

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-877-2010
	:	
vs.	:	
	:	
	:	Opinion and Order re PCRA
ROBERT GRAHAM,	:	
Defendant	:	

OPINION AND ORDER

This Opinion is written to address issues that Defendant has raised in an “amended petition” that Defendant filed in response to the court’s notice that it intended to dismiss his PCRA petition without holding an evidentiary hearing.

In order to prevail on an ineffectiveness claim, a petitioner must show that the claim is of arguable merit, counsel’s performance lacked a reasonable basis designed to effectuate the defendant’s interests, and prejudice. Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203 (2001); Commonwealth v. Correa, 444 Pa. Super. 621, 664 A.2d 607 (1995). Prejudice in this context means that, but for counsel’s unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. Commonwealth v. King, 618 Pa. 405, 57 A.3d 607, 613 (2012). Counsel is presumed effective and the defendant bears the burden of proving otherwise. Commonwealth v. Fears, 86 A.3d 795, 804 (Pa. 2014).

Defendant first asserts that trial counsel was ineffective for failing to adequately develop the request for a Frye hearing regarding expert testimony in fingerprinting. Defendant cannot prevail on this claim.

Expert testimony is only precluded under Frye when an expert is going to

testify regarding novel scientific evidence that has not gained general acceptance in the relevant scientific community. See Commonwealth v. Blasioli, 713 A.2d 1117, 1119 (Pa. 1998). Defendant's expert did not indicate in his reports or in his testimony that fingerprint analysis or the ACE-V method is no longer generally accepted in the relevant scientific community. Instead, Defendant's expert opined that the Commonwealth's expert report did not comport with the standards and procedures described in the Pennsylvania State Police Bureau of Forensic Services (BFS) manual or those published by the Scientific Working Group on Friction Ridge Analysis, Study and Technology (SWGFAST). As the Superior Court noted when it rejected Defendant's claim on direct appeal that the trial court erred in denying the request for a Frye hearing: "The existence of recent criticisms in the scientific literature of the reliability of the methodology employed by the Commonwealth's expert, some of which were published after the fingerprint analysis conducted in this case, are not sufficient to demonstrate a change in the scientific consensus of the basic underlying science." 1714 MDA 2012 at 17. Moreover, the Superior Court also found that Defendant was not prejudiced by the denial of a Frye hearing in this case.

Defendant also contends that the trial court abused its discretion by not ordering a Frye hearing in this case. To be eligible for relief under the PCRA, a defendant must plead and prove that the allegation of error has not been previously litigated or waived. 42 Pa.C.S. §9543(a)(3). An issue is previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. §9544(a)(2). An issue is waived if "the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state

postconviction proceeding.” 42 Pa.C.S. §9543(b). Defendant is not eligible for relief on this claim because it was previously litigated in the Pennsylvania Superior Court. 1714 MDA 2012 at 14-17.

Defendant’s third claim is that trial counsel abandoned him during the appellate proceedings, because he did not obtain leave of court to withdraw and Ms. Bellfy was substituted as his replacement sua sponte. Defendant is not entitled to relief on this claim. Although it is true that different counsel represented Defendant on appeal, both attorneys were members of the Lycoming County Public Defender office and Defendant has not alleged how any change in counsel prejudiced him. Moreover, Defendant fails to note that he filed a petition for appointment of counsel in the Superior Court, which was denied as moot because he was being represented by Ms. Bellfy.

Defendant’s fourth claim is that the Commonwealth used a peremptory challenge to strike the only African-American from the jury. Defendant is not eligible for relief on this claim because it was previously litigated in the Pennsylvania Superior Court. 1714 MDA 2012 at 17-19.

Defendant’s final claim is that the sentence imposed was illegal pursuant to Alleyne v. United States, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) because his criminal history and prior record score were utilized without being presented to the jury. This issue is without merit, because the United States Supreme Court carved out a narrow exception for prior convictions. Alleyne, 133 S.Ct. at 2160 n.1, 186 L.Ed.2d at 327 n.1 (citing Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)); see also Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63 (2000)(“Other

than the fact of a prior conviction, any fact that increases the penalty for a crime...must be submitted to a jury, and proved beyond a reasonable doubt); Commonwealth v. Miller, 2014 PA Super 214, 2014 Pa. Super. LEXIS 3410 at *12 n.5 (Sept. 26, 2014).

For the forgoing reasons, as well as the reasons set forth in the Opinion and Order entered on July 15, 2014, the court will dismiss Defendant's PCRA petitions without holding an evidentiary hearing.

ORDER

AND NOW, this _____ day of December 2014, after review of Defendant's response to the Court's Order giving notice of its intent to dismiss Defendant's Post Conviction Relief Act (PCRA) petition, the Court DISMISSES Defendant's PCRA petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Robert Graham, #KP-4522 (certified mail)
SCI-Somerset, 1600 Walters Mill Rd, Somerset PA 15510
Work file
Suzanne Fedele, Clerk of Courts