NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOHN FRANCIS NEIDLINGER JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 241 MDA 2012

Appeal from the PCRA Order January 21, 2011
In the Court of Common Pleas of Schuylkill County
Criminal Division at No(s): CP-54-CR-0000621-2009
CP-54-CR-0001020-2009

BEFORE: MUSMANNO, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: January 9, 2013

Appellant, John Francis Neidlinger, Jr., appeals from the order entered in the Schuylkill County Court of Common Pleas dismissing his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546.[1] We affirm.

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* Former Justice specially assigned to the Superior Court.

[1] Appellant purported to appeal from the court's December 29, 2010 notice pursuant to Pa.R.Crim.P. 907. The notice provided, *inter alia*, "Pursuant to Pa.R.Crim.P. 907 you are hereby notified that the enclosed proposed order dismissing your petition under the Post-Conviction Relief Act will be filed twenty (20) days from the date of this Notice." Notice, 12/29/10. The appeal instead lies from the January 21, 2011 order dismissing Appellant's PCRA petition without a hearing. ***See*** Pa.R.Crim.P. 910 ("An order granting, denying, dismissing, or otherwise finally disposing of a petition for post-conviction collateral relief shall constitute a final order for purposes of appeal.") We have amended the caption accordingly.

On August 24, 2009 in CP-54-CR-0000621-2009 ("CR-621-2009") Appellant entered a guilty plea to criminal trespass and harassment and in CP-54-CR-0001020-2009 ("CR-1020-2009") Appellant entered a guilty plea to one count of simple assault. "The written guilty plea colloquy indicated that [Appellant] had fully read the criminal complaint, the affidavit of probable cause and information, and admitted that the facts as stated against him in the complaint and information were true." PCRA Ct. Op., 1/21/11, at 2. In the oral guilty plea colloquy, "the court made it clear that [Appellant] was entering a plea to a criminal trespass felony of the second degree, including the elements of that offense, and likewise did so with regard to the simple assault." ***Id.***

Appellant did not file a direct appeal to this Court. On May 3, 2010, Appellant filed a *pro se* Writ of Habeas Corpus.[2] On June 15, 2010, the trial court entered an order stating, *inter alia*, that it would treat the filing as Appellant's first PCRA petition. On June 28, 2010, Appellant filed *pro se* PCRA petitions in each case alleging, *inter alia*, counsel was ineffective "for failure to investigate law, or correct error, and failed to provide/review discovery with" him. PCRA Pet., 6/28/10, at 3. Counsel was appointed for Appellant on July 8, 2010 and allowed forty-five days to file any

[2] Appellant filed the same document in both cases.

amendments deemed necessary to the PCRA petition. Order, 7/8/10.[3] On July 21, 2010, the court entered the following order: "[U]pon consideration of the multiple *pro se* filings of [Appellant] and in light of our Order of July 8, 2010, . . . the filings of May 3, 2010 and June 15, 29010 are treated by the Court as one claim for post conviction relief . . . ." Order, 7/21/10. On December 29, 2010, the court filed a notice pursuant to Pa.R.Crim.P. 907. On January 21, 2011, the court dismissed the PCRA petition.

Appellant filed a *pro se* writ of habeas corpus on September 12, 2011. The Commonwealth agreed that Appellant should have his appeal rights reinstated *nunc pro tunc* because counsel for Appellant did not receive a copy of the January 21, 2011 order dismissing Appellant's PCRA petition. Commonwealth's Answer to Aplnt's Writ of Habeas Corpus, 12/29/11, at 2 (unpaginated). The court granted the writ and permitted this appeal to proceed *nunc pro tunc*. Order, 1/16/12.[4] This timely appeal followed. Appellant filed a timely court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The PCRA court filed a responsive opinion incorporating its January 21, 2012 order.

Appellant raises the following issue for our review:

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[3] Counsel did not file an amended PCRA petition.

[4] The order further provided that Appellant's "*Pro S*e Petition for PCRA Relief based upon his counsel's failure to have appealed from the [January 21, 2011] Order" was dismissed "in light of this Order to allow an appeal *nunc pro tunc*." Order, 1/30/12.

> 1. Whether the lower court committed error when it dismissed Appellant's PCRA petition without a hearing where the petition raised adequate and specific claims of ineffective assistance of counsel such that a hearing was necessary to determine the specific factual issues raised in the PCRA petition and motion?

Appellant's Brief at 7.

Appellant avers that "it was not a knowing and voluntary guilty plea because of ineffective assistance of counsel." ***Id.*** at 16. Appellant contends the court erred in dismissing the PCRA petition without a hearing because a hearing was required "in order for the Court to determine, if, in fact, the public defender's office provided adequate legal representation when it counseled [Appellant] to plead guilty to the specifically graded offenses. To what degree Appellant's trial counsel adequately investigated the law as it relates to the facts alleged is simply unknown . . . ." ***Id.***.

As a prefatory matter, we consider whether Appellant has preserved his issue on appeal. The record in the case *sub judice* does not contain the notes of testimony from the August 24, 2009 guilty plea colloquy in both cases. "Our law is unequivocal that the responsibility rests upon the appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty." ***Commonwealth v. Preston***, 904 A.2d 1, 7 (Pa. Super. 2006) (*en banc*). Nevertheless, we made an informal inquiry to the PCRA court, and were informed that no transcripts were available.

If the notes of testimony were unavailable, appellate review in a PCRA appeal is not necessarily precluded.

> "When a transcript of proceedings is unavailable, our rules of court provide an alternative so as not to preclude appellate review." ***Commonwealth v. Michuck***, 454 Pa. Super. 594, 686 A.2d 403, 408 (1996). Pennsylvania Rule of Appellate Procedure 1923 provides as follows:
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> Rule 1923. Statement in Absence of Transcript
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> > If no report of the evidence of proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose statements thereto within ten days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the lower court for settlement and approval and as settled and approved shall be included by the clerk of the lower court in the record on appeal.
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> Pa.R.A.P. 1923

Commonwealth v. Knighten, 742 A.2d 679, 683 (Pa. Super. 1999). This Court in ***Knighten*** concluded:

> Our Court has repeatedly held that issues dependent upon a missing record for appellate review are waived where—as here—the appellant makes no attempt to reconstruct the missing portion of the record. ***See Michuck***, 686 A.2d at 407-08 (holding that the appellant's failure to provide the transcript of *voir dire* or a Rule 1923 substitute waives a claim of improper jury selection on appeal); ***Commonwealth v. McGriff***, 432 Pa. Super. 467, 638 A.2d 1032 (1994) (holding that, where the transcript is lost in the trial court, appellant's failure to comply with Rule 1923 renders his claim unreviewable on the merits); ***Commonwealth v. Buehl***, 403 Pa. Super. 143, 588 A.2d

> 522 (1991) (holding that an appellate court will not consider the merits of contentions not supported by either the record or a statement provided in accordance with Rule 1923).

Id. at 683-84.

In the absence of the notes of testimony from the guilty plea colloquy or a rule 1923 statement, Appellant's claim that counsel was ineffective for counseling him to plead guilty is waived on appeal. ***See id.***

Order affirmed.