

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOHN EARL MORAN,	:	
	:	
Appellant	:	No. 248 WDA 2012

Appeal from the PCRA Order entered on January 27, 2012
in the Court of Common Pleas of Allegheny County,
Criminal Division, No(s): CP-02-CR-0014345-2006,
CP-02-CR-0018849-2006, CP-02-CR-0018902-2006

BEFORE: STEVENS, P.J., MUSMANNO and ALLEN, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: March 11, 2013

John Earl Moran (“Moran”) appeals from the Order denying his Petition for relief filed pursuant to the Post Conviction Relief Act (“PCRA”).¹ We affirm.

On May 12, 2006, based upon an anonymous tip and surveillance, Pittsburgh police officers obtained a search warrant for, *inter alia*, Moran’s residence. In Moran’s bedroom, officers found narcotics, a micro tech digital scale, cutting and packaging materials, \$896 in cash, five cell phones, and a firearm with the serial number obliterated. Police officers arrested Moran and charged him with various drug and firearms offenses. Prior to trial, Moran filed a pre-trial suppression Motion, which the trial court granted. On

¹ 42 Pa.C.S.A. §§ 9541-9546.

direct appeal, this Court reversed the Order granting Moran's suppression Motion, and remanded the case for trial. *Commonwealth v. Moran*, 996 A.2d 11 (Pa. Super. 2010) (unpublished memorandum).

On remand, Moran entered a negotiated guilty plea to three counts of possession with intent to deliver a controlled substance (cocaine).² On January 24, 2011, as per the plea agreement, the trial court sentenced Moran to an aggregate prison term of 3½ to 10 years. Moran did not file a Motion to withdraw his guilty plea or a direct appeal of his judgment of sentence.

On October 31, 2011, Moran filed a *pro se* Petition for relief under the PCRA. The PCRA court appointed Moran counsel, who filed an Amended PCRA Petition. The PCRA Petition claimed that (a) Moran was entitled to credit for time served for the time period of September 20, 2006 through December 14, 2006; and (b) Moran's prior counsel rendered ineffective assistance by not filing a direct appeal when there existed a meritorious challenge to the legality of his sentence. Amended PCRA Petition at ¶ 16. In an Order filed on January 30, 2012, the PCRA court granted Moran's Petition without an evidentiary hearing. Specifically, the PCRA court ordered that Moran be granted (a) at CC 200614345, one day of credit for May 13, 2006; (b) at CC 200618849, credit for the time period between September 20, 2006 and December 14, 2006; and (c) at CC 2006618902, credit for the

² 35 P.S. § 780-113(a)(30).

time period between September 20, 2006 and December 14, 2006. PCRA Court Order, 1/30/12. Thereafter, Moran filed the instant timely appeal.

On appeal, Moran presents the following claims for our review:

I. Whether [Moran] is entitled to reinstatement of his right to file an appeal with respect to his January 24, 2011 judgment of sentence as he was deprived of his right to effective assistance of counsel—under Article I, Section 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendments to the United States Constitution—and his right of appeal—under Article V, Section 9 of the Pennsylvania Constitution—when [his prior counsel] failed to consult with [Moran] about exercising said rights when a meritorious claim existed regarding the legality of sentences?

II. Whether the [PCRA] court erred and/or abused its discretion in failing to hold an evidentiary hearing?

Brief for Appellant at 2.

This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. *Commonwealth v. Donaghy*, 33 A.3d 12, 15 (Pa. Super. 2011).

To prevail on a petition for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his or her conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S.A. § 9543(a)(2). These circumstances include the ineffectiveness of counsel, which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(i) and (ii).

Moran first claims that the PCRA court erred when it failed to reinstate Moran's right to a direct appeal, *nunc pro tunc*. Brief for Appellant at 12-13. Moran disputes the PCRA court's conclusion that Moran's ineffectiveness claim was rendered moot by the PCRA court's grant of relief on his sentencing claim. *Id.* at 13. Moran argues that "prejudice need not be established in order to sustain a claim for reinstatement of direct appeal rights beyond the fact that a defendant would have appealed if consulted [by counsel] during the period within which to file an appeal." *Id.* According to Moran, his ineffectiveness claim was not rendered moot by the lack of a meritorious issue to pursue on direct appeal, or the PCRA court's correction of the illegal sentence in post-conviction proceedings. *Id.* We disagree.

To prevail on a claim of ineffective assistance of counsel, an appellant must prove that (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused him prejudice. *Commonwealth v. Reaves*, 923 A.2d 1119, 1128 n.10 (Pa. 2007). "Where a defendant clearly asks for an appeal and counsel fails to file one, a presumption of prejudice arises regardless of the merits of the underlying issues." *Donaghy*, 33 A.2d at 15 (citing *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999)).

However, *Lantzy* does not address a situation ... in which the defendant has not clearly articulated his wishes regarding an appeal. Such a situation was subsequently addressed in *Commonwealth v. Touw*, 2001 PA Super 229, 781 A.2d 1250 (Pa. Super. 2001).

In *Touw*, [the Pennsylvania Superior Court] applied the U.S. Supreme Court's holding in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), in which the [Supreme] Court addressed the question of whether "counsel [is] deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes [regarding an appeal] one way or the other[.]" *Flores-Ortega*, 528 U.S. at 477. In answering this question, the [Supreme] Court used the two-pronged framework established under [*Strickland v. Washington*, 466 U.S. 668 (1984),] which requires that a defendant asserting a claim of ineffective assistance of counsel must show (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant.

With regard to the first *Strickland* prong, the [Supreme] Court declined to set a bright-line rule, but concluded counsel "has a constitutionally-imposed duty to consult with his client about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." [*Flores-Ortega*, 528 U.S. at] 480. The [Supreme] Court defined the term "consult" to mean "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* at 478.

In line with the second prong of *Strickland*, the *Flores-Ortega* Court went on to hold that once a defendant establishes that counsel had a constitutionally imposed duty to consult, but failed to do so, **he must also show that prejudice resulted from such failure.** *Id.* at 481. In order to do so, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* The question [of] whether a given defendant made the requisite showing of prejudice will turn on the facts of a particular case. *Id.* at 485.

Donaghy, 33 A.3d at 15 (emphasis added).

Certainly, had the PCRA court not granted relief, Moran could have established prejudice resulting from counsel's failure to challenge the legality

of sentence on direct appeal. However, the PCRA court granted Moran relief on his claim. As the PCRA court correctly recognized, its grant of the requested relief affects the justiciability of the issue raised by Moran.

“Pennsylvania law states that appellate courts will not decide moot or abstract questions; an actual claim or controversy must exist at all stages of review.” *Del. River Pres. Co. v. Miskin*, 923 A.2d 1177, 1183 n.3 (Pa. Super. 2007); *see also In Re R.D.*, 44 A.3d 657, 680 (Pa. Super. 2012) (recognizing that “[a]s a general rule, an actual case or controversy must exist at all stages of the judicial process, or a case will be dismissed as moot). “An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case[.]” *In Re R.D.*, 44 A.3d at 680. “If events occur to eliminate the claim or controversy at any stage in the process, the case becomes moot.” *Del. River Pres. Co.*, 923 A.2d at 1183 n.3.

In his Amended PCRA Petition, Moran claimed that the trial court imposed an illegal sentence when it failed to grant him credit for time served. Amended PCRA Petition at ¶ 16(1). Moran further claimed that counsel rendered ineffective assistance by not filing a direct appeal, where there existed a meritorious claim challenging the legality of his sentence. *Id.* at ¶ 16(2). The PCRA court’s grant of relief on Moran’s sentencing claim eliminated the claim/controversy underlying Moran’s ineffectiveness claim.

Under these unique circumstances, the PCRA court's grant of relief rendered Moran's ineffectiveness claim moot.

Moreover, because the PCRA court granted relief, a meritorious challenge to the legality of Moran's sentence no longer existed. **See Reaves**, 923 A.2d at 1128 n.10 (requiring that a petitioner claiming ineffective assistance of counsel plead and prove, *inter alia*, that the claim is of arguable merit). The record also is clear that Moran no longer suffered prejudice resulting from counsel's failure to file a direct appeal challenging the legality of his sentence. **See id.** (requiring that a petitioner claiming ineffective assistance of counsel plead and prove prejudice caused by counsel's action or inaction). Because Moran could no longer establish that his underlying claim has arguable merit or prejudice resulting from counsel's inaction, Moran is not entitled to relief on this basis as well.

Finally, Moran claims that the PCRA court improperly denied his Petition without holding an evidentiary hearing. Brief for Appellant at 15. Moran contends that his Petition raised an issue of fact, which, if resolved in his favor, could support the grant of relief. **Id.** According to Moran, "a PCRA Court must hold an evidentiary hearing as a pre-requisite to exercising its fact-finding function on the reasonableness of counsel's strategy." **Id.** (footnote omitted). We disagree.

Pennsylvania Rule of Criminal Procedure 907 provides that

[a] petition for post-conviction collateral relief may be granted without a hearing when the petition and answer show that there

is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.

Pa.R.Crim.P. 907(2).

Here, the PCRA court granted relief without a hearing. Moran is entitled to no further relief, as the PCRA court's Order rendered his ineffectiveness claim moot. As there existed no further case or controversy, we discern no error or abuse of discretion by the PCRA court. Accordingly, we cannot grant Moran relief on this claim.

Order affirmed.