NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LEONARD JASON DAVENPORT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 942 MDA 2012

Appeal from the Order May 14, 2012
In the Court of Common Pleas of Adams County
Criminal Division at No(s): CP-01-CR-0000749-2007

BEFORE: BOWES, SHOGAN, and PLATT,* JJ.

MEMORANDUM BY BOWES, J.: Filed: January 28, 2013

Leonard Jason Davenport appeals from the May 14, 2012 order denying his PCRA petition. We affirm and grant counsel's petition to withdraw.

On November 13, 2007, Appellant entered negotiated guilty pleas to three counts of possession with intent to deliver (cocaine). The guilty pleas stem from Appellant's participation in three controlled drug transactions that occurred during September 2006 in Gettysburg Borough, Pennsylvania. During the covert operations, Appellant sold cocaine totaling $400 to Pennsylvania State Police Trooper James Brorza. Pursuant to the negotiated plea agreement, Appellant's aggregate judgment of sentence for the three

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* Retired Senior Judge assigned to the Superior Court.

offenses would not exceed four to ten years imprisonment. Following a comprehensive plea colloquy, the trial court accepted the guilty plea and scheduled a sentencing hearing for January 11, 2008. Appellant absconded prior to sentencing. He was apprehended approximately three years later in North Carolina and returned to the trial court's jurisdiction.

Upon his return to Pennsylvania, Appellant engaged privately retained counsel to represent him during the sentencing proceeding. Appellant never requested to withdraw his guilty pleas and the Commonwealth confirmed that it would continue to honor the November 2007 plea agreement. On December 23, 2010, the trial court imposed the previously negotiated term of four to ten years imprisonment, $400 restitution to the Commonwealth, and various laboratory and court fees.[1] The trial court determined that Appellant was ineligible for Recidivism Risk Reduction Incentive ("RRRI") due to a prior indecent assault conviction and it found the effective date of the sentence to be October 8, 2010, the date Appellant was transferred from

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[1] We observe that the trial court misidentified the $400 as restitution rather than a cost of prosecution. ***See Commonwealth v. Boyd***, 835 A.2d 812, 818-19 (Pa.Super. 2003) (Commonwealth not entitled to restitution for buy money because it is not a victim as the term is defined in 18 Pa.C.S. § 1106). Nevertheless, since the $400 buy money was taxable pursuant to 16 P.S. § 1403 as part of the costs of prosecution, the trial court's mistake is inconsequential. ***See Commonwealth v. Smith***, 901 A.2d 1030, (Pa.Super. 2006) ("buy money expended by officers in furtherance of their investigation and apprehension of persons suspected of crime are reasonable costs of prosecution within the purview of § 1403").

North Carolina. We dismissed the ensuing direct appeal on May 18, 2011, due to Appellant's failure to file a brief.

Thereafter, on February 3, 2012, Appellant filed a *pro se* PCRA petition. Appellant asserted that 1) plea counsel provided ineffective assistance in failing to advise him of the mandatory restitution that the court imposed against him and in failing to review the applicable sentencing guidelines; 2) sentencing counsel provided ineffective assistance in failing to file a petition to withdraw the guilty plea so that Appellant could renegotiate a lesser sentence; and 3) the aggregate term of four to ten years imprisonment is illegal, in part because the trial court improperly determined RRRI eligibility. The trial court appointed Thomas R. Nell, Esquire to represent him during the post-conviction proceedings. While Attorney Nell did not file an amended PCRA petition, he prosecuted Appellant's claims during the ensuing PCRA hearing.[2] At the conclusion of the hearing, the

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[2] We are cognizant that the failure to file an amended petition or present a brief arguing on behalf of the defendant ordinarily constructively denies a petitioner his right to a counseled PCRA proceeding. ***See Commonwealth v. Powell***, 787 A.2d 1017, 1019 (Pa.Super. 2001); ***Commonwealth v. Priovolos***, 746 A.2d 621, 625 (Pa.Super. 2000); ***Commonwealth v. Davis***, 526 A.2d 440 (Pa.Super. 1987) (failure to file amended petition or supporting brief constructively denied petitioner right to PCHA counsel even though counsel did appear before court to make argument); ***see also Commonwealth v. Burkett***, 5 A.3d 1260, 1277 (Pa.Super. 2010) (collecting cases and stating, "As a matter of law, an amended PCRA petition is required on a first-time petition.") However, we find that counsel adequately represented Appellant at the PCRA evidentiary hearing herein and, therefore, counsel was not *per se* ineffective in neglecting to file an amended petition. ***See Commonwealth v. Murray***, 836 A.2d 956, 961

(Footnote Continued Next Page)

PCRA court entered the above referenced order denying relief. This counseled appeal followed.

Attorney Nell filed with this Court a petition to withdraw from representation pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (*en banc*). In ***Commonwealth v. Pitts***, 981 A.2d 875, 876 n.1 (Pa. 2009), our Supreme Court explained that the procedure for withdrawal of court-appointed counsel in collateral attacks on criminal convictions pursuant to ***Turner*** and ***Finley*** requires independent review of the record by competent counsel. According to the Supreme Court,

> Such independent review requires proof of:
>
> 1. A "no-merit" letter by PCRA counsel detailing the nature and extent of his review;
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> 2. The "no-merit" letter by PCRA counsel listing each issue the petitioner wished to have reviewed;
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> 3. The PCRA counsel's "explanation", in the "no-merit" letter, of why the petitioner's issues were meritless;
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> 4. The [reviewing] court conducting its own independent review of the record; and

(Footnote Continued) ––––––––––––––––––––

(Pa.Super. 2003), *reversed on other grounds by* ***Commonwealth v. Robinson***, 970 A.2d 455 (Pa.Super. 2009) (*en banc*) (remand unnecessary where counsel did not file an amended petition but advocated on behalf of client at evidentiary hearing).

> 5. The [reviewing] court agreeing with counsel that the petition was meritless.

Id. at n.1.

Herein, Attorney Nell's petition to withdraw indicates that he prepared a no-merit letter that 1) detailed the nature of his review; 2) delineated the issues Appellant sought to raise in his PCRA petition; and 3) explained why the issues are meritless. Moreover, Attorney Nell mailed Appellant a copy of his no-merit letter and advised him of his right to proceed *pro se* or with privately retained counsel in the event the request to withdraw was granted. ***See Commonwealth v. Widgins***, 29 A.3d 816, 818-819 (Pa.Super. 2011). Thus, Attorney Nell has complied with the procedural dictates outlined in ***Turner*** and ***Finley***. Accordingly, we must now independently examine the merits of Appellant's issues.

"Our standard of review in an appeal from the grant or denial of PCRA relief requires us to determine whether the ruling of the PCRA court is supported by the record and is free from legal error." ***Commonwealth v. Lesko***, 15 A.3d 345, 358 (Pa. 2011).

> This review is limited to the findings of the PCRA court and the evidence of record. ***Id.*** We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. ***Id.*** This Court may affirm a PCRA court's decision on any grounds if the record supports it. ***Id.*** Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa.Super. 2011). However, we afford no such deference to its legal conclusions. ***Commonwealth v. Paddy***, 609 Pa. 272, 15 A.3d 431, 442 (2011); ***Commonwealth v. Reaves***, 592 Pa. 134, 923 A.2d

> 1119, 1124 (2007). Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary. ***Commonwealth v. Colavita****,* 606 Pa. 1, 993 A.2d 874, 886 (2010).

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa.Super. 2012).

Appellant's first two assertions relate to the allegedly ineffective assistance of plea counsel and sentencing counsel. Our Supreme Court recently reiterated the applicable legal principles relating to the right to constitutionally effective counsel as follows:

> Appellant may only obtain relief if [he] pleads and proves by a preponderance of the evidence that [his] conviction resulted from ineffective assistance of counsel that, under the circumstances, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. ***See*** 42 Pa.C.S. § 9543(a)(2)(ii). The Pennsylvania test for ineffectiveness is, in substance, the same as the two-part performance-and-prejudice standard set forth by the United States Supreme Court, ***see Strickland v. Washington****,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), although this Court has divided the performance element into two sub-parts dealing with arguable merit and reasonable strategy. Thus, to 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. ***See Commonwealth v. Pierce****,* 515 Pa. 153, 158–60, 527 A.2d 973, 975–76 (1987). To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland****,* 466 U.S. at 694, 104 S.Ct. at 2068; ***accord Commonwealth v. Cox****,* 603 Pa. 223, 243, 983 A.2d 666, 678 (2009). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. ***See Commonwealth v. Ali****,* 608 Pa. 71, 86–87, 10 A.3d 282, 291 (2010). No relief is due, however, on any claim that has been waived or previously litigated, as those terms have been construed in the decisions of this Court. ***See*** 42 Pa.C.S. § 9543(a)(3).

Commonwealth v. King, 2012 WL 6015050, *2 (Pa. filed November 26, 2012).

The crux of Appellant's first complaint is that plea counsel's ineffectiveness in failing to either inform him of the mandatory restitution or the applicable sentencing guidelines caused him to enter the guilty plea unknowingly. Essentially Appellant posits that had he been informed of the restitution requirement or guideline ranges, he would have rejected the plea agreement and proceeded to trial. We disagree.

The certified record belies Appellant's contention that he was not informed of his sentencing exposure. The trial court advised Appellant as follows during the guilty plea colloquy:

> The Court: The charge against you is delivery of a controlled substance as an ungraded felony. It carries with it a maximum sentence of 10 years in jail. This is cocaine?
>
> . . . .
>
> The Court: 10 years in jail and maximum fine of $100,000. I have been told you're pleading guilty to three charges of delivery of a controlled substance. That means your exposure would be 30 years in jail and fines totaling $300,000 do you understand that?
>
> [Appellant]: Yes.

N.T., 11/13/07, at 2-3. During the ensuing rendition of the factual basis for the plea, the Commonwealth indicated, "there's a total of $400 . . . due to the Pennsylvania State Police [in buy money]. . . . ***Id***. at 5-6. Thereafter, the Commonwealth confirmed that the guideline sentence range of minimum sentences was twelve to eighteen months based upon Appellant's prior drug

felony and his prior record score of three. ***Id***. at 6. Accordingly, the trial court advised Appellant that while the four-year minimum in the plea agreement was greater than the sentencing recommendation, the Commonwealth declined to pursue the applicable mandatory sentences for transactions that occurred within a school zone. The following exchange is significant.

> The Court: Do you understand that individually the sentences are each outside of the sentencing guidelines?
>
> [Appellant]: Yes.
>
> The Court: They are greater than what the guidelines provide. However, there are mandatories which the Commonwealth is not seeking, and I supposed if these all ran consecutively, they would be in the same area of approximately four years. Do you understand that?
>
> [Appellant]: Yes.
>
> The Court: Do you have any questions about anything I have said, sir?
>
> [Appellant]: No, sir.
>
> The Court: Is it true that you delivered your cocaine to Trooper Borza on three separate occasions[?]
>
> [Appellant]: Yes.
>
> The Court: We'll go ahead and accept the guilty plea.

Id. at 7-8.

As the certified record demonstrates that prior to entering his guilty plea Appellant was informed of both the expectation of restitution and the relationship between the negotiated minimum sentence and the applicable

guideline ranges, he cannot establish that his underlying legal claim has arguable merit or that he suffered prejudice as a result of the putative error. Accordingly, this claim fails.

Next, we address the ineffective assistance claim Appellant leveled against sentencing counsel. Appellant maintains that sentencing counsel led him to believe that the trial court had reconsidered its previously negotiated offer of four to ten years imprisonment and that it would recommend modifying the sentence to three to six years imprisonment. Appellant continues that although he informed counsel that he assented to the new bargain, the Commonwealth refused to recognize the amended agreement during the sentencing proceedings. Apparently ignoring the portion of the certified record wherein Appellant admitted that he committed the underlying crimes, ***id***. at 8, Appellant posits that counsel's ineffective advice caused "him to forego his right to seek pre-sentence withdrawal of his guilty plea on the ground that he is innocent." *Pro se* PCRA Petition, 2/3/12, at 3.

In rejecting Appellant's claim, the PCRA court concluded that sentencing counsel's testimony during the PCRA hearing contradicted Appellant's assertion that the Commonwealth ever agreed to revise the negotiated guilty plea. In contrast to Appellant's self-serving allegations regarding counsel's misinformation, sentencing counsel disclosed to the PCRA court that he not only advised Appellant of the Commonwealth's unyielding position, but he also provided Appellant with correspondence

wherein the Commonwealth confirmed its stance. The PCRA found sentencing counsel's testimony credible and Appellant's allegations unsustainable. Trial Court Opinion, 6/28/12, at 5-6. It is axiomatic that it exceeds our standard of review to reweigh the evidence or reassess a PCRA court's credibility determinations. ***Commonwealth v. Nero***, 2012 WL 6131118, *7 (Pa.Super. 2012). Moreover, as highlighted below, the record sustains the PCRA court's factual findings.

During the PCRA hearing, sentencing counsel testified that he had been practicing criminal defense since 1976. He explained that he represented Appellant during the extradition and sentencing proceedings as a favor to Appellant's sister. Counsel further elucidated that he met with Appellant several times before the sentencing hearing, that Appellant believed the original sentencing agreement contemplated a three-to-six-year term of imprisonment, and that Appellant raised the possibility of either renegotiating the sentencing agreement to reflect his understanding of it or seeking to withdraw his guilty plea prior to sentencing. However, when counsel communicated Appellant's understanding to the district attorney's office, the Commonwealth confirmed unequivocally that it would refuse to renegotiate the four-to-ten-year sentence that was previously agreed upon. Indeed, as it relates to Appellant's perspective generally, sentencing counsel noted, "Appellant had several recollections that proved untrue or incomplete[.]" N.T. PCRA Hearing, 5/14/12, at 28.

Counsel described the various discussions as follows:

A. Again, for instance, one of the things was to go over the sentencing guidelines and to understand how the bargain was proffered. There was a bargain that I understood originally to be three to six.

Q. Where did you get that number from?

A. First from [Appellant] and then I was writing letters to [the Commonwealth] and was referencing the three to six.

Q. And then did you receive a correspondence from me, from our office, but from me specifically which indicated that I would stand behind the four-to-ten offer if the Defendant chose to proceed to sentencing on December 23?

. . . .

Q. But my question was did you receive a letter from me December 14 of 2010 indicating what the plea offer was and would continue to be?

A. Yes.

Q. Did you communicate that to [Appellant]?

A. Everything I received from you not only did I talk to him about it, I gave him copies.

Q. So then that letter was dated December 14. He appeared for sentencing on December 23 of 2010 and were you aware of what his intentions were when he came in for sentencing on December 23?

A. He was going to be sentenced. He had never been sentenced, so I was essentially representing him as a sentence, his sentencing attorney. That was the attorney he elected, and again he had my correspondence and originally started calling it a three to six, and but you had provided at that time I believe a copy of his original colloquy and you had that earlier letter and it was four to ten. We were also talking about triple RI eligibility which we had discussed previously.

> Q. My question was though when he came in for sentencing on December 23, had you communicated to him that the sentence that was offered from the DA's Office was four to ten?
>
> A. Yes. He had a copy of your letter plus prior to going into the courtroom, I sat down and had an extensive talk with him.
>
> Q. He was aware what the terms of the offer were?
>
> A. Yes. I haven't seen a copy of the sentencing colloquy but again it's always my practice to allow my clients to have an allocator, and so not only did I describe what happened but I believe he had an opportunity to talk to Judge Campbell.
>
> Q. Did he indicate any desire at that time to withdraw his guilty plea?
>
> . . . .
>
> Q. [Counselor] my question was prior to having sentencing imposed, did he indicate to you that he wanted to withdraw his guilty plea?
>
> A. No. Never.

N.T. PCRA Hearing, 5/14/12, at 22-24.

Hence, the record bears out that counsel relayed Appellant's request to renegotiate the plea to the Commonwealth and, although the Commonwealth rejected this request, Appellant never sought to withdraw his plea prior to sentencing. As the record supports the PCRA court's factual findings and credibility determination, we will not disturb them. Accordingly, we conclude that Appellant's underlying legal claim that sentencing counsel misinformed him about the existence of a renegotiated plea agreement lacks arguable merit.

Lastly, we confront Appellant's remaining arguments that the trial court imposed an illegal sentence because it failed to pronounce the sentence in open court and improperly determined his ineligibility for RRRI. Again, no relief is due.

First, as it relates to Appellant's bare claim that the trial court erred in failing to articulate his judgment of sentence on the record, we note that this claim is waived pursuant to § 9544(b) because it was not raised in a post-sentence motion. ***See*** 42 Pa.C.S. § 9544(b) ("an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding."). Moreover, to the extent that Appellant's challenge implicates sentencing counsel's stewardship in failing to level an objection to the putative omission, we confront that issue and conclude that it is unavailing.

We observe that the trial court did, in fact, iterate the judgment of sentence during the sentencing proceedings. Indeed, in pertinent part, the trial court declared, "Pursuant to a negotiated plea agreement the sentence of the Court is that Defendant shall serve no less than 4 years nor more than 10 years in a State Correctional Institution designated by the Pennsylvania Department of Corrections. . . . The Defendant is not RRRI eligible as a result of a prior conviction for indecent assault." Trial Court Order, 12/23/10; ***see also*** N.T. Sentencing, 12/23/10, at 4 (noting that order was previously transcribed and entered as separate document). Thus,

Appellant's position is factually inaccurate. As counsel cannot be deemed ineffective for declining to raise a meritless claim, no relief is due.

Unlike the preceding assertion of trial court error, which was arguably waived, a challenge to the trial court's RRRI eligibility determination implicates a non-waivable issue regarding the legality of the sentence. ***Commonwealth v. Pardo***, 35 A.3d 1222, 1230 (Pa.Super. 2011) citing ***Commonwealth v. Main***, 6 A.3d 1026 (Pa.Super. 2010). Nevertheless, as with Appellant's other claims, relief is not warranted.

As the trial court accurately observed, Appellant's precise complaint is unclear. To the extent Appellant posits that he was never convicted of indecent assault, his perception is faulty. Moreover, the record belies any assertion that he may level to challenge sentencing counsel's effectiveness. In fact, counsel not only discussed with Appellant the issue of Appellant's RRRI ineligibility based on the prior indecent assault conviction, but also confirmed the existence of the conviction and concluded that Appellant's recollection of the earlier criminal proceeding was inaccurate. Additionally, despite knowing the reality of Appellant's criminal record, counsel zealously argued during the sentencing proceeding that Appellant should be considered eligible for RRRI. N.T. Sentencing, 12/23/10, at 3-4. Thus, this aspect of counsel's representation is unassailable. Finally, we point out that since the certified record establishes the disqualifying offense, Appellant cannot meritoriously assert that sentencing counsel provided ineffective

assistance in failing to file a post-sentence motion to refute Appellant's ineligibility. Thus, for all of the foregoing reasons, we conclude that Appellant's putative ineffective assistance of counsel claims fail.

Having addressed the issues Appellant raised in his PCRA petition and independently reviewed the certified record, we agree with Attorney Nell that Appellant's PCRA petition is meritless. Accordingly, we grant the petition to withdraw.

Order affirmed. Thomas R. Nell's petition to withdraw from representation is granted.