

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

GREGORY S. GOLDEN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 193 EDA 2011

Appeal from the PCRA Order January 4, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0403141-2005
CP-51-CR-0403171-2005
CP-51-CR-0403181-2005
CP-51-CR-0403191-2005
CP-51-CR-0403201-2005
CP-51-CR-0511841-2005

BEFORE: STEVENS, P.J., BOWES, J., and PLATT, J.*

MEMORANDUM BY STEVENS, P.J.

Filed: January 3, 2013

Appellant, Gregory Golden, appeals the Order entered in the Court of Common Pleas of Philadelphia County dismissing his petition filed under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, without an evidentiary hearing. After careful review, we affirm.

The relevant facts and procedural history are as follows: On January 6, 2006, Appellant pled guilty to six counts of burglary,¹ one count of

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 3502.

indecent assault,² three counts of indecent exposure,³ one count of simple assault,⁴ and one count of corruption of minors.⁵ The trial court aptly set forth the facts underlying Appellant's guilty plea as follows:

On May 17, 2004, at approximately 4:30 a.m., Appellant entered the home of [C.O.] at 3479 Emerald Street, in Philadelphia, through an unlocked dining room window. [C.O.] awoke in her bedroom to find Appellant at the foot of the bed with his shirt pulled over his face, masturbating over her. [C.O.] felt something wet hit her, and Appellant fled.

On June 14, 2004, at approximately 4:00 a.m., Appellant entered 11 year-old complainant [C.R.'s] bedroom, put his hand down her panties, and touched her vagina. Complainant pushed his hand away, and Appellant placed his hand back inside her panties. Appellant then walked into the hallway, smoked a cigarette, and returned to complainant's room. Appellant tried again to put his hand down her pants, but she pushed his hand away again and he left.

On July 5, 2004, at 1815 E. Ontario Street, 28 year-old [N.B.] awoke at approximately 5:00 a.m. to find Appellant standing over her and exposing his penis, before fleeing out the rear window.

On September 4, 2004, at 4:40 a.m., Appellant entered the bedroom of 17 year-old [E.C.], at 2019 E. Ontario Street, and complainant awoke to find Appellant pulling her feet towards the open window. Complainant screamed and Appellant fled.

On September 13, 2004, at approximately 5:00 a.m., Appellant entered the living room of 33-year-old [A.C.], at 3271 Joyce Street, while she and her four children were asleep. Complainant awoke to find Appellant masturbating in front of her, and screamed, causing him to flee through the front door.

On September 16, 2004, at approximately 8:00 p.m., Appellant entered the home of [D.O.], at 3345 Jasper Street, and took various music CD's before leaving.

² 18 Pa.C.S.A. § 3126.

³ 18 Pa.C.S.A. § 3127.

⁴ 18 Pa.C.S.A. § 2701.

⁵ 18 Pa.C.S.A. § 6301.

Trial Court Opinion, 4/19/12, at 1-2.

The trial court sentenced Appellant to an aggregate of fourteen years to twenty-eight years in prison, and he filed a timely direct appeal to this Court. In his counseled appeal, Appellant presented solely discretionary aspects of sentencing claims; however, concluding Appellant's claims did not present a substantial question permitting our review, we quashed his appeal on April 2, 2008. **See Commonwealth v. Golden**, 325 EDA 2006 (Pa.Super. 4/2/08) (unpublished memorandum). In a footnote, we indicated that, even if Appellant was entitled to review of his claims, we would find no abuse of discretion. **See id.** Specifically, this Court stated, "The record indicates that all of the sentences imposed were within the standard range of the sentencing guidelines, and the sentencing court considered all proper factors in imposing sentence." **Golden**, 325 EDA 2006, at 6 n.4. Appellant did not file a petition for allowance of appeal with our Supreme Court.

On or about September 17, 2008, Appellant filed a timely *pro se* PCRA petition, counsel was appointed, and counsel filed an amended PCRA petition asserting direct appeal counsel was ineffective for failing to raise "any issues" on direct appeal, resulting in this Court quashing the appeal. The PCRA court provided Appellant with notice of its intent to dismiss the PCRA petition without an evidentiary hearing and, on January 4, 2011, the PCRA court dismissed Appellant's petition. This timely appeal followed, and all Pa.R.A.P. 1925 requirements have been met.

On appeal, Appellant solely contends the PCRA court erred in denying his petition without an evidentiary hearing. Specifically,

Appellant argues that the [PCRA] court erred in denying [Appellant] an evidentiary hearing because [Appellant] asserted in his PCRA petition that appellate counsel was ineffective on appeal because he failed to raise any issues, [resulting in Appellant's] appeal from the judgment of sentence [being] quashed.

Appellant's Brief at 5.

Initially, we note "[o]ur standard of review of the denial of PCRA relief is clear; we are limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Wojtaszek***, 951 A.2d 1169, 1170 (Pa.Super. 2008). Further, "[t]here is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." ***Commonwealth v. Jones***, 942 A.2d 903, 906 (Pa.Super. 2008). "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." ***Commonwealth v. Walls***, 993 A.2d 289, 295 (Pa.Super. 2010) (citation omitted).

Since Appellant's claim challenges the stewardship of prior counsel, we apply the following principles. Counsel is presumed to be effective, and Appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa.Super. 2004). In order for Appellant to prevail on a

claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, that:

(1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. The petitioner bears the burden of proving all three prongs.

Commonwealth v. Johnson, 868 A.2d 1278, 1281 (Pa.Super. 2005) (citations omitted). “We stress that boilerplate allegations and bald assertions of no reasonable basis and/or ensuing prejudice cannot satisfy a petitioner’s burden to prove that counsel was ineffective.” ***Commonwealth v. Chmiel***, 612 Pa. 333, 30 A.3d 1111, 1128 (2011) (quotation and quotation marks omitted). Furthermore, the appellate courts have recognized that a claim of appellate counsel ineffectiveness for failing to raise a claim on direct appeal is distinct from a claim of appellate counsel ineffectiveness grounded in the manner in which appellate counsel litigated a claim on direct appeal. ***See Commonwealth v. Koehler***, --- Pa. ---, 36 A.3d 121 (2012); ***Commonwealth v. Paddy***, 609 Pa. 272, 15 A.3d 431 (2011).

Here, Appellant asserts appellate counsel was ineffective on direct appeal for failing to raise “any issues.” He specifically asserts “[c]ounsel on appeal did not raise any issues as a result of which the defendant’s appeal from the judgment of sentence was quashed.” Appellant’s Brief at 5. However, Appellant is mistaken in this regard.

A review of the certified record reveals appellate counsel presented discretionary aspects of sentencing claims on direct appeal. Specifically, appellate counsel presented in a separate Pa.R.A.P. 2119(f) statement and the argument portion of the appellate brief the following issues: (1) Whether the trial court abused its discretion when it imposed an excessive, grossly disproportionate aggregate state sentence of 14 to 28 years following an open guilty plea; (2) Whether the trial court erred in failing to give individualized consideration to Appellant's rehabilitative needs and failing to consider Appellant's mitigating factors and/or giving them proper weight; and (3) Whether the trial court failed to state on the record reasons indicating the sentence was the minimum amount of confinement consistent with the protection for the public, the gravity of the offense, and the rehabilitative needs of Appellant.

However, noting there is no automatic right to an appeal of the discretionary aspects of a sentence, and concluding Appellant's issues did not present a substantial question permitting our review, we quashed the appeal. Alternatively, we noted there was no merit to Appellant's discretionary aspects of sentencing claims.

Therefore, contrary to Appellant's assertion, appellate counsel did, in fact, raise issues on direct appeal. That is, Appellant has pointed to no issue, which appellate counsel failed to raise on direct appeal, and he has not challenged the manner in which appellate counsel presented the

discretionary aspects of sentencing issues on direct appeal. Therefore, we conclude the PCRA court did not err in denying Appellant relief on his PCRA ineffectiveness claim without an evidentiary hearing. ***See Walls, supra.***

For all of the foregoing reasons, we affirm.

Affirmed.