

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. 1280-2007
	:	
	:	CRIMINAL DIVISION
STEPHEN LYONS,	:	
Defendant	:	PCRA

OPINION AND ORDER

On October 4, 2012, 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

Stephen Lyons (Defendant) was found guilty of Criminal Trespass and Simple Assault following a jury trial before the specially presiding Senior Judge Clinton W. Smith. On August 25, 2008, the Defendant was sentenced to an aggregate period of twenty-eight (28) to seventy-two (72) months imprisonment in a State Correctional Institution. The Defendant filed a direct appeal, which the Superior Court of Pennsylvania denied on sentence on July 10, 2009.

On March 9, 2010, the Defendant filed his first *pro se* PCRA Petition. Edward J. Rymsza, Esquire, who was appointed to represent the Defendant, amended the Defendant's PCRA Petition on October 27, 2010. The Petition raised three (3) issues: a) trial counsel was ineffective for failing to raise a sufficiency of the evidence challenge either at trial and/or post trial challenging the sufficiency of the evidence of the count of Criminal Trespass; b) trial counsel was ineffective for failing to raise the sufficiency of the evidence claim regarding the

count of Criminal Trespass on direct appeal; c) trial counsel was ineffective for failing to request a lesser included instruction of Defiant Trespass and/or Simple Trespass. This Court proposed dismissal of the PCRA Petition on April 15, 2011. Subsequently on May 26, 2011, the Court dismissed the Defendant's Petition. The Superior Court affirmed the dismissal of the PCRA Petition on February 23, 2012.

Prior to the Superior Court decision, the Defendant filed a second PCRA Petition on December 19, 2011. On December 23, 2011, this Court dismissed the second PCRA Petition as the first PCRA Petition was on appeal and the Court did not have jurisdiction to proceed. On October 4, 2012, the Defendant filed his third PCRA Petition. Counsel was not assigned in accordance with Pa.R.Crim.P. 904(D) as this was considered Defendant's second or subsequent PCRA Petition. The Defendant alleges that his PCRA Counsel was ineffective because he did not raise all the issues he could have on appeal and in his amended Petition. Specifically, the Defendant believes that he was denied counsel during voir dire and his PCRA Counsel failed to raise this in his Petition.

With regard to the issue of PCRA ineffectiveness the Defendant now raises, on February 26, 2008, the Defendant waived his right to counsel after an on the record colloquy. On April 7, 2008, James Protasio, Esquire was appointed to represent the Defendant. On April 25, 2008, the Court clarified in an Order that Attorney Protasio was appointed as stand-by counsel only. In an Order dated May 1, 2008, the Court found that the Defendant desired to withdraw his prior waiver of counsel: "On April 30, 2008, Defendant completed jury selection for his trial, which is scheduled to begin on May 22, 2008. Attorney James Protasio was standby counsel for the jury selection. At the end of jury selection Defendant approached sidebar and stated he felt

overwhelmed and felt he needed counsel to represent him at trial.” The Court appointed Attorney Protasio to represent the Defendant from that point onward.

PCRA Counsel was ineffective for failure to raise ineffective assistance of counsel claim against trial/appellate counsel in the Amended PCRA Petition for trial/appellate counsel’s failure to raise the denial of the right to counsel at voir dire claim at post-trial or on direct appeal

The Defendant contends that his PCRA Counsel was ineffective for not raising the issue of having no counsel during jury selection. 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. “To establish ineffectiveness for failure to call a witness, a defendant must prove the witness existed and was available to testify for the defense, counsel knew or should have known the witness existed, the witness was willing to cooperate, and the proffered testimony’s absence denied him a fair trial.” Commonwealth v. Small, 980 A.2d 549 (Pa. 2009); Commonwealth v. Clark, 961 A.2d 80 (Pa. 2008).

Here, the Court determined that the Defendant made a knowingly, voluntarily, and intelligent waiver of his right to counsel. The Defendant did not make an attempt to withdraw his waiver of counsel pre-trial, where he filed numerous motions. Only after the completion of jury selection did the Defendant indicate that he wanted to withdraw his waiver. A court will not

consider ineffective assistance claims that arose from the period of self-representation.

Commonwealth v. Spotz, 18 A.3d 244, 270-71 (Pa. 2011); Faretta v. California, 422 U.S. 806 (1975) (“a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’”). Therefore, this Court cannot consider the Defendant’s allegation of denial of counsel when he waived his right to counsel and only after jury selection requested a withdrawal of his waiver.

Moreover, even though the issue that the Defendant would like to raise is without merit, it is not ineffective assistance of counsel for an attorney not to raise all issues that could have possibly been raised on appeal. “[E]ven identifying an issue of ‘arguable’ merit does not prove that appellate counsel acted unreasonably, or that prejudice ensued. This is so because, as the U.S. Supreme Court has recognized, appellate counsel is not constitutionally obliged to raise every conceivable claim for relief. Counsel may forego even arguably meritorious issues in favor of claims which, in the exercise of counsel’s objectively reasonably professional judgment, offered a greater prospect of securing relief.” Commonwealth v. Jones, 815 A.2d 598, 613 (Pa. 2002) (citing Jones v. Barnes, 463 U.S. 745, 750-54 (1983)). “This process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” Id. (citing Smith v. Murray, 477 U.S. 527, 536 (1986)).

Counsel for the Defendant’s first PCRA Petition only raised what he believed were the best issues. The letters that the Defendant provided in his current PCRA Petition show that counsel was aware of other issues but did not decide to raise them as part of an appeal strategy. The letter dated October 26, 2010 stated: “I believe the issues raised are the ones with the most merit, rather than shotgun the court with a variety of less credible issues.” Furthermore, the

letter dated December 6, 2010 stated: “I believe the issues raised are the best issues. My feeling always is that if you shotgun the court with too many issues, including the ones that are meritless, they merely take away from the best issues. Therefore, the Defendant’s PCRA counsel was not ineffective for not raising all the issues possible on appeal.

Finally, the Defendant’s third PCRA Petition is untimely. 42 Pa.C.S. 9545(b) requires that a PCRA petition be filed within one (1) year of the date the judgment in a case becomes final, or else meet one of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1). The exceptions set forth in 42 Pa.C.S. § 9545(b)(1) are as follows:

- (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.

Here, the Superior Court denied the Defendant’s direct appeal on July 10, 2009. The Defendant filed his current PCRA Petition on October 4, 2012, which is clearly beyond one (1) year of the date the judgment became final. The Defendant was aware of the issue at the time of his first PCRA Petition. The fact that the Defendant did not raise this issue until after the first PCRA Petition was on appeal with the Superior Court does not account for a timeliness exception. The Defendant could have raised the issue timely on his first petition.

As the Court finds there are no meritorious issues with Defendant’s PCRA Petition, it intends to dismiss the Petition unless the Defendant files an objection within twenty (20) days.

“[A] PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only where the petition presents genuine issues of material fact. . . . A PCRA court’s decision denying a claim without a hearing may only be reversed upon a finding of an abuse of discretion.”

Commonwealth v. McLaurin, 45 A.3d 1131, 1135-1136 (Pa. Super. 2012) (citations omitted).

Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified of this Court’s intention to deny the Defendant’s PCRA Petition.

ORDER

AND NOW, this _____ day of November, 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

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