

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-50-2003 (03-10,050)  
:   
vs. : CRIMINAL DIVISION  
:   
: Notice of Intent to Dismiss 2<sup>nd</sup> PCRA  
RICHARD W. ILLES, SR., :   
Defendant :

**OPINION AND ORDER**

Before the court is Defendant’s “Amended Second Petition for Post-Conviction Relief for Restoration of PCRA Appeal Rights Based on PCRA Attorney Ineffectiveness.”

**Factual Background**

In 2004, a jury found Defendant guilty of first degree murder for the killing of his wife. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant appealed his conviction to the Pennsylvania Superior Court, which affirmed Defendant’s judgment of sentence in a memorandum decision dated March 6, 2006. On August 17, 2006, the Pennsylvania Supreme Court denied Defendant’s petition for allowance of appeal.

In 2007, Defendant filed his first Post Conviction Relief Act (PCRA) petition. Initially, the trial court gave notice of its intent to dismiss the petition without holding an evidentiary hearing. In response thereto, however, Defendant filed an amended petition. The trial court then held hearings on several, but not all, of the issues raised by Defendant. The trial court subsequently denied Defendant’s first PCRA petition, and Defendant appealed.

Defendant raised eight issues in his appeal before the Superior Court. In a memorandum decision dated June 21, 2011, the Superior Court affirmed the trial court's denial of Defendant's first PCRA petition. The Superior Court's opinion addressed all the issues raised by Defendant, but found some of them lacked merit or were waived, at least in part due to defects in the appellate brief filed by PCRA counsel. Defendant filed a petition for reargument on July 5, 2011, which the Superior Court denied on September 2, 2011.

Defendant filed his second PCRA petition on September 8, 2011, and filed an amended petition on April 17, 2012. In both petitions, Defendant sought reinstatement of his first PCRA appeal rights nunc pro tunc on several of the issues where the Superior Court noted defects in PCRA counsel's brief.

The Court held a videoconference with Defendant and the attorney for the Commonwealth on July 3, 2012. Both parties argued that an evidentiary hearing was not necessary, with Defendant arguing the defects in the appellate brief constituted prejudice per se and the Commonwealth arguing that Defendant could not establish prejudice because the trial court found that trial counsel was not ineffective. The Court gave the parties thirty (30) days to submit any case citations or documents in support of their respective positions. Defendant, however, was transferred to another institution for another legal matter and there was some delay in him receiving the Commonwealth's submission, which resulted in a brief delay in Defendant filing his response thereto. The matter is now ripe for decision.

## **DISCUSSION**

Initially, the Court must determine whether it has jurisdiction to address Defendant's second PCRA petition.

(1) Any petition..., including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. §9545(b)(1), (2).

Clearly, Defendant's petition was not filed within one year of his judgment becoming final. Defendant's judgment of sentence became final on or about November 15, 2006 when the time period for filing a petition for writ of certiorari to the United States expired ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal. 42 Pa.C.S.A. § 9545(b)(3) ("a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review."). His second PCRA petition was not filed until September 8, 2011, which was almost five years after his judgment of sentence became final. Therefore, to be considered timely, Defendant must plead and prove one of the exceptions contained in section 9545(b)(1) set forth above.

Defendant asserts that his petition is timely pursuant to section 9545(b)(1)(ii). He avers that he did not know PCRA counsel's brief was defective until he reviewed the

brief and the Superior Court's decision regarding it. He also notes that he could not file his second PCRA petition while his first PCRA petition was on appeal, and that appeal was not complete until the Superior Court denied his petition for reargument on September 2, 2011. Defendant's second PCRA petition was docketed on September 8, 2011.

The potential problem with this argument is that it ignores a line of Pennsylvania appellate court decisions beginning with Commonwealth v. Gamboa-Taylor, 562 Pa. 70, 753 A.2d 780, 785 (2000), which held that an allegation of PCRA counsel's ineffectiveness could not be invoked as a newly-discovered "fact" for purposes of section 9545(b)(1)(ii).

Defendant relies on Commonwealth v. Bennett, 930 A.2d 1264 (Pa. 2007) for the proposition that his petition is timely and prejudice should be presumed. Bennett, however, is clearly distinguishable because the claim in that case emanated from a complete denial of counsel. The Pennsylvania Supreme Court stated, in relevant part:

In Gamboa-Taylor and subsequent cases, we addressed situations when PCRA counsel had allegedly ineffectively narrowed the class of claims raised by not including all of the viable claims in the first petition. In such instances, we concluded that by allowing the claim to go forward, 'the timeliness requirements crafted by the legislature would thus effectively be eviscerated by any petitioner who was willing to file serial PCRA petitions alleging ineffective assistance of counsel.' Thus, we firmly rejected any attempts 'to circumvent the one-year time limitation via claims of PCRA counsel ineffectiveness...'

Those cases, however, have no relevance when the claim emanates from the complete denial of counsel.

930 A.2d at 1272. While PCRA counsel's allegedly defective brief may have resulted in a narrowing of Defendant's claims on the appeal of his first PCRA, it did not result in a

complete denial of his right to appeal or his right to counsel,<sup>1</sup> because the Superior Court addressed several issues on the merits.<sup>2</sup>

Even if Defendant's petition is considered timely, this court cannot grant him the relief requested. A second or subsequent post conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred. Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107, 112 (1988). A petitioner makes such a prima facie case "only if he demonstrates that either the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged." Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516, 520-21 (1997). On direct appeal, the Superior Court found that the evidence was sufficient to support Defendant's conviction. None of the issues raised allege new evidence that would establish Defendant's actual innocence. Therefore, the court finds Defendant has not set forth a prima facie case that he was innocent of the crimes charged.

Instead, Defendant claims that due to PCRA counsel's ineffectiveness he was denied merits review on appeal of some of his claims of trial counsel ineffectiveness. The trial court, however, previously rejected Defendant's claims of trial counsel ineffectiveness, and this court is bound by that finding. See Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326, 1331 (1995), citing Golden v. Dion & Rosenau, 410 Pa. Super. 506, 510, 600 A.2d

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<sup>1</sup> The Court notes that at this stage of the proceedings, Defendant did not have a Sixth Amendment right to counsel, but a right to counsel based on Rule 904 of the Pennsylvania Rules of Criminal Procedure. Commonwealth v. Smith, 572 Pa. 572, 818 A.2d 494, 499 n.6 (2003).

<sup>2</sup> There also may be an issue whether Defendant filed his second PCRA petition within 60 days of the date the claim could have been presented. The Superior Court affirmed the trial court's denial of Defendant's first PCRA petition in a memorandum opinion dated June 21, 2011. Defendant could have filed his second PCRA

568, 570 (1991)(“once a matter has been decided by a trial judge the decision should remain undisturbed, unless the order is appealable and an appeal therefrom is successfully prosecuted). Therefore, this court cannot find that the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate.

For similar reasons, Defendant cannot establish all the elements of an ineffective assistance of counsel claim. Generally, to establish a claim of ineffective assistance of counsel, the petitioner must plead and prove: (1) the claim is of arguable merit; (2) no reasonable basis existed for counsel’s act or omission; and (3) petitioner suffered prejudice such that there is a reasonable probability that the result of the proceeding would have been different. Commonwealth v. Lesko, 609 Pa. 128, 15 A.3d 345, 373-74 (2011), citing Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975 (1987).

Defendant claims that PCRA counsel was ineffective by filing a defective appellate brief with respect to his claims of trial counsel’s ineffectiveness, which resulted in the Superior Court finding that some of the issues were waived or lacked merit. Therefore, under the facts and circumstances of this case, the court believes Defendant must layer his ineffectiveness claim. In other words, to prevail on his claim of PCRA counsel’s ineffectiveness, Defendant must show that: (1) the underlying claim of trial counsel ineffectiveness has arguable merit, which requires Defendant to establish each Pierce prong with respect to trial counsel’s performance; (2) PCRA counsel had no reasonable basis for failing to properly pursue the claim; and (3) Defendant was prejudiced by PCRA counsel’s

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petition within 60 days thereafter, but instead he chose to file a petition for reargument on July 5, 2011.

performance. See Commonwealth v. Walker, 36 A.3d 1, 7 (Pa. 2011). This court, however, cannot find that the underlying claims of trial counsel ineffectiveness have arguable merit when the trial court has already rejected these claims.

Furthermore, Defendant is not entitled to the presumption of prejudice, because PCRA counsel's alleged ineffectiveness did not result in a complete denial of appellate review. Commonwealth v. Reed, 601 Pa. 257, 971 A.2d 1216, 1226 (2009) ("the filing of an appellate brief, deficient in some aspect or another, does not constitute a complete failure to function as a client's advocate so as to warrant a presumption of prejudice under Cronic").

In order to show actual prejudice, the Court believes Defendant must show that there is a reasonable probability that the Superior Court would have granted him a new trial or a remand for further proceedings if PCRA counsel had filed a brief that appropriately cited to the record and complied with the rules of appellate procedure. Given the trial court's rulings on his underlying claims of trial counsel ineffectiveness, this court also cannot find that Defendant suffered actual prejudice as a result of PCRA counsel filing a defective brief.

### **Conclusion**

Unlike Bennett, this is not a case where counsel's acts or omissions completely deprived Defendant of any appellate review of his case. Defendant received his constitutional right to a direct appeal, the Superior Court affirmed his conviction, and the Pennsylvania Supreme Court denied Defendant's petition for allowance of appeal. Defendant also filed a counseled PCRA petition, which the trial court denied and Defendant appealed. The Superior Court conducted a merits review of some of the issues, but found

other issues were waived or lacked merit, because PCRA counsel failed to develop his argument, include appropriate citations in the record, or to explain why the trial court erred when it failed to grant an evidentiary hearing on certain issues. Defendant filed a petition for reargument, but the Superior Court denied it.

Although the court understands Defendant's frustration that, through no fault of his own, he was denied merits review of some of his claims of ineffective assistance of trial counsel that were raised in his PCRA appeal, the court has not found any case where the Pennsylvania appellate courts have granted nunc pro tunc relief in a case where only some, and not all, of the issues were forfeited by counsel's acts or omissions. In fact, in Reed the Pennsylvania Supreme Court noted that "to extend the Cronic exception to cases involving a defect in an appellate brief essentially would transform the exception into a rule, as many appellate briefs contain at least one arguable defect." Reed, 971 A.2d at 1227. Moreover, due to the coordinate jurisdiction rule and/or the law of the case doctrine, this court cannot find that there was arguable merit to the forfeited issues when the trial judge already rejected them.

In Defendant's response to the Commonwealth's letter brief, he states "That Judge Brown thought these issues had no merit is of no moment. If that determination was definitive, there would be no need for appeals or appellate courts." Defendant's argument misses the mark. An appellate court could reverse or overrule Judge Brown's decision. This court, however, cannot.

Accordingly, the court intends to dismiss Defendant's Amended Second PCRA petition without holding an evidentiary hearing. If Defendant is aware of any cases



where prejudice has been presumed and appeal rights have been reinstated when only some of the issues were waived, he should provide the citation in any response to the court's proposed dismissal. Otherwise, the court likely will dismiss his petition, and Defendant then can file an appeal from the final order dismissing his Amended Second PCRA petition in the hopes that the Superior Court will disagree with Judge Brown's assessment of the merits of his issues and either reinstate his previous appeal or remand the matter to this court for further proceedings.

**ORDER**

AND NOW, this \_\_\_\_ day of November 2012, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the Court gives the parties notice of its intent to dismiss Defendant's Amended Second PCRA petition. 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.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
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Work file