NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. THOMAS JAMES BOARTS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA Nos. 962 & 963 WDA 2012

Appeal from the PCRA Order May 22, 2012,
in the Court of Common Pleas of Erie County,
Criminal Division at Nos. CP-25-CR-0001502-2007,
CP-25-CR-0000045-2007

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: Filed: January 15, 2013

This is an appeal from an order dismissing Appellant's petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

The background underlying this matter can be summarized in the following manner.

> On August 9, 2007, Appellant pled guilty at Docket Number 45 of 2007 to Count 2, Acquisition or Obtaining Possession of Controlled Substances by Misrepresentation, Fraud, Forgery, Deception or Subterfuge, 35 P.S. § 780-113(a)(12), and to Count 7, Criminal Conspiracy (to acquire or obtain possession of controlled substances by misrepresentation, etc.), 18 Pa.C.S.A. § 903(a)(1). The charges arose as [Appellant] forged a prescription for fifty hydrocodone pills.
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> On the same date, Appellant pled guilty at Docket Number 1502 of 2007 to one count of Criminal Attempt (to acquire or obtain possession of controlled substances by misrepresentation, etc.), 18 Pa.C.S.A. § 903(a)(2), because he attempted to fill a forged

*Retired Senior Judge assigned to the Superior Court.

prescription for sixty hydrocodone pills. The remaining counts at both dockets were nolle prossed.

Appellant applied for the Erie County Treatment Court Program. He was admitted into the Erie County Treatment Court Program on August 9, 2007, at the plea and sentencing proceeding. He was sentenced to seven (7) years of Restrictive Intermediate Punishment at Count 2 of D.N. 45 of 2007 and five (5) years of probation at Count 7, consecutive to Count 2. At Docket Number 1502 of 2007, he was sentenced to five (5) years of consecutive probation and twenty-five (25) hours of community service.

Appellant participated in various drug treatment and mental health programs. Unfortunately, Appellant continually violated the terms of supervision. Appellant was detained on September 20, 2007, for marijuana use as confirmed by urinalysis testing. Appellant was released the next day from the Erie County Prison. Appellant was detained on May 29, 2008, for displaying a poor attitude toward the probation officer and failing to follow through with drug treatment and community service. The detainer was lifted on June 5, 2008.

Appellant's cooperation with drug treatment and cooperation with the probation office began to deteriorate in September of 2010. Appellant began missing appointments with the probation officer. Appellant was arrested on September 28, 2010. He admitted to abusing heroin for several months. The detainer was lifted on October 13, 2010, and Appellant was admitted to the Gaudenzia Crossroads Relapse Track Program. After completing the program, Appellant again resorted to abusing illegal substances, failed to report to probation and failed to cooperate with drug testing procedures.

Appellant reported to the probation office on November 23, 2010, and admitted to overdosing on heroin, buying Vicodin on the street and failing to report to probation on November 16, 2010.

A detainer was lodged against Appellant for violations of Condition #7A, unlawful use of controlled substances and Condition #9, failure to report to the probation office.

> A probation revocation hearing was held on December 21, 2010. Appellant was revoked after admitting to violating Conditions #7A and #9. Appellant was sentenced at Docket Number 45 of 2007 at Count 2 to thirty (30) to sixty (60) months of incarceration and at Count 7 to eighteen (18) to thirty-six (36) months of incarceration consecutive to Count 2. Five (5) years of probation was re-imposed at Docket Number 1502 of 2007 consecutive to Count 7 of Docket Number 45 of 2007. Credit for time served, 125 days, was awarded for time spent detained and for the time Appellant spent on electronic monitoring.
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> On January 5, 2011, Appellant filed a Motion to Reconsider Sentence *Nunc Pro Tunc* claiming the sentence imposed was too harsh and could be seen as excessive. The substance of the Motion was denied the same date.

Trial Court Opinion, 03/03/11, at 1-3 (citations omitted).

Appellant appealed to this Court, and his appellate counsel petitioned for leave to withdraw as counsel. Counsel stated that Appellant wished to argue that his sentence was manifestly excessive, clearly unreasonable, and not individualized as required by law. This Court determined that the only challenge Appellant preserved for appellate review was his claim that his sentence is excessive. We then concluded that Appellant's claim failed to raise a substantial question worthy of review and that the record failed to suggest that the court sentenced Appellant in an excessive manner. Accordingly, the Court granted counsel's request to withdraw and affirmed Appellant's judgment of sentence. ***Commonwealth v. Boarts***, 32 A.3d 829 (Pa. Super. 2011) (unpublished memorandum).

Appellant, acting *pro se*, timely filed a PCRA petition. He alleged that his sentence was excessive and seemed to incorrectly claim that his previous counsel failed to preserve such a claim for review on direct appeal. The

PCRA court appointed counsel to represent Appellant. PCRA counsel then petitioned for leave to withdraw as counsel.

The PCRA court subsequently issued notice of its intent to dismiss Appellant's PCRA petition without holding an evidentiary hearing. The court concluded, *inter alia*, that Appellant previously litigated his sentencing claim. The court also denied counsel's request to withdraw. On May 22, 2012, the court formally dismissed Appellant's PCRA petition. Appellant timely filed a notice of appeal.[1]

In his brief to this Court, Appellant asks us to consider one question, namely, "WHETHER THE LOWER COURT ERRED IN DENYING PCRA RELIEF PREDICATED ON A FINDING THAT THE PETITIONER'S CLAIMS WERE FINALLY LITIGATED AND/OR WAIVED?" Appellant's Brief at 2.

The argument Appellant presents in support of this issue is woefully inadequate. The argument is devoid of any citation to pertinent authority and amounts to little more than a series of bald assertions of error. In terms of the PCRA court's determination that Appellant previously litigated his sentencing claim, Appellant merely offers the following sentence, "Irrespective of the prior appellate review and adjudication issued by this Court, the Petitioner was permitted to reassert the instant claims in

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[1] Generally speaking, "[o]n appeal from the denial of PCRA relief, an appellate court's standard of review is whether the ruling of the PCRA court is free of legal error and supported by the record." ***Commonwealth v. Jones***, 932 A.2d 179, 181 (Pa. Super. 2007).

challenge to the revocation sentence." Appellant's Brief at 5. Appellant is wrong.

The PCRA clearly and unambiguously states, "To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence . . . [t]hat the allegation of error has not been previously litigated or waived." 42 Pa.C.S.A. § 9543(a)(3). For purposes of the PCRA, "an issue has been previously litigated if[, *inter alia*,] the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue[.]" 42 Pa.C.S.A. § 9544(a)(2).

In his PCRA petition, and currently on appeal, Appellant claims that his sentence is excessive. Appellant previously litigated this issue on direct appeal; he, therefore, is not eligible for relief under the PCRA. Moreover, to the extent that Appellant argues that his previous counsel was ineffective for failing to preserve such a claim on direct appeal, in addressing his direct appeal issues, this Court explicitly stated that Appellant preserved his excessive sentence claim. Thus, any claim to the contrary is meritless.

Order affirmed.