NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DAMIAN LAYTON,	:	No. 1080 EDA 2012
Appellant	:	

Appeal from the PCRA Order, March 8, 2012,
in the Court of Common Pleas of Delaware County
Criminal Division at No. CP-23-CR-0004081-2005

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND PLATT,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED AUGUST 15, 2014**

Appellant, Damian Layton, appeals from the order of March 8, 2012, denying his first petition for post-conviction relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Finding no error, we affirm.

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

> In December 2004, Newtown Township Police Detective John Newell received information from a confidential informant that the occupants of 2405 Peoples Street, Chester, Pennsylvania, were selling cocaine from inside of the residence. The informant indicated that "Larry" and "Damian" were selling cocaine, and that the informant had purchased cocaine at the residence. This purchase took place two weeks prior to the date that police applied for a search warrant of the premises. In addition, Detective Newell conducted a controlled

* Retired Senior Judge assigned to the Superior Court.

> purchase of narcotics, using the same informant, within 48 hours of the application for the search warrant.
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> On April 1, 2005, police executed a search warrant at the Peoples Street residence. Police Detective Christopher Sponaugle proceeded to the second floor of the residence, where he observed Layton and co-defendant Kenneth Byrd ("Byrd") run out of a bedroom and move rapidly into the bathroom, closing the door behind them. Detective Sponaugle and two other officers tried to force the door open. During this time, Detective Sponaugle heard the sound of a flushing toilet. When the door finally opened, Detective Sponaugle observed Layton standing and Byrd squatting next to the toilet. According to Detective Sponaugle, both Layton and Byrd were wet, a sandwich bag was floating in the toilet, white powder residue was on the bathroom floor and there was an odor of cocaine in the bathroom. Layton and Byrd subsequently were placed under arrest.

Commonwealth v. Layton, No. 504 EDA 2007, unpublished memorandum at 1-2 (Pa.Super. filed February 2, 2009).

Following a bench trial, appellant was convicted of possession of a controlled substance, possession of a controlled substance with the intent to deliver, possession of drug paraphernalia and conspiracy to possess a controlled substance with the intent to deliver. Appellant was sentenced to an aggregate term of imprisonment of 54 to 108 months.[1] A direct appeal was filed, and on February 2, 2009, this court affirmed appellant's judgment

[1] Appellant's co-defendant, Kenneth Byrd, was convicted of possession of a controlled substance, possession with intent to deliver, possession of drug paraphernalia, and conspiracy. He received an aggregate sentence of 90 to 180 months.

of sentence. ***Commonwealth v. Layton***, 970 A.2d 471 (Pa.Super. 2009) (unpublished memorandum).

On April 22, 2009, appellant filed a ***pro se*** PCRA petition seeking to reinstate his appeal rights ***nunc pro tunc*** in order to pursue relief in the Pennsylvania Supreme Court. On October 30, 2009, the Commonwealth conceded that prior appellate counsel failed to file a petition seeking allowance of appeal with the Pennsylvania Supreme Court after being timely requested to do so by appellant. The PCRA court granted appellant's petition on December 10, 2009. Appellant filed a petition seeking allowance of appeal with the Pennsylvania Supreme Court which was denied by ***per curiam*** order dated June 22, 2010. ***Commonwealth v. Layton***, 997 A.2d 1176 (Pa. 2010).

Appellant filed a ***pro se*** PCRA petition on March 22, 2011, raising numerous issues. On April 26, 2011, Stephen Molineux, Esq., was appointed to serve as PCRA counsel. On January 9, 2012, Attorney Molineux filed a ***Turner***/***Finley***[2] "no-merit" letter. Appellant filed a ***pro se*** objection to the no-merit letter on February 6, 2012. On February 16, 2012, the PCRA court filed a notice of intent to dismiss the PCRA petition in accordance with Pa.R.Crim.P. 907, 42 Pa.C.S.A. By separate order dated February 16, 2012, counsel was permitted to withdraw his representation. Appellant filed a

[2] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (***en banc***).

pro se objection to the notice on March 6, 2012. On March 8, 2012, the PCRA court dismissed appellant's PCRA petition without an evidentiary hearing. This appeal followed.

Appellant raises the following issues for our consideration:

> [1] Was counsel[']s ineffective assistance for failing to argue the Defense "Equal Access Rule," where numerous others had access to the residence of 2405 People[s] Street?
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> [2] Ineffective assistance of counsel for failing to preserve for review the Commonwealth's failure to turn over ***Brady*** material?
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> [3] Was counsel ineffective for failing to object or raise on direct appeal the violation of appellant's rights to be sentence[d] within the time limits of Rule 704 of the Pennsylvania Rule[s] of Criminal Procedure?
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> [4] Was trial counsel ineffective for failing to object or raise on direct appeal the trial court's failure to state on the record his reasons for sentencing appellant to consecutive sentences? And [were] Laurence Narcisi, Henry DiBenedetto Forrest, and PCRA Counsel Stephen Molineux ineffective for not raising trial counsel's ineffectiveness?

Appellant's brief at 4.

Counsel may withdraw at any stage of collateral proceedings if, in the exercise of his or her professional judgment, counsel determines that the issues raised in those proceedings are without merit, and if the court concurs with counsel's assessment. ***Commonwealth v. Bishop***, 645 A.2d 274, 275 (Pa.Super. 1994). However, before PCRA counsel may withdraw, he must

provide the PCRA petitioner with a copy of the petition to withdraw that includes a copy of both the no-merit letter and a statement advising the petitioner that, in the event the PCRA court grants the petition to withdraw, the petitioner has the right to proceed ***pro se***, or with the assistance of privately retained counsel. ***Commonwealth v. Widgins***, 29 A.3d 816, 818 (Pa.Super. 2011). Instantly, our review of the record indicates that both PCRA counsel and the PCRA court have fulfilled their legal obligations pursuant to ***Turner***/***Finley***. We now turn to the issues raised by appellant.

> 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***, 940 A.2d 365 (Pa. 2007). "[T]he PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1040 (Pa.Super. 2007), ***appeal denied***, 951 A.2d 1163 (Pa. 2008).

Appellant argues the PCRA court erred in denying him relief as counsel was ineffective. (Appellant's brief at 22.). To establish ineffectiveness of

counsel, a PCRA petitioner must show the petitioner's underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. ***Commonwealth v. Cox***, 983 A.2d 666, 678 (Pa. 2009). Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different. ***Id.*** The law presumes counsel was effective. ***Id.***

In his first issue, appellant claims all prior counsel were ineffective for failing to present a defense asserting that others had equal access to the drugs and appellant did not live in the house or have access to the specific part of the house where the drugs were found. (Appellant's brief at 13). According to appellant, he could not have constructively possessed drugs found in the house. Based on our review of this matter, it appears that this court had addressed and specifically rejected these claims on direct appeal.

On direct appeal, appellant challenged the sufficiency of the evidence to establish constructive possession necessary to sustain a conviction for possession with intent to deliver a controlled substance. We summarized appellant's argument and rejected it:

> In his next two claims of error, Layton asserts that the evidence was insufficient to sustain his convictions of possession of controlled substances with the intent to deliver and criminal conspiracy. Brief for Appellant at 10, 14. First, Layton argues that "there is no evidence that he possessed, either in fact or constructively, the contraband in question." ***Id.*** Layton argues that there is no evidence linking him to the cocaine in the safe in the second floor bedroom because (a) at least six other individuals

> had access to the house; (b) there was evidence of another man's ownership of the house; (c) there was no evidence establishing Layton's dominion and control over the narcotics; (d) there is no evidence of any interaction between Layton and the others inside the house; (e) Layton did not live in the house; and (f) there is no evidence that Layton was the boss or leader who ordered other individuals to do his bidding. ***Id.*** at 13.

Memorandum decision at 6-7.

The PCRA court determined appellant's equal access argument lacked arguable merit and opined:

> The Commonwealth did not argue at trial that [Layton] lived in the apartment. Rather, it asserted that [appellant] had constructive possession of the drugs because he had access to the bathroom. Additionally, the Commonwealth argued that the police observed [appellant] blocking the bathroom door. They saw a sticky white substance on the bathroom door. The bathroom smelled like cocaine, and a sandwich bag was floating in the toilet. These facts support a finding that [appellant] had constructive possession of the drugs.
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> Trial counsel did argue that [appellant] did not live in the house and that others lived there. Additionally, trial counsel attempted to attack the credibility of the officers' observations. [Appellant] was not prejudiced by the fact that his counsel failed to argue that he could not be convicted because others had "equal access" to the drugs. Trial counsel did, in fact, argue that there was insufficient evidence to convict [appellant] because at least six other individuals had access to the house, there was evidence of another man's ownership of the house, and [appellant] did not live there. In fact, the Superior Court concluded that this argument lacked merit. Accordingly, this issue has been litigated.

PCRA court opinion, 1/31/14 at 6.

It is well settled that "post conviction relief claims alleging that counsel had provided ineffective assistance are generally to be considered distinct from the underlying claims that the trial court erred, even though such underlying claims of error had been litigated on direct appeal." ***Commonwealth v. Kimbrough***, 938 A.2d 447, 451 (Pa.Super. 2007); ***see also Commonwealth v. Collins***, 888 A.2d 564, 571-572 (Pa. 2005). In this case, we addressed the sufficiency of the evidence "equal access" argument on direct appeal. Thus, the underlying claim to appellant's present assertion of counsel's ineffectiveness has already been determined to be without merit. Accordingly, there is no merit to his argument that counsel was ineffective.

Next, appellant argues the Commonwealth failed to provide him with all results or reports of scientific tests, expert opinions, or written or recorded reports. Specifically, appellant argues the Commonwealth did not properly record the currency used in the controlled drug buys and did not properly preserve certain drug evidence. (Appellant's brief at 15). According to appellant, prior counsel were ineffective for failing to argue that a ***Brady***[3] violation occurred in this case.

"[T]o prove a ***Brady*** violation, the defendant must show that: (1) the prosecutor has suppressed evidence; (2) the evidence, whether exculpatory or impeaching, is helpful to the defendant; and (3) the suppression

[3] ***Brady v. Maryland***, 373 U.S. 83 (1963).

prejudiced the defendant." ***Commonwealth v. Busanet***, 54 A.3d 35, 48 (Pa. 2012). The defendant bears the burden of demonstrating that the Commonwealth withheld or suppressed evidence. ***See Commonwealth v. Ly***, 980 A.2d 61, 75 (Pa. 2009); ***Commonwealth v. Porter***, 728 A.2d 890, 898 (Pa. 1999). In the PCRA context, a petitioner must demonstrate that the alleged ***Brady*** violation "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Ly***, 980 A.2d at 75.

Here, the evidence appellant seeks does not exist. Attorney Molineux, in his no-merit letter, noted:

> [Appellant] will be unable to show prejudice since there were no documents that had not already been turned over. The prosecutor stated that evidence relating to the money used in the controlled buy was not recorded and that evidence pertaining to the positive results from field testing of the substances involved in the controlled buy were not preserved either. All evidence was turned over.

No-merit letter, 1/9/12 at 12. The PCRA court determined appellant's argument lacked merit because the Commonwealth turned over all ***Brady*** materials. (PCRA court opinion, 1/31/14 at 6.) We see no error here. ***See Commonwealth v. Smith***, 17 A.3d 873, 890 (Pa. 2011) ("The Commonwealth cannot violate ***Brady*** by suppressing evidence that does not exist."). As the underlying claim is without merit, appellant is not entitled to relief on his ineffectiveness claim. ***Cox***, ***supra***.

Next, appellant claims all prior counsel were ineffective for failing to pursue a claim based upon a delay in sentencing. Pennsylvania Rule of Criminal Procedure 704(A)(1) states that "[e]xcept as provided by Rule 702(B) [allowing for an oral motion for extraordinary relief], sentence in a court case shall ordinarily be imposed within 90 days of conviction or the entry of a plea of guilty or nolo contendere." Pa.R.Crim.P. 704(A)(1). The comment to Rule 704 explains,

> [the] sentence should be imposed within 90 days of conviction or the entry of a plea of guilty or ***nolo contendere***, unless the court orders a psychiatric or psychological examination pursuant to Rule 702(B). Such an order should extend the time for sentencing for only as much time as is reasonably required, but in no event should sentencing be extended for more than 30 days beyond the original 90-day limit . . . .

Pa.R.Crim.P. 704, comment. The comment states that the failure to impose a sentence within the 90-day time period:

> may result in the discharge of the defendant. ***See Commonwealth v. Anders***, 725 A.2d 170 (Pa. 1999) (discharge is appropriate remedy for violation of Rule 1405 [now Pa.R.Crim.P. 704] time limits, but only if the defendant can demonstrate that the delay in sentencing was prejudicial to the defendant).

Pa.R.Crim.P. 704, comment. In applying Rule 704, this court has recognized that:

> [t]he appropriate remedy for a violation of Pa.R.Crim.P. 1405 [now Pa.R.Crim.P. 704], is discharge. However, the remedy does not automatically apply whenever a defendant is sentenced more than [ninety] days after conviction

> without good cause. Instead, a violation of the [ninety-day] rule is only the first step toward determining whether the remedy of discharge is appropriate.
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> * * *
>
> [A] defendant who is sentenced in violation of Pa.R.Crim.P. 1405 [now Pa.R.Crim.P. 704], is entitled to a discharge only where the defendant can demonstrate that the delay in sentencing prejudiced him or her. . . . [T]o determine whether discharge is appropriate, the trial court should consider:
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> > (1) the length of the delay falling outside of [the Pa.R.Crim.P. 704 90-day-and-good-cause provisions]; (2) the reason for the improper delay; (3) the defendant's timely or untimely assertion of his rights; and (4) any resulting prejudice to the interests protected by his speedy trial and due process rights. Prejudice should not be presumed by the mere fact of an untimely sentence. Our approach has always been to determine whether there has in fact been prejudice, rather than to presume that prejudice exists. The court should examine the totality of the circumstances, as no one factor is necessary, dispositive, or of sufficient importance to prove a violation.

Commonwealth v. Diaz, 51 A.3d 884, 887 (Pa.Super. 2012), ***appeal denied***, 76 A.3d 538 (Pa. 2013), quoting ***Commonwealth v. Anders***, 725 A.2d 170, 172-173 (Pa. 1999) (footnotes and internal citations omitted).

Accordingly, in assessing appellant's claim, we consider the following four factors: the length of the delay, the reason for the delay, appellant's

assertion of his rights, and the prejudice resulting to appellant. ***See Diaz***, 51 A.3d at 889.

Our review of the record in the instant case discloses the delay in sentencing was 22 days beyond the 90-day period prescribed by Rule 704. The PCRA court does not address the reasons for the delay, but noted in its Rule 1925(a) opinion that "Defendant cannot show any prejudice. Any attempt by his counsel to seek dismissal on this ground would have failed." (PCRA court opinion, 1/31/14 at 7.) Appellant contends "this delay prejudiced [him] by not allowing [him] to perfect his direct appeal in violation of appellant's due process right." (Appellant's brief at 18.) However, this assertion by appellant does not explain how he was not allowed to perfect his direct appeal. Appellant's direct appeal was timely filed and was not affected by the delay in sentencing. We see no prejudice to appellant. Appellant's argument is without merit, and thus, counsel cannot be found to be ineffective.

Last, appellant claims that all counsel were ineffective for failing to challenge the discretionary aspects of the sentence imposed. Ordinarily, discretionary sentencing claims are not cognizable under the PCRA. 42 Pa.C.S.A. § 9543(a)(2)(vii). However, appellant has framed his claim in terms of counsel ineffectiveness. ***See Commonwealth v. Whitmore***, 860 A.2d 1032, 1036 (Pa.Super. 2004), ***reversed in part on other grounds***, 912 A.2d 827 (Pa. 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).

Regarding trial counsel's ineffectiveness, appellant 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***, 897 A.2d 451 (Pa. 2006).

Instantly, appellant claims the trial court failed to place its reasons on the record for imposing consecutive rather than concurrent terms of imprisonment. The record shows that appellant was sentenced to consecutive sentences totaling 4½ to 9 years. More specifically, appellant was sentenced to a term of 36 to 72 months' imprisonment for possession with intent to deliver and to a term of 18 to 36 months for conspiracy to be

served consecutively. A sentence of 6 to 12 months' imprisonment was imposed for drug paraphernalia to be served concurrently with the possession with intent to deliver sentence.

"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***, 14 A.3d 825 (Pa. 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***.

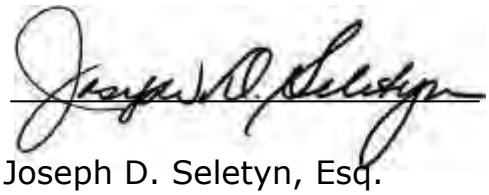
Here, appellant does not raise a substantial question for our review. Each sentence was within the standard range of the guidelines and the aggregate sentence was not manifestly excessive or unreasonable. "Generally, if the sentence imposed falls within the sentencing guidelines, no substantial question exists." ***Commonwealth v. Maneval***, 688 A.2d 1198, 1199-1200 (Pa.Super. 1997), citing ***Commonwealth v. Johnson***, 666 A.2d 690, 692 (Pa.Super. 1995). The Commonwealth points out for what amounted to seven separate drug delivery/possession with intent to deliver crimes, appellant received concurrent sentences on six of them and consecutive sentences only for the crimes committed on one docket.

PCRA counsel recognized that the failure by prior counsel to raise a claim concerning the trial court's failure to state its reasons on the record for imposing certain consecutive sentences may have presented a substantial question; however, under these facts, PCRA counsel also recognized the sentences imposed were within the guidelines and were not manifestly excessive. There was no real basis to challenge the consecutive nature of the sentences even though the trial judge did not expressly state his reasons for the consecutive sentences. 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***, 724 A.2d 293, 304 (Pa. 1999).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/15/2014