

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

**COMMONWEALTH OF PENNSYLVANIA,** :  
 :  
 :  
 v. : **No. 167-2007**  
 :  
 : **CRIMINAL DIVISION**  
 **JERMAR HINES,** :  
 :  
 **Defendant** : **PCRA**

**OPINION AND ORDER**

On June 17, 2011, the Defendant filed a *Pro Se* Post Conviction Relief Act (PCRA) Petition. 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 holding any further proceedings.

***Background***

On March 31, 2009, after a non-jury case stated trial, this Court found beyond a reasonable doubt that Jermar Hines (Defendant) committed the following violations of the Controlled Substance, Drug, Device and Cosmetic Act: Possession With the Intent to Deliver a Controlled Substance-Cocaine;<sup>1</sup> Possession of a Controlled Substance-Cocaine;<sup>2</sup> Possession of Drug Paraphernalia;<sup>3</sup> and the summary motor vehicle offenses of Driving While Operating Privilege is Suspended or Revoked;<sup>4</sup> and Maximum Speed Limits.<sup>5</sup> After verdict, the Court ordered that the District Attorney's Office provide a prior record score memo for the Defendant. The Commonwealth placed the Defendant's counsel on notice that they would be seeking the five (5) year mandatory set forth in 18 Pa.C.S. § 7508 as this was the Defendant's second or

---

<sup>1</sup> 35 P.S. § 780-113(a)(30).

<sup>2</sup> 35 P.S. § 780-113(a)(16).

<sup>3</sup> 35 P.S. § 780-113(a)(32).

<sup>4</sup> 75 Pa.C.S. § 1543(a)

<sup>5</sup> 75 Pa.C.S.A. § 3362(a)(1).

subsequent conviction for Possession With Intent to Deliver a Controlled Substance and the Defendant was at the time of his arrest found with seventeen (17) grams of cocaine. On April 24, 2009, this Court sentenced the Defendant to five (5) to ten (10) years incarceration in a State Correctional Institution.

On April 24, 2009, the Defendant appealed his sentence to the Superior Court of Pennsylvania. The Defendant argued that the Court erred in denying the Defendant's Motion to Suppress Evidence.<sup>6</sup> On February 22, 2010, the Superior Court affirmed the Defendant's conviction and sentence. On April 20, 2010, the Superior Court accepted the Defendant's application for re-argument/reconsideration filed on March 9, 2010. On February 3, 2011, the Superior Court affirmed their original decision.

On May 26, 2011, the Defendant filed a *pro se* PCRA Petition. Lori Rexroth, Esquire was appointed to represent the Defendant. On August, 24, 2011, Attorney Rexroth amended the Defendant's PCRA Petition. On February 29, 2012, after a Court conference, this Court ordered the preparation of transcripts for the Defendant's waiver of his jury trial. Subsequently, Attorney Rexroth filed Defendant's Verified Statement in Support of his Amended Motion for Post Conviction Collateral Relief on April 5, 2012. On September 11, 2012, as Attorney Rexroth no longer served as conflicts counsel, the Defendant's case was transferred to Julian Allatt, Esquire. After a subsequent PCRA conference and argument, the parties agreed that this Court would assess whether a hearing would be needed for the issues raised in Defendant's PCRA Petition.

### ***Discussion***

Defendant's Amended PCRA Petition sets forth with specificity the following issues: a) trial court failed to properly colloquy the Defendant as to his waiver of his right to a jury trial; b)

---

<sup>6</sup> The Honorable William S. Kieser denied the Defendant's Motion to Suppress Evidence on March 18, 2008. Judge Kieser retired from active service on December 31, 2008.

trial counsel provided ineffective assistance of counsel by failing to properly advise the Defendant of the process of the case stated trial process, resulting in the Defendant's waiver of a jury trial to be invalid; c) trial counsel provided ineffective assistance of counsel by failing to properly investigate and calculate both the Defendant's prior criminal record and his Prior Record Score; d) trial counsel provided ineffective assistance of counsel by failing to properly advise the Defendant of the potential sentence exposure to which he was subjected or the applicable mandatory minimum sentence to which he was facing; e) trial counsel provided ineffective assistance of counsel by failing to preserve sentencing issues for reconsideration by the Trial Court; and f) trial counsel provided ineffective assistance of counsel by failing to properly preserve all issues for appeal.

***Trial court failed to properly colloquy the Defendant as to his waiver of his right to a jury trial***

Defendant argues his jury trial waiver was improper. A Defendant may waive a jury trial with approval by a judge of the court in which the case is pending. Pa.R.Crim.P. 620. "To be valid, it is well settled that a jury waiver must be knowing and voluntary, and the accused must be aware of the essential ingredients inherent to a jury trial." Commonwealth v. Houch, 948 A.2d 780, 787 (Pa. 2008). The essential ingredients include: 1) that the jury be chosen from members of the community (i.e., a jury of one's peers), 2) that the accused be allowed to participate in the selection of the jury panel; and 3) that the verdict must be unanimous. Id. A defendant need not be advised of the possible sentences he could receive if convicted. Commonwealth v. Boyd, 334 A.2d 610 (Pa. 1975).

Here, the record clearly shows that the Defendant made a knowing and voluntary waiver of his jury trial. The Honorable Richard A. Gray advised the Defendant that the jury is chosen

from members of the community, that he is allowed to participate in the selection of the jury panel, and that the verdict must be unanimous:

COURT: I want to make sure that you understand before we approve your waiver that you understand that you have the absolute right to have a jury trial on these charges against you and that if you choose to have a jury trial, we go through a process by which we bring in a panel of 40 to 45 jurors, drawn at random, to fill in the jury box here and then we would pick a jury from those 40 people. Do you understand this?

DEFENDANT: Yes.

COURT: Have you ever been through the process before?

DEFENDANT: Yes.

COURT: So you understand that you and your attorney would then have the opportunity to ask questions to the jury to make sure that the prospective jurors would be – could be fair and impartial in this case?

DEFENDANT: Yes.

COURT: Then you would have seven peremptory challenges that you also would be able to exercise; in other words, get rid of certain jurors and strike them off the list to make sure that we get down to a jury of 12 and 2 alternates. You have seven peremptories that you can exercise for any reason, no reason, good reasons or bad reasons. Do you understand that?

DEFENDANT: Yes.

COURT: This jury selection process then would be in open court and again, the District Attorney would ask questions and the judge may ask questions of the jury panel, as well as you, as we went over.

The purpose of this now in waiving your jury trial right, it doesn't change the burden of proof because it's still the Commonwealth's burden to prove you guilty beyond a reasonable doubt but in a jury trial, of course, you have to have an unanimous verdict, in other words the Commonwealth has to convince 12 jurors beyond a reasonable doubt that you are, in fact, guilty. Do you understand that?

DEFENDANT: Yes.

COURT: In a nonjury trial, you would – the Commonwealth would really be only convincing one judge as opposed to 12 jurors. Do you understand that?

DEFENDANT: Yes, sir. Yes, I do.

N.T., February 10, 2009, p 3-4. As the requirements of Pennsylvania law were fulfilled in notifying the Defendant of his rights to a jury trial, this Court finds that the waiver was valid and this issue lacks merit.

***Trial counsel provided ineffective assistance of counsel by failing to properly advise the Defendant of the process of the case state trial process, causing the Defendant's waiver of a jury trial to be invalid***

The Defendant argues that his waiver of the jury trial was invalid because he was not advised of the specific type of trial he would be having. 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.

“[W]hen a defendant seeks to collaterally attack his waiver of a jury trial, on grounds that it was caused by the ineffective assistance of his trial counsel, to prove prejudice, he must demonstrate a reasonable probability that but for counsel’s constitutionally deficient service, the outcome of the waiver proceeding would have been different, *i.e.*, that he would not have waived his right to a jury trial.” Commonwealth v. Mallory, 941 A.2d 686, 704 (Pa. 2008). The claim should be analyzed like other ineffectiveness claims and the totality of the relevant circumstances must be considered, which includes: 1) defendant’s knowledge of and experience with jury trials, 2) his explicit written waiver (if any), and 3) the content of relevant off-the-record discussions counsel had with his client. Id. at 698.

As stated above, the Defendant's waiver of his non-jury trial was knowing and voluntary. The requirements of the Court's inquiring of the Defendant for a waiver to be valid have been established and the Pennsylvania courts have declined to add further obligations. The waiver was also explicitly made on the record. Moreover, the Defendant has knowledge and experience of jury trials. The Defendant had a prior record score of five (5) so this was not his first contact with the criminal justice system. In addition, the Defendant acknowledged during the jury waiver proceeding that he has gone through a jury trial before:

COURT: Have you been through the process before?

DEFENDANT: Yes.

N.T., February 10, 2009, p 3.

Finally, the Defendant argues that his counsel did not inform him properly of a case stated trial. The Defendant, however, cannot collaterally attack his jury trial waiver by arguing he did not understand a case stated trial. A waiver of a jury trial does not mean that the trial will also be case stated. The waiver only pertained to whether a jury or a judge would be the trier of fact. The Court finds from the totality of the relevant circumstances, including the Defendant's failure to object to the proceeding, that the waiver of the jury trial was valid and the Defendant understood the right he waived by proceeding non-jury. Therefore, this Court finds that the Defendant would have waived his right to a jury trial and that this issue is without merit.

***Trial counsel provided ineffective assistance of counsel by failing to properly investigate and calculate the Defendant's prior criminal record and his Prior Record Score***

The Defendant contends that his counsel was ineffective for not properly investigating his prior criminal record and his prior record score. The Defendant does not present any meritorious reasons as to why his prior record score was miscalculated or how he was prejudiced by the

miscalculation of his criminal record and prior record score. The Defendant was sentenced to five (5) to ten (10) years at a State Correctional Institution. The Defendant was sentenced based on the applicable mandatory sentence of five (5) years, as it was after his second conviction for the offense Possession With Intent to Deliver a Controlled Substance. The Defendant's prior record score did not factor in the calculation of the sentence he received as he received no more than the mandatory. "Where a minimum sentence is statutorily mandated, a sentencing court lacks the authority to impose a sentence less severe than dictated by the legislature."

Commonwealth v. Bess, 789 A.2d 757, 761 (Pa. Super. 2002). In addition, the Court ordered the District Attorney's Office to prepare a Prior Record Confirmation after the non-jury trial on March 31, 2009. The District Attorney's Office at sentencing confirmed that the Defendant's prior record score was a five (5). Although here is no indication that the prior record score was incorrect, since Defendant's sentence was driven by the applicable mandatory rather than the guidelines, this Court finds that this issue is without merit.

***Trial counsel provided ineffective assistance of counsel by failing to properly advise the Defendant of the potential sentence he was subjected or the mandatory minimum sentence he was facing***

The Defendant contends that his counsel did not advise him of the applicable mandatory sentence he was facing. 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)).

Here, even if his counsel did not advise him of the mandatory minimum there is no indication by counsel that the outcome of the proceeding would have been different or specifically how the Defendant was prejudiced. After the Defendant was convicted, the Commonwealth advised him and the Court that they were seeking a five year mandatory minimum based on a second conviction under Possession With Intent to Deliver. N.T., March 31, 2009, p 18. In addition, the Court stated that Defense Counsel was on notice in the Order given after the non-jury trial on March 31, 2009: “Defense Counsel has been placed on notice that the Commonwealth will be asking for a mandatory; this being the Defendant’s second or subsequent conviction for a Possession With The Intent To Delivery a Controlled Substance.” As the statute only requires that the Defendant receive notice prior to sentencing and that the Defendant was found with seventeen (17) grams of cocaine, the Court properly sentenced him to the mandatory of five (5) years.<sup>7</sup> As the sentence is valid, the Court is unable to determine how the outcome of the proceeding would have been different or how the Defendant was prejudiced. Therefore, the Court finds that the ineffective assistance of counsel claim is without merit.

***Trial counsel provided ineffective assistance of counsel by failing to preserve sentencing issues for reconsideration by the Trial Court***

The Defendant states that defense counsel was ineffective because they failed to preserve sentencing issues for reconsideration by the trial court. In order to establish ineffectiveness, the defendant “must establish that counsel inexcusably failed to raise issues which, had they been raised, would have afforded Appellant relief.” Commonwealth v. Porter, 728 A.2d 890, 896 (Pa.

---

<sup>7</sup> “When the aggregate weight of the compound or mixture containing the substance involved is at least ten grams and less than 100 grams . . . if at the time of sentencing the defendant has been convicted of another drug trafficking offense: five years in prison and \$ 30,000 . . . .” 18 Pa.C.S. § 7508(a)(3)(ii). “Notice of the applicability of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth’s intention to proceed under this section shall be provided after conviction and before sentencing.” 18 Pa.C.S. § 7508 (b).



1999). Defendant does not allege any specific issues which would have afforded him relief. In fact, defense counsel did file a Motion for Reconsideration of Sentence, which was denied by this Court on May 7, 2012.<sup>8</sup> Moreover, this Court has reviewed the Defendant's sentencing order and the sentencing transcripts and there does not appear to be any issues that would have afforded the Defendant relief. Therefore, this Court finds that this issue is without merit.

***Trial counsel provided ineffective assistance of counsel by failing to properly preserve all issues for appeal***

The Defendant alleges that defense counsel was ineffective because they failed to preserve all issues for appeal. As stated above, the Defendant must establish that his counsel failed to raise issues that would have afforded him relief. Again, the Defendant has not made any specific allegations but has made a broad allegation of ineffectiveness. As the Defendant does not state any issues that have merit and this Court is unable to find any, this issue is without merit.

---

<sup>8</sup> Defendant's Motion stated that "the imposed sentence is excessive in that he does not believe the mandatory minimum applies to him and that other mitigating factors would merit a lesser sentence."

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of December, 2012, the Defendant is notified that it is the intention of the Court to dismiss the Defendant's PCRA petition because it does not raise a genuine issue concerning any material fact. 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.  
Julian Allatt, Esq.  
Jermar Hines #EW-5823  
P.O. Box 1000  
Houtzdale, PA 16698-1000