

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 99-10,741
:
:
vs. : CRIMINAL DIVISION
:
:
CLYDE McALLISTER, :
Defendant : 1925(a) Opinion

OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Order dated January 4, 2002 and docketed January 7, 2002, wherein the Court denied the defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts are as follows. The defendant was arrested and charged with over 200 drug related charges. On February 1, 2000, the defendant pled guilty to corrupt organizations, criminal conspiracy, 21 counts of delivery of cocaine and 98 counts of unlawful use of a communications device. In exchange for the plea of guilty, the Commonwealth and the defendant agreed that the minimum term of incarceration would be no less than five years nor more than eight years and the remaining counts would be dismissed. On April 4, 2000, the Court sentenced the defendant to incarceration in a state correctional institution for a minimum of six and one-half (6 ½) years and a maximum of thirteen (13) years. At the guilty plea and sentencing

hearings, Marc Lovecchio represented the defendant.

On May 2, 2000, the defendant filed an appeal. During the appeal, William Miele and Donald Martino of the Lycoming County Public Defender's Office represented the defendant. In his appeal, the defendant sought to withdraw his guilty plea and challenged the length of his sentence.¹ Attorney Martino sent the defendant numerous letters regarding the status of the defendant's appeal. Attorney Martino advised the defendant that, if he succeeded on appeal and was permitted to withdraw his plea, the dismissed charges could be reinstated and he could receive a harsher sentence. Attorney Martino, though, clearly informed the defendant that the decision whether to continue with his appeal was his (the defendant's) to make. The defendant chose to withdraw his appeal. Attorney Martino notified the Superior Court of the defendant's decision, and the appeal was discontinued on March 28, 2001.

On May 7, 2001, the defendant filed a pro se Post Conviction Relief Act (PCRA) petition. The Court appointed Gregory Stapp to represent the defendant. Attorney Stapp filed an amended PCRA petition on July 12, 2001. The Court held an argument on the amended PCRA petition on September 21, 2001. After argument, the Court entered an Order giving the defendant and Attorney Stapp notice of its intention to deny

¹ The defendant, however, did not allege that the guilty plea was induced by an illegal wiretap in his appeal.

the petition without holding an evidentiary hearing. In response to this notice, the defendant sent the Court a response with several exhibits attached, including various letters from Attorney Martino, and Attorney Stapp. The Court reviewed the defendant's submissions and entered an Order denying the defendant's petition on January 4, 2002. The defendant, through counsel, filed an appeal on January 23, 2002.

In an Order dated January 28, 2002, the Court ordered the defendant to file a concise statement of matters complained of on appeal within fourteen days.

On March 12, 2002, the Honorable Clinton W. Smith, President Judge, reassigned this case to Matthew Ziegler as Attorney Stapp resigned from his position as conflict's counsel. A motion was filed on the defendant's behalf in the Pennsylvania Superior Court seeking leave to file the statement of matters complained of on appeal nunc pro tunc. The Superior Court denied the motion without prejudice to the defense seeking such relief from the trial court. No such motion was filed.

On May 23, 2002, the Court issued a 1925(a) Opinion to the effect that any issues the defense wished to raise were waived by the failure to file a statement of matters complained of on appeal. Upon receiving the 1925(a) Opinion, Attorney Ziegler explained to Court staff that he had not

interpreted the Order from the Superior Court as this Court had. Instead, he believed the Superior Court wanted him to wait for the appeal to be dismissed and then file a new PCRA petition. Wanting to avoid delaying the case further, Court staff told Mr. Ziegler to simply file a motion to file a concise statement of matters complained of on appeal nunc pro tunc along with such a statement as soon as possible. Within three days thereafter, Attorney Ziegler filed a motion to appeal nunc pro tunc. The Court denied that request as this matter was already on appeal. Nevertheless, the Court gave the defense until June 15, 2002 to file a concise statement of matters complained of on appeal and vacated the prior 1925(a) Opinion. Attorney Ziegler filed such a statement on June 11, 2002.

The defendant first alleges that the Court erred in failing to grant relief under the PCRA where trial counsel was ineffective for failing to object to or withdraw the plea agreement where the sentence imposed exceeded the agreement. The defense contends the agreement was for a sentence with a minimum of five years and a maximum of fifteen years. The record belies this contention. Although the defendant submitted a copy of a letter written by Attorney Lovecchio as part of his pro se PCRA petition, it is clear that the five to fifteen year sentence was merely a **proposal** Mr. Lovecchio was making on the defendant's behalf to the prosecutor. The

written guilty plea colloquy, which was initialed and signed by the defendant, states the agreement as follows: "Minimum term of incarceration to be no less than 5 years nor more than 8 years (to be determined by court), dismissal of remaining charges." This agreement was discussed both at the guilty plea hearing and the sentencing hearing. N.T., February 1, 2000, at p. 17; N.T., April 4, 2000 at pp. 25-26, 45. The defendant participated in both hearings and made various statements on the record. He never objected to the statement of the agreement or stated that the agreement was for a five year minimum and a fifteen year maximum. Based on the foregoing, the Court finds this issue is utterly without merit.

The defendant next asserts the trial court erred in failing to grant relief under the PCRA where appellate counsel was ineffective for coercing the defendant to drop his original appeal to the Superior Court. The letters from Attorney Martino to the defendant that defendant included in his response to the Court's notice of intent to dismiss belie this assertion. Attorney Martino repeatedly told the defendant the decision whether to drop the appeal was one for the defendant to make. Attorney Martino appropriately advised the defendant of the possible consequences of pursuing his appeal to withdraw his guilty plea, including the dismissed charges being reinstated and a longer sentence. Attorney

Martino would have been ineffective had he not advised the defendant of these consequences. Thus, this assertion also is meritless.

In his third issue, the defendant claims the trial court erred in failing to grant relief under the PCRA where the defendant's plea of guilty was unlawfully induced by an illegal wiretap. The defendant has failed to set forth any basis to support his allegation that the wiretap was illegal. Furthermore, the defendant has not offered any certifications or statements of any witness to support this, or any of his other, claims. Absent such statements, any witness's testimony would be inadmissible. See 42 Pa.C.S. §9545(d). The Court notes the legality of the wiretap was not raised prior to the defendant's guilty plea when he was represented by Attorney Lovecchio or in his appeal (prior to it being withdrawn) when he was represented by Attorney Martino. The defendant voluntarily withdrew his appeal. Based on the foregoing, this issue is waived.

In the alternative, the Court notes the Honorable Correale F. Stevens of the Pennsylvania Superior Court approved the wiretap in accordance with 18 Pa.C.S. §5708. Search Warrant Affidavit, p. 55, para. 78; N.T., April 4, 2000, at p.3.

In addition, the Court does not believe the wiretap induced the plea. The defendant admitted his involvement to

the police and cooperated with them. Further, the defendant was the supplier for individuals involved in this drug ring, who agreed to cooperate with the Commonwealth as part of their plea agreement. For examples, see Commonwealth v. Samuel Sanders, No. 99-11,624; Commonwealth v. Lori Rooney, No. 99-11,478. Finally, the defendant indicated on his written guilty plea colloquy that he was pleading guilty because of the plea agreement and because he was guilty.

The Court notes that the defense attempts to reserve the right to raise additional issues after the transcripts have been reproduced. The court reporters completed the transcripts and filed them of record on August 7, 2000 and September 29, 2000. These transcripts have been in the file since then. The defense has had ample time to obtain and review these transcripts. Therefore, any additional issues should be deemed waived.

DATE: _____

By The Court,

Kenneth D. Brown, J.

cc: Kenneth Osokow, Esquire
Matthew Ziegler, Esquire
Law Clerk
Superior Court (original & 1)
Work file