

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-600-2008
:
vs. :
:
WAYNE SHOWERS, :
Defendant :

OPINION AND ORDER

This matter came before the court on Defendant's Post Conviction Relief Act (PCRA) petition, which seeks reinstatement of his direct appeal rights nunc pro tunc. The relevant facts follow.

On March 31, 2008, Defendant Wayne Showers was charged with various sexual offenses against three minor children, K.T., A.T., and B.P. A jury trial was held May 5-6, 2009. The jury convicted him of four counts: aggravated indecent assault of a child, indecent assault of a child under 13, statutory sexual assault, aggravated indecent assault, and indecent assault. A.T. was the victim of the aggravated indecent assault of a child and indecent assault of a child charges, and B.P. was the victim of the statutory sexual assault, aggravated indecent assault, and indecent assault.¹

On August 11, 2009, Defendant was sentenced to an aggregate term of 52 to 180 months of incarceration in a state correctional institution, consisting of 36 to 120 months for aggravated indecent assault of a child and a consecutive 16 to 60 months for statutory sexual assault. The other convictions merged for sentencing purposes.

¹ Defendant was acquitted of all the charges involving K.T.

Defendant filed a timely notice of appeal. The trial court ordered Defendant to file a concise statement of errors complained of on appeal pursuant to Rule 1925(b) of the Rules of Appellate Procedure (“1925(b) Statement”). Defendant’s attorney raised the following issues in the 1925(b) statement: (a) Defendant avers the evidence presented at trial considered in the light most favorable to the Commonwealth as verdict-winner, was insufficient to sustain a conviction under Count 3, Aggravated Indecent Assault of a Child as there was no evidence that Defendant engaged in penetration of the victim’s genitals and (b) Defendant avers the evidence presented at trial, considered in the light most favorable to the Commonwealth as verdict-winner, was insufficient to sustain a conviction under Count 10, Indecent Assault, as there was no evidence that Defendant engaged in indecent contact with the victim. In the appellate brief, however, defense counsel’s sole argument was that the Commonwealth failed to prove that A.T. was under the age of thirteen at the time of the offenses. Since this argument was different from the argument raised in the 1925(b) statement, the Pennsylvania Superior Court found that all the issues were waived and affirmed Defendant’s judgment of sentence in a decision filed on June 29, 2010.

On or about July 26, 2011, Defendant filed a pro se PCRA petition. Since this was Defendant’s first petition and he was previously represented by a public defender, a conflict counsel was appointed to represent Defendant. Unfortunately, Defendant’s PCRA petition languished because his attorney failed to file an amended PCRA petition or a no merit letter, despite being given numerous opportunities to do so. Ultimately, new counsel was appointed to represent Defendant and, on October 2, 2012, the case was transferred to

the undersigned. After a conference to determine the status of Defendant's PCRA petition, the court gave new counsel an opportunity to file an amended PCRA petition on Defendant's behalf.

On January 7, 2013, counsel filed an amended PCRA petition. At a conference also held that day, defense counsel argued that Defendant was entitled to reinstatement of his appeal rights based on the existing record without holding an evidentiary hearing. The Commonwealth asserted that Defendant was not entitled to the presumption of prejudice,² but rather had to prove actual prejudice, because counsel filed a direct appeal and perfected it by filing a timely 1925(b) statement. According to the Commonwealth, Defendant could not prove actual prejudice, because neither the issues asserted in the 1925(b) statement nor the issues argued in the appellate brief had any merit; therefore, Defendant would not be entitled to reinstatement of his direct appeal rights or any other relief under the PCRA.

After reviewing appellate case law regarding reinstatement of appeal rights nunc pro tunc, including the cases listed in footnote 2, as well as Commonwealth v. Reed, 601 Pa. 257, 971 A.2d 1216 (2009) and Commonwealth v. Fink, 24 A.3d 426 (Pa. Super. 2011), the Court finds the outcome in this case is governed by the rationale of the Fink case.

In Fink, the defendant filed a suppression motion based on a purported

² See for example, Commonwealth v. Halley, 582 Pa. 164, 870 A.2d 795 (2005)(prejudice presumed where counsel failed to file a 1925(b) statement); Commonwealth v. Liebel, 573 Pa. 375, 825 A.2d 630 (2003)(prejudice presumed where counsel failed to file a requested petition for allowance of appeal to the Pennsylvania Supreme Court); Commonwealth v. Lantzy, 558 Pa. 214, 736 A.2d 564 (1999)(prejudice presumed in the context of an unjustified failure to file a requested direct appeal).

Miranda violation. The trial court denied the motion. The case proceeded to a non-jury trial, and the trial court found Fink guilty of first degree murder in connection with the strangulation death of his former paramour. Fink filed a direct appeal challenging the trial court's refusal to suppress all evidence gathered as a result of his statement to the police. Finding the appellate brief insufficient to advocate this claim, the Pennsylvania Superior Court deemed the sole issue in Fink's appeal waived. The Superior Court, however, did not quash Fink's appeal, but rather affirmed the judgment of sentence.

Fink filed a PCRA petition, requesting the trial court to reinstate his direct appeal rights so that new counsel could file a proper advocate's brief. The trial determined that the circumstances surrounding Fink's waiver on his direct appeal were not sufficient to compel either a finding of prejudice or a presumption allowing reinstatement of his appeal rights nunc pro tunc. Fink appealed.

In the PCRA appeal, Fink argued that the inadequacy of counsel's brief on direct appeal rendered his representation ineffective per se and compelled consideration of his claim in accordance with Commonwealth v. Franklin, 823 A.2d 906 (Pa. Super. 2003), wherein the Superior Court found that when counsel's brief was so flawed that the appeal was quashed, the appellant was deprived of an independent review of his case and effectively stripped of his right to direct appeal; therefore, he was entitled to the presumption of prejudice and reinstatement of his appeal rights nunc pro tunc. The Commonwealth claimed that Franklin was inapplicable because Fink's appeal was affirmed, not quashed. Relying on Reed, the Commonwealth further argued that Fink was required to prove ineffective

assistance of counsel pursuant to the traditional three-pronged test.

The Superior Court reversed the trial court and found that Fink was entitled to the presumption of prejudice and reinstatement of his appeal rights nunc pro tunc. It distinguished Reed on the basis that, notwithstanding the finding of waiver, the panel in Reed conducted a merits review. Furthermore, although the appeal was quashed in Franklin, the Superior Court found that distinction “to be one without a difference where in both instances a merits review could not be completed.”

Here, as in Fink and Franklin, the Superior Court found the issues raised in the appellate brief were waived and it did not conduct any merits review. Although the specific defects in the brief may be different, the result was the same; the appellant in each case was completely denied any appellate review of the merits of his case due to counsel’s acts or omissions.

The court, however, can grant PCRA relief without holding an evidentiary hearing only after an answer to the petition has been filed by the Commonwealth either voluntarily or pursuant to court order. Pa.R.Cr.P. 907(2) and comment. Therefore, the court will order the Commonwealth to file a written answer to the petition.

ORDER

AND NOW, this ___ day of February 2013, upon consideration of Defendant’s PCRA petition and in accordance with the foregoing Opinion, the court **ORDERS** and **DIRECTS** the Commonwealth to file a written answer to the counseled PCRA petition filed on January 7, 2013 within 20 days of the date of this Order. The court will

review the answer to determine if there are any genuine issues of material fact. If there are, the court will schedule an evidentiary hearing. If there are not, the court will decide the PCRA petition without holding an evidentiary hearing. The court will deem the allegations of the PCRA petition admitted if the Commonwealth fails to file an answer as directed.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Julian Allatt, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Wayne Showers, JF 0015
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