

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 97-11,555
 :
 vs. : CRIMINAL DIVISION
 : Post Conviction Collateral Relief
 DAMEAN L. BUXTON, :
 Defendant :

OPINION

Before the Court is Defendant's Motion for Post Conviction Collateral Relief, filed January 8, 2001. An argument on the Petition was held March 16, 2001. Following argument and upon review of the record, the Court finds that there are no genuine issues concerning any material fact and that Defendant is not entitled to Post Conviction Collateral Relief.

After a bench trial on June 25, 1998, Defendant was found guilty of three (3) counts of robbery, three (3) counts of simple assault, two (2) counts of aggravated assault and related offenses. Defendant was acquitted of attempted homicide and possessing an instrument of crime. On August 21, 1998, Defendant was sentenced to 5 ½ years to 11 years incarceration on the aggravated assault and a consecutive five (5) year period of probation for robbery. A Post Sentence Motion for Judgment of Acquittal was denied by Order dated November 17, 1998. Defendant appealed to Superior Court but that Court affirmed his judgment of sentence by Order entered December 30, 1999.

Upon filing of the Motion for Post Conviction Collateral Relief, counsel was appointed to review the Petition. At argument on March 16, 2001, defense counsel presented the issues raised by Defendant. The Commonwealth argued the Petition should be denied without an evidentiary hearing because the issues raised in the Petition are meritless. The Court agrees with the Commonwealth.

Defendant contends trial counsel was ineffective in failing to appeal his sentence, in failing to

introduce at trial evidence that would have influenced the outcome, in failing to require a pre-trial hearing to have certain charges thrown out because they failed to meet the statutory definition, in failing to “appeal” the pre-sentence report, and also contends his sentence failed to follow the guidelines and that the sentencing Court erred in failing to merge the aggravated assault and robbery for sentencing purposes. These will be addressed seriatim.

With respect to the first issue, that trial counsel was ineffective by failing to appeal Defendant’s sentence, as discussed hereinafter, there are no sentencing issues of arguable merit. Trial counsel was thus not ineffective in failing to raise any.

Second, although Defendant contends trial counsel failed to introduce at trial evidence that would have influenced the outcome, this contention is insufficient to raise an issue before this Court. Defendant must allege sufficient facts, i.e. the nature of the evidence which should have been introduced, before this Court can address any alleged deficiency. Commonwealth v Coleman, 664 A.2d 1381 (Pa. Super. 1995).

Third, with respect to Defendant’s contention trial counsel was ineffective in failing to pursue a pre-trial hearing “to have certain charges thrown out,” the Court notes a preliminary hearing was held September 30, 1997. Defense counsel filed a Petition for Writ of Habeas Corpus and the preliminary hearing transcript was reviewed by the Court. Trial counsel was thus not ineffective as the appropriate channels for possible relief were pursued.

Fourth, with respect to the pre-sentence investigation, trial counsel indicated at sentencing that he had no objections or amendments to the report. Upon further review by PCRA counsel, no inaccuracies have been noted. The Court cannot, therefore, find trial counsel ineffective in this regard.

Fifth, Defendant contends the Court erred in sentencing him to 5 ½ to 11 years incarceration on the aggravated assault charge, specifically objecting to the Court’s use of the deadly weapon enhancement. 42 Pa. C.S. Section 9721. Defendant points to Section 303.10 (A)(3), which provides there shall be no deadly weapon enhancement for aggravated assault under 18 Pa. C.S. Section 2702 (a)(4). Defendant was sentenced on count 7, however, aggravated assault, 18 Pa. C.S. Section 2702 (a)(1), not Section 2702 (a)(4). The count of aggravated assault under Section 2702

(a)(4) was determined to merge with aggravated assault under Section 2702 (a)(1) for sentencing purposes and no further sentence was imposed. This claim is thus without merit.

Finally, Defendant contends the Court erred in failing to find that the robbery and aggravated assault merged for sentencing purposes. The Court finds no merit in this argument. The Supreme Court held in Commonwealth v Belsar, 676 A.2d 632 (Pa. 1996), that the same facts may support multiple convictions and separate sentences for each conviction except in cases where the offenses are greater and lesser included offenses, and that a criminal act can result in separate convictions and sentences for both aggravated assault and robbery since robbery requires proof of theft, which aggravated assault does not, and aggravated assault requires proof of circumstances manifesting extreme indifference to the value of human life, which robbery does not.

As the Court finds there is no genuine issue concerning any material fact and that Defendant is not entitled to Post Conviction Collateral Relief, no purpose would be served by any further proceedings. The parties are hereby notified of this Court's intention to dismiss the Petition. Defendant is further notified he may respond to the proposed dismissal within twenty (20) days of the date of this notice. If no response is received within that time period, the Court will enter an Order dismissing the Petition.

By the Court,

DATE: April 18, 2001

Dudley N. Anderson, Judge

cc: DA
PD
Damean Buxton, Sr., OS-9712, 1 Kelley Drive, Coal Township, PA 17866-1021
Gary Weber, Esq.
Hon. Dudley N. Anderson