

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
JEROME REGIS KIRSCH, JR.,		
Appellant		No. 636 WDA 2013

Appeal from the PCRA Order of March 18, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0003050-2011

BEFORE: BENDER, P.J., GANTMAN AND OLSON, JJ.

MEMORANDUM BY OLSON, J.:

FILED DECEMBER 4, 2013

Appellant, Jerome Regis Kirsch, Jr., appeals from the PCRA court's March 18, 2013 order, granting the Commonwealth's motion to dismiss Appellant's PCRA petition for failure to prosecute. We vacate and remand.

The PCRA court has provided us with a thorough and well-written summary of the underlying facts. As the PCRA court explained:

This matter arises out of [Appellant's] arrest on December 16, 2010[,] at which time [Appellant] was charged at [docket number] CC 201103050 [(hereinafter "3050")] with two counts of Involuntary Deviate Sexual Intercourse[,] three counts of Criminal Solicitation[,] two counts of Aggravated Indecent Assault[,] two counts of Endangering the Welfare of Children, two counts of Indecent Exposure, two counts of Corruption of Minors, and one count of Indecent Assault. [Appellant] was also charged at [docket number] CC[]201201972 [(hereinafter "1972")] with one count of theft. . . .

On August 7, 2012, [Appellant] entered into a negotiated plea agreement at [docket number 3050]. Pursuant to the

agreement, Appellant agreed to plead guilty to the following counts:] Count 7 (Endangering the Welfare of a Child), Count 9 (Indecent Exposure), Count 11 (Corruption of Minors)[,] and Count 13 (Indecent Assault)[.]¹ In exchange, the Commonwealth agreed to withdraw the remaining charges at the docket number and recommend that Appellant serve a term of ten years' probation. At docket number 1972, Appellant] also entered into a plea agreement pursuant to which [Appellant] would plea[d guilty to theft and receive a sentence of probation.²]

After an appropriate colloquy during which [Appellant] was informed of the charges and potential penalties, a summary of the offenses was presented by the Commonwealth at each case. The summary at [docket number 3050] was as follows:

[]Had the case [at docket number 3050] proceeded to trial, the Commonwealth would have called Detectives Kuma and Holly from the Allegheny County Police Department. They would have testified, along with the victims, who I will name as John Doe 1 and 2 for purposes of this plea, both minors at the time, they would have testified that in the years of 2005 and 2006, [Appellant] . . . did have sexual contact with John Doe 1 and John Doe 2. During those periods of time in which [Appellant] was alone with John Doe 1 and 2, it was alleged by those victims and investigated by the police that [Appellant] did engage in oral sexual contact, anal sexual contact, and/or indecent exposure at the time with those individuals. The first incident was during a wrestling match with [John Doe 2]. The second incident was a [sleep-over] incident that involved both [John Doe 1] and [John Doe 2]. The third incident occurred on a bicycle trail and/or near a bridge in the woods with [John Doe 1 and 2]. Lastly, it was alleged by [John Doe 1] that there was an incident of indecent assault that occurred when the two of them were in private.[]

¹ 18 Pa.C.S.A. §§ 4304, 3127, 6301, and 3126, respectively.

² 18 Pa.C.S.A. § 3921.

As to the case at [docket number 1972], the summary was as follows:

[]On or about November 27[, 2011], the victim[s] . . . notice[d] that they had some jewelry missing and valued the jewelry in excess of [\$2000.00]. They call[ed] the police. The police responded and interviewed them, and they told [the] police that they suspected their son, [Appellant], was the only person with access to the jewelry, and he was in need of money. The police officers then looked through pawn records from the City of Pittsburgh Police Department and determined that [Appellant] had sold jewelry at Embassy Diamond Jewelers. The[police] interviewed [Appellant]. He admitted to taking the jewelry in question and pawning it at some jewelry shop. Further, the victims would have testified [that Appellant] did not have permission.[]

[Appellant] offered no correction or addition to the summaries, acknowledged that he was guilty of the charges to which he was entering a plea[,] and confirmed that he had completed the Guilty Plea and Explanation of Defendant's Rights form. [Appellant] also acknowledged that he was satisfied with his counsel's representation. [Appellant] was then sentenced at [docket number 3050 to an aggregate term of 10 years' probation. At docket number 1972, the trial court sentenced Appellant to] a two year period of probation [and ordered that Appellant pay restitution in the amount of] \$9,120.00. No [post-sentence motion was] filed and no direct appeal was taken.

On October 12, 2012, [Appellant] filed a *pro se* [petition under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. On] October 30, 2012 [the PCRA court appointed counsel to] represent [Appellant]. On January 28, 2013[, counsel filed an amended PCRA petition]. In [the] PCRA petition, [Appellant] alleged that his plea was unknowing, involuntary[,] and unintelligent and [that it was] entered as a result of the ineffective assistance of counsel in that his trial counsel threatened [and/or] coerced him into pleading guilty by representing that he would be convicted if he went to trial and would receive a sentence of

20 to 40 [years'] incarceration. [Appellant] also alleged that trial counsel was ineffective in failing to adequately consult with him about exercising his direct appeal rights and in failing to file a petition to withdraw his guilty plea or in failing to file a direct appeal.

On February 12, 2013[,], the Commonwealth filed an [a]nswer to [Appellant's PCRA] petition. While [the Commonwealth denied that Appellant's] plea was unknowing or involuntary, the Commonwealth conceded that an evidentiary hearing was necessary [to resolve Appellant's claims]. On March 7, 2013[,], the PCRA court issued an order] scheduling an evidentiary hearing for March 18, 2013. [The scheduling order was entered on March 11, 2013.] On March 18, 2013[,], counsel for [Appellant], counsel for the Commonwealth[,], and [Appellant's] trial counsel appeared [for the hearing. Appellant, however, failed to] appear. [As a result, the Commonwealth orally moved] to dismiss [the PCRA petition] for failure to prosecute[. On March 18, 2013, the PCRA court] granted the Commonwealth's motion [and dismissed Appellant's PCRA petition].

On April 15, 2013, [Appellant] filed a [m]otion for [r]econsideration of the March 18, 2013 order[.] In his [p]etition, [Appellant averred] the following:

. . .

[] 11. [On August 24, 2012, Appellant was arrested for an alleged violation of his probation.] On March 7, 2013, [Appellant] was released from the Allegheny County Jail.

12. By order dated March 7[,], 2013 and entered March 11, 2013, the PCRA court scheduled a hearing on Appellant's PCRA p]etition.

13. On March 12, 2013 [Appellant's counsel] . . . first became aware of the March 18, 2013 PCRA hearing and, on March 13, 2013 [Appellant's counsel] received a copy of the [PCRA court's scheduling order].

14. [Appellant's counsel] was not able to reach [Appellant] prior to the March 18, 2013 evidentiary hearing.

15. On March 18, 2013, [Appellant's PCRA counsel, Appellant's trial counsel, and an attorney] for the Commonwealth appeared for the hearing scheduled for that date[. Appellant] failed to appear[. Appellant's PCRA counsel was informed by the PCRA court's staff that Appellant] received notice of the March 18, 2013 hearing as a condition of [Appellant's] release from jail[. The Commonwealth] orally moved to dismiss [Appellant's PCRA petition] due to [Appellant's] failure to prosecute[. The PCRA court granted the Commonwealth's motion on March 18, 2013 and dismissed Appellant's PCRA petition].

16. The following week, a warrant was issued for [Appellant's] arrest for a suspected violation of [Appellant's] probation and [Appellant] was arrested and lodged in the Allegheny County Jail.

17. On or about April 5, 2013, [Appellant] notified [his counsel] that he [did not] receive notice of the March 18, 2013 hearing.[.]

PCRA Court Opinion, 7/18/13, at 2-6.

On April 15, 2013, the PCRA court denied Appellant's motion for reconsideration and, that day, Appellant filed a timely notice of appeal to this Court. Appellant now raises the following claims on appeal:³

1. Whether the [PCRA court] erred and/or abused its discretion in dismissing [Appellant's] PCRA [petition] for failure to prosecute where no hearing was held on the

³ The PCRA court did not order that Appellant file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

reasons for [Appellant's] failure to appear at the March 18, 2013 evidentiary hearing?

2. Whether [Appellant's] plea was unknowing, involuntary, unintelligent and entered as the result of ineffective assistance of counsel as [trial counsel] threatened/coerced [Appellant] into pleading guilty by representing that [Appellant] would be convicted if he went to trial and would receive a sentence of 20 to 40 [years'] incarceration?

3. Whether [Appellant's trial counsel] was ineffective and deprived [Appellant] of his right to appeal in failing to adequately consult with [Appellant] about exercising direct appeal rights when [Appellant] indicated he wanted to withdraw his plea and was otherwise interested in exercising said rights and, if adequately consulted about said rights, would have timely exercised his right of appeal?

Appellant's Brief at 3.

We conclude that Appellant's first claim entitles him to relief. Therefore, we are required to vacate the PCRA court's order and remand the matter for an evidentiary hearing on whether Appellant received notice of the scheduled, March 18, 2013 hearing.

In the case at bar, on March 11, 2013, the PCRA court entered an order declaring that the hearing on Appellant's PCRA petition would take place on March 18, 2013. Appellant's counsel averred that she was unable to contact Appellant prior to the hearing date and, therefore, she was unable to inform Appellant of the scheduled hearing. Appellant's Motion for Reconsideration, 4/15/13, at 2-3.

On March 18, 2013, Appellant failed to appear at the scheduled hearing and, as a result, the PCRA court granted the Commonwealth's motion to dismiss for failure to prosecute. Further, Appellant's counsel

averred, she did not request a continuance because, during the PCRA hearing, the PCRA court informed her that Appellant had “received notice of the March 18, 2013 hearing [on March 7, 2013,] as a condition of [Appellant’s] release from jail.” *Id.* at 3.

As Appellant’s counsel averred, she was finally able to speak with Appellant on April 5, 2013 and, at that time, Appellant informed her that he did not receive notice of the scheduled March 18, 2013 evidentiary hearing. *Id.* at 3-4. Upon discovering this, Appellant’s counsel filed a motion for reconsideration and requested that the PCRA court vacate its dismissal order, as Appellant’s failure to appear at the hearing was the result of the fact that Appellant did not receive notice of the hearing. *Id.* at 1-5. The PCRA court denied the motion, reasoning that – since counsel did not request a continuance at the hearing – the petition was properly dismissed. PCRA Court Opinion, 7/18/13, at 7. Respectfully, we conclude that this ruling was made in error.

Pennsylvania Rule of Criminal Procedure 908 provides a PCRA petitioner with a rule-based right to appear, in person, at the PCRA hearing. The rule declares: “[t]he judge **shall** permit the [petitioner] to appear in person at the [PCRA] hearing and shall provide the [petitioner] an opportunity to have counsel.” Pa.R.Crim.P. 908(C) (emphasis added). In the case at bar, Appellant’s counsel averred that Appellant did not appear at the March 18, 2013 PCRA hearing because he did not receive notice of the hearing. Appellant’s Motion for Reconsideration, 4/15/13, at 3. Moreover,

Appellant's counsel averred that she did not request a continuance because, during the PCRA hearing, the PCRA court informed her that Appellant "received notice of the March 18, 2013 hearing as a condition of [Appellant's] release from jail." *Id.* Thus, according to Appellant's counsel, she "would not have [had] a reasonable excuse for asking for a continuance of the hearing [after being told by the PCRA court] that [Appellant] was independently informed of the hearing date." Appellant's Brief at 16.

Given these averments – and as the record now stands – we conclude that the PCRA court erred in dismissing Appellant's PCRA petition. Moreover, we conclude that the PCRA court must hold a hearing to determine whether Appellant's failure to appear at the March 18, 2013 hearing was voluntary or was the result of a lack of notice to Appellant. If, following the hearing, the PCRA court determines that Appellant's failure to appear was the result of a lack of notice, the PCRA court must then hold a hearing on Appellant's PCRA petition.^{4, 5}

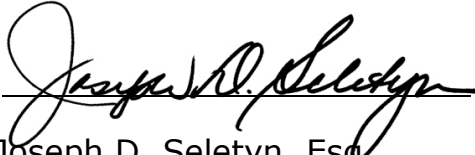
Order vacated. Jurisdiction relinquished.

⁴ Within the Commonwealth's brief to this Court, the Commonwealth apparently concedes that the PCRA court erred when it dismissed Appellant's PCRA petition without holding a separate hearing, wherein Appellant could explain why he failed to appear at the March 18, 2013 hearing. **See** Commonwealth's Brief at 16.

⁵ In light of our disposition, Appellant's remaining issues are premature and will not be considered by this Court.

J-S58038-13

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013