

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 1659 - 2007
	:	
vs.	:	CRIMINAL DIVISION
	:	
ANTONIO PETERSON,	:	
Defendant	:	PCRA

OPINION AND ORDER

Before the Court is Defendant’s Amended Motion for Post-Conviction Collateral Relief, filed August 16, 2013. A conference on the motion was held December 2, 2013.

In September 2008 Defendant was tried on drug charges but the trial ended in a mistrial after, in response to the prosecutor’s question, the confidential informant testified that he had met Defendant in prison. Prior to the second trial, Defendant moved to dismiss the charges on double jeopardy grounds. By Order dated October 17, 2008, that motion was denied. During the second trial, again in response to a question by the prosecutor, the confidential informant testified to having had contact with Defendant “over at the jail”. Defendant’s request for a mistrial was denied and instead the court explained to the jury that the informant was referring to incarceration related to the pending charges and warned them to not make any adverse inference from that fact. Defendant was convicted and sentenced and filed an appeal in which he challenged both the October 17, 2008, Order and the court’s denial of his second mistrial request. The Superior Court addressed the second issue but found the first to have been waived for failure to provide that Court with a transcript of the first trial.

Defendant’s first PCRA petition was filed in November 2010. Upon agreement of counsel, Defendant’s appellate rights were re-instated on the basis that appointed counsel had abandoned Defendant by failing to provide the transcript. An appeal was filed, but newly appointed counsel again abandoned Defendant and failed to file a brief. The appeal was dismissed.

Defendant's second PCRA petition was filed in August 2011. Again the court reinstated Defendant's appellate rights on the basis that he had been abandoned by appointed counsel. This time, appointed counsel abandoned Defendant before the matter even reached the Superior Court – he failed to file a Notice of Appeal. Newly appointed counsel then filed a Motion to File Notice of Appeal *Nunc Pro Tunc*, which was granted, the Notice of Appeal was filed, and the matter reached Superior Court. Because Superior Court had actually addressed one issue in the first appeal, however, the Court held that reinstatement of appellate rights was not the appropriate remedy to correct the alleged error of counsel having failed to preserve the other issue. Instead, the Court advised this court in its remand, Defendant's recourse was "to seek PCRA relief based on the ineffectiveness of appellate counsel in failing to present the waived issue(s)."

In response, this court directed the filing of an Amended PCRA Petition by appointed counsel, and a conference was held on that petition, as noted above. The Amended Petition presents one issue: whether appellate counsel was ineffective in failing to provide the transcript and thereby waiving the double jeopardy issue. According to the Superior Court, this court is to decide "(1) if the underlying claim (i.e., the waived claim) had arguable merit; (2) if counsel had no reasonable basis for counsel's act or omission (i.e., the waiver); and (3) if counsel's conduct prejudiced the petitioner (i.e., whether there is a reasonable probability the outcome of the appeal would have been different absent counsel's conduct).

With respect to whether the double jeopardy claim had arguable merit, the court notes that retrial of a defendant who successfully moved for a mistrial is prohibited by principles of double jeopardy "only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial". Commonwealth v. Simeone, 712 A.2d 770, 774 (Pa. Super. 1998). In the instant case, the conduct in question occurred at the beginning of the prosecutor's questioning of his second witness, William Sheran. The following exchange occurred:

Q. Mr. Sheran, in July and August 2007 were you working with Agent Howe as a confidential informant?

A. I was.

Q. Specifically on July 23rd and August 2nd of 2007 did you work on behalf of Agent Howe and – with respect to two purchases of cocaine from –

- A. Yes, I did.
Q. Now, prior to these two dates did you know Defendant Peterson?
A. I did.
Q. And how did you know Defendant Peterson?
A. I had to do a – 120 days in the Clinton County Correctional Facility.
They put me –

(Mr. Protasio) Your Honor, I object. May we approach?

N.T., September 15, 2008, at p. 60-61. After gleaning from the prosecutor that in preparation for trial he had “asked [the informant] to tell him how he knew [the defendant]” and that he “didn’t ask him to lie”, Id. at p. 64, the trial court concluded that “[w]hile the Assistant District Attorney could have anticipated that answer and obviously failed to properly prepare the witness for trial, there is no evidence, beyond the suggestions made by defense counsel, that the Assistant District Attorney acted intentionally.” Order of the Honorable J. Michael Williamson dated October 17, 2008, at p. 1.

This court agrees that nothing in the record suggests intentional conduct on the part of the prosecutor. Rather, it appears to be simply a case of attorney incompetence, and as such, does not support the request for dismissal of the charges on double jeopardy grounds. See, *e.g.*, Commonwealth v. Culver, 51 A.3d 866 (Pa. Super. 2012)(no clear intent to deprive defendant of a fair trial, misconduct explained by incompetence or mere indifference). Therefore, the court finds no arguable merit to the waived claim. Since counsel cannot be found ineffective for failing to pursue a claim without arguable merit, Commonwealth v. Ellis, 510 A.2d 1253 (Pa. Super. 1986), the court need not examine the other two factors. Defendant is not entitled to relief.

ORDER

AND NOW, this 4th day of December 2013, upon review of the record and pursuant to Rule 907(a) of the Pennsylvania Rules of Criminal Procedure, it is the finding of this Court that Defendant's Motion for Post-Conviction Collateral Relief raises no genuine issue of fact and Defendant is not entitled to post conviction collateral relief.

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Motion. 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 Motion.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
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Hon. Dudley Anderson