 331 (1999), quoting ***Strickland v. Washington***, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A "'[r]easonable probability' is defined as 'a probability sufficient to undermine confidence in the outcome.'" ***Id.*** at 309, 724 A.2d at 331, quoting ***Strickland***, 466 U.S. at 694, 104 S.Ct. 2052.

Commonwealth v. Jones, 811 A.2d 1057, 1060 (Pa.Super. 2002), ***appeal denied***, 574 Pa. 765, 832 A.2d 435 (2003).

Even though appellant frames the issue in terms of trial counsel ineffectiveness, he would still be required to show that there is a substantial question as to the appropriateness of the sentence for our review on appeal. ***See Whitmore***, 860 A.2d at 1036. Otherwise, he fails to meet the first prong of the ineffectiveness test, ***i.e.***, that the underlying issue has arguable merit. ***Id.***

> To demonstrate that a substantial question exists, "a party must articulate reasons why a particular sentence raises doubts that the trial court did not properly consider [the] general guidelines provided by the legislature." ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617, 622 (2002), quoting, ***Commonwealth v. Koehler***, 558 Pa. 334, 737 A.2d 225, 244 (1999). In ***Mouzon***, our Supreme Court held that allegations of an excessive sentence raise a substantial question where the defendant alleges that the sentence "violates the requirements and goals of the Code and of the application of the guidelines . . . ." ***Id.*** at 627. A bald allegation of excessiveness will not suffice. ***Id.***

Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa.Super. 2005), ***appeal denied***, 587 Pa. 684, 897 A.2d 451 (2006).

We will address appellant's third and fifth claims together. Appellant argues that the trial court failed to give adequate reasons for sentencing him outside the aggravated range of the sentencing guidelines. Appellant also contends that prior counsel was ineffective for failing to preserve these claims. On direct appeal, appellant raised a challenge to the discretionary

aspects of sentencing; however, this court found the issue waived for failure to preserve it in his Rule 1925(b) statement. ***Nelson***, ***supra*** at 4. ***See Whitmore***, 860 A.2d at 1036 ("appellate counsel's failure to perfect on appeal a discretionary sentencing claim which has arguable merit is without any reasonable basis designed to effectuate his client's interest").

"Where the appellant asserts that the trial court failed to state sufficiently its reasons for imposing sentence outside the sentencing guidelines, we will conclude that the appellant has stated a substantial question for our review." ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa.Super. 1999) (***en banc***) (citation omitted). Therefore, appellant has presented at least a colorable claim that a substantial question exists, and we may conduct a substantive review of appellant's arguments concerning the discretionary aspects of his sentence to ascertain whether relief is warranted. ***See also Commonwealth v. Reynolds***, 835 A.2d 720, 733-734 (Pa.Super. 2003) (allegation that sentencing court failed to offer specific reasons for the sentence raises a substantial question) (citation omitted).

> The matter of sentencing is vested within the sound discretion of the trial court; we only reverse the court's determination upon an abuse of discretion. To demonstrate that the trial court has abused its discretion, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. Moreover, 42 Pa.C.S.A. § 9721(b) provides that the

> trial court must disclose, on the record, its reasons for imposing the sentence.

Commonwealth v. Hanson, 856 A.2d 1254, 1257 (Pa.Super. 2004) (citations and internal quotation marks omitted). "[T]he sentencing judge must state of record the factual basis and specific reasons which compelled him or her to deviate from the guideline ranges. When evaluating a claim of this type, it is necessary to remember that the sentencing guidelines are advisory only." ***Commonwealth v. Griffin***, 804 A.2d 1, 8 (Pa.Super. 2002), ***appeal denied***, 582 Pa. 671, 868 A.2d 1198 (2005), ***cert. denied***, 545 U.S. 1148 (2005), citing ***Commonwealth v. Eby***, 784 A.2d 204, 206 n.2 (Pa.Super. 2001).

The guidelines are "advisory guideposts" only, that recommend rather than require a particular sentence; they are not mandatory, and the trial courts retain broad discretion in sentencing. ***Commonwealth v. Walls***, 592 Pa. 557, 570, 926 A.2d 957, 964-965 (2007) (citations omitted). We may vacate a sentence outside the guidelines only where the sentencing court abused its discretion in imposing a sentence that is "unreasonable." ***Id.*** at 567-568, 926 A.2d at 963, citing 42 Pa.C.S.A. § 9781(c), (d).

Appellant's sentence for theft by deception fell within the mitigated range of the guidelines; his sentences for forgery and access device fraud fell outside the aggravated range. (PCRA court opinion, 4/20/12 at 4.) The trial court explained its reasons for the sentence on the record, at appellant's sentencing hearing:

> In this offense, you involved another person. Now, she wasn't charged, but you involved her in you [sic] criminal episode. You haven't responded to prior incarcerations. You've served, as incarceration, the maximum of prior – your prior New Jersey. You served as much of your federal sentence, as the regulations allow, in incarceration. And it's pretty clear from all of this that you do not respect other people's rights and you have not learned to respect other people's rights. I believe confinement's necessary to protect the safety and the good order of society, to protect people and their rights and their personal rights. I also believe it's necessary to confine you to protect commerce.

Notes of testimony, 8/31/04 at 26.

> The type of behavior you engaged in, cost all of us money. It casts a cost on all of society, because every time this sort of thing happens, the price of goods goes up and other people, some of them poor people who can't afford it, are asked to pay more, because you engage in this kind of activity.

Id. at 27-28.

The trial court also articulated the reasons for its sentence in its opinion on direct appeal, including appellant's lack of remorse and failed previous efforts at rehabilitation:

> [Appellant] did not show remorse for his criminal conduct during his testimony at trial or at sentencing. It was clear from [appellant]'s testimony at trial that he believed the jury should acquit him because the Commonwealth had not made him a "fair offer" to resolve the charges in this case without trial. N.T. 1/30/04 at 128. He declined to offer any statement at sentencing, but the Court had the benefit of the trial testimony. The Court concluded that [appellant] continues to be a danger to society and manifests an unwillingness to conform his behavior to that of a law-abiding individual. The

> Court considered the report of psychologist John Campagna who concluded that [appellant] has serious difficulty in social and occupational functioning. The Court also considered the contents of the pre-sentence report and the statements made by the parties at time of sentencing. ***See***, C-4, 8/31/04 and N.T. 8/31/04 at 3-29.

Trial court opinion, 11/30/05 at 10-11.

We find that the trial court put ample reasons on the record justifying an upward departure from the guidelines. Therefore, appellant cannot demonstrate how he was prejudiced by counsel's failure to preserve the issue for direct appeal.

We now turn to appellant's fourth issue on appeal. Appellant claims that the trial court abused its discretion by running his sentences consecutively, and that prior counsel was ineffective for failing to preserve the claim on direct appeal.

"In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." ***Commonwealth v. Perry***, 883 A.2d 599, 603 (Pa.Super. 2005) (citations omitted).

> Long standing precedent of this Court recognizes that 42 Pa.C.S.A. section 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. ***Commonwealth v. Graham***, 541 Pa. 173, 184, 661 A.2d 1367, 1373 (1995). . . . Any challenge to the exercise of this discretion ordinarily does not raise a substantial question. ***Commonwealth v. Johnson***, 873 A.2d 704,

> 709 n.2 (Pa.Super. 2005); ***see also Commonwealth v. Hoag***, 445 Pa.Super. 455, 665 A.2d 1212, 1214 (Pa.Super. 1995) (explaining that a defendant is not entitled to a "volume discount" for his or her crimes).

Commonwealth v. Mastromarino, 2 A.3d 581, 586-587 (Pa.Super. 2010), ***appeal denied***, 609 Pa. 685, 14 A.3d 825 (2011), quoting ***Commonwealth v. Gonzalez-Dejusus***, 994 A.2d 595, 599 (Pa.Super. 2010). "[T]he key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Id.*** at 587, quoting ***Gonzalez-Dejusus***, ***supra***.

Here, appellant does not raise a substantial question for our review. The aggregate sentence of 46 months' to 13 years' imprisonment is neither grossly disparate to appellant's conduct nor does it "viscerally appear as patently 'unreasonable.'" ***Id.*** at 589, quoting ***Gonzalez-Dejusus***, ***supra***. Rather, appellant appears to be seeking a "volume discount" for his crimes on the basis that they occurred close in time and place and involved the same department store. We agree with the trial court that given the facts of the case, consecutive sentences were warranted. (PCRA court opinion, 4/20/12 at 8.) Since the underlying claim does not raise a substantial question and is without arguable merit, counsel cannot be held ineffective for failing to properly present it on direct appeal. ***See Whitmore, supra*** ("[I]t is axiomatic that counsel will not be considered ineffective for failing to

pursue meritless claims."), quoting ***Commonwealth v. Pursell***, 555 Pa. 233, __, 724 A.2d 293, 304 (1999).[4]

In his sixth issue on appeal, appellant claims that the sentencing guidelines in effect in 1983 should have been applied to his 1983 convictions. According to appellant, under the previous version of the guidelines, only the most serious offense should have counted towards his prior record score. Appellant contends that his 1983 convictions were all part of the same criminal transaction, ***i.e.***, the robbery of the bank in New Jersey. Under the guidelines in effect at that time, where a defendant has two or more prior convictions arising from the same transaction, only the most serious conviction offense from that transaction should count in the prior record score. (Appellant's brief at 41.) As appellant recognizes, the amended version of the guidelines eliminated the "same transaction"

[4] We note that appellant argues his convictions of forgery, access device fraud and theft by deception all arose out of the same criminal transaction, ***i.e.***, the credit card offenses. (Appellant's brief at 22.) At first blush, this appears to be a merger argument, which goes to the legality of sentencing and is non-waivable. ***Commonwealth v. Duffy***, 832 A.2d 1132, 1136 (Pa.Super. 2003), ***appeal denied***, 577 Pa. 694, 845 A.2d 816 (2004). However, upon closer inspection, appellant's argument is really that his prior record score should have been applied against only the most serious offense, ***i.e.***, forgery. Appellant claims that the sentencing ranges for the remaining offenses of access device fraud and theft by deception, which have lower offense gravity scores, should have been calculated with a prior record score of zero. (Appellant's brief at 24.) This argument is based on previous editions of the sentencing guidelines in effect before the time of the instant offenses. Since, for the reasons discussed ***infra***, we find that the trial court's application of the 1997 guidelines was proper, we reject appellant's argument.

language and counts all prior convictions except those imposed "totally concurrent" to another sentence. (***Id.*** at 44-45, citing 204 Pa.Code § 303.5.) Appellant argues that application of the sentencing guidelines as amended on June 13, 1997 was ***ex post facto***. We disagree.[5]

> The United States Constitution provides that 'no State shall . . . pass any . . . ex post facto Law. . . .' U.S. Const. Art. 1, § 10. The Pennsylvania Constitution provides that 'no ex post facto law . . . shall be passed.' Pa. Const. Art. 1, § 17. The Pennsylvania Constitution provides the same ex post facto protections as the United States Constitution.

Commonwealth v. Davis, 760 A.2d 406, 409 (Pa.Super. 2000), citing ***Commonwealth v. Fisher***, 559 Pa. 558, 741 A.2d 1234, 1238 (1999).

> In 1798, the United States Supreme Court identified four types of prohibited ex post facto laws:
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> 1st. Every law that makes an action done before passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal

[5] It should be noted that on direct appeal we addressed a similar argument, that the sentencing guidelines in effect at the time of appellant's 1983 convictions should have governed sentencing for the current convictions. ***Nelson***, ***supra*** at 7. We held that under ***Rodda***, ***supra***, the 1997 guidelines applied. ***Id.***, citing ***Rodda***, 723 A.2d at 216 (version of the guidelines in effect at the time the crime is committed apply, regardless of the date sentence is imposed). However, since we did not address the precise argument appellant presents herein, that application of the 1997 guidelines constituted an ***ex post facto*** violation, we do not consider it already litigated. Appellant framed the issue as one of trial court error in calculating his prior record score, not one of constitutional dimension. ***Id.*** at 6.

> rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.
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> ***Calder v. Bull***, 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648 (1798) []. These four categories are still recognized today. ***Collins v. Youngblood***, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); ***Fisher***, 741 A.2d at 1238.

Id. (emphasis deleted).

> We recently set forth other relevant ex post facto principles as follows:
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> The bulk of our ex post facto jurisprudence has involved claims that a law has inflicted a [sic] "a greater punishment, than the law annexed to the crime, when committed." ***Calder*** [.] We have explained that such laws implicate the central concerns of the Ex Post Facto Clause: "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." ***Weaver v. Graham***, 450 U.S. 24, 30, [101 S.Ct. 960, 67 L.Ed.2d 17][ ] (1981).
>
> To fall within the ex post facto prohibition, a law must be retrospective—that is "it must apply to events occurring before its enactment"—and it "must disadvantage the offender affected by it" ***id.***, at 29[, 741 A.2d 1234][,] by altering the definition of criminal conduct or increasing the punishment for the crime, ***see Collins*** [,] 497 U.S. [at 50][, 110 S.Ct. 2715].
>
> ***Commonwealth v. Kline***, 695 A.2d 872, 874 (Pa.Super.1997), ***appeal denied***, 552 Pa. 694, 716 A.2d 1248 (1998).

Id. at 409-410.

Instantly, application of the amended guidelines to appellant's sentences did not increase the punishment for the crimes committed in 1983. The 1997 version of the guidelines applies only to future offenses. The fact that under the 1997 guidelines, appellant's prior record score for his 1983 convictions may have increased does not make the amended guidelines retroactive. The 1997 sentencing guidelines were triggered when appellant committed new crimes in 2002.

We find the following cases to be instructive. In ***Commonwealth v. Cook***, 941 A.2d 7 (Pa.Super. 2007), this court rejected the appellant's argument that application of the 2004 amendments to the DUI statute, which increased the "look-back" window of prior convictions from 7 to 10 years, was ***ex post facto***.

> This Court has repeatedly held that the amendment to the DUI statute providing for a ten year look-back period to determine whether a defendant had prior DUI offenses, for purposes of enhancing subsequent offenses, did not constitute an ***ex post facto*** violation. The amendment did not retroactively enhance prior DUI convictions occurring before its effective date; it only enhanced punishment for the latest offense, which is considered to be an aggravated offense because it is a repetitive one.

Id. at 13 (citations omitted).

Similarly, in ***Commonwealth v. Ford***, 947 A.2d 1251 (Pa.Super. 2008), ***appeal denied***, 598 Pa. 779, 959 A.2d 319 (2008), this court found that the "three strikes" statute, 42 Pa.C.S.A. § 9714, was not an ***ex post facto*** law. The December 20, 2000 amendment to Section 9714 eliminated

a requirement that to be considered as strikes, previous convictions had to have been committed within 7 years of the date of the instant offense. The appellant in ***Ford*** argued that any crimes which occurred prior to the amendment to Section 9714 should not be considered strikes for purposes of sentencing a defendant as a third-strike offender. This court disagreed, finding that Section 9714 was not retroactive and did not change the punishment for the predicate offense. ***Id.*** at 1253 (citations omitted). Rather, Section 9714 applied prospectively only, to future recidivist offenses. ***Id.*** "[E]ven if we were to deem § 9714 'retroactive' on some level because it takes into account convictions that occurred prior to its enactment, we would find that the legislature surely intended such a result, thereby satisfying § 1926."[6] ***Id.*** at 1254, quoting ***Commonwealth v. Smith***, 866 A.2d 1138, 1144 (Pa.Super. 2005), ***appeal denied***, 583 Pa. 682, 877 A.2d 462 (2005).

Similarly, here, the 1997 amended version of the sentencing guidelines applied prospectively only, to appellant's new crimes committed in 2002. They did not increase the punishment for offenses committed in

[6] 1 Pa.C.S.A. § 1926 provides that no statute shall be considered as retroactive unless clearly and manifestly so intended by the General Assembly.

1983. Appellant's argument that application of the 1997 guidelines to calculate his prior record score was illegally retroactive is without merit.[7]

In appellant's first two issues, he claims that the PCRA court erred in dismissing his petition without an evidentiary hearing; and that both trial counsel and appellate counsel were ineffective for failing to properly present these claims. As we have determined, for the reasons discussed ***supra***, that appellant's claims are without arguable merit and/or do not afford him any relief on collateral review, prior counsel were not ineffective and the PCRA court did not err in dismissing appellant's petition without a hearing.

Order affirmed.

[7] To the extent appellant repeats his argument that his 1983 federal and New Jersey convictions should have been treated as a single criminal transaction for purposes of calculating his prior record score, this argument was raised on direct appeal and rejected on the merits. ***Nelson***, ***supra*** at 6-8. We held that the trial court properly counted appellant's federal and New Jersey convictions separately. ***Id.*** Therefore, the matter is finally litigated. 42 Pa.C.S.A. § 9544(a)(2).