

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 97-12,027
:
:
vs. : CRIMINAL DIVISION
:
:
HILTON MINCY, :
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 Orders issued January 6, 2003, November 25, 2002 and June 26, 2002. The reasons for the Court's denial of Defendant's Post Conviction Relief Act (PCRA) petition can be found in the Order docketed January 6, 2003 and the Opinion accompanying the Order docketed June 26, 2002.

There are three issues in Defendant's concise statement of matters complained of on appeal, which were not addressed in the Orders listed above. These issues are contained in paragraphs 2, 3 and 4k of Defendant's concise statement.

Issues 2 and 3 relate to a motion for reconsideration of his sentence, which Defendant allegedly

wanted filed, but either was not accepted by the Court or not timely filed by counsel. The Court did not address these issues previously because they were not raised in Defendant's PCRA petitions.¹ Therefore, these issues are waived. They also are waived because they could have been raised on direct appeal, but were not. 42 Pa.C.S.A. §9544(b); Commonwealth v. McGriff, 432 Pa.Super. 467, 638 A.2d 1032, 1035 (1994). Moreover, the Court does not believe these claims are cognizable under the PCRA, because they do not challenge the legality Defendant's sentence or involve the truth-determining process. 42 Pa.C.S.A. §9543(a)(2); Commonwealth v. Gaerttner, 437 Pa.Super. 84, 649 A.2d 139, 142 (1994), appeal denied 540 Pa. 617, 657 A.2d 488 (1995); Commonwealth v. Lewis, 430 Pa.Super. 336, 634 A.2d 633, 636 (1993), appeal denied 539 Pa. 689, 653 A.2d 1228 (1994).

Even assuming for the sake of argument that Defendant is challenging the legality of his sentence, such a claim is without merit. The Court imposed a sentence of 17 to 40 years on Defendant's conviction for attempted homicide, which caused serious bodily injury to Albert

¹ Although Defendant asserted in his pro se petition that counsel was ineffective for failing to file motions on defendant's behalf that had been requested, the motions listed parenthetically were "discovery, motion to dismiss evidence/sever counts move trial." Defendant never mentioned a motion for reconsideration. Furthermore, when counsel amended Defendant's pro se petition, he did not include any claim of ineffectiveness related to

Johnson. The remaining convictions merged for sentencing purposes. The statutory maximum sentence for attempted murder where serious bodily injury is sustained is 40 years. 18 Pa.C.S.A. §1102(c). Therefore, Defendant's sentence is not illegal.

In paragraph 4k of his concise statement, Defendant asserts trial counsel was ineffective for failing to "discuss the plea offer that the District Attorney's office made of 5 to 10 years with the Defendant before proceeding to trial and in telling the Defendant that he would only get 6 to 12 years even if he lost, when he actually was sentenced to 17 to 40 years." While Defendant raised this issue in his pro se petition, albeit in a somewhat different form (see footnote 2 infra.), it was not contained in the amended petition filed by counsel. In all candor, the Court believed this issue was abandoned when it was not listed in the amended petition. Nevertheless, the Court believes this issue is waived. The issue alleges ineffectiveness of trial counsel. Defendant had different counsel for his direct appeal. Certainly at the time of his appeal, Defendant realized he could get more than 6 to 12 years since the Court imposed a sentence of 17 to 40 years. This issue was not raised on appeal. Defendant did not

a failure to file a motion for reconsideration.

assert in his pro se petition that appellate counsel was ineffective in any respect. Although counsel raised various claims of ineffectiveness of appellate counsel in the amended PCRA petition, this issue was not one of them. By failing to raise this issue on appeal and/or failing to raise this issue as a layered ineffectiveness claim in the pro se or amended PCRA petitions, the defense waived this issue. Although this issue is raised as a layered ineffectiveness claim in the concise statement of matters complained of on appeal, Defendant cannot raise an issue on appeal that was not properly raised at the trial court level.

The Court also does not believe Defendant could prevail on this claim. When Defendant's pro se petition is read closely, it does not allege counsel failed to communicate the plea offer to Defendant, but rather alleges counsel failed to communicate Defendant's counter-offer to plead "no contest" to the District Attorney's office.² To establish prejudice from counsel's alleged failure, Defendant would need to show the Commonwealth would have

² Defendant's pro se petition states: "Lycoming County District Attorney's office offered plea agreement of 5 to 10 years, defendant wished to take plea bargain only on grounds to plea 'no contest' due to counsels ethics and incompetence. Trial counsel refused to relay message and intentionally mislead defendant by stating he could only get 6 to 12 years if he lost trial, and that if all witnesses were introduced, defendant could possibly

accepted a "no contest" plea. This would require testimony from someone in the District Attorney's office, presumably the assistant district attorney handling his case. In order for testimony to be admissible at an evidentiary hearing, Defendant must file a certification stating the name, address, date of birth and substance of the witness's testimony. 42 Pa.C.S.A. §9545(d)(1). No certifications were filed on this issue.

DATE: _____

By The Court,

Kenneth D. Brown, Judge

cc: District Attorney
Gregory Stapp, Esquire
Law Clerk
Gary Weber, Esquire (Lycoming Reporter)

get favorable verdict."