

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1472-2011
:
vs. :
:
:
LARRY BURDEN, :
Defendant :

OPINION AND ORDER

This matter came before the court on Defendant Larry Burden’s Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

At approximately 9:50 a.m. on October 9, 2011, the Rite Aid store on Fifth Street was robbed. The robber approached the clerk and told the clerk to get behind the register and give him all the money. As the clerk was walking around the counter, the robber said “hurry or I’ll hurt you.” The clerk noticed that the robber kept his hands inside the pouch of his hoodie, where there was a bulge that the clerk recognized as the outline of a gun. The clerk opened the cash drawer and handed the robber \$149, which consisted predominantly of \$1 bills.

A customer observed the robbery take place and, while calling 9-1-1, the customer followed the perpetrator. The customer observed the robber remove some of his clothing and discard it. When the police arrived, the customer pointed out the robber to them.

Officers took the robber into custody and he was identified as Larry Burden. As a result of a search incident to arrest, the officers discovered a .357 revolver loaded with four rounds of live ammunition in Burden’s waistband, the \$149 in cash stolen from Rite

Aid, and nine baggies of crack cocaine. The police also recovered a hat and hoodie that Burden discarded along the route he took after he left the store. During booking, Burden commented to the officers, “You got the money; you got what you want.”

The police charged Burden with persons not to possess a firearm, possession of a firearm without a license, terroristic threats, theft by unlawful taking, receiving stolen property, possessing instruments of crime, simple assault by physical menace, and three counts of robbery.

A jury trial was held on all of the counts except one count of robbery that was withdrawn by the Commonwealth and the person not to possess a firearm charge, which was severed and tried non-jury. Burden was convicted of all the charges.

On July 3, 2012, the court imposed an aggregate sentence of 9 ½ to 20 years of incarceration in a state correctional institution. Burden filed post sentence motions, which the court denied.

Burden filed a timely notice of appeal in which he asserted sufficiency and weight of the evidence challenges to his convictions for robbery and simple assault. The Pennsylvania Superior Court affirmed Burden’s convictions in a memorandum opinion filed on April 19, 2013.

Trial counsel sent Burden a letter dated April 23, 2013, advising him that the Superior Court denied his appeal and that he could file a PCRA petition alleging ineffective assistance of counsel. Trial counsel did not discuss the possibility of filing a petition for allowance of appeal with the Pennsylvania Supreme Court. Nevertheless, on May 15, 2013, Burden wrote a letter to counsel requesting that she file such a petition. On May 28, 2013,

trial counsel sent a letter to Burden advising him that she received his letter requesting that she file a petition for allowance of appeal after the date that the filing was due; however, he could file a PCRA petition alleging ineffective assistance of counsel.

Burden filed a timely pro se PCRA petition in which he asserted numerous claims, including a claim that trial counsel was ineffective for failing to file a petition for allowance of appeal to the Pennsylvania Supreme Court. The court appointed counsel to represent Burden and gave counsel an opportunity to file an amended PCRA petition or a no merit letter pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1998) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). Counsel filed an amended PCRA petition which only pursued the issue with respect to counsel's failure to file a petition for allowance of appeal. In the amended petition, counsel argued that Burden was abandoned by counsel when she failed to file an petition for allowance of appeal or to advise him of his right to file such petition and, based on Commonwealth v. Liebel, 825 A.2d 630 (Pa. 2003), the court should reinstate his right to file a petition for allowance of appeal nunc pro tunc.

At a conference on Burden's petition, the Commonwealth did not dispute the facts. Instead, the prosecutor argued that Burden was not entitled to relief because he did not identify any non-frivolous issue that could be asserted in such a petition. The prosecutor did not provide any specific case citations, but he claimed that more recent appellate case law held that if the issues that could be raised in a petition for allowance of appeal were frivolous, then counsel was not required to file such a petition.

After a review of the case law, the court finds that Burden is entitled to reinstatement of his right to file a petition of allowance of appeal nunc pro tunc under the

facts and circumstances of this case.

In Commonwealth v. Liebel, 825 A.2d 639, 635 (Pa. 2003), the Pennsylvania Supreme Court determined that the failure of counsel to seek allowance of appeal constitutes ineffectiveness where the defendant requested counsel to file such a petition and counsel disregarded his request.

Here, the Superior Court affirmed Burden's judgment of sentence in a decision filed on April 19, 2013. In a letter dated May 15, 2013, Burden wrote to trial counsel asking her to file a petition for allowance of appeal with the Pennsylvania Supreme Court, but she neither filed such a petition nor sought leave to file such a petition nunc pro tunc.

The correspondence between Burden and trial counsel¹ also shows that this particular defendant reasonably demonstrated to counsel that he was interested in pursuing all avenues through which he could obtain relief from his convictions. Burden inquired about an appeal before he was even sentenced in this case. See Pro Se PCRA Petition, Exhibit E (letter dated March 7, 2012 from trial counsel to Burden). He inquired about a PCRA petition before the court decided his post sentence motions. See Pro Se PCRA Petition, Exhibit F (letter dated August 20, 2012 from trial counsel to Burden). He also sought information and asked questions about his appeal. See Pro Se PCRA Petition, Exhibit G (letter dated January 2, 2013 from trial counsel to Burden) and Exhibit K (letter dated February 11, 2013 from trial counsel to Burden).

The court recognizes that in the case of Commonwealth v. Bath, 907 A.2d 619

¹ This correspondence is attached to Burden's original pro se PCRA petition.

(Pa. Super. 2006), the Superior Court found that the appellant was required to show that any issue he wished to assert rose above frivolity. Bath, however, is factually distinguishable from the current case. The appellant in Bath never requested counsel to file a petition for allowance of appeal. 907 A.2d at 622. He also did not argue that he reasonably demonstrated to counsel that he was interested in appealing. Id. at 623. The only remaining situation where a duty to file an appeal or to consult with a defendant about filing an appeal arises is where counsel has a reason to believe that a rational defendant would want to appeal such as when there are non-frivolous grounds for appeal. See id. at 623. Bath did not even attempt to show that any issue arose above frivolity.

Burden, on the other hand, wrote a letter asking counsel to file a petition for allowance of appeal within thirty (30) days of the Superior Court's decision. He also demonstrated through his correspondence with counsel that he was interested in pursuing all avenues of challenging his convictions. Under the facts and circumstances of this case, trial counsel either should have recognized Burden was interested in pursuing all avenues of appeal, and then file a petition for allowance of appeal or file a petition for allowance of appeal nunc pro tunc when Burden's letter dated within the thirty day appeal period was received shortly after the appeal period had expired.

ORDER

AND NOW, this ___ day of December 2014, the court reinstates Defendant's right to file a petition for allowance of appeal nunc pro tunc. Counsel shall file such a petition with the Pennsylvania Supreme Court within thirty (30) days of the date of this order.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald F. Martino, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file