

**IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
	:	
v.	:	No: 99-10,902
	:	
GEORGE COX MACON, JR.,	:	
Defendant	:	
	:	

OPINION AND ORDER

Before the Court is Defendant's Petition filed under the Pennsylvania Post-Conviction Relief Act alleging the ineffectiveness of his trial counsel. Defendant was charged on June 2, 1999 with multiple drug-related offenses and eventually entered a guilty plea on March 16, 2000 to the offenses of conspiracy and delivery of a controlled substance (3.4 grams of cocaine). He was sentenced on September 14, 2000 to a term of incarceration of not less than 18 months nor more than 36 months in a state correctional facility followed by a two year consecutive term of probation. He was also made Boot Camp eligible. Defendant then made a timely appeal of his sentence, but failed to file a Pa.R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal, resulting in the Court issuing an opinion that all appellate issues sought to be raised by the Defendant were waived under Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998). New counsel was then appointed to represent Defendant and file an appellate brief on his behalf. The Pennsylvania Superior Court issued an Opinion on November 28, 2001 denying the appeal and finding that Defendant did not meet his burden of proof in showing that

trial counsel was ineffective. The instant petition under the Post-Conviction Relief Act (PCRA) was filed on July 30, 2002 and another attorney was appointed to represent Defendant's interests. A conference was held on Defendant's petition on October 14, 2002, at which time the Court permitted Defendant 30 days to file an amended PCRA petition. No such amended petition has been filed. An additional conference was held on January 29, 2003. At that time, Defendant's counsel represented his assertions as follows:

1. Trial counsel was ineffective for his failure to investigate Defendant's case, file motions on Defendant's behalf, meet with Defendant and explore an entrapment defense for Defendant.
2. Defendant's guilty plea was improperly induced because of his trial counsel's ineffective assistance.
3. Appellate counsel did not consult with Defendant prior to filing an Anders brief with the Pennsylvania Superior Court.
4. The plea bargain was not honored by the sentencing Court.

These assertions will be addressed in reverse order. Initially, this Court notes that the sentencing Court in this case did, in fact, sentence Defendant in accordance with the plea agreement which he had negotiated with the Commonwealth. The guilty plea colloquy submitted by Defendant at the time of the entry of his guilty plea shows that he had negotiated a plea agreement for an "18 month minimum sentence BC", which stands for a minimum sentence of incarceration of no more than 18 months, with BC presumably standing for Boot Camp. The sentencing Order in Defendant's case specifically provides that he is to

serve an indeterminate sentence “the minimum of which shall be eighteen (18) months and the maximum of which shall be thirty-six (36) months,” followed by two years of probation supervision. Additionally, Defendant was specifically made eligible for the Boot Camp program. It should be noted that at the time of sentencing Defendant was aware that because of injuries he suffered in an automobile accident in the months between his guilty plea and his sentencing that it was very unlikely that he would be placed in the Boot Camp program. See Transcript of Sentencing, 9/14/00, pp. 3, 7. Defendant nevertheless requested that the sentencing hearing go forward and in fact participated in the hearing. The sentence he received followed the proposed sentence set forth in his plea agreement.

Defendant asserts that appellate counsel failed to consult him prior to filing an Anders brief in his case so that Defendant could pursue issues that he wished to have raised on appeal. This is a factually incorrect assertion. In Anders v. California, 386 U.S. 738; 87 S. Ct. 1396; 18 L. Ed. 2d 493 (1967) the United States Supreme Court has held that where appellate counsel determined that the appeal is frivolous, counsel need merely to certify that the record had been reviewed and presented no colorable grounds for reversal. Such a brief has come to be known as an Anders brief. In this case, Appellate counsel did not in fact file an Anders brief but instead set forth various issues for the Pennsylvania Superior Court in an advocate’s brief. The Superior Court deemed some of those issues waived because of appellate counsel’s failure to file a statement of reasons relied upon for allowance of appeal as required by Pa.R.A.P. 2119(f), but addressed Defendant’s

allegation of ineffective assistance of trial counsel, denying his appeal. Defendant makes no assertion as to any issues he wished to raise with the Superior Court that were not in fact previously raised.

Finally, Defendant contends that trial counsel was ineffective for his failure to investigate Defendant's case, file motions on Defendant's behalf, meet with Defendant and explore an entrapment defense for Defendant. He also claims that his guilty plea was improperly induced because of his trial counsel's ineffective assistance. However, Defendant does not specifically allege what prejudice came to him because of counsel's failure to prepare as Defendant would have wished, nor does he explain why or how his plea was improperly induced because of these actions. Moreover, the issue of ineffective assistance of counsel has already been addressed on direct appeal in Defendant's case by the Pennsylvania Superior Court. As explained by the Superior Court opinion filed November 28, 2001, in reviewing a claim for ineffective assistance of counsel, the attorney is presumed to be effective and the burden rests upon the movant to prove otherwise. Opinion of the Superior Court, 11/28/01, pp. 3, 4, citing Commonwealth v. McCauley, 2001 Pa.Super. LEXIS 2749, at **2 (Pa.Super. October 19, 2001 (citing Commonwealth v. Cox, 556 Pa. 368, 382, 728 A.2d 923, 929 (1999), cert. den., 150 L.Ed.2d 233, ___ U.S. ___, 121 S.Ct. 2246 (2001))). Additionally, "to overcome the presumption an appellant must show that: "(1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for the action or omission in question; and (3) but for counsel's ineffectiveness, the outcome of the trial would have been different." Opinion of the Superior Court at 4, citing McCauley, id., at **3 citing

Commonwealth v. Tigney, 730 A.2d 968 (Pa.Super. 1999). The Superior Court went on to say in Defendant's case that

claims of counsel's ineffectiveness in connection with a guilty plea will provide a basis for relief only if the ineffectiveness caused an involuntary or unknowing plea. . . . The law does not require that appellant be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [appellant's] decision to plead guilty be knowingly, voluntarily and intelligently made.

Id., page 4, citing McCauley, id., citing Commonwealth v. Hallock, 772 A.2d 180, 182 (Pa.Super. 1998). The appeals court in this case has already made a decision that there is nothing in the record to support a claim that Defendant's guilty plea was not made in a knowing, voluntary and intelligent manner. This Court finds that Defendant has made no additional showing of evidence which supports such a claim and that therefore his allegation that he is entitled to relief because of the ineffectiveness of trial counsel will again be denied.

ORDER

Accordingly, this ____ day of February, 2003, the Court gives Notice to the parties of its intention to DISMISS Defendant's PCRA petition without further hearing. Pursuant to Pa.R.Crim.P. 907, Defendant is given twenty (20) days from this date to respond to the proposed dismissal of his petition. If no response is received from Defendant within the twenty (20) day period, then this Court will enter a further, final Order dismissing Defendant's PCRA petition.

By the Court,

_____ J.

xc: James Protasio, Esquire
District Attorney (KO)
Judges
Hon. Nancy L. Butts
Court Administrator
Diane L. Turner, Esquire
Gary Weber, Esquire