NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MIGUEL A. GIMENEZ Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1863 MDA 2013

Appeal from the PCRA Order September 27, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0005288-2011, CP-36-CR-0005293-2011, CP-36-CR-0005306-2011

BEFORE: BENDER, P.J.E., MUNDY, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J.: **FILED JULY 01, 2014**

Miguel Gimenez ("Appellant") appeals *pro se* from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA").[1] Specifically, Appellant argues that his trial counsel was ineffective for failing to employ an interpreter, that his PCRA counsel was ineffective by filing a no-merit letter, and that the PCRA court erred in dismissing his PCRA petition without a hearing. After careful review, we affirm.

On August 15, 2012, Appellant entered an open guilty plea in three cases[2] to a total of nine counts of delivery of a controlled substance[3] and

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[1] 42 Pa.C.S. §§ 9541-9546.

[2] CP-36-CR-0005280-2011, CP-36-CR-0005293-2011 & CP-36-CR-0005306-2011.

three counts of criminal use of a communication facility.[4] On September 24, 2012, the trial court sentenced Appellant to an aggregate sentence of 11 to 22 years of incarceration. Appellant had counsel and a court-appointed Spanish-language interpreter at both proceedings.

Appellant did not file post-sentence motions or a direct appeal. Instead, on October 23, 2012, Appellant filed a timely *pro se* PCRA petition. The petition alleged trial counsel was ineffective because Appellant thought he was entering a negotiated guilty plea to 5 to 10 years of incarceration. The PCRA petition further alleged the sentence the court imposed was excessive, and that the court did not employ an interpreter to inform him of his rights. Court-appointed PCRA counsel filed a ***Turner***[5]/***Finley***[6] "no-merit" letter on February 2, 2013, together with an application to withdraw as counsel. The PCRA court filed a Pa.R.Crim.P. 907 notice of intent to dismiss the PCRA petition without a hearing on March 13, 2013,[7] and denied the petition on September 27, 2013. Appellant timely appealed and filed a

(Footnote Continued) ———————————

[3] 35 P.S. § 780-113(a)(30).

[4] 18 Pa.C.S. § 7512(a).

[5] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa.1988).

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

[7] Appellant did not file a response to this notice.

Pa.R.A.P. 1925(b) statement of matters complained of on appeal.[8] The PCRA court filed a Pa.R.A.P. 1925(a) opinion that adopted the reasoning from the court's previously-filed Pa.R.Crim.P. 907 notice.

Appellant raises the following questions for our review:

> 1. Was [t]rial [c]ounsel [i]neffective for failing to employ an interpreter to communicate with Appellant [on] pertinent issues of his defense?
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> 2. Was PCRA counsel ineffective where he filed a no-merit letter and sought to withdraw although it is clear that Appellant's issues ha[ve] arguable merit?
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> 3. Did [the] PCRA [c]ourt err in dismissing Appellant's PCRA [p]etition where it is clear that it was not wholly frivolous?
>
> 4. Did Appellant file an answer to [the PCRA c]ourt[']s Pa.R.Crim.P. 907 Notice To Dismiss?
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> 5. Did Appellant file a timely 1925(b) Concise Statement of Matters Complained of on Appeal?

Appellant's Brief at 8.

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[8] The PCRA court's 1925(a) opinion purports to dismiss Appellant's 1925(b) statement as untimely filed. ***See*** 1925(a) Opinion, p. 1. The court explains it ordered Appellant to file his 1925(b) statement no later than November 12, 2013, and the time stamp on the statement indicates the prothonotary received the statement on November 13, 2012. ***Id.*** However, Appellant includes with his brief a cash slip indicating he filed the statement on November 5, 2013. ***See*** Appellant's Brief, Exhibit J. As Appellant is incarcerated, he receives the benefit of the mailing date for timeliness purposes. ***Commonwealth v. Patterson***, 931 A.2d 710, 714 (Pa.Super.2007) ("Pursuant to the prisoner mailbox rule, we deem a document filed on the day it is placed in the hands of prison authorities for mailing"). Accordingly, we find his 1925(b) statement timely filed.

In reviewing an order denying PCRA relief, our well-settled standard of review is "to determine whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Barndt***, 74 A.3d 185, 191-192 (Pa.Super.2013) (internal quotations and citations omitted).

Appellant first argues that plea counsel provided ineffective assistance by failing to employ an interpreter. ***See*** Appellant's Brief, pp. 15-25. This claim lacks merit.

This Court follows the ***Pierce***[9] test adopted by our Supreme Court to review PCRA claims of ineffective assistance of counsel:

> When a petitioner alleges trial counsel's ineffectiveness in a PCRA petition, he must prove by a preponderance of the evidence that his conviction or sentence resulted from ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. We have interpreted this provision in the PCRA to mean that the petitioner must show: (1) that his claim of counsel's ineffectiveness has merit; (2) that counsel had no reasonable strategic basis for his action or inaction; and (3) that the error of counsel prejudiced the petitioner-i.e., that there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. We presume that counsel is effective, and it is the burden of Appellant to show otherwise.

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[9] ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa.1987).

Commonwealth v. duPont, 860 A.2d 525, 531 (Pa.Super.2004) (internal citations and quotations omitted). The petitioner bears the burden of proving all three prongs of this test. ***Commonwealth v. Meadows***, 787 A.2d 312, 319-320 (Pa.2001). "If an appellant fails to prove by a preponderance of the evidence any of the ***Pierce*** prongs, the Court need not address the remaining prongs of the test." ***Commonwealth v. Fitzgerald***, 979 A.2d 908, 911 (Pa.Super.2010).

Here, Ms. Isabel Waplinger acted as an interpreter at Appellant's guilty plea hearing. ***See*** N.T. 8/15/2012, p. 2. Ms. Keila Lechene acted as an interpreter at Appellant's sentencing hearing. ***See*** N.T. 9/24/2012. Appellant did not express any confusion or indicate in any way at either the guilty plea hearing or the sentencing hearing that he did not understand the proceedings. ***See*** N.T. 8/15/2012; 9/24/2012. His claim that counsel was ineffective for failing to employ an interpreter is baseless.

To the extent Appellant argues trial counsel was ineffective because Appellant thought he was pleading guilty to a 5 to 10 year negotiated guilty plea, the record also belies this claim. At the guilty plea hearing, the Assistant District Attorney explained to the court that Appellant was pleading guilty without any conditions. N.T. 8/15/2012, pp. 2-3. Appellant confirmed that he understood that the court could sentence him in its discretion and that no one had said anything to him about what his sentence was likely to be. ***Id.*** at 10.

Appellant next claims PCRA counsel provided ineffective assistance of counsel by filing a no-merit letter and seeking to withdraw as counsel. ***See*** Appellant's Brief, pp. 25-26. This claim also lacks merit.

Our Supreme Court has explained the procedure required for court-appointed counsel to withdraw from PCRA representation:

> [***Turner*** and ***Finley***] establish the procedure for withdrawal of court-appointed counsel in collateral attacks on criminal convictions. Independent review of the record by competent counsel is required before withdrawal is permitted. Such independent review requires proof of:
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> 1) A "no-merit" letter by PCRA counsel detailing the nature and extent of his [or her] review;
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> 2) A "no-merit" letter by PCRA counsel listing each issue the petitioner wished to have reviewed;
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> 3) The PCRA counsel's "explanation", in the "no-merit" letter, of why the petitioner's issues were meritless;
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> 4) The PCRA court conducting its own independent review of the record; and
>
> 5) The PCRA court agreeing with counsel that the petition was meritless.

Commonwealth v. Pitts, 981 A.2d 875, 876 n.1 (Pa.2009) (citations omitted). In addition, this Court has required that PCRA counsel who seeks to withdraw must:

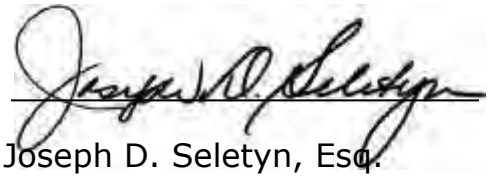
> contemporaneously serve a copy on the petitioner of counsel's application to withdraw as counsel, and must supply the petitioner both a copy of the "no-merit" letter and a statement advising the petitioner that, in the event the court grants the application of counsel to withdraw, he or she has the right to proceed *pro se* or with the assistance of privately retained counsel.

Commonwealth v. Friend, 896 A.2d 607, 614 (Pa.Super.2006) (emphasis deleted).

Here, counsel has complied with the mandates of ***Turner*** and ***Finley***. Additionally, we agree with counsel's assessment that Appellant's claims lack merit for the reasons stated ***supra***. "[C]ounsel cannot be deemed ineffective for failing to pursue a meritless claim." ***Commonwealth v. Koehler***, 36 A.3d 121, 144 (Pa.2012). Further, our independent review of the record has revealed no other preserved issues of arguable merit. Accordingly, PCRA counsel did not provide ineffective assistance of counsel by filing a "no-merit" letter.[10]

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014

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[10] Our disposition of Appellant's first two claims necessarily disposes of Appellant's third claim, that the PCRA court erred by dismissing the PCRA petition. Appellant's fourth and fifth claims – that Appellant filed an Answer to the PCRA court's Pa.R.Crim.P. 907 notice, and that Appellant timely filed his 1925(b) statement – are not substantive claims and have no bearing on our disposition. Accordingly, we will not address these claims beyond the timeliness implications discussed ***supra***, at note 8.