

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-765-2011; CR-1102-2011
:
vs. :
: Notice of Intent to Dismiss Defendant's
WILLIAM KESTER, : PCRA without holding an evidentiary
Defendant : hearing

OPINION AND ORDER

This matter came before the Court on Defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

In case 765-2011, Defendant was charged with driving under the influence of alcohol (DUI)- incapable of safely driving, a misdemeanor of the second degree; DUI with a high rate of alcohol, a misdemeanor of the first degree; driving under suspension-DUI related; driving the wrong way on a one-way road; and driving an unregistered vehicle. In case 1102-2011, Defendant was charged with theft by unlawful taking and receiving stolen property, both felonies of the third degree.

On September 6, 2011, Defendant entered an open guilty plea to all the charges in case 765-2011 and theft by unlawful taking in case 1102-2011.

On December 7, 2011, the Court sentenced Defendant to an aggregate sentence of 3 ½ to 7 years of incarceration in a state correctional institution, consisting of 1 ½ to 3 years of incarceration for theft by unlawful taking and a consecutive 2 to 4 years of incarceration for DUI. The Court acknowledged that its sentence was within the aggravated sentencing guideline ranges, but gave reasons on the record, which included but were not limited to the fact that this was Defendant's fourth DUI within ten years and his fifth DUI in

his lifetime; Defendant had countless other criminal convictions in the last decade as a result of his alcohol and/or substance abuse, including thefts, possession of drug paraphernalia, recklessly endangering another person, fleeing and eluding, resisting arrest, and driving under suspension violations; and Defendant had gone through countless local efforts at rehabilitation and bringing his substance issues under control, all to no avail. Defendant was given credit for time served from July 25 to December 6, 2011, but he was not eligible for a recidivism risk reduction incentive (RRRI) due to his prior recklessly endangering another person conviction.

On September 10, 2012, Defendant filed a pro se PCRA petition, in which he claimed ineffective assistance of counsel because he thought his plea deal was for 18 months to 3 years and covered all cases. Defendant also claimed the Court disrespected him at sentencing and improperly compared him to a man that killed his wife in a DUI. Defendant asked for a modification or reconsideration of sentence or for his direct appeal rights to be restored. Since this was Defendant's first PCRA petition and he appeared to be indigent, the Court appointed counsel to represent Defendant and gave counsel an opportunity to either file an amended PCRA petition or a no-merit letter pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988) and Commonwealth v. Finley, 379 Pa. Super. 390, 550 A.2d 213 (1988). The Court also scheduled a conference on the PCRA petition with counsel for both parties for November 26, 2012.

On November 21, 2012, counsel filed a motion to withdraw, which included a no-merit letter.

The Court held a conference with defense counsel and the Commonwealth on November 26, 2012, at which defense counsel reiterated the reasons why he believed Defendant's PCRA petition lacked merit, and, without divulging the content of Defendant's correspondence with him, he indicated that he would be unable to properly amend Defendant's PCRA petition to assert claims that Defendant's former counsel was ineffective for failing to file a motion for reconsideration of sentence or a direct appeal.

The Court must conduct an independent review of the record before it dismisses a PCRA petition without holding an evidentiary hearing and permits court appointed counsel to withdraw. After such a review, the Court agrees that Defendant's PCRA petition lacks merit.

Arguably, Defendant's petition raises three issues: (1) counsel was ineffective because Defendant's plea deal was for a sentence of 18 months to 3 years on all cases, but that was not the sentence he received; (2) counsel was ineffective for failing to file a motion to reconsider sentence or a direct appeal; and (3) the sentencing judge disrespected Defendant in court when, knowing of Defendant's addiction, he judged Defendant's personal life, indicated Defendant was unfit for society and compared Defendant to a man who killed his wife in a DUI.

Counsel is presumed effective, and a PCRA petitioner bears the burden of proving by a preponderance of the evidence that counsel's performance was deficient and such deficiency prejudiced him. Commonwealth v. Busanet, 54 A.3d 35, 45 (Pa. 2012). To prove counsel ineffective, a petitioner must demonstrate that: (1) the underlying issue has

arguable merit; (2) trial counsel had no reasonable basis for his action or failure to act; and (3) prejudice, i.e., but for counsel's act or omission there is a reasonable probability that the outcome of the proceedings would have been different. Id.; Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203, 213 (2001).

Defendant first claims that counsel was ineffective because Defendant thought his plea was for 18 months to 3 years on all cases. Defendant's assertions, however, are belied by the transcript of the guilty plea hearing. At the beginning of the hearing, defense counsel indicated that Defendant would be pleading open on the DUI case and on his other case there was an agreement for the State Intermediate Punishment (SIP) program, but there was a question whether that was permissible. Guilty Plea Transcript, p. 2. After some discussion, it was determined that Defendant would not be eligible for the SIP program because he had a conviction for recklessly endangering another person that would disqualify him. Guilty Plea Transcript, p. 3. Defense counsel spoke to Defendant, and then he proceeded to enter an open plea on both cases. The Court specifically advised Defendant that there was no agreement on a sentence to recommend to the Court, the Commonwealth would argue for whatever sentence it wanted, defense counsel would argue for whatever sentence the defense wanted, and the Court would decide after taking into account numerous factors including but not limited to the sentencing guidelines, any mandatory minimums, Defendant's criminal history, the circumstances of the offenses and the protection of the public. Guilty Plea Transcript, p. 11. The Court then asked Defendant if he understood, and Defendant replied in the affirmative. Guilty Plea Transcript, p. 11.

Clearly, at the time Defendant entered his guilty plea he understood that there was no agreement for a specific sentence in his case, let alone a sentence of 18 months to 3 years. Therefore, this claim lacks merit.

Defendant also asserts that his counsel was ineffective for failing to file a motion to reconsider sentence or a direct appeal. Again, the Court cannot agree.

Defendant contends counsel should have filed a motion to reconsider sentence to request that his sentence run concurrently rather than consecutively. Such a motion would have been an exercise in futility.

A judge has discretion to impose a sentence consecutive to or concurrent with another sentence. 42 Pa.C.S. §9721(a); Commonwealth v. Bowen, 55 A.3d 1254, 1265 (Pa. Super. 2012). Under the facts and circumstances of these cases, the Court would not have imposed concurrent sentences.

The cases involved separate crimes that occurred on separate dates. In one case, Defendant was driving under the influence of alcohol. This was Defendant's fifth conviction for DUI and his fourth such conviction within the last ten years. In the other case, Defendant violated the trust of his elderly mother by stealing her jewelry, some items of which were family heirlooms, and pawning or selling it. The police only recovered one item, a watch, because it was engraved with a family member's initials.

Defendant's prior record score also did not accurately reflect his extensive criminal record. The sentencing guidelines cap a numerical prior record score at 5. But for that cap, Defendant's prior record score would have been an 8.

Finally, Defendant had numerous opportunities to change his ways and become a law-abiding member of society, but he did not. Defendant had been through the local Drug Court program, incarcerated in the county prison, and under the supervision of county probation and parole officers, all to no avail.

After mulling all these considerations, the Court came to the conclusion that the only way to protect the public from Defendant committing further crimes and for Defendant to recognize the gravity of his offenses and the fact that he was fortunate that his extensive history of impaired driving had not resulted in injury or death was for him to spend a lengthy period of time incarcerated in a state correctional facility. Even if counsel had filed a motion for reconsideration, the Court was not about to give Defendant a volume discount for his current crimes. Since Defendant was not prejudiced by counsel's failure to file such a motion, Defendant also is not entitled to relief on this claim of ineffective assistance of counsel.

Defendant also claims counsel was ineffective for failing to file a direct appeal. To proceed on such a claim, Defendant must be able to plead and prove either that: (1) he timely requested counsel to file such an appeal and counsel disregarded his request or (2) counsel had reason to think that a rational defendant would want to appeal or that this particular defendant reasonably demonstrated to counsel that he was interested in appealing and counsel failed to consult with him about an appeal. Commonwealth v. Donaghy, 33 A.3d 12, 15 (Pa. Super. 2011); Commonwealth v. Maynard, 900 A.2d 395, 397-398 (Pa. Super. 2006). In his no-merit letter, PCRA counsel indicated that the contents of

correspondence from Defendant, as well as correspondence between trial counsel and Defendant, preclude PCRA counsel from pleading or proving the necessary facts to support a claim that Defendant's direct appeal rights should be reinstated. The only reason PCRA counsel did not include the correspondence or specifically state the contents thereof was a concern that to do so would violate his ethical obligations with respect to the attorney-client privilege and confidential communications. Since Defendant has failed to plead the necessary facts to support this claim, it too must fail.

Finally, Defendant contends the Court disrespected him and judged his life during the sentencing hearing. The Court cannot agree.

Generally speaking, the law requires the Court to consider the criminal history and personal characteristics of a defendant prior to imposing sentence. For example, section 9721(b) of the Judicial Code indicates that in selecting from the available sentencing alternatives, "the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community and the rehabilitative needs of the defendant." 42 Pa.C.S. §9721(b).

Section 9725 regarding sentences of total confinement also requires similar considerations. That section states:

The court shall impose a sentence of total confinement if, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that the total confinement of the defendant is necessary because:

- (1) there is undue risk that during a period of probation or partial confinement the defendant will commit another crime;

- (2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
- (3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

42 Pa.C.S. §9725.

The Court did not discuss Defendant's addiction and prior criminal record to disrespect him in any way. Rather, consideration of Defendant's character and criminal history were necessary to fashion an appropriate sentence. It was clear from Defendant's lengthy criminal history that there was a risk that he would commit another crime if the Court did not incarcerate him. Since local sentencing alternatives were previously unsuccessful, the Court determined that Defendant was in need of lengthy incarceration in a state correctional institution.

The Court also needed to discuss Defendant's character and prior history to show how Defendant failed to appreciate the seriousness of his offenses. This also was the reason the Court mentioned a former client who killed his wife as a result of driving under the influence of alcohol. This was Defendant's fifth DUI conviction and his fourth such conviction in a ten year period. Defendant also had numerous convictions for driving while his license was suspended as a result of his DUI convictions. It was readily apparent that the only way to keep Defendant from drinking and driving was to send him to state prison. Defendant was fortunate that no one was injured or killed as a result of any of his DUI convictions. If Defendant did not stop abusing drugs and alcohol, he would either continue to end up back in state prison because he would keep committing crimes or he would end up

in a coffin. See Sentencing Transcript, pp. 13-15.

ORDER

AND NOW, this ____ day of January 2013, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the Court is satisfied that there are no genuine issues of material fact, the Defendant is not entitled to relief, and no purpose would be served by any further proceedings. The parties are hereby notified of this Court's intention to dismiss Defendant's PCRA Petition without holding an evidentiary hearing. 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.

In light of these findings, the Court grants defense counsel's motion to withdraw. Defendant is notified that he has a right to proceed pro se or to hire private counsel but the Court will not appoint another attorney to represent him.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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