

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 1908-2005
	:
TIMOTHY PERRY,	:
	:
Defendant	: 1925(a) OPINION

Date: April 3, 2008

**OPINION IN SUPPORT OF THE ORDER OF SEPTEMBER 12, 2006 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant Timothy Perry, (hereafter “Perry”), has appealed from this Court’s Order of September 12, 2006 in which he was sentenced to serve a period of incarceration in the State Correctional Institution for a minimum of twenty-four months and the maximum of forty-eight months. The Court sentenced Perry following a guilty plea and sentencing hearing held on September 12, 2006. On appeal, Perry asserts that his trial counsel was ineffective for failing to file a motion to suppress evidence obtained from an allegedly invalid warrant. The Court asserts there was no factual or legal basis for Perry’s trial counsel to file such a motion and therefore Perry does not have a valid claim for ineffectiveness of counsel and his appeal should be denied.

On December 12, 2005, Perry was arrested at his apartment on 427 W. 4th Street in Williamsport by Deputy Marshals from the U.S. Marshal’s Service and Officer Dustin Kreitz of the Williamsport Bureau of Police pursuant to a warrant issued by New Your State Parole for absconding from parole. The Deputy Marshals were the first to arrive on the scene and subsequently called for assistance from Officer Krietz. Upon Krietz’s arrival, a search was conducted on Perry incident to his arrest which uncovered 7 bags of suspected heroin and

approximately \$1,000.00. Perry verbally waived his Miranda Rights and told the officers that he had additional heroin in his nightstand. Perry and the other lessee to the apartment gave consent to the officers for the premises to be searched. The search uncovered an additional 129 bags of suspected heroin as well as \$200.00 cash and a .45 cal. Semi-automatic handgun. Perry was then transported to the Williamsport Bureau of Police Headquarters where he waived his Miranda Rights during a video-taped interview and agreed to give officers a statement. Perry stated that he possessed the heroin with intent to sell it for profit and that he owned the handgun found in his apartment.

On December 14, 2005, Perry was charged with the following counts: Count 1, Possession with Intent to Deliver a Controlled Substance, heroin, under 35 Pa. C.S. § 780-113(a)(30); Count 2, Possession with Intent to Deliver a Controlled Substance, heroin, under 35 Pa. C.S. § 780-139(A)(16); Count 3, Possession of Drug Paraphernalia, under 35 Pa. C.S. § 780-113(a)(32); and Count 4, Persons not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms under 18 Pa.C.S.A. § 6105(c)(1). On March 17, 2006, this Court entered an order scheduling this case for pre-trial on April 6, 2006 as Perry had failed to tender his guilty plea despite having twice scheduled a guilty plea. On June 12, 2006 Defense counsel was granted a continuance due to illness. On August 3, 2006 the case was continued on the Commonwealth's motion due to an unavailable police witness. On August 7, 2006 Defense counsel filed a Motion to Suppress which was denied as untimely by the Honorable Dudley Anderson in an order entered September 8, 2006.

On September 12, 2006, Perry entered a guilty plea and was sentenced on the above listed charges under Count 1, Possession with Intent to Deliver in violation of 35 § 780-113(a)(30), to a term of state incarceration for a minimum of 24 months and a maximum of 48

months, as well as a \$1000.00 fine. On December 4, 2006 Perry filed a Petition under the Post Conviction Relief Act. On December 11, 2006 this Court entered an order appointing Perry counsel on his first petition and scheduling a hearing on the matter for February 13, 2007. The appointed counsel was from specially employed conflicts counsel, or Perry had been represented by the Lycoming County Public Defenders Office throughout his prosecution. Due to several conflicts attorneys' leaving their positions as such, the case was continued until an Amended Petition for Post Conviction Relief was filed on May 17, 2007 by new conflicts counsel. Subsequent to this amended petition being filed, another new conflicts counsel was appointed. The scheduled hearing was recessed for a period of 30 days for the new counsel to meet with Perry. On July 31, 2007, Andrea Pulizzi, Perry's current conflicts counsel filed a second Amended Petition for Post Conviction Relief. On September 11, 2007 an order was entered following an on the record conference where the Court found, over objection by the Commonwealth, sufficient grounds alleged by Perry that his trial counsel, James Cleland, Esquire was ineffective for failing to file a timely appeal and ineffective for failing to file a motion to suppress. Accordingly the Court granted Perry the right to an evidentiary hearing on these issues.

On November 8, 2007, this Court held a PCRA evidentiary hearing. At the conclusion of the hearing the Court found that Attorney Cleland was ineffective for failing to file a timely appeal and granted Perry the right to appeal his case nunc pro tunc to the Superior Court. On the issue of ineffectiveness for failure to file a timely suppression motion during the original trial, the Court found Perry's claim without factual or legal basis. The Court concluded after the evidentiary hearing that the U.S. Marshals possessed valid warrants to conduct the search of Perry's apartment. Due to the Court's finding that the warrants were valid, the Court held trial

counsel was not ineffective for failing to file a suppression motion because there was no legal basis to file such a motion, and if the motion had been filed under the basis given by Perry, it would have been denied.

On December 6, 2007, Perry filed a Notice of Appeal from the September 12, 2006 order. On December 7, 2007, this Court filed an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Perry to file a concise statement of matters complained of an appeal within fourteen days of the order. On December 28, 2007, Perry filed his Concise Statement of Matters Complained of on Appeal.

In his statement of matters, Perry raises the following issues:

- (1) Trial counsel failed to provide effective assistance of counsel by failing to file a Motion to Suppress. Specifically Appellant submits:
 - (a) That trial counsel failing to file a Motion to Suppress evidence obtained from the residence of Appellant at the time of his arrest as the U.S. Marshals Office did not possess a valid warrant to arrest Appellant and therefore did not have the authority to search the residence.

Perry's Concise Statement of Matters Complained of on Appeal Pursuant to Rule 1925(B) Order.

Perry's claim that trial counsel was ineffective for failing to file a motion to suppress evidence was addressed at the PCRA evidentiary hearing held on November 8, 2007. The Court relies on this order and reasons stated on the record on that date during the hearing to support its ruling that there was no factual basis for Mr. Cleland to file a suppression motion as the U.S. Marshals had a valid warrant to search Perry's residence. See N.T. November 8, 2007, pp. 18, 21-23, 25 and 28. The Court noted in its order that had such a motion been filed by Mr. Cleland, given the facts elicited at the hearing, it would have been denied as frivolous. This Court recognizes the issue is before the Superior Court to decide and the order of November 8, 2007 is advisory on this issue.

The sentence of September 12, 2006 should be upheld as Perry's trial counsel was not ineffective for refusing to file a motion to suppress when there was no legal basis to file one. Accordingly, Perry's appeal should be denied and the order of September 12, 2006 affirmed.

BY THE COURT,

William S. Kieser, Judge

cc: Andrea Pulizzi, Esquire
District Attorney
Terra Girolimon, Esquire (Law Clerk)
Judges
Gary Weber, Esquire