

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	No. 851-2008
v.	:	
	:	CRIMINAL DIVISION
GRADY LEE NEAL,	:	PCRA
Defendant	:	

OPINION AND ORDER

On March 19, 2010, Defendant filed a *Pro Se* Petition for Relief under the Post Conviction Relief Act (PCRA). Conflicts Counsel James Protasio, Esq. was appointed to represent the Defendant. On June 28, 2010, a Court Conference was held in this matter.

Background

On January 15, 2009, the Defendant was found guilty of the following: one count of Possession With Intent to Deliver a Controlled Substance, powder cocaine; one count of Possession With Intent to Deliver a Controlled Substance, crack cocaine; two counts of Possession With Intent to Deliver a Controlled Substance, marijuana; Possession of a Controlled Substance, cocaine; Possession of a Controlled Substance, crack cocaine; Possession of a Controlled Substance, marijuana; Possession of Drug Paraphernalia; False Identification to Law Enforcement Authorities; Driving While Operating Privilege is Suspended. The Defendant was initially sentenced on this case on February 17, 2009, by the Honorable Kenneth D. Brown to an aggregate term of five to ten years to be served in a state correctional institution, with a consecutive one year period of probation. However, on July 1, 2009, Judge Brown amended the Defendant's Sentencing Order to suspend count three, Possession With Intent to Deliver a Controlled Substance, marijuana. Under the amended sentence, the aggregate term imposed

against the Defendant was a minimum of four years and a maximum of eight years incarceration in a state correctional institution, with three years consecutive probation to be supervised by the Pennsylvania Board of Probation and Parole.

In response to Motions filed by the Defendant, on July 1, 2009, Judge Brown denied the Defendant's Post Sentence Motion with respect to the Defendant's claim that the Court erred in denying his Suppression Motion. Judge Brown also granted in part the Defendant's request for a Reconsideration of Sentence, the result of which is reflected in the Amended Sentencing Order outlined above. Also on July 1, 2009, this Court denied the Defendant's Post Sentence Motion which claimed: 1) there was insufficient evidence to sustain the jury's verdict; 2) the jury's verdict was against the weight of the evidence.

On July 8, 2009, the Defendant filed a notice of appeal. The Pennsylvania Superior Court dismissed the appeal on October 22, 2009, for failure to file a brief. The Defendant's sentence became final on November 22, 2009. Therefore, the Defendant's PCRA Petition was timely filed.

Discussion

The Defendant alleges in his PCRA Petition that his trial counsel was ineffective for failing to file a brief on appeal.

In order to establish a claim for ineffective assistance of counsel, a petitioner must establish:

(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (2009). See Commonwealth v. Pierce, 527

A.2d 973 (1987).

The Pennsylvania Constitution guarantees a direct appeal as of right. See Article V, Section 9 of the Pennsylvania Constitution. As such the “failure to file or perfect such an appeal results in a denial so fundamental as to constitute prejudice per se.” Commonwealth v. Lantzy, 736 A.2d 564, 571 (Pa. 1999). A finding that counsel’s actions were prejudicial per se is recognized by the courts because there are “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” United States v. Cronin, 466 U.S. 648, 658 (1984).

Although the facts of Commonwealth v. Reed, 971 A.2d 1216 (2009) are distinguishable from the facts of this case, the reasoning of the Reed Court in finding that trial counsel’s filing of a deficient brief was not prejudicial per se is pertinent. The Reed Court reasoned that:

Reed’s direct appeal counsel’s conduct in the instant case did not deprive Reed of his constitutional right to appeal....Although the Superior Court in Reed I opined that counsel’s failure to provide appropriate citation to authority and a copy of the notes of testimony resulted in a waiver of Reed’s argument, the court did not quash Reed’s appeal....Indeed, the issues apparently were sufficiently presented to allow the court to address the merits of Reed’s arguments, as the court indicated that it reviewed the evidence and the record.

Reed at 1226. In the Defendant’s case, trial counsel failed to file a brief at all, which resulted in a dismissal of the Defendant’s appeal. As such, the Defendant was deprived of his constitutional right to appeal. The Court believes that trial counsel’s failure to file a brief creates a presumption of prejudice. Therefore, the Court finds the Defendant is entitled to reinstatement of his appellate rights *nunc pro tunc*.

ORDER

AND NOW, this _____ day of July, 2010, upon consideration of the Defendant's Petition for Post Conviction Collateral Relief, with no objection by the Commonwealth, it is **ORDERED** and **DIRECTED** that the Defendant's PCRA Petition is **GRANTED** thereby reinstating his appellate rights, *nunc pro tunc*. It is further **ORDERED** and **DIRECTED** that the Defendant file his Notice of Appeal no later than thirty days (30) from the date of this Order.

By The Court,

Nancy L. Butts, President Judge

xc: Ken A. Osokow, Esq.
James R. Protasio, Esq.
Amanda B. Browning, Esq. (Law Clerk)
Gary L. Weber, Esq. (LLA)