

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-50-2003
vs. :
 : CRIMINAL DIVISION
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 :
 :
 : 1925(a) Opinion
RICHARD W. ILLES, SR.,
Appellant

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Order entered on January 2, 2013, which dismissed Appellant's second Post Conviction Relief Act (PCRA) petition.¹ The relevant facts follow.

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

In 2007, Appellant 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, Appellant filed an amended petition. The

¹Much of this Opinion is a re-print of the Court's Opinion which gave Appellant notice of the Court's intent to dismiss his second PCRA petition with some deletions and corrections.

trial court then held hearings on several, but not all, of the issues raised by Appellant. The trial court subsequently denied Appellant's first PCRA petition, and Appellant appealed.

Appellant 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 Appellant's first PCRA petition. The Superior Court's opinion addressed all the issues raised by Appellant, 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. Appellant filed a petition for reargument on July 5, 2011, which the Superior Court denied on September 2, 2011.

Appellant filed his second PCRA petition on September 8, 2011, and filed an amended petition on April 17, 2012. In both petitions, Appellant 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 Appellant and the attorney for the Commonwealth on July 3, 2012. Both parties argued that an evidentiary hearing was not necessary, with Appellant arguing the defects in the appellate brief constituted prejudice per se and the Commonwealth arguing that Appellant 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. Appellant, 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 Appellant filing his response thereto.

On November 2, 2012, the Court gave Appellant notice that it intended to

dismiss his second PCRA petition without holding an evidentiary hearing and an opportunity to respond thereto. Appellant filed a response to the notice on or about November 15, 2012. The Court dismissed Appellant's second PCRA petition without holding an evidentiary hearing, and Appellant filed a timely notice of appeal.

On appeal, Appellant claims that the lower court erred when it determined that Appellant's PCRA appeal rights could not be restored because the trial court had previously determined that the issues had no merit.

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 Appellant's conviction. None of the issues raised allege new evidence that would establish Appellant's actual innocence. Therefore, the court finds Appellant has not set forth a prima facie case that he was innocent of the crimes charged.

Instead, Appellant 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 Appellant'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 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, Appellant 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).

Appellant claimed 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 found that Appellant was required to layer his ineffectiveness claim. In other words, to prevail on his claim of PCRA counsel’s ineffectiveness, Appellant had to establish that: (1) the underlying claim of trial counsel ineffectiveness has arguable merit, which requires Appellant 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) Appellant was prejudiced by PCRA counsel’s

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

Furthermore, Appellant was 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 believed Appellant was required to show that there was 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 could not find that Appellant suffered actual prejudice as a result of PCRA counsel filing a defective brief.

Appellant relied heavily on the case of Commonwealth v. Bennett, 593 Pa. 382, 930 A.2d 1264 (2007). Unlike Bennett, this was not a case where counsel's acts or omissions completely deprived Appellant of any appellate review of his case. Appellant received his constitutional right to a direct appeal, the Superior Court affirmed his conviction, and the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal. Appellant also filed a counseled PCRA petition, which the trial court denied and

Appellant 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. Appellant filed a petition for reargument, but the Superior Court denied it.

Although the court understood Appellant'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 did not find any case where the Pennsylvania appellate courts 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 could not find that there was arguable merit to the forfeited issues when the trial judge had already rejected them.

Appellant did not allege anything in his response to the court's intent to dismiss his PCRA petition that would even arguably constitute an exception to the coordinate jurisdiction rule. He also did not put forth any argument to distinguish Reed.

In Appellant's response to the Commonwealth's letter brief, he stated "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." Appellant's argument

missed the mark. An appellate court could reverse or overrule Judge Brown's decision. This court, however, could not.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)