

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DARIN KENDRICK

Appellant

No. 1161 WDA 2013

Appeal from the PCRA Order of July 12, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No.: CP-02-CR-0016284-2006

BEFORE: FORD ELLIOTT, P.J.E., BOWES, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED: April 24, 2014

Darin Kendrick appeals the July 12, 2013 order dismissing his petition for relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46, without an evidentiary hearing. We affirm.

On May 20, 2008, Kendrick pleaded guilty to aggravated assault, terroristic threats, recklessly endangering another person, possession of a controlled substance—cocaine, and possession of a small amount of marijuana.¹ Sentencing was delayed for the preparation of a pre-sentence investigation report. However, when the parties appeared before the trial court for sentencing, Kendrick requested to withdraw his May 20, 2008

¹ 18 Pa.C.S. §§ 2702(a)(1), 2706(a)(1), and 2705, and 35 P.S. §§ 780-113(a)(16) and (31), respectively.

guilty plea. The trial court granted Kendrick's request, and re-scheduled the matter for October 29, 2008.

On that date, Kendrick again pleaded guilty to the aforementioned crimes. During the plea hearing, the assistant district attorney assigned to the case summarized the facts underlying the crimes to which Kendrick pleaded guilty as follows:

[O]n or about September 20, 2006, officers were dispatched to 2654 Woodland Avenue for a violent domestic. Officers were unable to get an answer at the door. Officers made a call back to the complainant and notified that police were at the front door.

The victim, Tina North, opened a second floor window and indicated to the officers that [Kendrick] was still inside the residence. She indicated to the officers that she was injured and unable to walk down the stairs and open the door. She proceeded to throw the keys to the residence out the window to the officers.

The officers then proceeded into the residence. They announced themselves, [and] made entry into the home. They then checked the interior of the residence. Officers then located [Kendrick] sitting on the toilet in the bathroom of the first floor. He was then detained and handcuffed.

The officers then checked the area in the bathroom for weapons. They located a clear plastic baggie containing marijuana laying on top of rubbish in the garbage can. Officers then discovered a folded one dollar U.S. currency containing a white powdered substance with suspected cocaine in the garbage can.

The victim indicated to the officers that she was asleep in her bedroom on the second floor of the residence when she was awoken by her boyfriend, [Kendrick]. She indicated that [Kendrick] proceeded to immediately pull her from the bed by her hair and began to punch her in the face.

Ms. North indicated that [Kendrick] then threw her into the closet next to the bed and threw a television set on top of her.

She said that [Kendrick] then began to strangle her. Ms. North stated that she was then strangled until she lost consciousness.

Ms. North indicated she woke sometime later when she was being pulled from the closet by [Kendrick]. She stated he then pulled her back into the bed and began striking her with an aluminum baseball bat. She indicated she was struck several times in the arms, back of the legs and head.

After being struck with the baseball bat, she indicated that [Kendrick] pulled her into an adjoining bedroom. Once in the other bedroom, she indicated that he pushed a large piece of furniture, namely a chest of drawers, on top of her. She indicated that he then left the bedroom and went downstairs[.] [U]sing her telephone[,] Ms. North then stated she was able to call 911 for help. She then believed at that point that he was trying to kill her.

As a result of the assault, Ms. North was observed with [a] swollen shut left eye, a lump on her head, bloody mouth, a welt on her left forearm, suspected broke left ring finger, a large welt on her lower back, a scratch on her lower right leg, complaint of pain in her right thumb and a welt on her left thigh[. T]here were numerous injuries suspected to be delivered.

After examination at the [residence], she was then transported from the scene to Allegheny General Hospital by medics. There was blood all over the bedroom of the residence. [Kendrick] was then placed under arrest and transported to the jail.

Upon check of the bedroom, the officers then located and recovered the aluminum bat on the floor of the bedroom. There were photographs taken of the victim's injuries at the hospital.

Notes of Testimony ("N.T."), 10/29/2008, at 6-8. Kendrick did not offer any additions or corrections to the Commonwealth's summary of the facts. ***Id.*** at 11.

Kendrick appeared before the trial court again on August 13, 2008 for sentencing. At sentencing, the trial court expressed concern that the Commonwealth had submitted a proposed sentencing guideline form for the

crime of aggravated assault—causing serious bodily injury. The trial court believed that the evidence did not prove, beyond a reasonable doubt, that serious bodily injury resulted from Kendrick’s attack on Ms. North. Rather, the court believed that the evidence established only that Kendrick attempted to cause serious bodily injury. Thus, the court believed that the proposed sentencing guidelines should reflect this distinction. N.T., 1/26/2009, at 4-7. In response to the trial court’s concern, the assistant district attorney submitted a new guideline form reflecting sentencing ranges for aggravated assault—attempted serious bodily injury. The re-submitted guideline form also indicated the range of sentences after the application of the deadly weapon enhancement. *Id.* at 8. The assistant district attorney also noted that Kendrick entered a general plea on October 29, 2008, and that the Commonwealth had not negotiated away its right to pursue the deadly weapon enhancement. Nonetheless, the assistant district attorney declared that the Commonwealth would leave the decision of whether to apply the enhancement to the trial court’s discretion. *Id.* at 9.

Before imposing a sentence, the trial court noted the following:

The Court is going to take into consideration the fact that [Kendrick] has entered a guilty plea here. I know the guidelines in the mitigated range with the deadly weapon enhancement are 54 to 66 months.

There is very little at all, Mr. Kendrick, that is mitigating about your conduct here. The Court has already had the district attorney amend the guidelines down because I do not believe the facts of the case were that you, in fact, caused serious bodily injury to the victim but you clearly attempted to – beyond any doubt attempted to. And that is what you plead guilty to.

Even though the guidelines are here for the benefit of the Court, I intend to try and mold the sentence to an appropriate sentence for the individual involved and the sentence I'm going to impose needs to be fair and just and appropriate punishment for your conduct.

Id. at 11-12. Thereafter, the Court sentenced Kendrick to sixty to one hundred and twenty months' incarceration on the aggravated assault count. No further punishment was imposed on the remaining counts. **Id.** at 12.

On February 4, 2009, Kendrick filed a motion for reconsideration of his sentence. On August 17, 2009, that motion was denied by operation of law. Initially, Kendrick did not file a direct appeal. However, Kendrick filed a *pro se* PCRA petition, which was later amended by appointed counsel, seeking to have his direct appeal rights reinstated. The trial court granted Kendrick's PCRA petition, and Kendrick pursued a direct appeal in this Court. On November 16, 2010, we affirmed Kendrick's judgment of sentence. **See Commonwealth v. Kendrick**, No. 647 WDA 2010, slip op. at 1, 8 (Pa. Super. Nov. 16, 2010). Kendrick did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On November 23, 2010, Kendrick, through PCRA counsel, filed a second PCRA petition. Kendrick alleged that trial counsel was ineffective for failing to object to the trial court's calculation of the applicable sentencing guidelines, which Kendrick believed were calculated incorrectly by twelve months. On January 14, 2011, after Kendrick filed an amended petition and the Commonwealth filed an answer, the PCRA court issued a notice of its intent to dismiss Kendrick's petition without a hearing pursuant to

Pa.R.Crim.P. 907. No action was taken on the case until May 28, 2013, when Kendrick filed a motion with the PCRA court seeking a final order disposing of Kendrick's PCRA petition. On July 12, 2013, the PCRA court issued an order dismissing Kendrick's PCRA petition without a hearing.

On July 17, 2013, Kendrick filed a notice of appeal, and an contemporaneous concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On September 25, 2013, the PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a). The court's opinion was not filed in the official docket until October 2, 2013.

Kendrick presents two issues for our consideration:

1. Whether [trial counsel] was ineffective in failing to preserve the claim that the [trial court] erred in calculating the standard range of the sentencing guidelines as [twelve] months higher than it actually was and whether said court intended to impose a sentence at the low end of the standard range which would have been [twelve] months lower than the minimum sentence actually imposed?
2. Whether the [PCRA court] erred and/or abused its discretion in not holding an evidentiary hearing on said claim?

Brief for Kendrick at 3.

Our review of a PCRA court order dismissing a petition under the PCRA is subject to the following standard:

We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. This Court may affirm a PCRA court's decision on any grounds if the record supports it. We grant great deference to the factual

findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Further, where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review is plenary.

Commonwealth v. Rykard, 55 A.3d 1177, 1183 (Pa. Super. 2012) (quoting ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa. Super. 2012); internal citations omitted)).

In his principal challenge, Kendrick contests trial counsel's effectiveness during his sentencing hearing. This issue is governed by the following standard:

In Pennsylvania, counsel is presumed effective, and a defendant bears the burden of proving otherwise. In order to be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel's action or inaction. When determining whether counsel's actions or omissions were reasonable, we do not question whether there were other more logical course of actions which counsel could have pursued: rather, we must examine whether counsel's decisions had *any* reasonable basis. Further, to establish prejudice, a petitioner must demonstrate that but for the act or omission in question, the outcome of the proceedings would have been different. Where it is clear that a petitioner has failed to meet any of the three, distinct prongs . . ., the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met.

Commonwealth v. Steele, 961 A.2d 786, 796-97 (Pa. 2008) (citations and internal quotation marks omitted; emphasis in original).

Kendrick argues that the trial court sentenced him based upon an incorrect calculation of the mitigated range of the sentencing guidelines. Specifically, during sentencing, the trial court stated that “without the deadly weapon enhancement, the bottom of the mitigated range would be [forty-eight] months.” Kendrick notes that the actual bottom of that range in such circumstances is thirty-six months, an assertion with which the Commonwealth agrees. **See** Brief for Kendrick at 15-16; Brief for the Commonwealth at 12. However, the Commonwealth maintains that the trial court’s statement was an instance of the court simply misspeaking, and not a reflection of the court’s confusion or error. **See** Brief for Commonwealth at 12. The PCRA court concluded that it relied upon the correct sentencing guidelines when it ultimately imposed the sentence, but did not state whether the statement relied upon by Kendrick was a misstatement or an error. Nonetheless, trial counsel did not object to this purported miscalculation, which Kendrick contends amounts to constitutional ineffectiveness. Kendrick argues that, due to the trial court’s miscalculation, the trial court sentenced him to twelve months more than it had intended.

We need not address whether this claim has arguable merit, or whether counsel had a reasonable basis for failing to object to the trial court’s statement, because it is clear to us that Kendrick cannot demonstrate that he suffered prejudice. **See Steele, supra** (“Where it is clear that a petitioner has failed to meet any of the three, distinct prongs . . . , the claim may be disposed of on that basis alone, without a determination of whether

the other two prongs have been met.”). Regarding prejudice, Kendrick states only that he “was prejudiced because, if said claim was timely and properly preserved, he would have obtained vacatur of his sentence and/or likely received a reduction in sentence.” Brief for Kendrick at 18. We disagree.

Even if we assume, *arguendo*, for the purposes of this analysis that the trial court was operating with an incorrect sentencing guideline range, it nonetheless is apparent from the record that the court utilized the guidelines as advisory only, and imposed its sentence based upon the individual facts and circumstances, and the lack of mitigating circumstances in the case. In other words, there is nothing in the record that would indicate that the sentencing guidelines were the driving factor in the trial court’s fashioning of Kendrick’s sentence. Indeed, as noted above, the trial court stated the following before imposing its sentence:

There is very little at all, Mr. Kendrick, that is mitigating about your conduct here. The Court has already had the district attorney amend the guidelines down because I do not believe the facts of the case were that you, in fact, caused serious bodily injury to the victim but you clearly attempted to – beyond any doubt attempted to. And that is what you plead guilty to.

Even though the guidelines are here for the benefit of the Court, I intend to try and mold the sentence to an appropriate sentence for the individual involved and the sentence I’m going to impose needs to be fair and just and appropriate punishment for your conduct.

N.T., 1/26/2009, at 11-12. Moreover, in rejecting Kendrick’s ineffectiveness claim, the PCRA court noted the following:

More importantly, as the Court stated on the record, although it was aware of the guidelines, it was imposing a sentence that it believed to be fair and appropriate under the circumstances of the case. . . . Thus, this Court was aware of the correct guidelines but imposed a sentence it believed to be appropriate under the circumstances.

PCRA Court Opinion, 9/25/2013, at 4. Thus, it is clear to us that, even if the trial court's initial calculation and application of the sentencing guidelines was incorrect, the calculation did not have a discernible impact upon the final sentence imposed by the court. Indeed, there is no indication whatsoever in the record that the trial court's sentence would have been different had the trial court calculated the guidelines otherwise.

Because Kendrick cannot demonstrate that his sentence would have been different had trial counsel objected to the trial court's calculation of the sentencing guidelines, he has not satisfied his burden pursuant to our three-part test for ineffective assistance of counsel. Hence, his claim fails.

In his second issue, Kendrick argues that the PCRA court abused its discretion for not holding an evidentiary hearing on Kendrick's ineffective assistance of counsel claim.

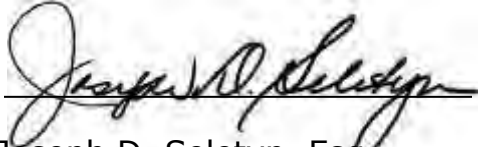
[T]he right to an evidentiary hearing on a post-conviction petition is not absolute. ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa. Super. 2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in 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, 701 A.2d 541, 542-43 (Pa. 1997).

Commonwealth v. Turetsky, 925 A.2d 876, 882 (Pa. Super. 2007) (quoting ***Commonwealth v. Khalifah***, 852 A.2d 1238, 1239-40 (Pa. Super. 2004)) (citations modified). Because we conclude that there is no evidence in the record that Kendrick suffered prejudice, we also conclude that the PCRA court did not abuse its discretion in dismissing Kendrick's PCRA petition without a hearing.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/24/2014