

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BRAETTA I. DELOACH,	:	
	:	
Appellant	:	No. 3241 EDA 2013

Appeal from the PCRA Order entered on October 31, 2013
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No. CP-51-CR-0013813-2007

BEFORE: BOWES, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JUNE 30, 2014

Braetta I. DeLoach (“DeLoach”) appeals from the Order denying relief under the Post Conviction Relief Act (“PCRA”). **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On June 12, 2009, DeLoach was convicted of third-degree murder and possession of an instrument of crime (“PIC”) for stabbing and killing her girlfriend.¹ After reviewing a Pre-Sentence Investigation Report (“PSI”), the trial court sentenced DeLoach to an aggregate prison sentence of 14½-35 years.²

This Court affirmed DeLoach’s judgment of sentence on January 19, 2011. **See Commonwealth v. DeLoach**, 23 A.3d 1084 (Pa. Super. 2011)

¹ **See** 18 Pa.C.S.A. §§ 2502(c), 907(a).

² The trial court sentenced DeLoach to 12-30 years in prison for the third-degree murder conviction, and 2½-5 years in prison for the PIC conviction.

(unpublished memorandum). The Supreme Court of Pennsylvania denied Allowance of Appeal on July 28, 2011. **See *Commonwealth v. DeLoach***, 25 A.3d 327 (Pa. 2011).

DeLoach then filed a timely PCRA Petition on August 24, 2011, claiming ineffective assistance of counsel for failure to file a Motion to Reconsider Sentence. On September 27, 2013, the PCRA court issued a Notice of Intent to Dismiss, and formally denied relief on October 31, 2013. DeLoach filed a timely Notice of Appeal.

On appeal, DeLoach raises the following questions for our review:

- I. Did the post-conviction court err when it denied the appellant post-conviction relief without a hearing?
 - A. Is [DeLoach] entitled to post-conviction relief in the form of the grant of leave to file a post-sentence motion *nunc pro tunc* in the nature of a motion for reconsideration of sentence or a remand for an evidentiary hearing as a result of the ineffective assistance of trial counsel for failing to file and litigate a post-sentence motion in the nature of a motion for reconsideration of sentence as requested by [DeLoach]?

Brief for Appellant at 4.

We review an order [denying] 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.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted).

DeLoach contends that her trial counsel was ineffective for failing to file a Motion to Reconsider Sentence. Brief for Appellant at 24-25. DeLoach argues that her sentence was excessive because there was “a possibility” that the sentencing judge did not give proper weight to factors which would, in her opinion, mitigate her sentence. *Id.* at 32-33. She further contends that had her trial counsel filed a Motion to Reconsider Sentence, her sentence would have been reduced. *Id.* at 39-40.

In Pennsylvania, there is a presumption that counsel was effective. ***Commonwealth v. Cross***, 634 A.2d 173, 175 (Pa. 1993). As such, the appellant has the burden to prove by the preponderance of the evidence that counsel was ineffective. ***Commonwealth v. Jones***, 471 A.2d 879, 880 (Pa. Super. 1984). A successful claim of ineffective assistance of counsel requires that the underlying claim have merit, that counsel’s action or inaction did not have a reasonable basis which would advance the defendant’s interests, and that but for the action or inaction of counsel, there is reasonable probability that the outcome of the case would have been different. ***Commonwealth v. Johnson***, 588 A.2d 1303, 1305 (Pa. 1991); ***see also Strickland v. Washington***, 466 U.S. 668, 695 (1984). A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim in its entirety. ***See Commonwealth v. Steele***, 961 A.2d 786, 800 (Pa. 2008).

Initially, DeLoach's trial counsel stated in her "Certification" that she did not recall DeLoach's request to file the Motion at issue, and that had she been aware of such a request, she would have strongly advised against it. **See** Certification of Regina Coyne, Esq. According to trial counsel, after DeLoach was convicted, but before sentencing, she was charged with aggravated assault of three corrections officers while in prison. **Id.** Trial counsel believed that, had a motion for reconsideration of sentence been granted, the sentence might have actually been increased because the charges would have become convictions. **Id.** At sentencing, the Commonwealth sought to introduce the aggravated assault charges as evidence of DeLoach's continued dangerousness. **See** N.T., 9/29/09, at 19-21. The trial court refused to consider the aggravated assault as evidence because only charges were involved at that point, not convictions. **Id.** While DeLoach baldly argues that the new convictions would not have been considered because the reconsideration hearing would have occurred prior to her guilty pleas (for the aggravated assault charges), she has not demonstrated that trial counsel's actions were unreasonable. **See Strickland**, 466 U.S. at 689 (stating that an ineffectiveness claim fails where tactical and procedural decisions taken by counsel had a reasonable basis). Based upon the foregoing, we conclude that trial counsel acted in a reasonable manner to advance DeLoach's best interests.

Further, DeLoach argued that there was only a mere “possibility” that the sentencing court impermissibly ignored mitigating factors, including: DeLoach’s abuse as a child; her receipt of an Associates Degree; her employment history; her drug use and abuse; her psychiatric history; and her abuse by the victim. Brief for Appellant at 32-33. Despite evidence showing that these factors were actually considered, a mere “possibility” is not enough to prove prejudice; there must have been a “reasonable probability” that but for the inaction of DeLoach’s attorney, her sentence would have been reduced. **See Strickland**, 466 U.S. at 695.

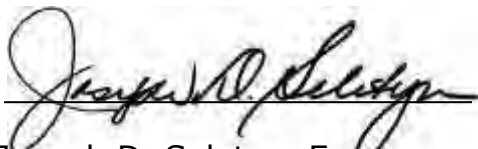
Here, the sentencing judge considered the PSI; DeLoach’s mental health evaluation; her age; her educational and employment history; her lack of a prior record; her ongoing drug and alcohol abuse; her continual violent behavior even after counseling; the facts and circumstances surrounding the murder; and her allocution. **See** N.T., 9/29/09, at 2-6, 36-40; **see also Commonwealth v. Devers**, 546 A.2d 12, 18 (Pa. 1988) (holding that when the sentencing court has the benefit of a PSI, it will be presumed that the court weighed and considered all mitigating factors). The sentencing judge also considered the maximum sentences for the crimes, 40 years for third-degree murder and 5 years for PIC. The trial court sentenced DeLoach to 14½-35 years in prison. **See Commonwealth v. Hess**, 745 A.2d 29, 31 (Pa. Super. 2000) (stating that sentencing is left to the sound discretion of the sentencing judge, and absent a manifest abuse of

discretion, will be left undisturbed); **see also Commonwealth v. Mouzon**, 828 A.2d 1126, 1128 (Pa. Super. 2003) (holding that the trial court, and in this case, the sentencing judge, is in the best position to weigh the nature of the crime, the defendant's character, and the defendant's display of remorse). DeLoach has not demonstrated that the result would have been different had counsel filed a Motion to Reconsider Sentence, as the trial court had already considered the mitigating factors.

DeLoach also argues that the PCRA court should have afforded her the "opportunity to present evidence in support of her claim at an evidentiary hearing." Brief for Appellant at 41. However, such a hearing is only granted where the petitioner pleads and offers to prove in her petition all disputed, material facts, which, if taken as true, would necessarily warrant relief. **Commonwealth v. Hanible**, 30 A.3d 426, 428 (Pa. 2011). DeLoach did not raise a genuine issue of any relevant, material fact which would compel relief. Thus, the PCRA court properly denied relief 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: 6/30/2014