

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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

OPINION AND ORDER

On December 19, 2012, this Court proposed the dismissal of Jermar Hines' (Defendant's) Post Conviction Relief Act (PCRA) Petition. The Court addressed six (6) issues raised by Attorney Rexroth's Amended PCRA Petition: a) trial court failed to properly colloquy the Defendant as to his waiver of his right to a jury trial; b) 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 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.

Prior to this Court's proposed dismissal of the PCRA Petition, Attorney Rexroth stopped serving as conflicts counsel for Lycoming County and the Petition was transferred to Julian Allatt, Esquire. On January 7, 2013, the Defendant filed a *pro se* motion objecting to the Court's proposed dismissal of his PCRA Petition. On January 17, 2013, this Court issued an order stating that if Attorney Allatt did not file objections to the proposed dismissal of the Petition, the

Court would still address the issues raised in the *pro se* Motion.¹ As Attorney Allatt did not file objections, this Court will now address the objections raised by the Defendant.

The Defendant raised additional issues not found in his amended PCRA Petition. The Defendant alleged ineffectiveness of his past and current PCRA counsel based on not raising all his possible issues in the Amended PCRA Petition and for lack of contact.² In addition, the Defendant raised issues that have never been raised before. Pa.R.Crim.P. 902(B) (“Failure to state such a ground in the petition shall preclude the defendant from raising that ground in any proceeding for post-conviction collateral relief”). Even though the Defendant did not set forth any grounds to delay the disposal of this matter, the Court will still address the Defendant’s new issue of whether his trial counsel was ineffective because they did not properly advise him on a case stated trial.

Whether trial counsel was ineffective for not properly advising the Defendant of a case stated/stipulated trial

The Defendant alleges that he was coerced into a non-jury case stated trial because his trial attorney did not properly explain the procedure.³ 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

¹ The Court’s order was forwarded to Attorney Allatt.

² Commonwealth v. Jones, 815 A.2d 598, 613 (Pa. 2002) (citing Smith v. Murray, 477 U.S. 527, 536 (1986)) (“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.”).

³ The Court already addressed whether the Defendant was coerced into waiving his right to a jury trial in an Opinion and Order dated December 18, 2012.

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.

First, the Court will determine whether counsel had no reasonable basis for having a non-jury case stated trial. Relevant to this issue is a brief rendition of the facts and procedure.⁴ On December 24, 2006, the Defendant was pulled over for speeding by Sergeant Joseph Hope (Hope) and subsequently Officer Michael Samar (Samar) responded. Due to impeding traffic, Hope told the Defendant to pull into a bank parking lot. While the Defendant pulled his vehicle into the parking lot the officers saw him begin to reach behind his seat and appear to be trying to hide something. Samar specifically saw the Defendant grab a black bag and hide it. The Defendant was removed from the vehicle and the black bag was found under the center console of the vehicle. The black bag was opened and suspected crack-cocaine was found in several smaller baggies. The bags were of different color and weight.

On February 17, 2007, the Honorable William S. Kieser presided over the Defendant's Motion to Suppress, which he denied. On March 18, 2008, Judge Kieser issued an Opinion in support of his decision. After the non-jury case stated trial, the Defendant appealed Judge Kieser's decision to deny the Motion to Suppress, which the Superior Court of Pennsylvania affirmed.

Based upon the facts and procedure of the case, trial counsel had a reasonable basis for a case stated trial. The main issue raised by the case was whether the search of Defendant's vehicle and black bag were legal. The evidence produced from the stop, if admissible, left little to no argument for trial. Instead of pleading guilty and waiving the issue of the search for appeal, the Defendant had a non-jury case stated trial and therefore could raise the issues in the Motion to Suppress on appeal. The non-jury case stated trial did not expend the resources and

⁴ For a more complete rendition of the facts please see Judge Kieser's Opinion dated March 18, 2008.

time of the Court as a regular trial would have, which the Court took into consideration during the sentencing hearing.⁵ N.T., 4/26/2009, p.7. Therefore, trial counsel would have had a reasonable basis for a case stated trial.

In addition, the Court will address whether there would be a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. The Defendant does not argue that the outcome of his case would have been different had the trial not been case stated. Both Hope and Samar testified at the Defendant's Motion to Suppress. The Defendant's black bag contained seventeen (17) baggies that contained a total of fifteen (15) grams of cocaine. At trial, the Court specifically stated that the amount of bags of varying weights and the amount of cocaine proved to the Court beyond a reasonable doubt that the drugs were not for personal use. N.T., 3/31/2009, p.15-16. There is no indication that the outcome of the trial would have been different if the non-jury trial was not case stated.

Finally, the Defendant never objected or expressed displeasure on the record with his non-jury case stated trial. The Court reviewed the transcripts of the non-jury trial and sentencing and the Defendant never raised any questions or objections about his trial. As there was a reasonable basis for the case stated trial and there is no reasonable probability that the outcome of the trial would have been different, the Court finds that this issue is without merit. The Defendant did not set forth any grounds to delay the disposal of his matter; therefore the Court will dismiss the PCRA Petition.

⁵ Due to the applicable mandatory sentence and the merger of charges, the Court did not have any discretion in lowering the Defendant's sentence. The applicability of the mandatory, however, was at issue prior to sentencing as it was uncertain whether the Defendant had a prior PWID from Philadelphia on December 8, 1995.

ORDER

AND NOW, this _____ day of February, 2013, the Court having received a response from the Defendant to this Court's proposed dismissal of his Post Conviction Relief Act (PCRA) Petition which does not set forth any grounds to delay the disposal of this matter, the Defendant's PCRA petition is hereby **DISMISSED**.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, the Defendant may lose forever his right to raise these issues.

A copy of this order shall be mailed to the Defendant by certified mail, return receipt requested.

By the Court,

Nancy L. Butts, President Judge

xc: DA (KO)
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