

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**NATHANIEL CLARK,
Defendant**

:
:
:
:
:
:
:

**No. 0342-CR-2006
CRIMINAL DIVISION
PCRA**

OPINION AND ORDER

On February 13, 2012, current Court Appointed Counsel for the Defendant filed a Motion to Withdraw as Counsel in accordance with Commonwealth v. Turner, 544 A.2d 927 (1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa.Super.1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant failed to raise any meritorious issues in his PCRA Petition.

Background

Nathaniel Clark, Defendant, was arrested on December 7, 2005. Prior to his arrest, Taurance Johnson was arrested on drug charges and agreed to cooperate with authorities by setting up a controlled buy with his supplier known as “Pook.” Suppression Court Opinion, 6/16/2006 at 1. In the presence of officers, Mr. Johnson arranged on his phone to purchase cocaine from “Pook” and was then transported in a U.S. Marshal’s vehicle to the designated location. Mr. Johnson identified “Pook,” Pook’s vehicle, and then met with him in a store for five to ten minutes. Id. at 1-2. Subsequently, “Pook” was arrested and identified as the Defendant. Id. at 2.

On October, 25 2006, the Defendant was found guilty following a jury trial of Possession with Intent to Deliver a Controlled Substance and Criminal Use of a Communication Facility. On December 19, 2006, a non-jury trial was held on the severed charge of Possession of a

Firearm by a Prohibited Person before Judge William S. Kieser.¹ The non-jury trial resulted in a guilty verdict. The Defendant was sentenced initially on January 5, 2007 and then resentenced on January 26, 2007 following Post Sentence Motions to an aggregate sentence of a minimum of seven (7) years and nine (9) months to twenty (20) years of incarceration in a state correctional institution. The conviction for the Possession of a Firearm by a Prohibited Person charge imposed no further penalty because the Commonwealth agreed for the sentence to run concurrently with the prior jury trial sentence. The Defendant's attorney at the time, Guy Sciolla, subsequently filed an appeal to the Superior Court of Pennsylvania on the Defendant's behalf, which was denied on April 6, 2009.

On June 18, 2010, Defendant filed a *pro se* Post Conviction Relief Act (PCRA) petition. Attorney Andrea Pulizzi was appointed by this Court to represent Defendant and filed a Motion to Withdraw as counsel on August, 20 2010 alleging that Defendant's petition was untimely. The Defendant filed objections to this Court's Order indicating its intention to dismiss his Petition and this Court dismissed Defendant's petition on December 1, 2010 and granted Attorney Pulizzi's request to withdraw. Defendant filed a *pro se* appeal to the Superior Court of Pennsylvania on December 20, 2010 and his case was remanded for the appointment of new counsel on October 12, 2011. The Court appointed Counsel Donald F. Martino, Esquire, on December 13, 2011 and Attorney Martino thereafter filed a Motion to Withdraw as Counsel as he determined that the PCRA Petition lacked merit. After an independent review of the record, the Court agrees with Attorney Martino and finds that Defendant fails to raise any meritorious issues in his PCRA Petition.

¹ Judge Kieser retired from active service on December 31, 2009.

Discussion

Defense Counsel's Turner-Finley letter to the Defendant sets forth with specificity the issues raised in the Defendant's PCRA Petition: 1) the Commonwealth committed a Brady violation because they failed to provide Defendant's counsel with information regarding Taurance Johnson's criminal history; 2) the trial court violated the Confrontation Clause of the U.S. Constitution in allowing hearsay testimony and that Appellate Counsel was ineffective for failing to raise this issue on appeal; 3) trial counsel was ineffective for failing to either raise or obtain suppression to Taurance Johnson's statements; 4) Defendant's waiver of a jury trial on the Person not to Possess a Firearm charge was invalid; 5) Defendant's trial on the charge of Person Not to Possess a Firearm was conducted inappropriately because it was conducted by a method referred to as "case stated;" and 6) trial counsel provided ineffective assistance of counsel by agreeing that any sentence received from the non-jury trial held on the charge of Person Not to Possess a Firearm would run concurrent to the sentence received from the jury trial.

The Commonwealth committed a violation because they failed to provide Defendant's counsel with information regarding Taurance Johnson's criminal history

The Defendant contends that the Commonwealth committed a Brady violation because they failed to provide Defendant's counsel with information regarding Taurance Johnson's criminal history, which could have been used to impeach Mr. Johnson. Brady v. Maryland, 373 U.S. 83, 835 S.Ct. 1194 (1963). Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady at 87, 1196-1197. Pennsylvania Rule of Evidence 607 states that "[t]he credibility of a witness may be impeached by any evidence relevant to that issue." Pa.R.Evid. 607. In order, however, to impeach the credibility of a person they must have first testified for the fact finders'

consideration. See Commonwealth v. Scarfo, 416 Pa. Super. 329, 391, 611 A.2d 242, 273 (1992).

In this case, Mr. Johnson did not testify at trial. The Commonwealth did not call Mr. Johnson for the jury trial or the non-jury trial dealing with the Person not to Possess a Firearm charge. In addition, the court granted Defendant's motion prior to the jury trial to suppress all statements by Mr. Johnson as hearsay. N.T. 29-30. Subsequently, the statements were not allowed for the truth of the matter asserted but for the limited purpose of explaining the officer's acts in connection with their investigation. Id. Therefore, because Mr. Johnson did not testify and his statements were suppressed as hearsay the Defendant had no reason to impeach Mr. Johnson and this issue has no merit.

The trial court violated the Confrontation Clause of the U.S. Constitution in allowing hearsay testimony and that Appellate Counsel was ineffective for failing to raise this issue on appeal

The Defendant alleges that the trial court violated the Confrontation Clause of the U.S. Constitution in allowing hearsay testimony because Mr. Johnson did not testify at trial. "The hearsay rule provides that evidence of a declarant's out-of-court statement is generally inadmissible because such evidence lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence." Commonwealth v. Dargan, 897 A.2d 496, 500 (Pa. Super. 2006). When a statement, however, is offered for a purpose other than the truth of the matter asserted it is not barred by hearsay. Id. "[T]he use of testimonial statements is not barred by the Confrontation Clause 'for purposes other than establishing the truth of the matter asserted.'" Id. (citing Crawford v. Washington, 541 U.S. 36, 58 (2004)).

Here, Judge Kieser suppressed the statements of Mr. Johnson for the truth of the matter asserted. The Judge did allow the statements for the limited purpose of explaining the officers' acts in connection with their investigation. In this limited purpose the statements were offered to

explain a course of conduct, which is allowed under Dargan and also not considered hearsay. Therefore, because the hearsay testimony was not allowed, the Confrontation Clause of the U.S. Constitution was not violated.

Trial counsel was ineffective for failing to either raise or obtain suppression to Taurance Johnson's statements

The Defendant argues that his trial counsel was ineffective for failing to either raise or obtain suppression to Taurance Johnson's statements. Trial Counsel did move for the suppression of Mr. Johnson's statements at trial on October 24, 2006. Attorney Mark Greenburg stated to Honorable William S. Kieser that:

I want you to exclude any out-of-court statements made by Taurance Johnson. Those out-of-court statements come in through the testimony of police officers or other witnesses who may have heard them, to prohibit that type of out-of-court statement by Taurance Johnson.

N.T. 7-8. Accordingly, Judge Kieser granted the motion barring Mr. Johnson's statements as hearsay but allowed the introduction of those statements "for the very limited purpose of explaining the officers' acts in connection with their investigation." N.T. 29-30. Therefore, because the trial counsel did raise the issue of Mr. Johnson's statements being hearsay and was also successful in getting the statements suppressed as hearsay, there is no merit to this issue.

Defendant's waiver of a jury trial on the Person not to Possess a Firearm charge was invalid

Defendant contends that his waiver of a jury trial on the Person not to Possess a Firearm charge was invalid. The Supreme Court of Pennsylvania has stated:

When a presumptively-valid waiver is collaterally attacked under the guise of ineffectiveness of counsel, it must be analyzed like any other ineffectiveness claim. Such an inquiry is not resolved by the mere absence of an oral waiver colloquy; instead, the analysis must focus on the totality of the relevant circumstances. Those circumstances include the defendant's knowledge of and experience with jury trials, his explicit written waiver (if any), and the content of relevant off-the-record discussions counsel had with his client.

Commonwealth v. Mallroy, 596 Pa. 172, 191, 941 A.2d 686, 698 (Pa. 2008). In addition, the Defendant must make a demonstration of actual prejudice in circumstances involving jury waivers. Id. at 196.

In this case, Defendant received an on-the-record colloquy asking whether he understood that he would not receive a jury trial and that the judge alone would make the decision in the case. Trial Transcript, 12/19/06, page 3. The Defendant responded in the affirmative. Further, the Defendant had completed a jury trial prior to the non-jury trial indicating that he had knowledge of and experience with jury trials. Finally, the agreement for the non-jury trial was beneficial to Defendant's legal interest. His waiver of jury resulted in the agreement that any penalty received as a result of a conviction after the non-jury trial would run concurrent with the sentence Defendant received at the jury trial. This agreement benefited the Defendant and was not prejudicial. Therefore, after assessing the totality of the circumstances, the Defendant's waiver of a jury trial was valid.

Defendant's trial on the charge of Person Not to Possess a Firearm was conducted inappropriately because it was conducted by a method referred to as "case stated"

Defendant alleges that his trial on the charge of Person Not to Possess a Firearm was conducted inappropriately because it was conducted by a method referred to as "case stated." During this process, evidence that was presented at a previous trial is introduced through submission of the record. In a claim of ineffective assistance of counsel, the defendant must demonstrate that: "1) the underlying claim is of arguable merit; 2) the particular course of conduct of counsel did not have some reasonable basis designed to effectuate his interests; and 3) counsel's ineffectiveness prejudiced him." Commonwealth v. Correa, 444 Pa. Super. 621, 625, 664 A.2d 607, 609 (1995) (citing Commonwealth v. Howard, 538 Pa. 86, 93 (1994)). "The law

presumes counsel's effectiveness so that the burden of establishing ineffectiveness rests squarely on the defendant. Id.

Here, the Judge specifically asked the Defendant whether he understood that the attorneys are going to stipulate on the record as to what evidence will be in this case and that rather than listening to witnesses there would be a statement as to what the witness would testify to. Trial Transcript, 12/19/06, page 3. The Defendant affirmed that he understood the procedure. The Defendant also agreed to the procedure for his own trial. Moreover, the agreement was negotiated to benefit the Defendant so that the penalty assessed would run concurrent to the sentence received from the jury trial. Therefore, because the procedure was explained to the Defendant, agreed upon by the Defendant, and that the Defendant received a benefit from the procedure, the Court finds there is no merit to this issue.

Trial counsel provided ineffective assistance of counsel by agreeing prior to commencing the non-jury trial held on the charge of Person Not to Possess a Firearm that any sentence received would run concurrent to the sentence received from the jury trial

Defendant argues again that trial counsel provided ineffective assistance of counsel by agreeing that any sentence received for the non-jury trial held on the charge of Person Not to Possess a Firearm would run concurrent to the sentence received from the jury trial held on October 24, 2006 and October 25, 2006. As stated earlier, in a claim of ineffective assistance of counsel, the defendant must demonstrate that: "1) the underlying claim is of arguable merit; 2) the particular course of conduct of counsel did not have some reasonable basis designed to effectuate his interests; and 3) counsel's ineffectiveness prejudiced him." Correa at 625.

The Defendant received an agreement that allowed for any further sentence that resulted from the non-jury trial to run concurrently with the sentence he received from his jury trial. Pursuant to this agreement the Defendant did not receive an additional sentence as a result of the non-jury trial guilty verdict. The Defendant has not shown that he was prejudiced and counsel

had a reasonable basis to effectuate his interests. Therefore, this issue lacks merit under the PCRA.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907 (1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the Petition.

ORDER

AND NOW, this day of April, 2012, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907 (1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed February 13, 2012, is hereby GRANTED and Donald F. Martino, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Donald F. Martino, Esq.
Nathaniel Clark #JK6021
SCI Somerset
1600 Walters Mill Road
Somerset, PA 15510-0001