

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
TAURON SMITH,	:	No. 2243 EDA 2011
	:	
Appellant	:	

Appeal from the PCRA Order, July 15, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0406283-2005

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 13, 2013**

Tauron Smith appeals from the order of July 15, 2011, dismissing his PCRA¹ petition without an evidentiary hearing. After careful review, we affirm.

The underlying facts of this matter have been previously summarized by this court as follows:

Kaulee Prioleau testified that on February 25, 2005, he was walking out of his home when he was approached by Smith and co-defendant, Lamont Childs. Smith and Lamont told Prioleau to walk back into his home and the two forced their way inside the residence. Prioleau's children and two extended family members with their children were at home. Childs then told Prioleau to drive him to America's Cash Express, a check cashing business where Prioleau's wife worked. There, Childs told Prioleau to tell his wife that the two men were acquaintances

¹ Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

and that she should open the safe. According to the plan, after the money was taken from the safe, co-defendant Robert Fennell would be contacted by a walkie-talkie connection on a Nextel cellular phone for a quick "get away."

Fennell and Childs forced Prioleau into his van to go to America's Cash Express. After the three entered the van, Fennell saw two neighbors outside Prioleau's home. Fennell exited to determine who they were and what they were doing. Childs joined Fennell, leaving Prioleau alone. Prioleau quickly contacted his wife via a Nextel walkie-talkie connection and alerted her of the planned robbery. His wife then contacted the police.

The two neighbors were forced into Prioleau's home at gunpoint. Smith remained inside with the hostages. Childs left with Prioleau to go to America's Cash Express. Childs was stopped with Prioleau en route by the police, and Childs fled on foot. Officers were summoned to Prioleau's home in response to the hostage situation. Fennell was arrested following a struggle in which several officers were injured.

Commonwealth v. Smith, 3527 EDA 2006, unpublished memorandum at 2-3 (Pa.Super. filed August 1, 2008). Following a jury trial, appellant was found guilty of unlawful restraint, burglary and criminal conspiracy, and sentenced to 17 to 34 years' imprisonment. On the ensuing direct appeal, this court affirmed the judgment of sentence. ***Id.*** Appellant did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On June 15, 2009, appellant filed a timely ***pro se*** PCRA petition. Counsel was appointed, and filed an amended petition on appellant's behalf.

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On July 15, 2011, following Rule 907² notice, appellant's petition was dismissed without a hearing. A timely notice of appeal was filed on Monday, August 15, 2011. New counsel was appointed to represent appellant on appeal, and appellant complied with the PCRA court's order to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. On April 12, 2012, the PCRA court issued a Rule 1925(a) opinion.

Appellant has raised the following issue for this court's review:

- A. Did the lower court err when it denied [appellant]'s amended [PCRA] petition without an evidentiary hearing wherein the issue raised was that he was denied effective assistance of appellate counsel as appellate counsel failed to engage in an adequate and timely consultation with him before the filing deadline, of his right to file a petition for allowance of appeal with the Supreme Court of Pennsylvania?

Appellant's brief at 2.

Appellant argues that the PCRA court erred in dismissing his petition without an evidentiary hearing where he alleged that direct appeal counsel failed to consult with him regarding his right to file a petition for allowance of appeal with our supreme court.

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. Halley***, 582 Pa. 164, 870 A.2d 795, 799 n. 2 (2005). The PCRA court's findings will

² Pa.R.Crim.P., Rule 907, 42 Pa.C.S.A.

not be disturbed unless there is no support for the findings in the certified record. **Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa.Super.2001).

Commonwealth v. Turetsky, 925 A.2d 876, 879 (Pa.Super. 2007), **appeal denied**, 596 Pa. 707, 940 A.2d 365 (2007).

[T]he right to an evidentiary hearing on a post-conviction petition is not absolute. **Commonwealth v. Jordan**, 772 A.2d 1011, 1014 (Pa.Super.2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. **Id.** It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing. **Commonwealth v. Hardcastle**, 549 Pa. 450, 454, 701 A.2d 541, 542-543 (1997).

Id. at 882, quoting **Commonwealth v. Khalifah**, 852 A.2d 1238, 1239-1240 (Pa.Super. 2004).

To prevail on a claim alleging counsel's ineffectiveness under the PCRA, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, **i.e.** there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different. **Commonwealth v. Kimball**, 555 Pa. 299, 724 A.2d 326, 333 (1999); **Commonwealth v. Douglas**, 537 Pa. 588, 645 A.2d 226, 230 (1994).

Commonwealth v. Bracey, 568 Pa. 264, 276, 795 A.2d 935, 942 (2001).

Appellant relies on ***Commonwealth v. Liebel***, 573 Pa. 375, 825 A.2d 630 (2003), and ***Commonwealth v. Gadsden***, 832 A.2d 1082 (Pa.Super. 2003), ***appeal denied***, 578 Pa. 162, 850 A.2d 611 (2004). In ***Liebel***, appellate counsel promised his client that he would file a petition for ***allocatur*** on his behalf, but failed to file the petition. Our supreme court, relying on ***Commonwealth v. Lantzy***, 558 Pa. 214, 736 A.2d 564 (1999), held that the petitioner raised a cognizable claim of ineffective assistance of counsel under the PCRA without having to show whether the ***allocatur*** petition would have been granted. The ***Liebel*** court reasoned that counsel's failure to file the promised ***allocatur*** petition, which the petitioner had a rule-based right to file, amounted to no representation at all and was ***per se*** ineffectiveness.

In ***Gadsden***, this court remanded for an evidentiary hearing where it was unclear from the extant record whether the petitioner asked counsel to file a petition for ***allocatur***, and if so, whether counsel's failure to do so was justifiable. The PCRA court in ***Gadsden*** dismissed the claim without a hearing on the basis that failure of counsel to pursue ***allocatur*** does not raise a cognizable PCRA claim, which was in contravention of the principles set forth in ***Liebel***. ***Gadsden***, 832 A.2d at 1088. In ***Gadsden***, the petitioner's counsel informed via letter that he would not be seeking allowance of appeal with the supreme court; however, counsel sent this letter to petitioner only a few days before the expiration of the thirty-day

period for filing a petition for **allocatur** and it was unclear when the petitioner actually received the letter. **Id.** at 1087. Furthermore, there was no evidence of record to establish whether the letter was sent after adequate and timely consultation with the petitioner, in abrogation of a promise made to the petitioner, or in response to a request for an **allocatur** petition by the petitioner. **Id.** at 1087-1088. The **Gadsden** court cited **Commonwealth v. Touw**, 781 A.2d 1250 (Pa.Super. 2001), and **Roe v. Flores-Ortega**, 528 U.S. 470 (2000), for the proposition that an allegation of ineffective assistance of counsel based on counsel's failure to provide adequate consultation to a client with respect to the filing of a petition for **allocatur** with the Pennsylvania Supreme Court is a cognizable claim under the PCRA. **Gadsden** extended the holding in **Touw**, regarding an attorney's duty to consult with his client about filing a direct appeal, to **allocatur** petitions:

[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.

Gadsden, 832 A.2d at 1087, quoting **Touw**, 781 A.2d at 1254, quoting **Flores-Ortega**, 528 U.S. at 480.

Liebel is readily distinguishable because here, appellant does not claim that appellate counsel ever promised to file a petition for allowance of appeal on his behalf. In fact, appellant does not allege in either his **pro se** PCRA petition or in his amended, counseled PCRA petition that he ever requested counsel to file a petition for **allocatur**. Therefore, the second prong set forth above does not apply. Appellant argues that it was error for the PCRA court to dismiss the petition without an evidentiary hearing where, as in **Gadsden**, it was unclear from the record whether counsel adequately and timely consulted with him before the filing deadline. We disagree, and find support for our decision in **Commonwealth v. Bath**, 907 A.2d 619 (Pa.Super. 2006), **appeal denied**, 591 Pa. 695, 918 A.2d 741 (2007), which we determine to be controlling.

In **Bath**, as in the instant case, the petitioner sought relief based on allegations of ineffectiveness arising from counsel's failure to seek allowance of appeal following this court's affirmance of the judgment of sentence. Notably, the PCRA court in **Bath** denied the petition on the merits, without a hearing, following proper Rule 907 notice. **Id.** at 621. Also as in the instant case, the petitioner in **Bath** did not allege that he asked counsel to file a petition for **allocatur**; rather, his claim was based on counsel's alleged failure to consult with him concerning the potential advantages of filing such a petition. The **Bath** court held that such an alleged failure does not constitute ineffectiveness **per se**; rather, the petitioner must establish a

duty to consult by indicating issues of potential merit for further review by our supreme court.

. . .Bath never suggests which of his issues on direct appeal would not be considered frivolous upon further appeal. We find that Bath has failed to meet the prejudice prong of the test for ineffective assistance of counsel because Bath never puts forward or describes an issue raised upon direct appeal that would rise above mere frivolity upon further review. More importantly, we find that Bath did, in fact, have to meet this burden.

Id. at 623.

Where no request 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. **See Roe**, 528 U.S. at 480, 120 S.Ct. 1029; **Touw**, 781 A.2d at 1254. This does not require appellant to demonstrate that the Supreme Court would likely grant review to a petition for allowance of appeal, but only that appellant must show that any issue rises above frivolity. Bath has not even attempted this minimal undertaking.

Id. at 623-624.

In the case **sub judice**, as in **Bath**, appellant offers no argument in support of any of the issues raised on direct appeal. **See id.** at 624. Appellant raised two issues on direct appeal: (1) that the trial court improperly allowed the prosecution to admit prejudicial photographs of children who were in the residence during the hostage situation; and (2)

that the trial court erred in denying his Rule 600³ motion to dismiss because the Commonwealth refused to sever appellant's case from that of his two co-defendants. **Smith, supra** at 1. Regarding the photographs, we observed that appellant did not describe how the children appeared in the photographs or make a claim that their images were in any way inflammatory. **Id.** at 5. Furthermore, the defense conceded that the children could have been called as live witnesses at trial: "It is difficult to comprehend how photographs of individuals who could have appeared on the witness stand in person were so overly prejudicial that they denied [appellant] a fair trial." **Id.** The photographs were taken around the same time of the hostage incident and the Commonwealth claimed they were relevant to put a face on the victims of the crime. **Id.** at 4. We found no abuse of discretion in allowing the photographs to be shown at trial. **Id.** at 5.

Regarding appellant's Rule 600 speedy trial motion, the Commonwealth is not required to sever a defendant's case from a co-defendant's when faced with a possible Rule 600 violation, and principles of judicial economy weighed heavily against severance. **Id.** at 6-8. Furthermore, the Commonwealth showed due diligence in bringing appellant to trial and much of the delay in the case was due to scheduling difficulties beyond the Commonwealth's control. **Id.** at 7.

³ Pa.R.Crim.P., Rule 600(G), 42 Pa.C.S.A.

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Clearly, both issues raised on direct appeal were without merit and highly unlikely to receive further review in the Pennsylvania Supreme Court. Appealing such issues further would be manifestly frivolous, and appellant does not argue otherwise. As such, he has not met his burden of showing how he was prejudiced by counsel's alleged failure to consult with him regarding a petition for **allocatur**. Therefore, we cannot find that counsel was ineffective and the PCRA court properly denied appellant's petition without hearing. **Bath**, 907 A.2d at 624, citing **Commonwealth v. Mallory**, 888 A.2d 854, 862 (Pa.Super. 2005).

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambetta", written over a horizontal line.

Prothonotary

Date: 5/13/2013