

Drunkenness⁶. Petitioner was represented by private counsel, James Protasio, Esquire at trial.

On December 6, 2016, Petitioner was sentenced by the Court on the Aggravated Assault charge, to a state sentence of sixty-six (66) months to fifteen (15) years, with a consecutive sentence of nine (9) months to (2) years on the conviction for Recklessly Endangering Another Person. On the charge of Public Drunkenness, the court made a finding of guilt without further penalty; the remaining charges the Court found they merged for sentencing.

At the same hearing Petitioner was resentenced on a probation violation and represented by the Public Defender's Office. As a result of the Petitioner being convicted of the new charge while on probation for the charge of Fraudulent Obtaining of Food Stamps/Welfare⁷, the Petitioner received a consecutive sentence of three (3) years probation from the Court.

Petitioner filed neither Post Sentence Motions nor an appeal to the Superior Court of Pennsylvania; therefore Petitioner's sentence became final on January 5, 2017. Petitioner had one year from that date to file his PCRA petition.

On February 17, 2017 this Court received a letter from the Petitioner "addressing some concerns" which the Court treated as a PCRA petition in accordance with ***Commonwealth v. Johnson***, 803 A.2d 1291, 1293 (Pa. Super. 2002) ("We have repeatedly held that the PCRA provides the sole means for obtaining collateral review, and that any petition filed after the judgment of sentence

⁶ 18 Pa.C.S.A. § 5505.

⁷ 62 P.S. § 481(a) at docket number CR-41-1270-2016.

becomes final will be treated as a PCRA; Petitioner's PCRA petition is timely. See 42 Pa.C.S.A. Section 9545(b)1.

William J. Miele, Chief Public Defender was appointed to represent Petitioner. A court conference was initially scheduled for April 25, 2016. Several continuances were granted by the Court so that the transcripts could be prepared. On October 2, 2017, Attorney Miele filed a Motion to Withdraw as Counsel and letters pursuant to ***Turner/Finley, supra***. After a review of the record and conference with counsel, the Court ordered that additional testimony was needed on the issue of whether trial counsel consulted with the Petitioner regarding an appeal.

A hearing was held by the Court on March 19, 2018. The Court finds that Petitioner was advised of his appeal rights by trial counsel. Since there are no meritorious issues alleged by the Petitioner, his petition will be dismissed and PCRA counsel's motion to withdraw as counsel will be granted.

Discussion

Incarcerated defendants, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by a preponderance of the evidence the following four components:

- 1) Defendant has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.
- 2) Conviction or sentence resulted from one or more of the following
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
 - (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
 - (v) Deleted.
 - (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
 - (vii) The imposition of a sentence greater than the lawful maximum.
 - (viii) A proceeding in a tribunal without jurisdiction.
- 3) Allegation of the error has not been previously litigated or waived; and
- 4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel.

42 Pa.C.S. § 9543 (eligibility for relief).

Petitioner is currently incarcerated at SCI Houtzdale. Petitioner, when he wrote to the Court, alleged that he wished to take an appeal and trial counsel failed to file the paperwork. Once assigned, PCRA counsel also specifically asked Petitioner to tell him any errors that he believed that trial counsel committed in the handling of his case. Petitioner never replied to PCRA counsel.

Therefore the only issue before the Court and the one which the Court believed that a hearing was required involved whether trial counsel consulted with Petitioner regarding an appeal.

In order to prevail on a claim of ineffective assistance of counsel, a Defendant must demonstrate that that underlying claim is of arguable merit, and that counsel's

actions had not reasonable basis designed to effectuate the Defendant's interests and that counsel's actions prejudiced the Defendant. **Commonwealth v. Correa**, 664 A.2d 607 (Pa. Super. 1995). "It is well established that counsel is presumed effective and the defendant bears the burden of proving ineffectiveness." **Commonwealth v. Cooper**, 941 A.2d 655 (Pa. 2007).

In reviewing the transcript of the sentencing hearing, this Court reviewed his appeal rights with him. See, Notes of Testimony, December 6, 2016 at pp. 22-24.

The Court: I'm sure that Mr. Protasio has gone over the fact that you've gone to trial, that you have the right to file post-sentence motions, you have the right to take an appeal from not only what happened during the trial, but also this Court's sentence That you've now just heard essentially what I'm going to give you. So you have the right to file a post sentence motion within 10 days and an appeal within 30. If you are going to file either or both of those motions you've got to get with Mr. Protasio as soon as possible. And, in fact, if you wanted to take a few minutes before the Sheriffs transport you back to the County prison to talk with him while you're here I would suggest you do that. So I would ask the Sheriffs that we give a little bit of latitude before you transport him back to the county prison. Do you have any questions about your appeal rights?

Petitioner: No, your honor.

And then a short time later,

The Court: Do you have questions about anything?

Petitioner: No, your honor.

The Court: Do you understand your post-sentence rights so that—please take an opportunity to talk with Mr. Protasio before you [go] back to the county prison.

Id.

Trial Counsel testified at the hearing that prior to the Petitioner's sentencing that they discussed his appeal rights. Counsel also remembers this Court specifically

requesting that he also go over those rights with Petitioner after the sentencing hearing; they did so in the Lawyer's Lounge on the 2nd floor of the courthouse.

Petitioner testified that he did in fact speak with trial counsel after the sentencing hearing. He described in general terms the room in which the conversation took place. The description of that room matched the lawyers lounge on the 2nd floor of the courthouse. He testified that he didn't remember being advised of any rights. Petitioner testified that he thought that appeals were filed automatically.

Clearly the record indicates that the Court notified Petitioner of his appeal rights, gave him the opportunity to ask questions, not once but twice and then made certain he had sufficient time to speak with trial counsel and did before he left the courthouse. The Court finds the Petitioner's belief that appeals were filed automatically has no support in the record. He would have had ample opportunity to speak with his attorney to request the filing of any challenge available to him by rule of criminal procedure and failed to do so.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to dismiss the Defendant's PCRA Petition. The Defendant may respond to this proposed dismissal within twenty (20) days. If no

response is received within that time period, the Court will enter an Order dismissing the Petition.

ORDER

AND NOW, this _____ day of April, 2018, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss the PCRA petition unless Defendant files an objection to that dismissal within twenty (20) days of today's date.
2. The **Motion to Withdraw as Counsel** filed **October 2, 2017**, is hereby **GRANTED** and William J. Miele, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

cc: DA (KO)
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