J-S32029-14

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOHN PAUL CURRIN,	:	
	:	
Appellant	:	No. 1679 WDA 2013

Appeal from the PCRA Order September 30, 2013,
Court of Common Pleas, Fayette County,
Criminal Division at No. 233 of 2009 - CP-26-CR-0000233-2009

BEFORE: PANELLA, DONOHUE and ALLEN, JJ.

MEMORANDUM BY DONOHUE, J.: FILED: June 18, 2014

Appellant, John Paul Currin ("Currin"), appeals from the September 30, 2013 order dismissing without an evidentiary hearing his petition for relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. § 9541-46 ("PCRA"). We affirm.

On December 16, 2008, Currin, with the aid of his girlfriend, Ashley Lynn Johnston, robbed the Parkville Savings Bank near the Uniontown Mall in Fayette County. When police officers attempted to stop Currin's truck, he drove erratically in an attempt to get away. The police eventually stopped Currin's truck with a PIT (precision immobilization technique) maneuver. Rather than obey police commands to surrender himself, however, Currin tried to escape again by accelerating his truck and colliding with at least one

of the police vehicles. The police officers shot Currin in the hand, at which time he finally surrendered.

On June 3, 2009, after rejecting a plea offer of 15 to 30 years of incarceration, Currin entered an open guilty plea to three counts each of aggravated assault and criminal conspiracy, and one count each of robbery, theft by unlawful taking, receiving stolen property, fleeing or attempting to elude police officers, and criminal mischief.[1] On July 31, 2009, the trial court sentenced him to 20 to 40 years of incarceration.

While represented by counsel, Currin filed a premature *pro se* PCRA petition on August 7, 2009. The trial court incorrectly labeled the petition as untimely and dismissed it without prejudice because of the court's lack of jurisdiction. On August 10, 2009, Currin filed a *pro se* motion to modify his sentence. He filed *pro se* notices of appeal on December 21, 2009 and December 29, 2009, docketed at Nos. 2186 WDA 2009 and 19 WDA 2010, respectively. This Court ultimately quashed both appeals as premature because of the pending post-sentence motion.[2] In response to newly-appointed counsel's August 26, 2011 motion to compel judgment, the trial court directed the clerk of courts to enter an order indicating that Currin's *pro se* post-sentence motion was denied by operation of law. Currin filed a

[1] 18 Pa.C.S.A. §§ 2702, 903, 3701, 3921, 3925, 3733, 3304.

[2] The certified record indicates that the appeal at No. 19 WDA 2010 was quashed through this Court's June 23, 2010 order, but that the appeal at No. 2186 WDA 2009 was not quashed until December 5, 2013.

counseled appeal, docketed at No. 1478 WDA 2011, and on August 14, 2012, a panel of this Court affirmed the judgment of sentence.

On July 12, 2013, Currin filed a *pro se* PCRA petition. The court appointed James V. Natale, Esquire to represent Currin. Attorney Natale filed a "Motion to Withdraw with Supporting Brief" pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), in which he asserted that Currin's PCRA claims were time-barred and otherwise lacked merit. On September 6, 2013, the PCRA court granted Attorney Natale's motion to withdraw. On September 5, 2013, the PCRA court issued a Pa.R.Crim.P. 907 notice in which it advised Currin of its intention to dismiss his PCRA petition as untimely. On September 11, 2013, Currin filed a *pro se* motion in opposition to counsel's motion to withdraw and a petition for writ of *habeas corpus*, which the court treated as a response to the Rule 907 Notice rather than another PCRA petition. On September 30, 2013, the PCRA court dismissed Currin's PCRA petition without an evidentiary hearing.

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. Davis***, 86 A.3d 883, 887 (Pa. Super. 2014). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

Preliminarily, we must determine whether Currin's PCRA petition is timely. This Court has repeatedly held that the time limitations pursuant to the PCRA amendments are jurisdictional. ***Commonwealth v. Green***, 14 A.3d 114, 117 (Pa. Super. 2011).

> A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1); ***Commonwealth v. Bretz,*** 830 A.2d 1273, 1275 (Pa. Super. 2003). A judgment is deemed final 'at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.' 42 Pa.C.S.A. § 9545(b)(3). '[T]he plain language of the PCRA requires a claimant to 'allege' and 'prove' that his petition meets the jurisdictional time requirements.' ***Commonwealth v. Morris,*** 573 Pa. 157, 176, fn. 4, 822 A.2d 684, 695, fn. 4 (2003) (*citing* 42 Pa.C.S. § 9545(b)(1)).

Id.

Currin did not file a petition for allowance of appeal with the our Supreme Court. His judgment of sentence thus became final on September 13, 2012, when the 30-day period for seeking such discretionary review expired. Accordingly, Currin had one year from this date, or until September 12, 2013, to file a PCRA petition. Because Currin filed the instant PCRA petition on July 12, 2013, Currin's PCRA petition was timely filed, and the trial court erred in its ruling to the contrary.[3]

[3] The PCRA court did not specify why it believed Currin's PCRA petition was untimely. In Attorney Natale's motion to withdraw and supporting brief, he

As a result, we proceed to consider the five issues that Currin raises in this appeal:

> 1. Did the PCRA court, relying [apparently] solely on PCRA counsel's determination, abuse its discretion by denying the Petitioner's PCRA as untimely when it fact the PCRA was timely filed?
>
> 2. Was Appellant denied his Pennsylvania Constitutional right to one meaningful Post-Conviction review due to PCRA counsel's conclusion that Appellant's pro se issues were previously litigated, moreover, when the PCRA court abused its discretion by concurring with counsel instead of doing its own independent review of the record?
>
> 3. Was Defense Counsel Keiser Ineffective for not objecting and allowing the prosecutor to enter false/fabricated evidence or acts not based nor alleged in the complaint/indictment?
>
> 4. Was defense (plea) counsel ineffective for failing to perform any pre-trial investigation

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indicates his belief that Currin's judgment of sentence became final on August 30, 2009, 30 days after his sentencing. As our discussion *supra* explains, this conclusion was incorrect.

The PCRA court further indicated that the instant PCRA petition was Currin's second, citing ***Commonwealth v. Fehy***, 737 A.2d 214, 222 (Pa. 1999) (a second or subsequent PCRA petition will not be considered in the absence of a strong *prima facie* showing that a miscarriage of justice occurred). Order, 9/6/2013, at 2. This is erroneous, as the instant petition is the first PCRA petition filed by Currin following the disposition of his direct appeal. ***See Commonwealth v. Fowler***, 930 A.2d 586, 591 (Pa. Super. 2007) (stating that a PCRA petition filed following a direct appeal is considered an appellant's first PCRA petition; the one-year time clock begins to run after the disposition of that appeal). Thus, the rule in ***Fehy*** has no application here.

> which in turn led to an erroneous advisement to the Appellant's plea of guilty?
>
> 5. Was defense (plea) counsel ineffective for failing to have the Appellant's preliminary hearing transcribed and preserved when they held critical conflicts in the testimony presented by the Commonwealth that if heard would have mitigated the outcome of the Appellant's sentence?

Currin's Brief at 4 (bracketing in the original).

We have already resolved Currin's first issue on appeal in his favor, as we have determined that the instant PCRA petition was timely filed. For his second issue on appeal, Currin contends that the PCRA court erred in granting Attorney Natale's motion to withdraw from representation. In his motion to withdraw, Attorney Natale set forth the following issues that Currin intended to raise in a counseled PCRA petition:

> 1. Whether [Currin's] guilty plea was entered knowingly, voluntarily, and intelligently?
>
> 2. Whether Attorney David Kaiser was ineffective by failing to: visit and discuss the case with [Currin], provide [Currin] with discovery, ask about [Currin's] hearing disability, and ask about [Currin's] Mental Health?
>
> 3. Whether Attorney Jeremy Davis was ineffective by advising [Currin] that he could not withdraw his guilty plea prior to sentencing?
>
> 4. Whether the Assistant District Attorney, Mark D. Brooks, committed prosecutorial misconduct by: failing to preserve a transcript of the Preliminary Hearing; responding to [Currin's] Motion for Discovery two and a half months after it was filed;

> failing to alert the Court that [Currin] was not entering his guilty plea knowingly, voluntarily, and intelligently; and that the charge of aggravated assault was not justified?

Motion to Withdraw Representation with Supporting Brief, 8/19/2013, at 3. In support of his request to withdraw, Attorney Natale identified two grounds why he should be relieved from his appointment to represent Currin: (1) Currin's PCRA petition was untimely filed, and (2) all of the issues Currin intended to raise had already been litigated in his direct appeal and were meritless because this Court, in affirming the judgment of sentence, ruled that Currin entered his guilty plea knowingly, intelligently, and voluntarily. ***Id.*** at 4-8.

Again, we agree with Currin, as the PCRA court erred in granting Attorney Natale's motion to withdraw for the reasons set forth therein (and relied upon by the PCRA court). As previously discussed, Currin's PCRA petition was not untimely. Moreover, the ineffective assistance of counsel claims that Currin wanted to raise had not been previously litigated. While it is true that Currin's claims regarding Attorney Kaiser's alleged ineffectiveness implicate the validity of Currin's guilty plea, they are nevertheless separate and distinct issues from those litigated on direct appeal. In ***Commonwealth v. Collins***, 888 A.2d 564 (Pa. 2005), our Supreme Court ruled that "ineffectiveness claims are distinct issues from those claims raised on direct appeal and should be reviewed under the

three-prong ineffectiveness standard." ***Id.*** at 573. The ineffectiveness claims "challenge the adequacy of representation rather than the conviction of the defendant." ***Id.***

For these reasons, Currin's PCRA petition was not untimely and the PCRA court should not have granted Attorney Natale's motion to withdraw from representation. The question remains, however, as to whether Currin is entitled to any remedy for these errors. In this regard, we begin by noting that the denial of PCRA relief cannot stand unless the petitioner was afforded the assistance of counsel, and the right to counsel includes the concomitant right to the effective assistance of counsel during PCRA proceedings, as per Rule 904 of the Pennsylvania Rules of Criminal Procedure. ***See, e.g.***, ***Commonwealth v. Albert***, 561 A.2d 736 (Pa. 1989). As a result, in our view, if the PCRA court's erroneous decision to deprive Currin of counsel resulted in prejudice to him, the proper remedy would be to remand the case back to the PCRA court for the appointment of substitute counsel to assist him in his efforts to obtain PCRA relief. ***Cf. Commonwealth v. Albrecht***, 720 A.2d 693, 699-702 (Pa. 1998).

Based upon our independent review of the record in this case, however, we conclude that none of the issues Currin wanted to raise in a counseled PCRA petition were meritorious, and thus the deprivation of counsel was not prejudicial to him. In reviewing the list of issues that Currin wanted to raise in a counseled PCRA petition (as well as his third, fourth,

and fifth issues raised here on appeal), we conclude that they all lack any merit. We begin with the list of issues set forth in Attorney Natale's motion to withdraw. The first issue, that the guilty plea was not knowingly, intelligently, and voluntarily entered, was previously litigated during direct appeal, and thus cannot not be re-litigated on PCRA review. 42 Pa.C.S.A. § 9543(a)(3). The fourth issue, raising claims of prosecutorial misconduct, was not litigated during his direct appeal. Since these claims could have been litigated on direct appeal, however, they were waived and cannot not be raised in a PCRA petition. 42 Pa.C.S.A. § 9544(b); ***see also Commonwealth v. Ligons***, 971 A.2d 1125, 1146 (Pa. 2009).

The third issue, alleging ineffectiveness of Attorney Jeremy Davis, is facially meritless. While a claim that an attorney mistakenly advised Currin that he could not withdraw his guilty plea before sentencing would clearly have merit if factually supported, the record in this case shows that Attorney Davis was not appointed to represent Currin until well after his direct appeal had been filed with this Court. ***See Commonwealth v. John Paul Currin***, 1478 WDA 2011, *7 n.2 (Pa. Super. Aug. 14, 2012) (unpublished memorandum). Because Attorney Davis did not represent Currin prior to sentencing, he could not have advised Currin that he could not withdraw his plea at that time.

With respect to Currin's claims regarding Attorney Kaiser's alleged ineffectiveness, including both those set forth in Attorney Natale's motion to

withdraw (second issue) and the third, fourth, and fifth issues here on appeal, they all essentially make the same argument – namely that Attorney Kaiser's failure to investigate, review the evidence, and prepare his case resulted in circumstances that forced him to plead guilty to crimes that he did not commit.[4] In his appellate brief, Currin argues that evidence in the record shows that he did not commit two of the three counts of aggravated assault to which he plead guilty. In particular, Currin claims that the evidence supports his testimony at his plea proceedings (N.T., 6/3/2009, at 23) that there was little or no damage to two of the three police cars at the scene, and that two of the three officers involved in his capture suffered no injuries at all. Currin's Brief at 20-26. According to Currin, Attorney Kaiser's lack of information on these points prejudiced him, as it caused Attorney Kaiser to ignore Currin's claims of innocence as to the two aggravated assault charges and to advise instead that he plead guilty to every charged offense (including the two aggravated assaults he did not commit).

[4] A review of the certified record, including the transcript of the plea proceedings, makes clear that Currin's contentions regarding counsel's failure to inquire about hearing and/or mental difficulties have no merit. His responses to various inquiries demonstrated that Currin could hear and understand what was transpiring throughout the proceedings. This Court reached the same conclusion in affirming his judgment of sentence. ***See Commonwealth v. Washington***, 927 A.2d 586, 607 (Pa. 2007) ("[A]lthough we will analyze a distinct claim of ineffectiveness that is based on the underlying issue decided on direct appeal, in many cases those claims will fail for the same reasons they failed on direct appeal.").

These claims, however, are clearly meritless. Currin plead guilty to three counts of aggravated assault under 18 Pa.C.S.A. § 2702(a)(2), which provides as follows:

> **§ 2702. Aggravated assault**
>
> **(a) Offense defined.--**A person is guilty of aggravated assault if he:
>
> * * *
>
> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation, while in the performance of duty;

18 Pa.C.S.A. § 2702(a)(2). To be found guilty under this provision, the Commonwealth has no obligation to demonstrate any serious bodily injury to a police officer. Instead, it is sufficient for the Commonwealth to establish an intent to inflict a serious bodily injury. ***Commonwealth v. Marti***, 779 A.2d 1177, 1183 (Pa. Super. 2001). This intent may be proven by circumstances that reasonably suggest the defendant intended to cause a serious bodily injury. ***Id.*** The certified record on appeal plainly reflects that the Commonwealth could satisfy this evidentiary burden at trial, as the Affidavit of Probable Cause attached to the criminal complaint against Currin stated, in pertinent part, as follows:

> CURRIN's vehicle came to rest facing these Troopers and as the troopers attempted to arrest CURRIN,

> CURRIN began to spin his tires in another attempt to flee these Troopers[,] placing these Troopers in fear of their lives by CURRIN attempting to run over the Troopers to flee this area of Fayette County.

Affidavit of Probable Cause, 12/16/2008, at 1.

Accordingly, contrary to his protestations, Currin could well have been convicted of three counts of aggravated assault at trial regardless of whether there was actual damage to all three police cars or actual injuries to the three police officers.[5] Instead, the Commonwealth needed to prove only that Currin attempted to inflict serious bodily injury on the three police officers, which likely could have been established by the trial testimony of those police officers. As such, Currin's contention that Attorney Kaiser negligently advised him to plead guilty to all three counts of aggravated assault (in exchange for a potential reduction in sentence) is meritless. Even if, as Currin now contends, Attorney Kaiser failed to ferret the evidence regarding the lack of damage to the police cars and/or the lack of injuries to the police officers, Currin cannot state a meritorious claim of ineffective

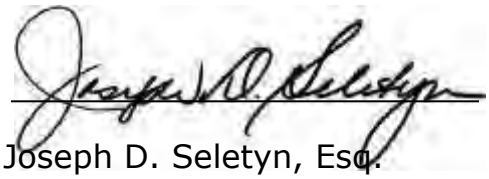
[5] Alternatively, Currin also argues that Attorney Kaiser should have advised him to plead guilty to "attempted" aggravated assault, which would have resulted in a lower offense gravity score under the sentencing guidelines and thus a shorter sentence. Currin's Brief at 25-26. This is a simple misreading of the aggravated assault statute, since an attempt to inflict serious bodily injury on a police officer constitutes an actual violation of section 2702(a)(2) and is not a mere inchoate crime.

assistance of counsel since he has not established how Attorney Kaiser's advice to plead guilty was deficient in any manner.[6]

As we conclude that the PCRA court's error in granting Attorney Natale's motion to withdraw did not result in any prejudice to Currin, we will not remand the case for the appointment of substitute counsel. Instead we affirm the PCRA court's dismissal of Currin's PCRA petition, albeit for different reasons. ***Commonwealth v. Doty***, 48 A.3d 451, 456 (Pa. Super. 2012) (this Court is not bound by the rationale of the PCRA court and may affirm on any basis).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/18/2014

[6] Counsel is presumed to have provided effective representation unless a PCRA petitioner pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome at trial if not for counsel's error. ***Commonwealth v. Wantz***, 84 A.3d 324, 331 (Pa. Super. 2014). A claim of ineffectiveness may be denied by a showing that appellant fails to meet any of these prongs. ***Commonwealth v. Washington***, 927 A.2d 586, 594 (Pa. 2007).