

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

COMMONWEALTH

v.

**JOHN COOKE,
Defendant**

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No.: 98-12,087

OPINION AND ORDER

Before the Court is Defendant's Petition under the Post-Conviction Relief Act (PCRA) filed on October 9, 2002. The procedural history in this case is as follows:

Defendant pleaded guilty to Robbery, Kidnapping, Conspiracy, Receiving Stolen Property, and Robbery of a Motor Vehicle and was sentenced by the Court to 9 to 20 years imprisonment on June 22, 1999. A direct appeal was filed, but defense counsel failed to file a Pa.R.A.P. 1925(b) statement. A panel of the Superior Court found all issues waived and affirmed Defendant's sentence on July 6, 2000. Defendant filed a pro se PCRA Petition on January 9, 2001 and Matthew Zeigler, Esq., was appointed conflict counsel. The PCRA Petition was granted on April 5, 2001 and Defendant was given 30 days to file an appeal nunc pro tunc. Defendant filed the appeal on May 2, 2001. The Superior Court affirmed his sentence on July 19, 2002. Appellant requested that Attorney Zeigler appeal his case to the next level if he was denied by the Superior Court. During the period of time Defendant could have appealed his case to the

Supreme Court, Attorney Zeigler's contract with the County expired and Diane Turner, Esq., Attorney Zeigler's partner at the time, adopted Defendant's case. Not until August 20, 2002 did Attorney Turner inform Defendant that he no longer had a right to appointed counsel and that her firm was discontinuing representation. Letter dated 8/20/02. Defendant again petitioned for post-conviction relief on October 9, 2002 arguing that counsel was ineffective for failing to notify him of the denial of his appeal in a timely manner, thereby costing him the opportunity to appeal to the Supreme Court. The Court denied Defendant's Petition. Defendant appealed that denial on November 21, 2002. Based upon new case law handed down after this Court's decision was rendered, the Superior Court vacated this Court's Order denying Defendant's Petition and remanded the case for an evidentiary hearing. The purpose of the hearing was to determine whether Attorney Zeigler provided Defendant with adequate and timely consultation before the filing deadline regarding Defendant's right to file a petition for allowance of appeal with the Supreme Court. The hearing was also to determine whether Defendant asked counsel to petition for allocatur and, if so, whether counsel's failure to file the petition was justified. The evidentiary hearing was held on February 2, 2005.

Defendant's right to file an appeal should be reinstated only if counsel was ineffective for failing to file the Petition for Allowance of Appeal (PAA). The Supreme Court has held that a petitioner has a right to file a PAA, "provided that appellate counsel believes that the claims that a petitioner would raise . . . would not be completely frivolous." *Commonwealth v. Ellison*, 2004 Pa.Super 203, 851 A.2d 977, 979 (2004); citing *Commonwealth v. Liebel*, 573 Pa. 375, 825 A.2d 630 (2003). "The

only things a petitioner needs to show are that he asked his attorney to file a PAA and there is some chance that the Supreme Court would have taken his case, i.e., his claims are not completely frivolous.” 851 A.2d at 981.

From the stipulated evidence at the hearing, it is apparent that the Defendant did in fact ask counsel to petition for allocatur, counsel did not do so, and that counsel’s consultation with Defendant was too late to allow him to file. However, counsel’s failure to file was justified if the claims Defendant wanted to raise were completely frivolous. In his appeal, Defendant claims that (1) his sentence was manifestly excessive, and that (2) his guilty plea was improperly induced and therefore not knowing and voluntary. The Superior Court held that the first claim was waived for failure to include it in a post-sentence motion or the Court-ordered 1925(b) statement. The second claim was found meritless; that the Defendant was sufficiently aware of the nature of the offenses and the maximum potential sentence as evidenced by the trial court’s colloquy and Defendant’s own brief to the Superior Court.

It is the finding of this Court, based on the standard set forth in *Liebel* and *Ellison*, that the Defendant’s second claim cannot be said to be completely frivolous. Those cases made clear that a Petitioner need not prove that the Supreme Court would have granted review, but only that there existed *some chance* of review. The claim that Defendant’s guilty plea was not knowing and voluntary met this standard. Knowing and voluntary pleas and effective counsel for criminal defendants are important issues that, as presented, had at least some chance of review. The Supreme Court could conceivably choose to independently evaluate the transcripts and weigh the evidence to ensure the proper application of these safeguards. Because Defendant’s claim would

have stood some chance of Supreme Court review it was not completely frivolous. Therefore, the failure of counsel to file the PAA in the above-captioned case was not justified, and the Court will grant Defendant's right to file an appeal nunc pro tunc.

ORDER

AND NOW, this _____ day of February, 2005, the Court hereby GRANTS the Defendant's Right to File a Petition for Allowance of Appeal in the above-captioned case nunc pro tunc to the Supreme Court of this Commonwealth. The Defendant is granted 30 days from the date of this Order to file the appeal.

By the Court,

Nancy L. Butts, Judge

xc: Eric Linhardt, Esquire
District Attorney (KO)
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges