NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DARALE HARMON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2871 EDA 2013

Appeal from the PCRA Order of September 6, 2013
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0000683-2006

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STABILE, JJ.

MEMORANDUM BY OLSON, J.: **FILED JULY 03, 2014**

Appellant, Darale Harmon, appeals from the order entered on September 6, 2013 denying his petition filed under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

We previously summarized the horrific factual background of this case as follows:

> On November 9, 2005, [22] year old J.H. went to bed in her bedroom in the residence that she shared with Chris Bachalis in Middletown Township. [] Bachalis was not at home at the time. J.H. heard a knock at the door, but did not answer it because she was not feeling well. Shortly thereafter, five males with guns appeared in her bedroom. The males told J.H. that she was "not part of the plan" in that she was not supposed to be home, and that they were there to get [Bachalis]. They tied her wrists to the headboard of her bed using electrical and cell phone charger cords. Over the course of the next [10] to [12] hours they repeatedly took turns raping J.H. vaginally, orally, and anally. While forcing her to perform oral sex on him, one of the perpetrators ejaculated in her mouth and told her to

swallow. At times they held a handgun to her breast and hip and threatened to shoot her. They took pictures of her during the commission of the crimes, depicting her tied up with a gun being pointed at her. One of the perpetrators roughly yanked a tampon from her vagina. During the course of the early morning, while the five males took turns assaulting J.H., the others ransacked the entire apartment. They stole cell phones, televisions, prescription drugs, and other items.

They found J.H.'s drivers license and identification, wrote down the information, and told her that they knew who she was and that if she reported the rapes they would "come for her" and kill her. They stole her cell phone. They repeatedly asked when her roommate was going to return as they intended to kill him.

When her roommate, Bachalis, finally returned to the house the next morning, the assailants directed J.H. to answer the door while they hid. After she let Bachalis into the house, she ran back upstairs to her bedroom. The five males appeared, threatened Bachalis with guns, assaulted him, robbed him, and forced him into a closet. Shortly thereafter, a friend of the victims dropped by, and she was also robbed of some cash and forced into the closet. Finally, after having been in the apartment some [12] hours, the five males left the house.

The subjects were located primarily through global positioning when the police got T-Mobile to "ping" the cell phone taken from J.H. The positional coordinates of the cell phone led detectives to an address in Philadelphia where four of the men, including Appellant, were located.

The four were taken to Frankford Hospital for forensic examination. When the detective opened the rear door of the police van used to transport the subjects, they found that the subjects had set fire to some of their legal papers in the back of the van. Police and fire department personnel were called and the subjects were re[-]secured in the police van. The four were arrested and taken to Bucks County Correctional Facility in lieu of bail. The next day a prison attendant recovered a piece of paper with the name of the fifth suspect. Investigators identified him and determined that he also lived in Philadelphia.

Appellant was one of the four subjects found in Philadelphia. When arrested, he was in possession of the cell phone stolen

> from J.H. When the police searched Appellant, they found condoms that were of the same brand and lot number as that of a condom wrapper found on the night stand next to J.H.'s bed. Later, a used condom was recovered from the apartment stuck to a bloodstained shirt that was left behind by one of the perpetrators.
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> J.H. identified all five perpetrators from photo lineups. Plentiful physical evidence including blood, semen, urine, and fingerprints was recovered from the scene of the crimes.

Commonwealth v. Harmon, 988 A.2d 720 (Pa. Super. 2009) (unpublished memorandum), at 1-3 (internal alterations and ellipsis omitted), *quoting* Trial Court Opinion, 12/12/06, at 4-6.

> We previously outlined the procedural history of this case as follows:
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> On April 24, 2006, Appellant pled guilty to [a myriad of offenses, *inter alia*,] rape,[1] [involuntary deviate sexual intercourse,[2]] kidnapping,[3] robbery,[4] arson,[5] carrying a firearm without a license,[6] burglary,[7] aggravated indecent assault,[8] and

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[1] 18 Pa.C.S.A. § 3121.

[2] 18 Pa.C.S.A. § 3123.

[3] 18 Pa.C.S.A. § 2901.

[4] 18 Pa.C.S.A. § 3701.

[5] 18 Pa.C.S.A. § 3301. Appellant did not file a PCRA petition in relation to his arson and related convictions, which were docketed at CP-09-CR-0005239-2006.

[6] 18 Pa.C.S.A. § 6106.

[7] 18 Pa.C.S.A. § 3502.

[8] 18 Pa.C.S.A. § 3125.

> criminal conspiracy.[9] Following an assessment by the Sexual Offender's Assessment Board, Appellant was found to be a sexually violent predator. On September 27, 2006, Appellant was sentenced [to an aggregate term of 30 to 60 years' imprisonment]. At the time of sentencing, the trial court had the benefit of a pre-sentence report. Post-sentence motions [seeking reconsideration of Appellant's sentence] were filed and denied.
>
> Appellant filed a direct appeal. On September 12, 2007, a panel of this court found all of Appellant's claims were waived for failing to file a [concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure] 1925(b) [("concise statement")], and we affirmed the judgment of sentence. ***Commonwealth v. Harmon***, 938 A.2d 1114 (Pa. Super. 2007) (unpublished memorandum).
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> On February 8, 2008, Appellant filed a *pro se* petition pursuant to the [PCRA]. [The petition challenged the legality and voluntariness of Appellant's guilty plea due to his counsel's alleged ineffectiveness. PCRA counsel was appointed and a] hearing was held on the petition on June 12, 2008. By order dated October 29, 2008, Appellant's direct appeal rights were reinstated *nunc pro tunc* and all other claims raised in the PCRA petition were denied [on their merits.[10]]

Commonwealth v. Harmon, 988 A.2d 720 (Pa. Super. 2009) (unpublished memorandum), at 3-4 (footnote omitted). On November 16, 2009, we affirmed the judgment of sentence. ***See id.*** at 15. Appellant did not seek review by our Supreme Court.

On September 2, 2010, Appellant filed a post-sentence motion for reconsideration of sentence and request for new trial, which the PCRA court

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[9] 18 Pa.C.S.A. § 903.

[10] Appellant did not file a timely appeal after his direct appeal rights were reinstated *nunc pro tunc*. Therefore, he later sought, and was granted, leave from the trial court to file his direct appeal *nunc pro tunc*.

treated as a *pro se* PCRA petition. On September 27, 2010, the PCRA court issued notice pursuant to Pennsylvania Rule of Criminal Procedure 907(1) of its intent to dismiss the petition. Appellant filed a response in which he requested additional time to file an amended petition. The PCRA court granted Appellant's request for additional time to file an amended PCRA petition. The matter then became dormant.

On October 3, 2011, Appellant filed a petition for *habeas corpus* relief in the United States District Court for the Eastern District of Pennsylvania. ***See Harmon v. Dist. Attorney of Cnty. of Bucks***, 2012 WL 1624396, *1 (E.D. Pa. Apr. 17, 2012), *adopted*, 2012 WL 1622639 (E.D. Pa. May 8, 2012). Appellant's habeas petition was dismissed for failure to exhaust his state court remedies. ***Id.*** at *3.

On or about April 13, 2012, counsel was appointed to represent Appellant in the dormant PCRA proceedings.[11] Thereafter, an evidentiary hearing was held on April 5, 2013. On September 6, 2013, the PCRA court

[11] The certified record is devoid of any order appointing counsel. However, after April 13, 2012, the docket reflects that Appellant was directed to contact his counsel whenever he attempted to contact the PCRA court. Furthermore, counsel avers in her brief that she was appointed on April 13, 2012 and the record reflects that she was present at the evidentiary hearing on April 5, 2013. As counsel was obviously appointed at some time prior to the evidentiary hearing we need not concern ourselves with the exact date of the appointment.

issued an order denying Appellant PCRA relief. This timely appeal followed.[12]

Appellant presents one issue for our consideration:

> Is Appellant entitled to [PCRA] relief based on his claim that [p]lea [c]ounsel was ineffective when he failed to file a [m]otion to [w]ithdraw [g]uilty [p]plea as directed by his client?

Appellant's Brief at 3.

Prior to addressing the merits of Appellant's issue on appeal, we note that the PCRA court determined that it did not have jurisdiction over Appellant's PCRA petition as it was untimely. ***See*** PCRA Court Opinion, 12/3/13, at 8. The timeliness requirement for PCRA petitions "is mandatory and jurisdictional in nature. The question of whether a petition is timely raises a question of law." ***Commonwealth v. Taylor***, 67 A.3d 1245, 1248 (Pa. 2013) (citations omitted). Therefore, our standard of review when determining if a petition is timely is *de novo* and our scope of review is plenary.

A PCRA petition is timely if it is "filed within one year of the date the judgment [of sentence] becomes final." 42 Pa.C.S.A. § 9545(b)(1). "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the

[12] On October 10, 2013, the PCRA court ordered Appellant to file a concise statement. On November 6, 2013, Appellant filed his concise statement. On December 4, 2013, the PCRA court issued its Rule 1925(a) opinion. Appellant's lone issue on appeal was included in his concise statement.

Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3). When an appellant is granted PCRA relief and permitted to file a direct appeal *nunc pro tunc*, the judgment of sentence is considered to be final when Appellant fails to seek discretionary review by our Supreme Court or the Supreme Court of the United States, or *certiorari* is denied by the Supreme Court of the United States. ***See Commonwealth v. Karanicolas***, 836 A.2d 940, 945 (Pa. Super. 2003). As such, Appellant's judgment of sentence became final on December 16, 2009. Appellant's PCRA petition was filed on September 2, 2010. Therefore, the petition was timely filed and the PCRA court had jurisdiction to consider the merits of Appellant's petition.

We next turn to the PCRA court's contention that Appellant's claim was previously litigated. Under the PCRA, a petitioner may not be granted relief upon claims that have been previously litigated. ***See*** 42 Pa.C.S.A. § 9543(a)(3). In its opinion, the PCRA court found that Appellant's present claim had been previously litigated in the 2008 PCRA proceedings. ***See*** PCRA Opinion, 12/3/13, at 5-6 (noting that the 2008 PCRA court addressed the merits of Appellant's ineffective assistance of counsel claims).

We note that, under the law as it stands today, the 2008 PCRA court could not have reached the merits of Appellant's ineffectiveness claims after granting Appellant the right to file a direct appeal *nunc pro tunc*. ***See Commonwealth v. Donaghy***, 33 A.3d 12, 14 n.5 (Pa. Super. 2011),

appeal denied, 40 A.3d 120 (Pa. 2012); ***see also Commonwealth v. Holmes***, 79 A.3d 562, 566 (Pa. 2013). However, at the time of Appellant's 2008 PCRA proceedings, and prior to the cases that have clarified the cognizability of ineffective assistance of counsel claims, ***Commonwealth v. Bomar***, 826 A.2d 831 (Pa. 2003), was still the law of this Commonwealth. Under ***Bomar***, a defendant could pursue an ineffective assistance counsel claim on direct appeal if certain pre-requisites were satisfied. ***See id.*** at 853-855 (in order for an appellate court to consider an ineffective assistance of counsel claim the defendant must have raised the issue in the trial court, the trial court must have held an evidentiary hearing, and the trial court must have addressed the merits of the claim); ***see Holmes***, 79 A.3d at 576 (citations omitted). This Court found those pre-requisites were satisfied on Appellant's *nunc pro tunc* direct appeal. ***See Commonwealth v. Harmon***, 988 A.2d 720 (Pa. Super. 2009) (unpublished memorandum), at 11 n.4. Therefore, we addressed the merits of Appellant's ineffectiveness claims. ***See id.***

It would appear that our prior memorandum may have erred in reaching the merits of Appellant's ineffective assistance of counsel claims on his *nunc pro tunc* direct appeal. During the intervening period after the trial court issued its 2008 opinion addressing the merits of Appellant's ineffectiveness claims, but prior to our November 2009 disposition of the case, our Supreme Court issued its decision in ***Commonwealth v. Wright***,

961 A.2d 119 (Pa. 2008). In ***Wright***, our Supreme Court announced a new rule, declaring that, in order for the ***Bomar*** exception to apply, a defendant must waive his right to file a PCRA petition alleging ineffective assistance of counsel. ***See Wright***, 961 A.2d 148 n.22. In our November 2009 memorandum, we did not address whether Appellant had waived his right to file a PCRA petition challenging his trial counsel's effectiveness. However, our review of the notes of testimony from the June 12, 2008 PCRA hearing indicates that Appellant did not waive his right to file a PCRA petition alleging ineffective assistance of counsel. As such, we conclude that Appellant maintained his right to file a PCRA petition regarding allegations of ineffectiveness not disposed of on his *nunc pro tunc* direct appeal.

At the evidentiary hearing held on June 12, 2008, Appellant raised ten distinct ineffectiveness claims. ***See*** N.T., 6/12/08, at 7-11. Most of those claims related to his trial counsel's failure to file a motion to withdraw his guilty plea. ***See id.*** However, Appellant did not allege that he requested his trial counsel to file such a motion and his counsel refused to do so. Instead, his claims were premised on other alleged errors, including for example, that he was under the influence of drugs at his plea hearing. Thus, we conclude that the particular claim Appellant has raised in this appeal has not been previously litigated.

Turning to the merits of Appellant's lone issue on appeal, "Our standard of review of an order denying PCRA relief is whether the record

supports the PCRA court's findings of fact, and whether the PCRA court's determination is free of legal error." ***Commonwealth v. Wantz***, 84 A.3d 324, 331 (Pa. Super. 2014) (citation omitted). "The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level." ***Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014) (citation omitted).

Appellant's claim relates to the purported ineffectiveness of his trial counsel. A "defendant's right to counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, [Section] 9 of the Pennsylvania Constitution is violated where counsel's performance so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth v. Simpson***, 66 A.3d 253, 260 (Pa. 2013) (internal quotation marks and citation omitted). "Trial counsel is presumed to be effective." ***Commonwealth v. Lippert***, 85 A.3d 1095, 1100 (Pa. Super. 2014). (citation omitted).

In order to overcome the presumption that counsel was effective, Appellant must establish that "(1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his client's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different." ***Commonwealth v. Luster***, 71 A.3d 1029, 1039 (Pa. Super. 2013) (internal alterations, quotation

marks, and citation omitted). "The burden of proving ineffectiveness rests with the appellant," and "[t]he failure to satisfy any one of the prongs of the test for ineffective assistance of counsel requires rejection of the claim." ***Commonwealth v. Hill***, 42 A.3d 1085, 1089-1090 (Pa. Super. 2012), *appeal granted on other grounds*, 58 A.3d 749 (Pa. 2012) (citations omitted).

Appellant avers that he sent various letters to his trial counsel, both before and after his sentencing, requesting that a motion to withdraw his guilty plea be filed. In this appeal, Appellant argues that his counsel's failure to file a motion to withdraw his guilty plea prior to the sentencing hearing was ineffective assistance of counsel. He does not challenge his trial counsel's failure to file a motion to withdraw his guilty plea after the imposition of sentence. [13]

We conclude that Appellant has failed to plead and prove that his underlying claim has arguable merit. In particular, the PCRA court "rejected Appellant's testimony as not credible." PCRA Court Opinion, 12/3/13, at 7. This finding of fact is well-supported by the record. At the evidentiary hearing, Appellant testified definitively that he sent a letter requesting that his counsel file a motion to withdraw his guilty plea to his trial counsel two days after the plea hearing. ***See*** N.T., 4/5/13, at 24 ("Two days after I took

[13] Although the question presented is phrased in broad terms, the argument section of Appellant's brief only addresses counsel's failure to file a motion prior to the sentencing hearing. ***See*** Appellant's Brief at 15-17.

the guilty plea, exactly."); ***id.*** ("Two days after I accepted the guilty plea[.]"); ***id.*** at 26-27 ("Q. So that was two days after you entered your guilty plea that you sent the first letter to [trial counsel], correct? A. Yes.").

However, at other points it appears as though Appellant only sent his counsel a letter requesting withdrawal of his guilty plea after sentencing. ***See id.*** at 27 ("I sent [trial counsel] more than two letters, sent him multiple letters, multiple letters after the sentencing. Everything was after the sentencing."); ***id.*** at 25 (noting that he sent the letter after the trial court told him that he had ten days to file certain motions – almost certainly referring to the ten day period with which defendants have to file post-sentence motions).

Furthermore, Appellant's testimony at the evidentiary hearing contradicted his prior sworn statements. For example, he testified that he didn't know he was pleading guilty to rape. ***Id.*** at 29. However, the record is clear that the trial court informed him that he was pleading guilty to rape. ***See*** N.T., 4/24/06, at 6 ("Mr. Harmon, you are pleading guilty to the crime of [r]ape[.]"); ***id.*** at 7 ("And you understand that [r]ape is a felony of the first degree[?]"). Thus, the trial court's determination that Appellant's testimony was self-serving and not credible is supported by the record. With this factual determination, there is no evidence that Appellant ever requested that his trial counsel withdraw his guilty plea prior to the sentencing hearing. As such, trial counsel could not have been ineffective

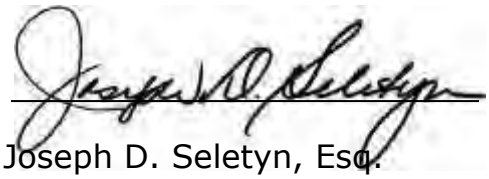
for failing to file a motion to withdraw Appellant's guilty plea prior to the sentencing hearing. Accordingly, Appellant's underlying claim lacks arguable merit.

Furthermore, Appellant is unable to show that he was prejudiced by his trial counsel's failure to file a motion to withdraw prior to sentencing. If Appellant realized after he pled guilty, and before sentencing, that he pled guilty to crimes he did not commit he could have easily raised the issue at his sentencing hearing. Instead, when asked at sentencing, under oath, "[Y]ou admit that you were involved in everything you are charged with?," Appellant responded "Yes sir, I do." N.T., 9/28/06, at 71-72. When his trial counsel asked him "You don't deny anything of what you are charged with?" he responded "No, sir." ***Id.*** at 74. "Appellant is bound by these statements, which he made in open court while under oath[.]" ***Commonwealth v. Willis***, 68 A.3d 997, 1009 (Pa. Super. 2013) (citation omitted). Appellant's purported reason for requesting to withdraw his guilty plea is his alleged innocence. The record, however, squarely refutes this claim. Thus, Appellant is unable to show the requisite prejudice for an ineffective assistance of counsel claim. Instead, it appears that Appellant was unhappy with the sentence the trial judge imposed in this case, which he deemed one of the worst cases he had seen in his 27 years as a trial judge and 13 years as a prosecutor. ***See*** N.T., 9/28/06, at 92. This will not afford a basis for relief.

In sum, we conclude that the PCRA petition Appellant filed on September 2, 2010 was timely, and that, therefore, the PCRA court had jurisdiction to consider this matter. Furthermore, the specific claim Appellant raised in his petition was not previously litigated. However, the PCRA court correctly determined that Appellant had failed to satisfy his burden of proving ineffective assistance of counsel. In particular, he failed to satisfy the first and third prongs of ineffectiveness. Therefore, the PCRA court correctly denied Appellant's PCRA petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/3/2014