

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **CR-918-2008**
:
:
v. :
:
: **CRIMINAL DIVISION**
COREY A. RINGKAMP, :
:
Petitioner : **PCRA**

OPINION AND ORDER

On June 12, 2014, the Petitioner filed a Post-Conviction Relief Act (PCRA) petition. On August 18, 2014, PCRA Counsel sent the Petitioner a “No Merit Letter.” On September 8, 2014, PCRA Counsel filed a Motion to Withdraw as Counsel. A court conference was held on September 30, 2014.

I. Background

On March 10, 2010, the Honorable Kenneth D. Brown found the Petitioner guilty of Possession of Marijuana with Intent to Deliver,¹ Possession of Marijuana,² Possession of Drug Paraphernalia,³ Possession of an Instrument of Crime,⁴ and Conspiracy to Deliver Marijuana.⁵ Pursuant to 42 Pa. C.S. § 9712.1, Judge Brown sentenced the Petitioner to five years of incarceration. The Petitioner filed an appeal, which was denied by the Superior Court of Pennsylvania on December 19, 2011.

The Petitioner argues that he is entitled to post-conviction relief for the following reasons. His sentence is illegal as a result of Alleyne v. United States.⁶ The evidence from the Petitioner’s vehicle should have been suppressed because police used an uncertified drug dog

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(16).

³ 35 P.S. § 780-113(a)(32).

⁴ 18 Pa.C.S. § 907(a).

⁵ 18 Pa. C.S. § 903(a) and 35 P.S. § 780-113(a)(30).

⁶ 133 S.Ct. 2151 (2013).

and entered the vehicle without a warrant. Counsel was ineffective during the suppression hearing because counsel did not attempt to suppress the evidence resulting from the search of a camera found in the Petitioner's vehicle. A Pennsylvania State Police (PSP) trooper involved in the Petitioner's case was disciplined for improper storage of evidence in another case. The Commonwealth did not file a brief with the Superior Court. The Petitioner's trial counsel was ineffective because the charges against the Petitioner's co-defendant were dismissed.

II. Discussion

A. Although 42 Pa. C.S. § 9712.1 is Unconstitutional, Petitioner's Sentence is not Illegal.

42 Pa. C.S. § 9712.1(a) provides, "Any person who is convicted of a violation of . . . The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person . . . is in physical possession or control of a firearm, whether visible, concealed about the person . . . or within the actor's . . . reach or in close proximity to the controlled substance, shall likewise be sentenced to a minimum sentence of at least five years of total confinement." 42 Pa. C.S. § 9712.1(c) provides, "The court . . . shall determine, by a preponderance of the evidence, if [the minimum sentence] is applicable."

In Commonwealth v. Newman,⁷ the Superior Court of Pennsylvania held that "Section 9712.1 . . . no longer pass[es] constitutional muster." 99 A.3d at 98.

In Commonwealth v. Watley,⁸ police stopped a vehicle with a driver and a passenger. 81 A.3d at 111. The police found a gun and controlled substances in the passenger side glove compartment. Id. A jury found the driver guilty of possession of controlled substances. Id. at 110. It also found the driver guilty of carrying a firearm without a license in connection to the

⁷ 99 A.3d 86 (Pa. Super. 2014).

⁸ 81 A.3d 108 (Pa. Super. 2013).

gun found in the glove compartment. Id. at 118-19. The trial court imposed a mandatory minimum sentence of five years pursuant to 42 Pa. C.S. § 9712.1. Id. at 112. The Superior Court held that the driver's sentence was not illegal. Id. at 121. It wrote the following:

[T]he uncontroverted evidence in the instant case established that one firearm was located in the same glove compartment as the drugs and another handgun was located on the passenger-side floor in close proximity to the drugs, and the jury determined beyond a reasonable doubt that [the driver] possessed those firearms. Therefore, the facts necessary to establish application of the mandatory minimum sentence not only were essentially undisputed and overwhelming, they were determined by the jury. Since [the driver] was convicted of PWID and unlawfully possessing two firearms relative to the same incident, the factual predicates for determining the mandatory minimum were proven to a jury beyond a reasonable doubt, and his sentence is not illegal.

Id.

Here, the Petitioner was found guilty of Possession of Marijuana with Intent to Deliver, Conspiracy to Deliver Marijuana, and Possession of an Instrument of Crime. The instrument of crime was a BB gun. It was uncontroverted that the marijuana and the BB gun were found in the glove compartment of the Petitioner's vehicle. The following exchanges between Defense Counsel and the Petitioner show it was uncontroverted that the marijuana and the BB gun were found in the glove compartment:

Defense Counsel: Now on April 29th at some point in time you were in the car and you were taken into custody?

Petitioner: Yes.

Defense Counsel: And subsequently the car was searched and there was marijuana found in the car?

Petitioner: Yes, correct, and now we're here.

Defense Counsel: Did you put the marijuana in the car?

Petitioner: No I did not.

Defense Counsel: When did you first learn that there was marijuana in the car?

Petitioner: When I went to the state barracks with my girlfriend to go pick up the car after I was released from the 48 hour detainer. Tyson – Trooper Havens arrested me and explained to me what he said he found in the car.

Defense Counsel: Now so you had no knowledge of that marijuana being in the glove box?

Petitioner: No.

N.T., 3/10/10, at 195-96.

Defense Counsel: Now there was also this BB gun found in the car.

Petitioner: Yes.

Defense Counsel: It was in the glove box.

Petitioner: I have no idea.

Defense Counsel: Well according to what they said.

Petitioner: According to what they said, yes it was.

N.T., 3/10/10, at 201.

PSP Trooper Tyson Havens testified that the gun fired BB's and was equipped with a carbon dioxide cartridge. *See* N.T., 3/10/10, at 71. Defense Counsel did not challenge the assertion that the gun had a carbon dioxide cartridge. "A carbon dioxide powered BB gun clearly fits within the ambit of section 9712(e)." Commonwealth v. Sterling, 496 A.2d 789, 792 (Pa. Super. 1985). Since the Petitioner was convicted of possessing the BB gun as a criminal instrument and possessing marijuana relative to the same incident, the factual predicates for determining the mandatory minimum were proven beyond a reasonable doubt, and the Petitioner's sentence is not illegal.

B. Petitioner is not Eligible for Relief on the Suppression Issues Because the Issues Have Been Either Waived or Litigated.

The Petitioner argues that the evidence from his vehicle should have been suppressed because police used an uncertified drug dog and entered his vehicle without a warrant. He also argues that counsel was ineffective during the suppression hearing because counsel did not attempt to suppress the evidence resulting from the search of a camera found in his vehicle.

To be eligible for PCRA relief a petitioner must show “[t]hat the allegation of error has not been previously litigated or waived.” *See* 42 Pa. C.S. § 9543(a)(3). “[A]n 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. § 9544(b). The issue of the uncertified drug dog could have been raised on appeal. Therefore, it has been waived. Likewise, the issue of police entrance into the vehicle without a warrant could have been raised on appeal and has also been waived.

“[A]n issue has been 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). The Superior Court ruled on the merits of the camera search issue. The Superior Court wrote, “[A]s described by the trial court, the totality of the facts presented supported the issuance of the [camera] search warrant.” Non-Precedential Opinion, 12/19/11, at 19. “[F]inal orders of the Superior Court . . . may be reviewed by the [Pennsylvania] Supreme Court upon allowance of appeal.” 42 Pa. C.S. § 724(a). “Review on a writ of certiorari is not a matter of right, but of judicial discretion.” Sup. Ct. R. 10. Because the Superior Court ruled on the merits, the camera search issue has been litigated. “[P]ost-conviction review of claims previously litigated on appeal cannot be obtained by alleging ineffectiveness of prior counsel and

by presenting new theories of relief to support previously litigated claims.” Commonwealth v. Michael, 755 A.2d 1274, 1277 (Pa. 2000).

C. Petitioner is not Eligible for Relief on the Issue of the Discipline of the Trooper Because the Issue does not Satisfy any of the Requirements of 42 Pa. C.S. § 9543(a)(2).

The Petitioner next argues he is entitled to relief because a PSP trooper involved in the Petitioner’s case was disciplined for the improper storage of evidence in another case. This issue simply does not satisfy any of the requirements of 42 Pa. C.S. § 9543(a)(2). Therefore, the Petitioner is not eligible for relief on this issue.

If the Petitioner is alleging that trial counsel was ineffective for not exploring the issue, the allegation is without merit. As PCRA Counsel notes, Defense Counsel questioned the trooper on his disciplinary record. N.T., 3/10/10, at 84-86.

D. Petitioner is not Eligible for Relief on the Brief Issue Because the Issue does not Satisfy any of the Requirements of 42 Pa. C.S. § 9543(a)(2).

The Petitioner next argues that he is entitled to relief because the Commonwealth did not file a brief in the Superior Court. This issue simply does not satisfy any of the requirements of 42 Pa. C.S. § 9543(a)(2). Therefore, the Petitioner is not eligible for relief on this issue.

E. Petitioner’s Ineffective Assistance of Counsel Claim is not Particular Enough to Meet the Ineffective Assistance Standard.

Finally, the Petitioner argues that trial counsel was ineffective because the Petitioner did not get the same result as his co-defendant. “[T]o establish a layered claim of IAC, a PCRA petitioner must demonstrate each prong of the [IAC] measure with particularity.”

Commonwealth v. Pitts, 884 A.2d 251, 254 (Pa. Super. 2005). The Petitioner’s claim is not particular enough to establish ineffective assistance of counsel. As PCRA Counsel notes, “[E]ach defendant is situated differently, the facts of each case, even those of codefendants, often differ, the prosecution has broad discretion in deciding when and how to prosecute distinct individuals and each defendant’s background is also different.” Thus, the Petitioner has failed to show that his trial counsel was ineffective.

III. Conclusion

Since the Petitioner was convicted of possessing the BB gun as a criminal instrument and possessing marijuana relative to the same incident, the factual predicates for determining the mandatory minimum were proven beyond a reasonable doubt, and the Petitioner’s sentence is not illegal. The Petitioner is not eligible for relief on the suppression issues because the issues have been waived or litigated. The Petitioner is not eligible for relief on the issue of the discipline of the trooper because the issue does not satisfy any of the requirements of 42 Pa. C.S. § 9543(a)(2). Likewise, the Petitioner is not eligible for relief on the issue of the Commonwealth not filing a brief in the Superior Court because the issue does not satisfy any of the requirements of 42 Pa. C.S. § 9543(a)(2). Finally, the Petitioner’s ineffective assistance of counsel claim is not particular enough to establish ineffective assistance of counsel.

ORDER

AND NOW, this _____ day of December, 2014, it hereby ORDERED and DIRECTED as follows:

1. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Petitioner is hereby notified that the Court intends to dismiss his PCRA petition unless he files an objection to the intended dismissal within twenty (20) days of this order's date.
2. The Motion to Withdraw as Counsel, filed September 8, 2014, is hereby GRANTED, and the Attorney may withdraw from the above-captioned case.

By the Court,

Nancy L. Butts, President Judge