NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	
v.	
CLIFFORD E. YOUNT	
Appellant	No. 986 WDA 2012

Appeal from the PCRA Order May 22, 2012
In the Court of Common Pleas of Clarion County
Criminal Division at No(s): CP-16-CR-0000377-2008
CP-16-CR-0000378-2008, CP-16-CR-0000379-2008
CP-16-CR-0000382-2008

BEFORE: GANTMAN, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, J.: FILED: June 5, 2013

Appellant, Clifford E. Yount, appeals from the order entered in the Clarion County Court of Common Pleas, dismissing his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

The relevant facts and procedural history of this appeal are as follows.

> Appellant sold marijuana to an undercover police informant on April 7, 11 and 14, 2008. During the sales, Appellant was observed driving his wife's Geo Tracker. As a result of the sales, the police obtained a warrant for Appellant's arrest. On May 30, 2008, Appellant was arrested, pursuant to the arrest warrant, while driving his wife's car. Detective Peck, the arresting officer, requested consent to search the car. Though Appellant hesitated, he eventually

---

[1] 42 Pa.C.S.A. §§ 9541-9546.

---

*Former Justice specially assigned to the Superior Court.

> consented to the search and signed a consent form. A search of the vehicle revealed eight baggies of marijuana.
>
> Appellant was charged with multiple counts of delivery of a controlled substance, criminal use of a communication facility, possession of a controlled substance, possession of drug paraphernalia and driving while operating privileges were suspended or revoked. The charges relate to four separate incidents—the three undercover sales and the traffic stop. The Commonwealth moved to consolidate the cases. Appellant objected only to consolidating the charges arising from the traffic stop with the others. The trial court consolidated the cases for trial over Appellant's objection.
>
> Appellant was arraigned on all charges on August 20, 2008. On September 26, 2008, Appellant filed a pretrial motion to suppress evidence and dismiss the charges against him, alleging that his consent to search the vehicle was not voluntary and that Detective Peck lacked the appropriate legal grounds to request consent. On October 29, 2008, the Commonwealth filed a motion to dismiss Appellant's motion on the ground that it was untimely. On November 3, 2008, the trial court dismissed Appellant's motion as untimely as it was filed more than 30 days after arraignment. ***See*** Pa.R.Crim.P. 579.
>
> On January 30, 2009, following a jury trial, Appellant was convicted on all counts except the vehicle code violation. On March 11, 2009, the trial court sentenced Appellant to six to twelve years' incarceration followed by one year [of] probation.
>
> On March 11, 2009, Appellant filed a post-sentence motion, claiming ineffective assistance of counsel for not filing the motion to suppress in a timely manner. The trial court appointed new counsel for purposes of the post-sentence motion. A hearing on the post-sentence motion was held on June 15, 2009. On July 28, 2009, the trial court issued an opinion and order, denying the motion.

Commonwealth v. Yount, No. 1479 WDA 2009, unpublished memorandum at 1-3 (Pa.Super. filed June 1, 2010) (internal footnotes omitted). This

Court affirmed the judgment of sentence on June 1, 2010, and Appellant did not seek further review with our Supreme Court.

On May 31, 2011, Appellant timely filed a *pro se* PCRA petition. The court appointed counsel, who filed an amended petition on September 8, 2011. In it, Appellant raised various claims of trial counsel's ineffectiveness. On April 3, 2012, Appellant filed a *pro se* request for PCRA counsel to raise additional issues concerning trial counsel's ineffectiveness. PCRA counsel subsequently informed the court that he wished to pursue the additional issues set forth in Appellant's *pro se* request. On April 26, 2012, the court entered an order classifying the request as an amendment to the PCRA petition. The court conducted an evidentiary hearing on May 3, 2012. The hearing commenced with PCRA counsel clarifying the exact issues Appellant wished to raise:

> [W]hat we would seek to do is to make an oral motion to modify the amended PCRA petition to include three distinct claims; one of those being the failure to properly arraign [Appellant] within time periods specified under the Pennsylvania Rules of Criminal Procedure; second is to make an allegation of ineffectiveness…by [trial counsel's] failure to file a post-sentence motion challenging the excessiveness of [Appellant's] sentence….
>
> * * *
>
> Third would be another ineffectiveness claim against [trial counsel] for failure to advise [Appellant] of the ramifications of proceeding to trial and as such creating a decision that was not voluntary on [Appellant's] behalf to proceed to trial.

(N.T. PCRA Hearing, 5/3/12, at 4-5). The Commonwealth did not object to the modification motion, which the court granted. On May 22, 2012, the court denied PCRA relief.

Appellant timely filed a notice of appeal on June 21, 2012. On June 25, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant subsequently filed a Rule 1925(b) statement.

Appellant raises two issues for our review:

> WHETHER THE [PCRA] COURT ERRED IN DENYING APPELLANT'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PURSUE APPELLANT'S EXCESSIVE SENTENCE AS AN APPELLATE ISSUE?
>
> WHETHER PREVIOUS PCRA REPRESENTATION IN THIS MATTER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WARRANTING A REMAND TO THE [PCRA] COURT FOR AN EVIDENTIARY HEARING ON THE MATTER OF WHETHER APPELLANT WAS THE VICTIM OF SENTENCING ENTRAPMENT?

(Appellant's Brief at 4).

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal*

denied, 593 Pa. 754, 932 A.2d 74 (2007).

In his first issue, Appellant acknowledges the sentences for each offense fell within the guidelines of the Sentencing Code. Nevertheless, Appellant contends the court abused its discretion by imposing consecutive sentences. Appellant asserts the imposition of consecutive sentences was unreasonable, because the transactions involved a small amount of drugs, the offenses were nonviolent, and Appellant did not target children. Appellant insists prior counsel should have challenged the excessiveness of the sentence. Appellant argues counsel had no rational basis for failing to raise this sentencing issue, and Appellant suffered prejudice due to counsel's failure to advance the claim. Specifically, Appellant avers there was a reasonable probability that the court would have re-sentenced him to a lesser term of incarceration if counsel had challenged the original sentencing scheme. Appellant concludes counsel was ineffective for failing to challenge the sentence as excessive.[2] We disagree.

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Williams***, 597 Pa. 109, 950 A.2d 294 (2008). When

---

[2] In the PCRA court, Appellant framed this issue as a claim of ineffective assistance of trial counsel for failing to raise an excessive sentence challenge in the post-sentence motion. In his appellate brief, however, Appellant's argument is couched in terms of appellate counsel's ineffectiveness for failing to challenge the sentence on direct appeal. Despite Appellant's repeated references to appellate counsel's ineffectiveness, Appellant appears to challenge the PCRA court's ruling regarding trial counsel's purported ineffectiveness. (***See*** Appellant's Brief at 14.)

asserting a claim of ineffective assistance of counsel, the petitioner is required to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and, (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326 (1999). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Williams, supra***.

"The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit…." ***Commonwealth v. Pierce***, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004).

> Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective.

Pierce, supra at 524, 645 A.2d at 194-95 (internal citations omitted).

> Prejudice is established when [a defendant] demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

> confidence in the outcome. In [***Kimball, supra***], we held that a "criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Commonwealth v. Chambers, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002) (some internal citations and quotation marks omitted).

"Generally, Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed." ***Commonwealth v. Prisk***, 13 A.3d 526, 533 (Pa.Super. 2011) (internal quotation marks omitted).

> Any challenge to the exercise of this discretion ordinarily does not raise a substantial question [as to the appropriateness of the sentence under the Sentencing Code]. ***See also Commonwealth v. Hoag***, 445 Pa.Super. 455, 665 A.2d 1212, 1214 (1995) (stating appellant is not entitled to volume discount for his crimes by having all sentences run concurrently). ***But see Commonwealth v. Dodge***, 957 A.2d 1198 (Pa.Super. 2008), *appeal denied*, 602 Pa. 662, 980 A.2d 605 (2009) (holding consecutive, standard range sentences on thirty-seven counts of theft-related offenses for aggregate sentence of 58 1/2 to 124 years' imprisonment constituted virtual life sentence and, thus, was so manifestly excessive as to raise substantial question). Thus, …the key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case. [***Commonwealth v. Mastromarino***, 2 A.3d 581 (Pa.Super. 2010), *appeal denied*, 609 Pa. 685, 14 A.3d 825 (2011)].

Id. at 533 (internal quotation marks omitted).

Instantly, the PCRA court emphasized that the jury found Appellant guilty of offenses stemming from three separate sales of marijuana:

> [Appellant's] lengthy sentence of six to twelve years resulted from a combination of three mandatory school zone enhancements requested by the district attorney and consecutive sentences imposed by [the] court.
>
> * * *
>
> In [Appellant's] case the criminal acts were…distinct and separate…. Each sale to [the confidential informant] was completely independent of the others. They happened days apart and were scheduled by the parties at different times. [The sentencing] court determined in exercising discretion that the separate and independent nature of each conviction warranted separate and consecutive sentences.

(***See*** PCRA Court Opinion, filed May 22, 2012, at 5, 6-7.) Essentially, Appellant was not entitled to a "volume discount" for his multiple convictions. Therefore, the aggregate sentence is not excessive in light of the criminal conduct at issue. Thus, Appellant's challenge to consecutive sentences under the rubric of counsel's ineffectiveness lacks arguable merit; counsel was not ineffective for failing to pursue this meritless claim. ***See Prisk, supra***; ***Poplawski, supra***.

In his second issue, Appellant contends "sentencing entrapment"[3] occurred in his case, because the Commonwealth intentionally scheduled

---

[3] "Sentencing entrapment is a federal doctrine which has been adopted by this Court." ***Commonwealth v. Kittrell***, 19 A.3d 532, 539 (Pa.Super. 2011), *appeal denied*, 613 Pa. 643, 32 A.3d 1276 (2011).

three separate controlled purchases to occur within a school zone, thereby triggering a sentencing enhancement and increasing Appellant's sentencing exposure. Appellant complains trial and appellate counsel were ineffective for failing to pursue this claim. Moreover, Appellant insists PCRA should have challenged all prior counsels' effectiveness in this regard. Appellant admits he did not previously raise this claim, and the PCRA court did not address it in the first instance. Nevertheless, Appellant argues this Court should permit him to advance the claim for the first time on appeal in the interest of judicial economy. Appellant concludes this Court must remand the matter for an evidentiary hearing on the entrapment issue. Appellant's claim is waived.

Generally, appellate Courts should decline to address claims which were not raised in the trial court; this principle applies to PCRA appeals as well. ***Commonwealth v. Colavita***, 606 Pa. 1, 28, 993 A.2d 874, 891 (2010). Therefore, claims of PCRA counsel's ineffectiveness likewise cannot be raised for the first time on appeal from the order denying relief. ***Id.*** at 32 n.12, 993 A.2d at 893 n.12. ***See also Commonwealth v. Ford***, 44 A.3d 1190 (Pa.Super. 2012) (holding claims of PCRA counsel's ineffectiveness cannot be raised for first time after notice of appeal has been filed from underlying PCRA matter). Instantly, Appellant waived the issue pertaining to PCRA counsel's ineffectiveness by failing to raise it before this

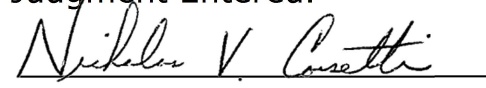
appeal.[4] ***See id.*** (emphasizing that petitioner's failure to challenge PCRA counsel's effectiveness in serial PCRA petition resulted in waiver of claims on appeal). Moreover, Appellant failed to preserve this claim in his Rule 1925(b) statement. ***See Commonwealth v. Schutzues***, 54 A.3d 86 (Pa.Super. 2012) (explaining appellant waived claim by failing to raise it in Rule 1925(b) statement). Therefore, Appellant's second issue warrants no further attention. Accordingly, we affirm the order dismissing Appellant's PCRA petition.

Order affirmed.

---

[4] Following the denial of PCRA relief, Appellant submitted *pro se* filings, questioning PCRA counsel's decision not to raise certain issues at the PCRA hearing. Even if the court had construed these *pro se* filings as serial PCRA petitions, we emphasize that Appellant did not advance any theory of ineffective assistance of PCRA counsel for failing to pursue a sentencing entrapment claim.

Judgment Entered.



Deputy Prothonotary

Date: June 5, 2013