

COMMONWEALTH OF PENNSYLVANIA, : IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA
vs. : NO. 97-11,301
: 97-11,193
TYRONE BUTLER, : CRIMINAL ACTION - LAW
:
Defendant : PCCR PETITION

OPINION AND ORDER

Background

This matter is before the Court on the PCCR Petition filed on November 6, 1998, *pro se*, in which Defendant asserts that trial counsel, Public Defender Jay Stillman, Esquire, was ineffective because of the failure of trial counsel to appeal this Court's May 13, 1998, sentence imposed at an intermediate punishment probation violation hearing, which had sentenced the Defendant to State Prison for drug-related offenses. Counsel was appointed to represent the Defendant in these proceedings and filed a First Amended PCCR Petition on February 17, 1999. Thereafter, the Defendant filed a *pro se* amended petition on March 23, 1999. The Petitions assert counsel's ineffectiveness because Defendant had requested trial counsel to appeal the sentence and counsel failed to so do. The apparent basis for the appeal was that the Court's sentence, imposed on May 13, 1998, was unlawful.

A complete history of this case that is relevant to the post-sentencing procedures is set forth in this Court's memorandum Opinion and Order of November 24, 1998 which denied Defendant's Motion for Modification of Sentence filed *nunc pro tunc* on October 30, 1998. That Opinion and Order are incorporated herein by reference as acknowledged therein, while this Court had imposed an unlawful sentence of a 10-year maximum on a conspiracy to deliver a non-controlled substance charge, the relief was

denied because such illegal sentence had been corrected by the Order of the Honorable Kenneth D. Brown on July 28, 1998 in response to a motion of Defendant's trial counsel.

Defendant also asserts that this Court had imposed an improper sentence on May 13, 1998, because that sentence exceeded Defendant's original sentence and also because the sentence of the Court departed from the Sentencing Guidelines, as Defendant contends that the minimum sentence of 27 months exceeded the aggravated guideline range and that this Court had not stated any reasons on the record for departing from the guidelines standards.

During the evidentiary hearing held in this case, for the first time, the Defendant has raised the issue that counsel at the parole violation hearing and re-sentencing proceeding of May 13, 1998, was ineffective because Defendant had advised him of reasons as to why he had violated parole which were not utilized by counsel when presenting the case to this Court at the parole violation hearing.

The Commonwealth argues in this case that the Defendant's various petitions and contentions must be denied because Defendant has introduced no facts which would substantiate that any ineffectiveness nor any other action by counsel interfered with Defendant's right to a direct appeal inasmuch as his adjudication of guilt was not made unreliable through counsel's ineffectiveness. This Court agrees.

The matter as to the illegal sentence as to the conspiracy offense was remedied long before Defendant filed any PCCR petition. In fact, it was remedied by the motion and request of counsel that represented the Defendant at the parole violation proceeding.

This Court does not find believable the assertion that Defendant had given trial counsel, at the parole violation proceeding, information which would have justified his violation of probation. The testimony proffered by the Defendant in this regard as to the reasons for the excuse as given to this Court at the PCCR hearing was not credible. It certainly did not amount to anything close to what this Court would have found justified violation of his intermediate punishment probation conditions, particularly for the length of time that the Defendant was an absconder. Even had trial counsel been advised of these assertions by Defendant, this Court can well conceive that such counsel would have probably recommended against attempting to persuade this Judge with such an excuse. Regardless, this Court also believes that the raising of this reason to assert counsel's ineffectiveness is a last-ditch effort to obtain relief by the Defendant whose is confronted with the fact that all the matters he had set forth seeking PCCR relief in the various petitions would be to no avail.

As noted before, the illegal sentence of this Court was appropriately corrected within six weeks of the time that the Order had been filed. All other post-sentence requests for relief that had been filed had also been reviewed by Judge Brown and had been denied. They were again reviewed and denied by this Court through its Order of November 24, 1998. At that time the Court rejected the Defendant's contentions that the sentence imposed was one in which the minimum sentence fell outside the Sentencing Guidelines. As this Court has previously found, the standard guideline range applicable to the sentence in this case for the minimum is 27-40 months. The sentence imposed by this Court, being a minimum of 27 months is a minimum sentence imposed at the bottom of the standard sentencing range. No evidence has

been presented by the Defendant at any proceeding which asserts his prior record score or the sentencing guideline information was miscalculated or inaccurate. Accordingly, there is no basis for any appeal to have been filed by prior counsel who represented the Defendant at the parole violation and sentencing proceeding on May 13, 1998.

ORDER

AND NOW, this 30th day of June 1999, for the reasons set forth in the foregoing Opinion the PCCR Petitions of the Defendant filed November 6, 1998; as amended by the filing of February 17, 1999 and March 23, 1999; and further amended orally at the time of the evidentiary hearing in these proceedings are **DENIED**.

BY THE COURT,

WILLIAM S. KIESER, JUDGE

cc: Court Administrator
District Attorney
Public Defender
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire, Lycoming Reporter