NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
OMAR FREEMAN,	:	
	:	
Appellant	:	No. 751 EDA 2012

Appeal from the Order Dated February 3, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0005468-2008

BEFORE: DONOHUE, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: March 13, 2013

Appellant, Omar Freeman, appeals *pro se* from the order of the Philadelphia County Court of Common Pleas dismissing his first petition filed pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Appellant contends that trial/direct appeal counsel was ineffective for: (1) "not challenging the trial court's findings that agents had reasonable suspicion that [he] was violating parole by absconding from his approved residence and failing to report to his parole agent as required"; (2) "not contesting whether a search of Appellant's residence was reasonably related to [Appellant's] particular violation of parole"; and (3) "failing to

* Former Justice specially assigned to the Superior Court.

present to Superior Court a substantial question regarding [Appellant's] sentence." PCRA Ct. Op., 8/6/12, at 5. Additionally, Appellant claims that PCRA counsel was ineffective for filing a ***Turner/Finley***[1] letter when his claims had merit. ***Id.*** We affirm.

The PCRA court summarized the relevant factual history as follows:

> Around October 16, 2007, [Appellant], who had been paroled and was subject to weekly reporting, failed to report to his assigned supervising agent, Agent Salgalucci, as scheduled. When Agent Salgalucci went to [Appellant's] approved residence, he was told that [Appellant] no longer lived there. On October 25, 2007, [Appellant] was declared delinquent and a warrant was issued for his arrest. In January 2008, Agent Ashton of the Fugitive Task Force was assigned to locate [Appellant]. Based on information in [Appellant's] file, Agent Ashton visited the residences of [Appellant's] aunt and the mother of his child and determined that [Appellant] was not living at either of those locations.
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> Around March 22, 2008, Agent Ashton spoke to a confidential informant who knew [Appellant] and told Agent Ashton that [Appellant] was living in the front bedroom of the third floor apartment at 819 Wynnewood Road in Philadelphia. On March 28, 2008, Agent Ashton and her partner, Agent Mike Eibel, set up surveillance of 819 Wynnewood Road in advance of a team preparing to arrest [Appellant]. During their surveillance, the agents saw [Appellant] leave through the main door of 819 Wynnewood Road, use a key to lock the door, and then enter the passenger side of a silver Pontiac. Alerting the arrest team of these developments, the agents followed the silver Pontiac to Lankenau Hospital where [Appellant] was arrested in the Emergency Room. Upon his arrest, the agents recovered the key to 819 Wynnewood Road and $1,207 from [Appellant's] person. As [Appellant] was

[1] ***See Commonwealth v. Turner***, 544 A.2d 927 (1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super 1988) (*en banc*).

placed in the transport van, he said, "Fuck parole. I will be in and out of prison. This is nothing. Fuck parole. I'm my own man. I don't follow no rules. I do whatever the fuck I want." When Agent Ashton told [Appellant] that she was going to search his home, [Appellant] replied, "I don't give a fuck."

Agent Ashton then returned to 819 Wynnewood Avenue with a supervisor and two additional members of the Fugitive Task Force and used the keys recovered from [Appellant] to open the main door to the building and to access the third floor apartment. In the front bedroom, Agent Ashton saw pictures of [Appellant], the butt of a gun between a mattress and box spring, and mail in a shoebox in a closet. In the kitchen, Agent Ashton saw a baggie on a table with a razor blade inside of it and a digital scale.

After the Court denied [Appellant's] motion [to suppress evidence, a nonjury] trial commenced[.] . . .

Philadelphia Police Officer Jean Spicer executed a search warrant for the third floor apartment at 819 Wynnewood Road at about 6:45 p.m. on March 28, 2008. In the front bedroom, she recovered a photograph of [Appellant, Appellant's] driver license, tally sheets, a brown box with alleged cocaine residue, and [Appellant's] jacket, which contained the keys to 819 Wynnewood Road and $1,207 in United States currency.[ ] Under the mattress in the front bedroom, she recovered a black Ruger nine-millimeter handgun with 14 live rounds and an obliterated serial number. In the closet of the front bedroom, she recovered ammunition, a Ruger gun box containing additional ammunition and a magazine, twenty-five jars with black lids containing codeine, several similar new and unused jars with black lids, and a PECO bill in [Appellant's] name for that address. From the kitchen, Officer Spicer recovered a digital scale in a box, several razor blades, and several Ziploc bags. From the middle bedroom of the apartment, Officer Spicer recovered a ballistic bullet-proof vest and a Graco Arms Jenning nine millimeter handgun with ten live rounds from under a mattress. From the closet in that room, she recovered 110 red tinted packets of marijuana, a Ruger gun box, a small scale, and additional ammunition.

Id. at 2-4.

The PCRA court also provided the following relevant procedural history:

> On October 10, 2008, [Appellant] was convicted of possession with intent to deliver a controlled substance (35 P.S. § 780-113(a)(30)) ("PWID"), possession of a firearm by a prohibited person (18 Pa.C.S. § 6105(a)(1)), and possession of a firearm with an obliterated serial number (18 Pa.C.S. § 6110.2(a)). On December 17, 2008, the Court sentenced [Appellant] to an aggregate term of nine to eighteen years' incarceration. [Appellant] filed a post-sentence motion, which the [trial court] denied on January 14, 2009. [Appellant] filed a direct appeal to the [this Court] on January 26, 2009. On December 15, 2009, [this Court] affirmed [Appellant's] sentence. [***Commonwealth v. Freeman***, 352 EDA 2009 (Pa. Super. unpublished memorandum Dec. 15, 2009). Appellant] filed a petition for allocator to the Supreme Court, which was denied on January 13, 2011. [Appellant] was represented at trial and on appeal by Brian J. McMonagle, Esquire.
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> On March 15, 2011, [Appellant] filed a *pro se* Motion for Post-Conviction Collateral Relief ("PCRA Petition"). David Rudenstein, Esquire, was appointed to represent [Appellant] on July 12, 2012. On October 21, 2011, pursuant to [***Finley***], Mr. Rudenstein filed a letter stating that there was no merit to [Appellant's] claims for collateral relief. On January 13, 2012, the [PCRA court] issued notice pursuant to Pa.R.Crim.P. 907 ("907 Notice") of its intent to dismiss [Appellant's] PCRA Petition without an evidentiary hearing. [Appellant] did not file a response to the [PCRA court's] 907 notice. On February 3, 2012, the [PCRA court] formally dismissed [Appellant's] PCRA Petition and granted Mr. Rudenstein's motion to withdraw his appearance.

Id. at 1-2.

Appellant timely filed a *pro se* notice of appeal on February 24, 2012. Appellant complied with the PCRA court's orders and timely filed his *pro se* Pa.R.A.P. 1925(b) statement.

Appellant presents four questions for our review:

> Whether Appellate counsel provided ineffective assistance by failing to challenge the trial court's findings that parole agents had reasonable suspicion that Appellant was violating parole by absconding from his approved residence and failing to report to his parole agent as required.
>
> Whether Appellate counsel provided ineffective assistance by failing to contest that the search of the Third Floor Apartment at 819 Wynnewood Road in Philadelphia was reasonably related to Appellant's particular violation of parole.
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> Whether Appellate counsel provided ineffective assistance by failing to sufficiently articulate the manner in which Appellant's sentence violated a specific provision of the sentencing scheme set forth in the Code or a particular fundamental norm underlying the sentencing process.
>
> Whether PCRA counsel provided ineffective assistance by filing a no-merit letter when the *pro se* claims possessed merit.

Appellant's Brief at 3.

It is well settled that:

> Our standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record.

Commonwealth v. Garcia, 23 A.3d 1059, 1061 (Pa. Super. 2011) (citations omitted), *appeal denied*, 38 A.3d 823 (Pa. 2012).

When reviewing a claim of ineffective assistance of counsel, we are mindful that a petitioner must "establish that the underlying claim is of arguable merit, counsel's course of action lacked any reasonable basis for advancing his client's interests, and [a petitioner] has suffered prejudice as a result." ***Commonwealth v. Griffin***, 644 A.2d 1167, 1172 (Pa. 1994). Moreover, "[t]he law presumes that counsel was effective and the burden of proving otherwise lies with [petitioner]." ***Id.***

Appellant, in his first two arguments, asserts that the PCRA court erred in dismissing his claims that trial/appellate counsel provided ineffective assistance in the litigation of his motion to suppress. Specifically, Appellant argues that counsel failed to: (1) "challenge the trial court's findings that parole agents had reasonable suspicion that Appellant was violating parole . . . ," and (2) "contest that the search of the Third Floor Apartment at 819 Wynnewood Road in Philadelphia was reasonably related to Appellant's particular violation of parole." Appellant's Brief at 8, 12. No relief is due.

"[A] parolee and a probationer have limited Fourth Amendment rights because of a diminished expectation of privacy." ***Commonwealth v. Williams***, 692 A.2d 1031, 1035 (Pa. 1997) (citation omitted). "The search of a parolee is [ ] reasonable . . . where the totality of the circumstances demonstrate that: '(1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty.'" ***Commonwealth v.***

Hunter, 963 A.2d 545, 552 (Pa. Super. 2008) (citation omitted). "It [is] not necessary for the parole officers to observe personally [a defendant] engage in illegal activity or suspicious conduct in order for them to form reasonable suspicion. Officers may rely upon information from third parties in order to form reasonable suspicion." ***Commonwealth v. Altadonna***, 817 A.2d 1145, 1152 (Pa. Super. 2003).

As conditions of parole, Appellant was required to report weekly to his assigned parole agent, Agent Salgalucci, and live at an approved residence. N.T. Suppression, 10/10/08, at 7-9. When Appellant failed to report, Agent Salgalucci went to Appellant's listed residence, observed that Appellant's personal belongings were gone, and was told by Appellant's sister that he no longer lived there. ***Id*** at 5-6. Appellant was then a fugitive for more than six months. ***Id.*** at 11-14. A confidential informant told parole fugitive unit agents that Appellant had moved to the 819 Wynnewood third floor apartment. ***See Id.*** at 13. Therefore, the totality of the circumstances establish that the parole officer had reasonable suspicion to believe that Appellant had violated parole by moving from his listed residence and failing to report for over six months. ***See Altadonna***, 817 A.2d at 1152; ***See also Hunter***, 963 A.2d at 552.

Moreover, as this Court previously noted, the Wynnewood apartment was not an approved residence and, based on investigation and surveillance, parole agents had reasonable suspicion to believe that Appellant was in

control/possession of the apartment. ***Freeman***, 876 EDA 2009 at 9. Thus, because the parole agents had reasonable suspicion that Appellant had moved to that apartment, their search of the Wynnewood apartment was reasonably related to Appellant's parole violation of absconding from an approved residence. ***See Hunter***, 963 A.2d at 552 (holding that when appellant violated probation by absconding from approved residence and failing to report, agent's search of appellant's previous apartment was reasonably related to violation to help agent find evidence as to where appellant may be found). Thus, Appellant's first and second claims of ineffective assistance of counsel were patently meritless, and the PCRA court properly dismissed them as such.

Appellant's third argument is that "counsel provided ineffective assistance by failing to sufficiently articulate the manner in which Appellant's sentence violated a specific provision of the sentencing scheme set forth in the Code or a particular fundamental norm underlying the sentencing process." Appellant's Brief at 15. This Court, on Appellant's direct appeal, addressed the lack of a substantial question that the sentence imposed was inappropriate. ***Freeman***, 352 EDA 2009 at 9-11. In the instant appeal, Appellant does not raise any new issues about his sentence and simply reiterates the same reasons for discretionary review that were set forth in his direct appeal. ***See*** Appellant's Brief at 15-17. Therefore, this claim of

ineffectiveness lacked any arguable merit, and the trial court properly dismissed it as frivolous.

Appellant's fourth argument is that "PCRA counsel provided ineffective assistance by filing a No-Merit letter when the *Pro Se* claims possessed merit." Appellant's Brief at 18. We find this claim has been waived.

"[C]laims of PCRA counsel ineffectiveness cannot be raised for the first time after a notice of appeal has been taken from an underlying PCRA matter." ***Commonwealth v. Ford***, 44 A.3d 1190, 1200 (Pa. Super. 2012). A PCRA petitioner has twenty days to respond after the judge gives notice to the parties of the intention to dismiss the petition. Pa.R.Crim.P. 907(1). In order to challenge the ineffectiveness of PCRA counsel's ***Turner/Finley*** no-merit letter, "a petitioner must allege any claim of ineffectiveness of PCRA counsel in response to the court's notice of intent to dismiss." ***Ford***, 44 A.3d at 1198. This gives the petitioner a twenty-day response period to "any issue pertaining to the adequacy of PCRA counsel's no-merit letter." ***Id.*** Therefore, "[a petitioner's] failure, prior to his PCRA appeal, to argue PCRA counsel's ineffectiveness . . . results in waiver of the issue of PCRA counsel's ineffectiveness." ***Commonwealth v. Pitts***, 981 A.2d 875, 880 n. 4 (Pa. 2009).

In the instant case, Appellant did not respond to the trial court's Rule 907 notice of its intent to dismiss his PCRA Petition. Trial Ct. Op. at 9. Moreover, Appellant's claim of PCRA counsel's ineffectiveness was raised for

the first time in this appeal. Thus, Appellant's fourth argument has been waived and no relief is due. ***See Pitts***, 981 A.2d 880 n.4.

Since we find no error by the PCRA court, we affirm the order dismissing Appellant's PCRA petition as meritless.

Order affirmed.