

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 1504-CR-2001
	:	CRIMINAL DIVISION
DAVID MARKLEY,	:	
Defendant	:	PCRA

OPINION AND ORDER

On February 27, 2012, current Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Motion to Dismiss pursuant to 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 has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

Background

David Markley (Defendant) pled guilty to Criminal Conspiracy to Commit Theft and Theft by Unlawful Taking on December 18, 2001. Defendant was paroled and was supervised by the Pennsylvania Board of Probation and Parole. Defendant had an initial supervision violation involving a domestic disturbance with his wife, which was resolved on October 1, 2010 by an Order filed October 18, 2010. On June 8, 2011, the Defendant's wife filed a temporary Protection from Abuse (P.F.A.) Order against Defendant in Clinton County, Pennsylvania.

On June 9, 2011, the Lock Haven Police Department responded to a domestic call from the Defendant's wife. Defendant was arrested for violating the terms of the P.F.A. Order by having contact with his wife. On June 13, 2011, Defendant pled guilty to the violation of the P.F.A. Order and was held in contempt and sentenced to seven (7) days in the Clinton County Correctional Facility. On September 1, 2011, Defendant had a final probation violation hearing

before this Court and was resentenced on the charge of Criminal Conspiracy to Commit Theft to a six (6) months to thirty-six (36) months period of state incarceration. The technical violation charged was of Condition 3A of “Conditions Governing Special Probation/Parole,” which states “Maintain regular contact with parole supervision staff by reporting regularly as instructed and following any written instructions of the Board or the parole supervision staff.” As supporting evidence it was said that “On 1/26/10, you were instructed not to have contact with your wife, Heather Markley. This instruction was effective 1/26/2010.” Defendant filed a Post Conviction Relief Act (PCRA) on January 23, 2012. Donald F. Martino, Esquire was appointed to represent the Defendant on January 26, 2012 for his PCRA Petition.

Discussion

Whether the State Board of Probation and Parole imposed an unlawful condition as part of Defendant’s supervision and that Defendant was found to have violated only this condition which resulted in his probation being incorrectly revoked and the imposition of a new sentence

The Defendant contends that the State Board of Probation and Parole imposed an unlawful condition as part of Defendant’s supervision and that Defendant was found to have violated only this condition, which resulted in his probation being incorrectly revoked and the imposition of a new sentence. In Visaint, the Superior Court held that “the legislature has specifically empowered the court, not the probation offices and not any individual probation officers, to impose the terms of probation.” Commonwealth v. Vilsaint, 2006 Pa. Super. 27, 893 A.2d 753, 757(Pa. Super. 2006). Defendant alleges that the term he violated in his probation was imposed by his probation officer and not the Court.

The Courts of Pennsylvania, however, have determined that there are implied conditions to probation. “The courts have recognized ‘implied conditions’ of probation, such as ‘do not commit another crime.’ Such implied conditions are obvious in nature.” Commonwealth v.

Allshouse, 2011 Pa. Super. 192, 33 A.3d 31, 37 (Pa. Super. 2011) (citing Vilsaint, 893 A.2d at 757 n.5). Therefore, it is implied within the conditions of probation that an individual will not commit another crime.

The Protection from Abuse Act confers upon courts the power to hold a defendant who violates a protective order to “indirect criminal contempt and punish the defendant in accordance with the law.” 23 Pa.C.S.A. § 6114(a).

In Commonwealth v. Allen, 506 Pa. 500, 486 A.2d 363 (1984), the Pennsylvania Supreme Court stated that a criminal contempt proceeding under the Protection from Abuse Act was “criminal in nature,” and further stated that “the finding of contempt involved a proceeding which was criminal in nature . . .” Id., 506 Pa. at 511, 486 A.2d at 368. Furthermore, the Pennsylvania Superior Court has stated on a number of occasions that a finding of criminal contempt under the Protection from Abuse Act is a crime. Wagner v. Wagner, 387 Pa.Superior Ct. 246, 564 A.2d 162 (1989), *petition for allowance of appeal denied*, 525 Pa. 528, 578 A.2d 415 (1990); Vito v. Vito, 380 Pa.Superior Ct. 258, 551 A.2d 573 (1988); Cipolla v. Cipolla, 264 Pa.Superior Ct. 53, 398 A.2d 1053 (1979).

Dunkelberger v. Pennsylvania Bd. of Probation & Parole, 140 Pa. Commw. 360, 33, 593 A.2d 8 (Pa. Commw. 1991).

In this case, Defendant pled guilty to the violation of a P.F.A. Order. Defendant was held in contempt and sentenced to seven (7) days in the Clinton County Correctional Facility. The act of violating a P.F.A. Order is criminal in nature. Committing a criminal act is a violation of the implied conditions of probation. Further, Defendant’s “Conditions Governing Special Probation/Parole” states that “[i]f you are convicted of a crime committed while on special probation, or violate any of the conditions of parole, the Court has the authority, after an appropriate hearing, to recommit you to serve the balance of the sentence” Therefore, Defendant violated his probation by committing and pleading guilty to a criminal act and was properly resentenced at his final probation violation hearing on September 1, 2011.

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 May, 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 27, 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

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