

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MICHAEL L. ANDRUS,	:	
	:	
Appellant	:	No. 1300 MDA 2013

Appeal from the PCRA Order Entered June 19, 2013,
In the Court of Common Pleas of Union County,
Criminal Division, at No. CP-60-CR-0000249-2011,
CP-60-CR-0000256-2011 CP-60-CR-0000294-2011,
CP-60-CR-0000295-2011, CP-60-CR-0000087-2011,
CP-60-CR-0000092-2011 and CP-60-CR-0000096-2011.

BEFORE: BENDER, P.J.E., SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED DECEMBER 23, 2014

Appellant, Michael L. Andrus, appeals from the order denying his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. We affirm.

On March 13, 2012, Appellant pled guilty pursuant to a complicated negotiated plea agreement that resolved several open cases, including charges of stalking, theft by unlawful taking, terroristic threats, and contempt for violation of orders. On June 6, 2012, Appellant was sentenced to an aggregate state sentence of three to six years of imprisonment, consistent with the plea agreement. Appellant was represented by Attorney

Mark H. Lemon (“Lemon”) throughout the trial-related proceedings. Appellant did not file a direct appeal.

On January 25, 2013, Appellant filed a *pro se* PCRA petition. By order entered February 4, 2013, the PCRA court appointed Attorney Steve T. Buttorff as counsel. PCRA court order, 2/4/13, at 1. On April 5, 2013, Attorney Buttorff filed an amended PCRA petition on Appellant’s behalf. Amended Petition for Post-Conviction Relief, 4/5/13. Following a hearing on Appellant’s petition, the PCRA court denied Appellant’s PCRA petition on June 19, 2013. PCRA Court Order, 6/19/13. Appellant filed a timely notice of appeal on August 14, 2013. Appellant was directed to file a Pa.R.A.P. 1925(b) statement, and Appellant timely complied.¹

Appellant presents the following issue for our review:

I. Did the trial court err when it denied the relief requested in [Appellant’s] Petition for Post Conviction Relief?

Appellant’s Brief at 4.

Our standard of review of an order denying PCRA relief is whether the record supports the PCRA court’s determination and whether the PCRA court’s determination is free of legal error. ***Commonwealth v. Phillips***, 31 A.3d 317, 319 (Pa. Super. 2011) (citing ***Commonwealth v. Berry***, 877

¹ We note that after Appellant’s appeal was filed, Attorney Buttorff filed a motion to withdraw as counsel due to the conflict of interest created by his hiring by the Union County Public Defender’s Office. As a result, on May 24, 2014, the PCRA court appointed Attorney Patrick A. Johnson as counsel to proceed with Appellant’s instant appeal.

A.2d 479, 482 (Pa. Super. 2005)). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.*** (citing ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001)).

When considering an allegation of ineffective assistance of counsel ("IAC"), counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his or her conduct; and (3) Appellant was prejudiced by counsel's action or omission. ***Commonwealth v. Pierce***, 527 A.2d 973, 975-976 (Pa. 1987). "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. Reed***, 42 A.3d 314, 319 (Pa. Super. 2012). A claim of ineffective assistance of counsel will fail if the petitioner does not meet any of the three prongs. ***Commonwealth v. Williams***, 863 A.2d 505, 513 (Pa. 2004). "The burden of proving ineffectiveness rests with Appellant." ***Commonwealth v. Rega***, 933 A.2d 997, 1018 (Pa. 2007).

Appellant maintains that the PCRA court erred in denying the relief he requested in his PCRA petition. Appellant's Brief at 9. Specifically, Appellant argues that he met his burden of proof as to his claim for ineffective

assistance of counsel in that trial counsel failed to file a motion to withdraw Appellant's guilty plea or an appeal. **Id.**

Appellant maintains that he directed Lemon to request a withdrawal of his guilty plea before and after sentencing. Appellant's Brief at 10-11. Appellant contends that, because he has the right to file a motion to withdraw a guilty plea and because Lemon did not take action on Appellant's request, Lemon is presumptively ineffective and his inaction is prejudicial. **Id.** at 11. Appellant asserts that he was "adamant that he instructed Lemon to withdraw his guilty plea prior to being sentenced" **Id.** at 12.

Despite his cursory claim that he directed counsel to withdraw his guilty plea, Appellant fails to develop any argument as to the basis upon which he believes he should have been permitted to withdraw his guilty plea. **See Commonwealth v. Katonka**, 33 A.3d 44, 46-47 (Pa. Super. 2011) (holding that a defendant may be permitted to withdraw a guilty plea prior to sentencing if the defendant presents a "fair and just" reason); **compare Commonwealth v. Prendes**, 97 A.3d 337, 352 (Pa. Super. 2014) (explaining that after the court has imposed a sentence, a defendant can withdraw his guilty plea "only where necessary to correct a manifest injustice."). Here, Appellant has failed to present **any reason** as to why he should have been permitted to withdraw his guilty plea, either pre- or post-

sentence. Thus, we cannot agree that Appellant's underlying claim, that he should have been permitted to withdraw his guilty plea, has arguable merit.

Moreover, Appellant has failed to prove that counsel had no reasonable basis for his action, or inaction, in this case. Despite Appellant's claim that he directed counsel to file a motion to withdraw his guilty plea, he presents no evidence in support of that allegation. In fact, when questioned during the PCRA hearing regarding a letter he claimed to have written to counsel stating that he wanted to file a motion to withdraw his guilty plea, Appellant responded: "No, I don't have anything, but I know that I -- I'm pretty sure I wrote him a letter." N.T., PCRA Hearing, 6/19/13 at 40.

Furthermore, a letter written by Lemon to Appellant was read into the record during the PCRA hearing. The letter provided as follows:

Dear [Appellant], I am sending this letter with regards to the above referenced matter, in response to the correspondence of August 5, 2012.

I wish to inform you that the period to file a modification of sentence is ten days from the date of the sentencing. The period to appeal such a sentence is 30 days from the date of the sentencing or 30 days after the denial of a post sentence motion.

You and I had discussed these criminal matters and the outcome on several occasions, including the day of your sentencing. At the conclusion of your sentencing, you gave me no indication that you wished to file a post sentence motion or an appeal. Accordingly, I took no further action on your behalf. At this point, the filing of any motion asking for a modification of a sentence or appeal would be untimely.

If you believe that I did not handle your case competently, I believe at this point, your only course of action would be to file a post conviction relief action petition alleging that I was not competent and that you were denied the right to file a post sentence motion and/or appeal of your sentence.

N.T., PCRA Hearing, 6/19/13 at 32-33. Such evidence refutes Appellant's claim that he had directed Attorney Lemon to file a motion to withdraw his guilty plea. Accordingly, the PCRA court's finding that Appellant failed to establish that counsel was ineffective for failing to file a motion to withdraw Appellants' guilty plea is supported by evidence of record and we cannot disturb it. **Phillips**, 31 A.3d at 319

Appellant also contends that trial counsel was ineffective in failing to file an appeal on Appellant's behalf. Appellant's Brief at 10. In support of this claim, Appellant cites to his own testimony at the PCRA hearing, during which he stated that he directed Attorney Lemon to file an appeal on his behalf. **Id.** at 10.

A review of the hearing transcript reveals that Appellant testified that after he was sentenced, he asked Attorney Lemon to file an appeal. N.T., PCRA Hearing, 6/19/13 at 8. Additionally, the following exchange took place:

[Appellant's Counsel]: Did Mr. Lemon ever file an appeal of your sentence?

[Appellant]: No.

[Appellant's Counsel]: Did you ever send Mr. Lemon a letter or make a phone call to this effect, as well?

[Appellant]: Yeah, I called him a couple times from the Clinton County Prison, and I do believe I wrote him a letter.

[Appellant's Counsel]: What would the letter have been about?

[Appellant]: Withdrawing my guilty plea.

N.T., PCRA Hearing, 6/19/13, at 9.

For purposes of refuting Appellant's claims, the Commonwealth introduced the letter written by Lemon to Appellant, as set forth above. N.T., PCRA Hearing, 6/19/13 at 32-33. Appellant testified that Lemon sent the letter to Appellant in response to Appellant's letter to Lemon inquiring as to the status of the appeal. *Id.* at 34. Subsequently in his testimony, Appellant testified that he did not "have any copies of any letters [Appellant] wrote to [Lemon]." *Id.* at 39.

Appellant's cursory averment that he asked trial counsel to file an appeal on his behalf, and that counsel failed to do so, is insufficient to satisfy his burden.

[B]efore a court will find ineffectiveness of trial counsel for failing to file a direct appeal, Appellant must prove that he requested an appeal and that counsel disregarded this request. Mere allegation will not suffice; the burden is on Appellant to plead and prove that his request for an appeal was ignored or rejected by trial counsel.

Commonwealth v. Harmon, 738 A.2d 1023, 1024 (Pa. Super. 1999) (citations omitted). Appellant presents no evidence supporting his claim that he directed counsel to file an appeal. In addition, the letter Lemon wrote to Appellant, as read into the record, indicates that Appellant had not requested that Lemon file an appeal and is evidence directly refuting Appellant's claim. Thus, this claim lacks merit.

To the extent that Appellant avers that, even in the absence of a request by a defendant, counsel may still be ineffective for failing to file an appeal, we find that this claim also lacks merit. Appellant's Brief at 9-10. This Court in **Commonwealth v. Touw**, 781 A.2d 1250 (Pa. Super. 2001), summarized the United States Supreme Court case of **Roe v. Flores-Ortega**, 528 U.S. 470 (2000), as follows:

If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?

The Court answered this question by holding:

[C]ounsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

Touw, 781 A.2d at 1254 (quoting **Roe**, 528 U.S. at 480).

Where no request [to file an appeal] has been made, an appellant must establish that a duty to consult was owed. Under **Roe** and **Touw**, an appellant may establish a duty to consult by indicating issues that had any potential merit for further review.

Commonwealth v. Bath, 907 A.2d 619, 623 (Pa. Super. 2006).

First, Appellant does not assert that counsel failed to consult with him about an appeal. In fact, the June 19, 2013 letter written by Lemon to Appellant, as set forth above, indicates that there was consultation between Lemon and Appellant regarding the outcome of the case. Arguably, if Appellant wanted Lemon to proceed with an appeal on his behalf, during that consultation would have been an optimal opportunity to request such. Thus, there is evidence of record supporting the conclusion that Lemon consulted with Appellant and that Appellant had an opportunity to request an appeal during that consultation.

Additionally, Appellant has not established that a consultation was owed. Appellant has failed to identify any issues that had potential merit for further review.² **See Bath**, 907 A.2d at 623. Therefore, we conclude that Appellant has not met his burden of establishing counsel was ineffective for

² As noted previously, Appellant's claim that counsel was ineffective for failing to withdraw Appellant's guilty plea entered pursuant to a negotiated plea agreement is meritless.

failure to consult with him regarding an appeal. Thus, we cannot conclude that counsel was ineffective.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2014