

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. 1266-2009
	:	CRIMINAL DIVISION
RICHARD L. BOWMAN,	:	
Defendant	:	PCRA

OPINION AND ORDER

On December 22, 2010, the Defendant filed a *Pro Se* Post Conviction Relief Act (PCRA) Petition. Lori Rexroth, Esq., Court appointed counsel for the Defendant, filed a Third Amended Motion for Post Conviction Collateral Relief. For the following reasons, the Court finds that the Defendant does not raise a genuine issue concerning any material fact and therefore no purpose would be served by any further proceedings.

Background

Richard Bowman (Defendant) pled guilty to Criminal Trespass, a felony of the second degree on December 16, 2009. On the same day, Defendant was sentenced to twenty-four (24) months to ten (10) years in a State Correctional Institution. On December 22, 2010, the Defendant filed a *pro se* PCRA Petition. Joel McDermott, Esquire was appointed to represent the Defendant in his Petition. Attorney McDermott filed a First Amended PCRA Petition on February 4, 2011. On June 2, 2011, Attorney McDermott filed a Petition for Permission to Withdraw as Counsel. On September 9, 2011, the Court Denied Attorney McDermott's Petition because he did not address all the allegations raised by the Defendant in his Petition. Further, the Court re-assigned the Defendant's case to Lori Rexroth, Esquire.

On November 8, 2011, Attorney Rexroth filed the Defendant's Second Amended Motion for Post Conviction Collateral Relief. After a Court Conference on March 5, 2012, the Court ordered the Defendant to file a certified statement in compliance with Pa.R.C.P. 902(14) in support of the allegations raised in the Petition. On April 5, 2012, the Defendant filed a verified statement. On the same day, the Defendant filed a Third Amended Motion for Post Conviction Collateral Relief. On June 12, 2012, the Court had a Conference on the Defendant's PCRA Petition.

Discussion

The Defendant alleges four (4) issues in his Third Amended Motion for Post Conviction Collateral Relief: 1) the Defendant was not properly advised by the trial court of his rights to file post-sentencing motions and to file an appeal, nor was he advised of the time frames in which his post-sentencing motions and appeals needed to be filed; 2) the Trial Judge should have recused herself because knowledge she gained as a former Assistant District Attorney when she prosecuted the Defendant on a prior case; 3) trial counsel provided ineffective assistance of counsel by failing to fully explore defenses to the charges because the Defendant was also a resident of the apartment he is accused of trespassing; and 4) trial counsel provided ineffective assistance of counsel by failing to file timely post-sentence motions and/or timely appeal to the Pennsylvania Superior Court. For the following reasons, the Court finds that the Defendant cannot seek relief under the PCRA.

The Defendant was not properly advised by the trial court of his rights to file post-sentencing motions and to file an appeal, nor was he advised of the time frames in which his post-sentencing motions and appeals needed to be filed

The Defendant contends that this Court did not advise him of his rights to file post-sentence motions and an appeal of the sentence. The judge shall determine on the record that the “defendant has been advised of the following: (a) of the right to file a post-sentence motion and to appeal, of the time within which the defendant must exercise those rights, and of the right to assistance of counsel in the preparation of the motion and appeal.” Pa.R.Crim.P. 704(C)(3). A breakdown in the court system occurs when the trial court fails to inform a defendant of the time requirements for filing a notice of appeal. Commonwealth v. Patterson, 940 A.2d 493 (Pa. Super. 2007). Untimely filings by a defendant will be excused when Pa.R.Crim.P. 704 has not been complied with. Commonwealth v. Khalil, 806 A.2d 415, 421 (Pa. Super. 2002).

Here, there is no record that this Court informed the Defendant of his right to file a post-sentence motion and to appeal. Consequently, this Court is willing to reinstate the appeal rights of the Defendant so that any untimely filings will be excused. This Court, however, was informed by Defendant’s PCRA counsel at conference that the Defendant does not want his appellate rights reinstated but another grant of relief. The Defendant is only entitled to the reinstatement of his appellate rights, therefore the Court will not grant the Defendant’s request for any other form of relief. Also, because this Court did not grant Defendant’s right to file a direct appeal *nunc pro tunc*, we are able to address Defendant’s other claims. Commonwealth v. Liston, 977 A.2d 1089 (Pa. 2009); see also Commonwealth v. Jones, 992 A.2d 884 (Pa. 2010).

The Trial Judge should have recused herself because knowledge she gained as a former Assistant District Attorney when she prosecuted the Defendant on a prior case

The Defendant alleges that the Trial Judge should have recused herself. In general, a motion for recusal is properly directed to and decided by the jurist whose participation the moving party is challenging. Commonwealth v. Travaglia, 661 A.2d 352, 370 (Pa. 1995). In filing a motion for recusal, the moving party must allege facts tending to show bias, interest or other disqualifying factors. Reilly v. Southeastern Pa. Transp. Auth., 489 A.2d 1291, 1300 (Pa. 1985). Once the judge decides whether to preside over the case, that decision is “final and the cause must proceed.” Id. In reviewing a lower court decision, the appellate court must determine whether the judge abused their discretion. The burden is placed on the party requesting recusal to establish that the judge abused discretion. Commonwealth v. White, 734 A.2d 374, 384 (Pa. 1999).

In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make.

Id. (citing Goodheart v. Casey, 565 A.2d 757, 764 (Pa. 1989)).

Here, the Defendant never made a recusal request during or prior to his guilty plea and sentencing. In fact, the first time the Defendant raised an issue about recusal was in his PCRA Petition. “Once the trial is completed with the entry of a verdict, a party is deemed to have waived his right to have a judge disqualified, and if he has waived that issue, he cannot be heard to complain following an unfavorable result.” Reilly v. Southeastern Pa. Transp. Auth., 489 A.2d 1291, 1300 (Pa. 1985); see also M & D Auto Body v. Workmen’s Compensation Appeal Bd., 599 A.2d 1016 (Pa. Commw. 1991); see also Commonwealth v. Childress, 680 A.2d 1184

(Pa. Super. 1996). Further, this Court is unaware of any conflict with the Defendant and therefore believes this issue has no merit.

Trial counsel provided ineffective assistance of counsel by failing to fully explore defenses to the charges because the Defendant was also a resident of the apartment he is accused of trespassing

The Defendant contends that his trial counsel was ineffective because they failed to fully explore the defense that he was actually a resident of the apartment he was accused of trespassing. To make a claim for ineffective assistance of counsel, a defendant must prove the following: (1) an underlying claim of arguable merit; (2) no reasonable basis for counsel's act or omission; and (3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007) (citing Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper, 941 A.2d at 664 (citing Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)). Further, Counsel is presumed to have been effective. Id.

A person commits the offense of Criminal Trespass if “knowing that he is not licensed or privileged to do so, he breaks into any building or occupied structure or separately secured or occupied portion thereof.” 18 Pa.C.S. § 3503(a)(1)(ii). A possible defense to Criminal Trespass is that “the actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain.” 18 Pa.C.S. § 3503(c)(3). At Defendant’s sentencing, the Defendant admitted to the following facts:

DEFENDANT: No, what happened is – we were at, um – me and my girlfriend at the time, Samantha, we have a relationship and, um, call (inaudible) the course that she moved in there by herself –

COURT: Okay.

DEFENDANT: -- because it was a Penn Vale Housing Projects, of course, my name can't be on the lease because my prior records but --

COURT: The allegations is you forced your way through the back door --

DEFENDANT: Yes --

COURT: -- and into her apartment.

DEFENDANT: -- and that's what I did.

COURT: Okay.

DEFENDANT: Um, we -- I had -- we had been arguing that day and I was drinking heavily, using drugs and -- whatever -- and came in the house, went outside to smoke a cigarette. She locked me back out. I kicked the door in. I -- I damaged the door and --

COURT: And that you said -- go ahead.

DEFENDANT: It was (inaudible) you know, just I scared the daylights out of her and, you know, I just couldn't take it back. You know what I Mean? So I'm pleading guilty to that today because that's what I did.

COURT: Because it looks like you told the state police that you weren't thinking clearly and you just lost it.

DEFENDANT: I just -- I just lost -- I mean she was the most important thing in my life at that time and I saw the fear in her eyes. You know, I still love her today but, you know what I mean. It just -- I know -- I mean I'm sure you got my letter and everything. I got a drug and alcohol problem --

COURT: Uh-huh.

DEFENDANT: -- that needs to be addressed.

COURT: Okay.

DEFENDANT: Going on for over 20 years.

COURT: Okay, I know there is a letter in here. Commonwealth?

COMMONWEALTH: The Defendant initially – or, um, told the State Police – I’m sorry – initially reported to 1408 Randall Circle for the report of a burglary in process – in progress. They knocked on the door and announced themselves, the State Police. They heard a female scream. She came running from the house. The victim reported that the Defendant had forced his way through the back door and entered her apartment without permission. She alleged that he had yelled at her, grabbed her, choked her, pulled her hair, and put his hand over her mouth so that she couldn’t breathe and threatened to kill her.

The Defendant was taken into custody and Mirandized and indicated to police that he was having problems. That he had been drinking earlier. That he did go to her house and force his way in through the back door. Defendant reported that he did, in fact, grab the victim around her face and mouth, but only in an attempt to calm her down. He acknowledged that he was nothing thinking clearly and had lost it.

From the Defendant’s statements it is clear that he was not on the lease of the residence nor was he licensed to enter. The Defendant also admitted to breaking into the house by kicking a back door open and attacking the resident. A defense of consent would not be successful because the Defendant was locked out of the apartment by the resident. It is not reasonable for the Defendant to believe he had consent to enter the premises. Therefore, any claim by the Defendant that he was privileged to enter the apartment has no merit and would not have resulted in a different outcome of the case.

In addition, “[w]here the record clearly demonstrates that a guilty plea colloquy is conducted, during which it became obvious the defendant understood the nature of the charges against him, the voluntariness of the plea is established.” Commonwealth v. Lewis, 634 A.2d 633 (Pa. Super. 1993). The entry of a plea of guilty “usually constitutes a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of plea.” Commonwealth v. Coles, 530 A.2d 453, 457 (Pa. Super. 1987); Commonwealth v. Moyer, 444 A.2d 101 (1982); Commonwealth v. Casner, 461 A.2d 324 (1983).

Here, Defendant pled guilty to Criminal Trespass. Defendant completed and signed a guilty plea colloquy. On December 16, 2009, Defendant provided a factual basis for the charges

against him. Defendant also indicated that he was pleading guilty on his own freewill, that it was his ultimate decision, and that he understood the plea agreement. The Court believes the record is clear that the Defendant entered a guilty plea voluntarily. In doing so, Defendant waived all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of the plea. Therefore, the Court finds that Defendant has waived the issue of any defenses he may have brought if he did not plead guilty.

Trial counsel provided ineffective assistance of counsel by failing to file timely post-sentence motions and/or timely appeal to the Pennsylvania Superior Court.

As stated above, the Defendant does not seek his appellate rights reinstated and therefore there is no relief that the Court can even grant the Defendant. In addition, the Defendant has not presented any facts supporting the assertion that counsel did not file a timely post-sentence motion or appeal when requested. See Commonwealth v. Collins, 687 A.2d 1112 (Pa.1996) (affirming the PCRA court's dismissal of a PCRA petition when the defendant failed to present facts supporting his assertion that trial counsel failed to file an appeal from judgment of sentence upon defendant's request). Therefore, the Court finds that Defendant's claim lacks merit.

ORDER

AND NOW, this _____ day of July, 2012, the Defendant and his attorney are notified that it is the intention of the Court to dismiss the Defendant's PCRA petition because it is not cognizable under the PCRA. The Court will dismiss Defendant's claim unless Defendant files an objection to that dismissal within twenty days (20) of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.
Lori Rexroth, Esq.