

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
CHRISTOPHER EDWARD HARKINS,		
Appellant		No. 379 EDA 2012

Appeal from the PCRA Order entered December 30, 2011
In the Court of Common Pleas of Pike County
Criminal Division at No(s): CP-52-CR-0000073-2007

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
CHRISTOPHER EDWARD HARKINS,		
Appellant		No. 380 EDA 2012

Appeal from the PCRA Order entered December 30, 2011
In the Court of Common Pleas of Pike County
Criminal Division at No(s): CP-52-CR-0000290-2008

BEFORE: DONOHUE, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: March 18, 2013

Appellant, Christopher Edward Harkins, appeals from an order entered on December 30, 2011 in the Criminal Division of the Court of Common Pleas of Pike County that denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We vacate in part

*Former Justice assigned to the Superior Court.

and affirm in part. Specifically, we vacate that aspect of the PCRA court's order that denied collateral relief on Appellant's challenge to the imposition of costs of incarceration at the Pike County Correctional Facility. We therefore amend Appellant's January 29, 2009 judgment of sentence to relieve Appellant of the obligation to repay such costs. We affirm the remainder of the PCRA court's December 30, 2011 order. Consequently, except as previously provided, all other provisions of Appellant's January 29, 2009 judgment of sentence shall remain undisturbed.

We summarize the relevant facts as follows. Before criminal charges were filed in this matter, Appellant was sued in civil court in the Pike County Court of Common Pleas. Certain victims of Appellant's crimes, as described in detail below, filed the civil claims. During the pendency of the civil action, Appellant violated several court orders that ultimately led to a finding of civil contempt and an order of imprisonment on May 22, 2007 pending compliance with those court orders. The court deferred the period of incarceration until June 1, 2007 to give Appellant an additional opportunity to comply with the outstanding orders. Appellant failed to comply and further failed to report to the Pike County jail to begin his sentence for civil contempt. A bench warrant was ultimately issued and Appellant was jailed for civil contempt.

Thereafter, Appellant was charged with theft and related offenses at several criminal docket numbers, including trial court docket nos. 73 CR 2007 and 290 CR 2008 (corresponding to Superior Court docket nos. 379

EDA 2012 and 380 EDA 2012, respectively). The charges at trial court docket 73 CR 2007 (Superior Court 379 EDA 2012) arose after Appellant, between November 2004 and August 2006, received \$200,000.00 from victims in exchange for his promise to build them a residential structure. Appellant failed to build the home, dealt with the funds as his own, and failed to return the money. The charges at trial court docket 290 CR 2008 (Superior Court 380 EDA 2012) are based upon Appellant's receipt, in August 2007, of \$3,365.00 from a victim in exchange for his promise to perform certain residential renovations. Although Appellant performed some of the work, he did not complete the job and failed to return any of the funds.

Appellant failed to appear at a scheduled plea hearing. As a result, the trial court issued a bench warrant for Appellant's arrest. Appellant surrendered to the outstanding warrants on April 2, 2008. On November 7, 2008, at trial court docket 73 CR 2007, Appellant pled guilty to theft by failure to make required disposition, 18 Pa.C.S.A. § 3927(a). Subsequently, on December 4, 2008, at trial court docket 290 CR 2008, Appellant pled guilty to theft by deception, 18 Pa.C.S.A. § 3922(a)(1). Pursuant to the plea agreements, the trial court dismissed several other charges pending against Appellant.

The trial court sentenced Appellant in both cases on January 29, 2009. At trial court docket 73 CR 2007, the court ordered Appellant to serve 30 months to seven years' incarceration in state prison. At trial court docket

290 CR 2008, the court sentenced Appellant to a concurrent term of 12 months to seven years' incarceration at a state prison facility. At sentencing, the trial court ordered Appellant to repay the cost of his incarceration at the Pike County Correctional Facility.

On February 9, 2009, Appellant filed post-sentence motions. In his motions, Appellant requested recusal by the trial judge, leave to withdraw his guilty plea, and amendment of his sentence to make him eligible for participation in the Recidivism Risk Reduction Act ("RRRI") program, 61 Pa.C.S.A. §§ 4501-4512. On April 6, 2009, the court granted Appellant's RRRI eligibility request but denied Appellant's other requests for relief. Appellant filed a direct appeal on May 4, 2009.

On February 18, 2010, this Court vacated Appellant's judgment of sentence and remanded the case with instructions that Appellant be given additional credit for time served. On March 10, 2010, the trial court resentenced Appellant and awarded Appellant credit for the additional time. The trial court denied a motion to modify or reconsider its resentencing order. No appeal was taken from the resentencing order that followed remand from this Court.

On March 21, 2011, Appellant filed a *pro se* petition pursuant to the PCRA. Counsel was appointed and an amended petition was filed on August 31, 2011. The PCRA court convened a hearing on November 1, 2011. The court denied the amended petition on December 30, 2011 and Appellant filed the present appeal on January 30, 2012. Pursuant to orders issued by

the PCRA court, Appellant filed concise statements of errors complained of on appeal at both docket numbers. The PCRA court filed its opinions on March 30, 2012.

In his brief to this Court, Appellant asks us to consider the following claims for review:

Did President Judge Kameen commit an abuse of discretion by not recusing himself in these PCRA proceedings?

Did [p]lea [c]ounsel render ineffective assistance of counsel by failing to file a [m]otion for [r]ecusal prior to [t]rial or [p]lea or [s]entencing despite requests from [Appellant] to do so?

Were [p]lea and [a]ppellate [c]ounsel ineffective in failing to challenge the legality of [Appellant's] sentence in post sentence motions or direct appeal where the costs of incarceration in Pike County Correctional Facility were imposed by the [trial c]ourt?

Was [p]lea [c]ounsel ineffective in failing to assert [Appellant's] rights to remain free from being placed twice in jeopardy under Article I Section 10 of the Pennsylvania Constitution and the Fifth Amendment of the United States Constitution insofar as [Appellant] had already been incarcerated for contempt on a civil case docketed at 875 Civil 2006 [in the Civil Division of the Pike County Court of Common Pleas]?

Was [p]lea [c]ounsel ineffective in advising [Appellant] of the incorrect offense gravity score of [five] for the offense to which [Appellant] was pleading?

Was [p]lea [c]ounsel ineffective in failing to file a [m]otion to [w]ithdraw a [p]lea prior to the imposition of sentence despite knowing that [Appellant] desired to withdraw his plea prior to sentencing?

Was plea counsel ineffective in failing to preserve or appeal the issue of restitution to the Superior Court despite the restitution amount being entirely speculative and approximately

\$20,000[.00] in excess of the civil judgment that was incorporated into the plea agreement?

Was [a]ppellate [c]ounsel ineffective in failing to confer with [Appellant] about the issues he wished to raise in his appeal?

Appellant's Brief at 4-5.

Our standard and scope of review in this case are well-settled. "In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error." ***Commonwealth v. G.Y.***, 2013 WL 85980, *5 (Pa. Super. 2013). The scope of our review is restricted to "the findings of the PCRA [c]ourt and the evidence on the record of the PCRA [c]ourt's hearing, viewed in the light most favorable to the prevailing party." ***Commonwealth v. Collins***, 888 A.2d 564, 574 (Pa. 2005). "[F]act-based findings of a post-conviction court, which hears evidence and passes on the credibility of witnesses, should be given great deference[.]" ***Commonwealth v. Martin***, 5 A.3d 177, 199 (Pa. 2010). "Factual findings will not be disturbed on appeal if they are supported by the record, even where the record could support a contrary holding." ***Id.***

In his first claim, Appellant asserts that the PCRA judge erred in refusing to recuse himself from presiding over Appellant's PCRA

proceedings.¹ To establish bias, Appellant relies exclusively upon an order entered on December 4, 2009 by the PCRA judge (acting then as the judge presiding over Appellant's underlying criminal cases) in which the judge denied a defense request for recusal. In the order, the judge explained that he granted Appellant's request for recusal in a separate criminal matter because he had reached the conclusion, based upon his participation in the criminal actions underlying the present PCRA proceedings, that Appellant lacked credibility. Trial Court Order, 12/4/09. The judge further explained that he recused himself from Appellant's other criminal action because he had been advised that Appellant might testify in that matter and he sought to avoid any appearance of impropriety that might arise from his evaluation of Appellant's new testimony in that case.² *Id.* Appellant maintains in the present appeal that the PCRA judge erred in denying recusal because he previously concluded in the December 4, 2009 order that Appellant lacked credibility and because he served as the trier of fact at Appellant's PCRA hearing.

¹ In these consolidated cases, Appellant moved unsuccessfully for the PCRA judge's recusal on August 31, 2011, at the same time he filed his amended PCRA petitions.

² The judge denied recusal in Appellant's criminal cases underlying the present appeal since Appellant had already pled guilty and been sentenced. Trial Court Order, 12/4/09.

The review of an order granting or denying a recusal motion lies within the exclusive jurisdiction of our Supreme Court; this Court lacks authority to consider the propriety of such determinations. **See Reilly by Reilly v. Septa**, 489 A.2d 1291, 1298 (Pa. 1985). Our function instead is to determine whether the proceedings before the PCRA court were fair and impartial. **Id.** at 1300. If the proceedings before the PCRA court meet these criteria, then the alleged disqualifying factors of the trial judge become moot. **Id.** We further note that a judge's participation in a PCRA petitioner's underlying criminal action is generally not grounds for recusal in any ensuing PCRA proceedings:

Pennsylvania law makes clear that it is generally preferable for the same judge who presided at trial to preside over the post-conviction proceedings. Familiarity with the case will likely assist the proper administration of justice. Only where it is adequately demonstrated that the interests of justice warrant recusal, should a matter be assigned to a different judge.

Commonwealth v. Lambert, 765 A.2d 306, 362 (Pa. Super. 2000) (citations and quotations omitted).

In the present appeal, Appellant cites no factual finding or legal determination made by the judge in the context of the PCRA proceedings that was supposedly tainted by bias or prejudice. Indeed, Appellant's sole contention on appeal seems to be that we should infer that the PCRA court erred in denying recusal simply because the court previously found that Appellant lacked credibility. However, in the absence of affirmative proof which raises doubt as to the PCRA court's ability to preside impartially, we

discern no abuse of discretion in the court's rejection of Appellant's request for recusal. Accordingly, Appellant is not entitled to relief on his first claim.

In his second claim, Appellant asserts that trial counsel in these consolidated cases were ineffective in failing to seek recusal of the presiding judge prior to sentencing. Appellant suggests that if the trial judge had disqualified himself prior to sentencing, "another [j]udge may have been better suited to decide a [presentence] motion to withdraw [Appellant's] guilty plea[.]" assuming such a motion had been filed. Appellant's Brief at 13. Alternatively, Appellant speculates that the trial court's views as to Appellant's credibility may have tainted the court's assessment of Appellant's allocution at sentencing. *Id.*

"[T]o succeed on an ineffectiveness claim, a petitioner must establish that: the underlying legal claim has arguable merit; counsel had no reasonable basis for her action or inaction; and the petitioner suffered prejudice as a result." *Commonwealth v. King*, 57 A.3d 607, 613 (Pa. 2012). A petitioner's failure to establish any prong of this test will defeat an ineffectiveness claim. *Commonwealth v. Williams*, 899 A.2d 1060, 1063 (Pa. 2006).

Here again, Appellant refers us to no factual finding, no legal determination, or other judicial action which was tainted by partiality on the part of the trial court. Without demonstrable proof that the interests of justice in this case called for recusal, we cannot conclude that Appellant's

underlying claim possesses arguable merit. Consequently, trial counsel cannot be deemed ineffective and Appellant's second claim merits no relief.

In his third claim, Appellant asserts that trial and appellate counsel were ineffective in failing to object to the trial court's sentencing order to the extent it imposed the cost of incarceration at the Pike County Correctional Facility. Appellant argues that the trial court lacked statutory authority to order Appellant to pay the costs of his incarceration at the Pike County facility. Since there was no basis for the sentencing court to impose such costs, Appellant claims he is entitled to PCRA relief because counsel was ineffective in failing to object to the trial court's sentencing order. Appellant asserts that this claim has arguable merit, that counsel had no reasonable strategic grounds for failing to object to this provision of the sentencing order, and that he was prejudiced by counsel's inaction because he is now obligated to pay costs that he should not owe. For these reasons, Appellant claims he is entitled to relief based upon counsel's ineffectiveness.

We agree with Appellant that the trial court lacked statutory authority to impose the costs of incarceration as part of Appellant's judgment of sentence. We note that, in his statement of questions presented, Appellant framed this issue in terms of a claim challenging the effectiveness of his trial counsel. **See** Appellant's Brief at 4. Appellant's amended petition, however, raised this claim in the context of a challenge to the legality of Appellant's sentence. Amended PCRA Petition with Request for Recusal, 8/31/11, at 9,

¶ 19(a) (“[Appellant] is serving a sentence greater than the lawful maximum insofar as ... [t]he costs of incarceration at the Pike County Correctional Facility were unlawfully imposed upon [Appellant] as part of the punishment.”). Because Appellant has adequately preserved this challenge to the legality of his sentence by raising it in his amended PCRA petition, we address this claim as an objection to the lawfulness of Appellant’s sentence and not under the rubric of a challenge to the stewardship of trial counsel.

A petitioner is eligible for relief under the PCRA if he pleads and proves, *inter alia*, any of following claims: a constitutional violation, the ineffective assistance of counsel, an unlawfully induced guilty plea, the improper obstruction of the right to appeal, the existence of after-discovered exculpatory evidence, **the imposition of a sentence greater than the lawful maximum**, or a proceeding in a tribunal without jurisdiction. 42 Pa.C.S.A. § 9543(a)(2)(i)-(viii).

Commonwealth v. Price, 876 A.2d 988, 992 (Pa. Super. 2005) (emphasis added).

In Pennsylvania, a sentence is unlawful when the trial court imposes a punishment that exceeds the scope of an applicable statute.

Commonwealth v. Burwell, 2012 WL 5941979, *1 (Pa. Super. 2012).

Thus, a defendant who challenges the court’s authority to order restitution raises an issue that implicates the legality of his sentence because restitution may be ordered only where it is expressly authorized by statute.

Id. A claim that challenges the legality of a sentence is cognizable under the PCRA. ***Commonwealth v. Turner***, 2012 WL 6642792, *2 (Pa. Super. 2012).

Like restitution, a court may not impose costs upon an offender unless it enjoys statutory authority to do so. *Commonwealth v. Houck*, 335 A.2d 389, 391 (Pa. Super 1975); *Commonwealth v. Williams*, 909 A.2d 419, 420 (Pa. Cmwlth. 2006) (“Costs must not be assessed except as authorized by law[.]”). Although we have been unable to locate appellate precedent which is precisely on point, we are satisfied that Appellant’s challenge to the court’s authority to impose costs of incarceration, in the manner that occurred in this case, raises a claim that implicates the legality of Appellant’s sentence and, therefore, is cognizable under the PCRA.

In this case, the trial court relied upon 42 Pa.C.S.A. § 9728 as the source of its authority to impose costs of incarceration upon Appellant. In relevant part, § 9728 states:

§ 9728. Collection of restitution, reparation, fees, costs, fines and penalties

* * *

g) Costs, etc.--Any sheriff’s costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.

42 Pa.C.S.A. § 9728(g). Section 9728(g) refers generally to administrative costs and costs associated with prosecution. It does not mention

correctional facilities and does not refer to costs associated with incarceration. Thus, under a plain reading of § 9728(g), the trial court lacked statutory authority to direct Appellant to pay the costs of his incarceration at the Pike County Correctional Facility. In the absence of statutory authority, the order to pay costs of incarceration constituted an illegal sentence. Accordingly, we vacate that aspect of the trial court's January 29, 2009 sentencing order that imposed costs of incarceration at the Pike County Correctional Facility upon Appellant. All other terms of the trial court's January 29, 2009 sentencing order shall remain undisturbed.

Appellant's fourth claim asserts that trial counsel was ineffective in failing to assert a double jeopardy claim under the Pennsylvania and United States Constitutions since Appellant was twice placed in jeopardy for identical conduct as a result of his contempt conviction and his criminal conviction at 73 CR 2007. By way of background, a prior panel of this Court held on direct appeal in Appellant's underlying criminal action that Appellant was jailed for civil contempt to compel his compliance with a trial court order to make a required disposition of funds and to produce information regarding certain bank accounts. *Commonwealth v. Harkins*, 996 A.2d 7 (Pa. Super. 2010) (unpublished memorandum) at 6. Appellant now challenges this determination, claiming – based upon information that emerged during his PCRA hearing and which he alleges was unavailable to the direct appeal panel – that his civil contempt conviction should be re-characterized as

criminal in nature. In particular, Appellant cites his testimony at the PCRA hearing and asserts that he was unable, not unwilling, to comply with the trial court's order because there was no money and there were no accounts. Because he was unable to purge his contempt, Appellant reasons that the contempt order was criminal in nature and therefore his contempt conviction, coupled with his conviction at 73 CR 2007, violated his right against double jeopardy. This claim is meritless.

The trial court in the civil action ordered Appellant to produce the victim's funds and information regarding his bank accounts because Appellant advised the court that he had access to the money as well as information regarding the accounts in question. Based upon these facts, this Court determined that the dominant purpose of the trial court's contempt order was to coerce Appellant's compliance with a lawful directive issued by the civil court judge. At his PCRA hearing, Appellant's testimony suggested that everyone (including the civil court judge) knew he was lying about having the money and access to the account information. It is this "new evidence" upon which Appellant rests his claim that he was unable, not unwilling, to comply with the court's directive and that the trial court's civil contempt order was, in fact, criminal in nature. In rejecting Appellant's contention, the trial court stated:

[T]his court did not know at the time it found [Appellant] in contempt that he was lying. Further, [Appellant's] argument lacks merit as he was under oath. [The trial court] will take a defendant's sworn testimony as truth and will not allow

[Appellant] to now come before [the court] and argue that because he was lying [the trial court actually] held him in criminal contempt.

Trial Court Opinion, 12/30/11, at 15. We concur with the PCRA court's assessment and, hence, conclude that Appellant is not entitled to relief on his fourth claim.

In his fifth claim, Appellant asserts that plea counsel was ineffective in advising him of an incorrect offense gravity score and the potential punishment he could receive.

Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea. Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Moreover, the law does not require that [the defendant] be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [his] decision to plead guilty be knowingly, voluntarily and intelligently made.

Commonwealth v. Anderson, 995 A.2d 1184, 1192 (Pa. Super. 2010) (citations and quotation marks omitted). “[T]here is no legal requirement that a defendant be aware of the guideline ranges in order to enter a valid guilty plea. A defendant [need only] be informed of the statutory maximum[.]” ***Commonwealth v. Fowler***, 893 A.2d 758, 765 (Pa. Super. 2006).

Our review of the certified record confirms the findings of the PCRA court that plea counsel discussed with Appellant the nature of the charges,

the potential sentences the court could impose, and the consequences of the guilty plea. Our review further confirms that Appellant initialed a thorough written colloquy after counsel reviewed that document with him. At the plea hearing, Appellant confirmed that no inducements, other than those included in the plea agreement, caused him to enter his guilty plea. In addition, the trial court advised Appellant of the maximum sentence that could be imposed. N.T. Plea Hearing, 11/7/08, at 13. Under these circumstances, Appellant is not entitled to relief.

In his sixth issue, Appellant claims that plea counsel in these consolidated cases were ineffective in failing to file motions to withdraw Appellant's guilty pleas prior to sentencing despite Appellant's request that they do so. As Appellant concedes, however, after the PCRA hearing, the court found no credible evidence that Appellant asked counsel to seek withdrawal of his guilty pleas prior to sentencing. Based upon our review, the record supports this finding. Accordingly, no relief is due.

Appellant's seventh claim argues that sentencing counsel and appellate counsel were ineffective in failing to challenge a \$20,000.00 enhancement of restitution over the amount of damages imposed in a civil case brought

against Appellant.³ Appellant claims that the enhancement is speculative. We disagree.

In its Rule 1925(a) opinion, the trial court explained the enhancement as follows:

Restitution in the instant case was set in excess of the amount in the civil action based upon information provided to the [trial court] by the Pike County Probation Department. [Appellant had completed additional, substandard work which had to be subsequently corrected by the [victims]. This substandard work, together with the excessive delays and interest on the civil judgment led to the larger amount of restitution ordered in the instant case in contrast to the base judgment in the civil action.

Trial Court Opinion, 3/30/12, at 21. This assessment finds support in the record; thus, Appellant is not entitled to relief.

In his eighth and final claim on appeal, Appellant contends that appellate counsel was ineffective in failing to confer with him regarding the issues he preferred to raise on direct appeal. Specifically, Appellant claims that counsel should have consulted with him regarding the inclusion of the following issues: 1) the trial court's alleged error in failing to grant Appellant's December 4, 2009 motion to recuse; 2) the trial court's alleged error in failing to grant Appellant's post-sentence motion to withdraw Appellant's plea; and 3) the court's alleged error in setting restitution.

³ When Appellant entered his guilty plea, he agreed to restitution in an amount equal to the civil damages awarded to the victims of his crimes.

We have carefully reviewed the certified record in this appeal. Based upon our review, we conclude that none of the foregoing claims possesses arguable merit. Consequently, appellate counsel cannot be faulted for failing to raise these issues on direct appeal. ***Commonwealth v. Sepulveda***, 55 A.3d 1108, 1118 (Pa. 2012) (“Counsel cannot be deemed ineffective for failing to raise a meritless claim.”). Appellant’s eighth issue merits no relief.

Order affirmed in part and vacated in part. Case remanded so that Appellant’s January 29, 2009 judgment of sentence may be amended consistent with instructions. Jurisdiction relinquished.

Fitzgerald, J., files a Concurring Statement.