

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ANDREW HENLEY,	:	
	:	
Appellant	:	No. 885 WDA 2012

Appeal from the Judgment of Sentence April 17, 2012,
Court of Common Pleas, Allegheny County,
Criminal Division at Nos. CP-02-CR-0005628-2006
and CP-02-CR-0005634-2006

BEFORE: DONOHUE, MUNDY and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: March 11, 2013

Appellant, Andrew Henley (“Henley”), appeals from the judgment of sentence dated April 17, 2012, raising a single issue sounding in ineffective assistance of counsel. Pursuant to *Commonwealth v. Barnett*, 25 A.3d 371 (Pa. Super. 2011) (*en banc*), we dismiss Henley’s ineffective assistance of counsel claim without prejudice to raise it in a subsequent Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46 (“PCRA”), petition. Because Henley does not raise any challenge to his judgment of sentence other than his ineffective assistance of counsel claim, we affirm the judgment of sentence.

This Court summarized the factual and procedural background of this case in a prior memorandum decision.

On March 18, 2006, [Henley] fired a number of shots at a bar in McKeesport, Pennsylvania, injuring a number of civilians. The following day, while

*Retired Senior Judge assigned to the Superior Court.

responding to an altercation in a parking lot in Homestead, Pennsylvania, officers spotted [Henley] at a distance and asked him to return to the scene, prompting [Henley] to open fire on the police. After ignoring commands to drop his weapon, [Henley] was shot by one of the officers and apprehended.

[Henley] was charged at two different docket numbers with a plethora of crimes for each incident. On December 1, 2008, the trial court accepted a negotiated plea agreement, pursuant to which the Commonwealth withdrew a number of the charges and declined to invoke mandatory minimum sentences in exchange for [Henley's] pleading guilty to the remaining charges for an aggregate sentence of 10 to 20 years of incarceration.

On December 1, 2008, the trial court sentenced [Henley] to two consecutive 5-to-10 year sentences at CP-02-CR-0005628-2006, and to two consecutive 5-to-10 year sentences at CP-02-CR-0005634-2006, with the former two running concurrent to the latter two, respectively. The trial court indicated that [Henley] was entitled to 14 months' credit for time served. [Henley] did not file a direct appeal; as such, his sentence became final on December 31, 2008.

On November 9, 2009, [Henley] *pro se* filed a timely PCRA petition. Counsel was appointed, and filed an amended PCRA petition on April 5, 2010. The amended petition alleged, *inter alia*, that [Henley] was entitled to additional credit for time served. On April 26, 2010, the Commonwealth filed a response to the amended petition in which it conceded that [Henley] was entitled to the additional credit for time served.

On June 11, 2010, the PCRA court entered an order, captioned at both CP-02-CR-0005628-2006 and CP-02-CR-0005634-2006, providing that [Henley] shall be given the additional credit for time served "toward the sentence imposed in this matter." On that same date the PCRA court filed, pursuant to

Pa.R.Crim.P. 907(1), a notice of intent to dismiss the PCRA petition.

On June 15, 2011, the PCRA court entered an order dismissing [Henley]'s petition. [Henley] filed a timely notice of appeal and concise statement of matters complained of on appeal. On August 30, 2011, the PCRA court entered an order adopting the reasoning indicated in its June 11, 2010 notice of intent to dismiss as its opinion pursuant to Pa.R.A.P. 1925(a).

Commonwealth v. Henley, 43 A.3d 531 (Pa. Super. 2012) (memorandum decision).

On appeal, Henley raised four issues for our review. We agreed with Henley that the trial court's order did not comply with the plea agreement and that the trial court's efforts to correct the error did not suffice to do so. Accordingly, in the above-referenced memorandum decision, this Court vacated Henley's judgment of sentence and remanded for re-sentencing to clarify the proper application of Henley's credit for time served. Further, because we concluded that Henley's prior sentence was illegal, we indicated that he had the right to file post-sentence motions and/or a direct appeal from his new judgment of sentence.

On April 17, 2012, the trial court re-sentenced Henley. Henley filed a post-sentence motion raising a single claim, namely that he was entitled to withdraw his guilty plea because it was not entered knowingly, intelligently or voluntarily, but rather was entered as a result of ineffective assistance of counsel. On May 29, 2012, the trial court denied this post-trial motion.

This timely appeal followed, in which Henley raises the following issue for our consideration and determination:

Whether [Henley] is entitled to withdraw his guilty plea as it wasn't knowingly, intelligently or voluntarily entered but, instead, was entered as the result of ineffective assistance of counsel as [Henley] was not aware of what was going on and plea and sentencing counsel failed to insure [Henley] was competent to enter a plea of guilty.

Henley's Brief at 4.

Henley's claim here clearly sounds in ineffective assistance of counsel. In ***Barnett***, this Court held that we have no jurisdiction to consider or decide claims of ineffective assistance of counsel on direct appeal absent an "express, knowing and voluntary waiver of PCRA review." ***Barnett***, 25 A.3d at 377 (quoting ***Commonwealth v. Liston***, 602 Pa. 10, 22, 977 A.2d 1089, 1096 (Castille, C.J., concurring)). No such waiver exists in this case. Both Henley and the Commonwealth agree that the proper course here is to dismiss this appeal without prejudice to Henley's right to present the ineffectiveness claim in a subsequent PCRA petition. Henley's Brief at 13; Commonwealth's Brief at 4.

Based on the foregoing, we dismiss Henley's claim of ineffective assistance of counsel without prejudice to raise it in a subsequent PCRA petition (along with any other PCRA claims he may have).

Judgment of sentence affirmed.