

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1481-2010
 :
 LAWRENCE NEWMAN, : Notice of Intent to Dismiss PCRA
 Defendant :

OPINION AND ORDER

This matter came before the court on Defendant’s post conviction relief act (PCRA) petition. The relevant facts follow.

Defendant engaged in sexual intercourse and other sexual conduct with his minor daughter, who was 13 years old when the sexual conduct began in 2008. The police became aware of the situation in 2010 after the victim became pregnant and gave birth to a son. Defendant was charged with numerous sexual offenses.

On January 6, 2012, Defendant entered a guilty plea. The terms of the plea agreement were that Defendant would plead guilty to incest, statutory sexual assault, corruption of a minor, unlawful contact with a minor, endangering the welfare of a child, recklessly endangering another person and involuntary deviate sexual intercourse, in exchange for a sentence of 13 to 30 years of incarceration in a state correctional institution. On May 7, 2012, the court advised Defendant of his registration requirements under Megan’s Law and sentenced Defendant in accordance with the plea agreement.

On May 24, 2013, current counsel filed a PCRA petition in which he alleged that previous counsel failed to file an appeal of Defendant’s sentence. The petition requested an evidentiary hearing, but the relief requested was “a new sentencing hearing.”

The court scheduled a conference with counsel on Defendant's petition, but directed defense counsel to file an amended PCRA petition that complied with Rule 902 of the Pennsylvania Rules of Criminal Procedure. Defense counsel filed an amended PCRA petition, which was nearly identical to the original petition and still did not address the requirements of Rule 902(A)(11) through (15). The court was most concerned that the petition did not allege Defendant requested his attorney to file an appeal or the date or time frame when such a request, if any, was made and did not include any witness certifications from Defendant or his previous attorney despite requesting an evidentiary hearing.¹ The court gave defense counsel an additional opportunity to amend the PCRA petition to include this information.

Defense counsel was unable to obtain any witness certifications to support the assertion that Defendant asked his previous counsel to appeal his sentence within thirty days of the date it was imposed. Therefore, instead of filing an amended petition, counsel filed 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)(en banc) and a motion to withdraw. Included as exhibits to the no merit letter was a memo from plea counsel to the deputy court administrator dated June 28, 2012 notifying her that Defendant wished to appeal his sentence² and a letter from plea counsel dated September 20, 2013 that to the best of his

¹ If the petition had included factual averments to support his claim and a verification from Defendant, the court might have found that such was an adequate substitute for a witness certification.

² At that time, plea counsel's contract with Lycoming County to serve as a conflict attorney had expired or was about to expire. The purpose of a memo such as this is to notify the deputy court administrator of the status of outgoing conflict counsel's cases. The deputy court administrator wrote on the memo the words "Kyle" and "need to file PCRA petition – to reinstate appeal rights nunc pro tunc." This notation was directed to a partner

recollection Defendant did not make his request until “after the running of the allotted time period within which Mr. Newman had a right to file an appeal.”

After a review of the record, the court agrees that Defendant’s petition lacks merit.

It is incumbent upon the petitioner to both plead and prove facts that show he is entitled to the relief requested. 42 Pa.C.S.A. §9543; Pa.R.Cr.P. 902. To prevail on a claim of ineffective assistance of counsel, a petitioner must show: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action chosen; 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. Commonwealth v. Elliott, 80 A.3d 415, 427 (Pa. 2013); Commonwealth v. Pierce, 51 Pa. 153, 527 A.2d 973, 975 (1987).

Defendant’s sole claim is that plea counsel was ineffective for failing to file an appeal. An “unjustified failure to file a requested appeal is ineffective assistance of counsel per se” and a defendant “need not show that he likely would have succeeded on appeal in order to meet the prejudice prong of the test for ineffectiveness.” Commonwealth v. Bath, 907 A.2d 619, 622 (Pa. Super. 2006), citing Commonwealth v. Lantzy, 558 Pa.214, 736 A.2d 564, 571 (1999). Defendant, however, has neither pled sufficient facts to show that counsel’s failure to file an appeal was unjustified nor provided any witness certifications to

in the law firm that was receiving the new conflict contract. This case was transferred to an associate at that firm, but she never filed a PCRA petition on Defendant’s behalf. She left the conflict attorney position in April 2013 and current counsel was appointed.

be entitled to an evidentiary hearing on this claim.³

In his written guilty plea colloquy, Defendant was notified that he had 30 days from the date of his sentence within which to file an appeal. See Written Guilty Plea Colloquy, p. 5 (Question 20). Therefore, to show that counsel's failure to file an appeal was unjustified,⁴ Defendant must plead and prove that within 30 days of the date of his sentence he asked plea counsel to file an appeal or he placed a letter in which he requested an appeal in a prison mailbox or into the hands of prison officials.⁵ Unfortunately, to date, Defendant has not provided any such information to his counsel or the court. Furthermore, if there are any documents which would show when Defendant requested an appeal or placed his letter in the hands of the prison officials, Defendant should submit them in his response to this Opinion and Order or state why he cannot do so. This should have been done as part of Defendant's PCRA petition. See Pa.R.Cr.P. 902(A)(12) and (D).

Where no request to appeal is made, a defendant must show that counsel had a constitutional duty to consult with him concerning whether he wanted to appeal. Bath, 907 A.2d at 623. "[C]ounsel has a constitutional duty to consult with a defendant about an appeal where counsel has reason to believe either '(1) that a rational defendant would want to appeal

³ See 42 Pa.C.S.A. §9545(d)(1), which provides that failure to substantially comply with the witness certification requirements "shall render the proposed witness's testimony inadmissible."

⁴ Counsel's failure to file an appeal would be justified if Defendant did not make the request within the 30-day time period, because the Superior Court would quash an untimely appeal.

⁵ Pursuant to the "prisoner mailbox rule," direct appeals filed by pro se prisoners are deemed filed on the date that the prisoner deposits the appeal with prison authorities or places it in a prison mailbox. Commonwealth v. Jones, 549 Pa. 58, 700 A.2d 423 (1997). Although this situation may not squarely fit within the prisoner mailbox rule because Defendant was not acting pro se, it seems incongruous that an appeal sent directly to the clerk of courts would fall within the rule, but requesting an appeal through court-appointed counsel would not. Such a result would discourage prisoners from utilizing their court-appointed counsel, which would be detrimental to both the prisoner's interest and the criminal justice system..

(for example, because there are non-frivolous grounds for an appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” Id., quoting Commonwealth v. Touw, 781 A.2d 1250, 1254 (Pa. Super. 2001)(quoting Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000)).

In his petition, Defendant alleges that his appeal would have addressed the following issues: (i) whether the court took into consideration his rehabilitative needs; (ii) whether the court considered mitigating or aggravating circumstances; (iii) whether the sentence was excessive due to his lack of a prior record; and (iv) whether his Megan’s Law listing requirement was properly decided. All of these issues are frivolous.

Since Defendant entered a negotiated guilty plea, he would be limited on direct appeal to asserting that the court lacked jurisdiction, his plea was involuntary, or his sentence was illegal. Commonwealth v. Markowitz, 32 A.3d 706, 711 (Pa. Super. 2011); Commonwealth v. Maynard, 900 A.2d 395, 396-97 (Pa. Super. 2006). The first three appeal issues are challenges to the discretionary aspects of Defendant’s sentence. The court, however, did not have any discretion when it imposed Defendant’s sentence. The only choice the court had was to accept or reject the negotiated plea in this case. Therefore, these issues are frivolous.

Defendant’s Megan’s Law issue also is frivolous. Defendant’s guilty plea to involuntary deviate sexual intercourse would make him a lifetime registrant under the version of Megan’s Law in effect at the time of his sentencing hearing. 42 Pa.C.S.A. §9795.1(b)(2).

Defendant also had convictions for incest and unlawful contact with a minor. Although Defendant would have been a ten-year registrant if he had only been convicted of one of those offenses, two or more convictions also would result in Defendant being a lifetime registrant. 42 Pa.C.S.A. §9795.1(b)(1).⁶ Moreover, since the passage of Pennsylvania's version of the Adam Walsh Act, even more of Defendant's convictions would require him to register for life. See 42 Pa.C.S.A. §9799.14.

There also is nothing in the record to indicate that Defendant in any way demonstrated to counsel before the expiration of the appeal period that he was interested in appealing.

For the foregoing reasons, the court intends to dismiss Defendant's PCRA petition without holding an evidentiary hearing.

ORDER

AND NOW, this ___ day of February 2014, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this Court's intention to dismiss Defendant's PCRA Petition. 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.

The court defers rendering a decision on counsel's motion to withdraw until Defendant's response time has expired.

⁶ Effective December 20, 2012, Pennsylvania's Megan's Law expired and was replaced with Pennsylvania's Adam Walsh Act, see 42 Pa.C.S.A. §9799.10 et seq.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Jerry Lynch, Esquire
Lawrence Newman, KN 5435
SCI Albion, 10745 Route 18, Albion PA 16475-0001
Gary Weber, Esquire (Lycoming *Reporter*)