

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CR-635-2012
v.	:	
	:	OTN: T 108327-2
JUSTIN ROSATO,	:	
Defendant	:	PCRA PETITION

**OPINION AND ORDER**

Before the Court is a Petition for Post-Conviction Relief filed by Defendant on July 17, 2014, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546, and a Motion to Withdraw as Counsel filed by Defendant’s court-appointed counsel pursuant to *Commonwealth v. Turner*, 518 Pa. 492, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). After conducting an independent review of Defendant’s petition and considering appointed counsel’s motion, for the reasons provided below, the Court finds that Defendant’s petition lacks merit and that counsel’s motion to withdraw is GRANTED pursuant to *Commonwealth v. Pitts*, 603 Pa. 1, 981 A.2d 875 (Pa. 2009). The Defendant is notified of the Court’s intention to dismiss the PCRA Petition, unless he files an objection to dismissal within twenty days (20) of today’s date.

**I. Factual and Procedural Background**

A criminal complaint was filed against defendant Justin Rosato on October 20, 2011, arising from a vehicle stop on October 16, 2011. By information filed May 17, 2014, defendant Rosato was charged with Driving under the Influence of Alcohol or controlled substance (1<sup>st</sup>), a misdemeanor of the first degree, and two summary offenses, operating a vehicle without headlamps between sunset and sunrise, and driving on the left instead of the right half of the roadway.<sup>1</sup>

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<sup>1</sup> 75 Pa. C.S.A. § 3802(a)(1), 75 Pa. C.S.A. §4302(a)(1) and 75 Pa. C.S. §3301(a).

On August 28, 2012, pre-trial counsel filed a motion to suppress evidence arising from the stop. An evidentiary hearing was held on September 17, 2012 before the Honorable Nancy L. Butts, President Judge. Substitute counsel appeared on behalf of the defendant at the hearing on September 17, 2012. On September 19, 2012, pre-trial counsel filed a petition to reopen the record to introduce evidence that defendant's vehicle, a 2004 Audi A8L, contains automatic headlights. The Court denied that petition and closed the record on September 28, 2012. By opinion and order dated October 3, 2012, the Court denied the motion to suppress.

A jury trial was held on January 22, 2014. Following trial, the jury found defendant guilty of driving under the influence – incapable of safe driving - and found that the defendant refused to submit to a blood alcohol count test. On the summary offenses, the Court entered a verdict of *not guilty* with respect to the headlights and a verdict of *guilty* with respect to failing to drive on the right half side of the road. On March 21, 2014, trial counsel filed a motion to withdraw as counsel based upon defendant's termination of his services and an expressed desire by defendant to represent himself. The Court granted the motion to withdraw on March 21, 2014, filed March 24, 2014. On March 21, 2014, the Court sentenced Mr. Rosato to the mandatory minimum sentence of five years intermediate punishment with the first year to be spent in the Lycoming County Prison / Prerelease Center. The sentence included community service, counseling, education, fines, fees and costs. Defendant did not file any post-sentence motion or direct appeal of his sentence.

On July 17, 2014, defendant filed the instant PCRA petition. The Court appointed counsel and a conference was held on October 1, 2014. Appointed counsel has filed a *Turner/Finley* letter and motion to withdraw.

## **II. Issues Raised**

Defendant Rosato raised the following issues either in his pro se petition or through appointed counsel:

- i) whether pre-trial counsel was ineffective in the pre-trial proceedings to suppress evidence;
- ii) whether pre-trial counsel was ineffective for failing to object to an affidavit that was not signed or sealed before the preliminary hearing;
- iii) whether trial counsel was ineffective by failing to file a direct appeal; and
- iv) whether the Court erred in considering a DUI conviction from West Virginia as a prior conviction in sentencing.

## **III. Eligibility for Post-Conviction Relief**

The PCRA provides specific requirements for eligibility for post-conviction relief. 42 Pa. C.S. § 9543. Section 9543(a) provides that in order to be eligible for relief, a Defendant must be convicted and serving a sentence of imprisonment, probation or parole for the crime; *Id.* In this matter, it is uncontested that Defendant is currently serving his sentence. However, section 9543(a) also lists three (3) other eligibility requirements; these requirements include:

- (2) That the conviction or sentence resulted from one or more of the following:

\* \* \*

- ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

\* \* \*

- (3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel. *Id.*

#### **IV. Legal Standards**

In order to succeed on a claim for ineffective assistance of counsel, Defendant must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Defendant's underlying claim has arguable merit, (2) trial counsel had no reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Defendant.

*Commonwealth v. Chmiel*, 612 Pa. 333, 361, 30 A.3d 1111, 1127 (Pa. 2011); *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987)). *See also, Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (*citing Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003)). A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs. *Commonwealth v. Busanet*, 618 Pa. 154 A.3d 35, 45 (Pa. 2012).

#### ***Prejudice***

“Prejudice in the context of ineffective assistance of counsel means demonstrating there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different.” *Commonwealth v. Champney*, 65 A.3d 386, 396 (Pa. 2013), *citing, Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 332 (Pa. 1999).

With these standards in mind, the Court will address Mr. Rosato's PCRA claims.

## **VI. Discussion**

The Court believes Mr. Rosato has not overcome the presumption of counsel effectiveness by proving all of the three factors required. A claim of ineffectiveness will be denied when defendant fails to establish any one of the three factors. *Busanet, supra*, 54 A.3d at 45. In the present case, the Court concludes that there is no arguable merit and/or no prejudice regarding any of the issues that were raised.

### **Pre-Trial Motion to Suppress Evidence**

The Court concludes that the Mr. Rosato failed to raise genuine fact issues supporting his claim of ineffective assistance of counsel with respect to suppressing evidence. The claim lacks arguable merit. In essence, defendant's claims are based upon pre-trial counsel's use of the term "probable cause" and his failure to introduce evidence that his automobile featured automatic headlights. First, the Court concludes that use of the term 'probable cause' did not render pre-trial counsel ineffective. Pre-trial counsel filed a motion to suppress any and all evidence obtained related to the incident on 10/16/11 based upon the illegality of the stop. As a result, an evidentiary hearing on the motion was held on September 17, 2012 before the Honorable Nancy L. Butts, President Judge. The Court denied the motion to suppress on October 3, 2012 and found that the police had a *reasonable suspicion* of a DUI to stop the vehicle and *probable cause* to arrest the defendant. As noted by Appointed Counsel, pre-trial counsel cited the appropriate standards with respect to the vehicle stop for failure to use headlights and cited the appropriate standard during argument and the evidentiary hearing before the Court. Significantly, the Court relied upon the correct standard when determining whether to suppress evidence and therefore no prejudice could occur from any reference to an incorrect standard.

Second, the Court's finding of reasonable suspicion did not rely on the failure to use headlamps as needed. Therefore, even if counsel were ineffective in failing to establish the automatic headlight feature on defendant's vehicle, this Court finds that no prejudice occurred because there was reasonable suspicion based upon the officer's observations of the moving violations of the vehicle. While the Opinion denying suppression noted the violation involving headlamps, the discussion analyzing and supporting the Court's finding of reasonable suspicion focused on the police officer's observations of driving outside the proper lane. The Court discussed the following observations when detailing the grounds for reasonable suspicion.

Even though the vehicle was driving on a road without lines, the Defendant was blatantly in the oncoming lane on the road for an extended period of time and would not have given an oncoming vehicle enough room to pass. It was not merely a swerve but a continuous obstruction into the oncoming lane. Further Williams observed the vehicle make two (2) wide turns and regularly drive on the center yellow line. *Opinion*, 10/3/14, at 3.

Furthermore, the Court cited cases which dealt with crossing fog lines, swerving out of lanes and having a loud exhaust, but the court did not cite any cases involving headlamps. *See, Opinion*, 10/3/14, at 3, n. 1, *citing, Commonwealth v. Angel*, 946 A.2d 115 (Pa. Super. 2008); *Commonwealth v. Hughes*, 908 A.2d 24 (Pa. Super. 2006); *Commonwealth v. Sands*, 887 A.2d 261 (Pa. Super. 2005) and *Commonwealth v. Bailey*, 947 A.2d 808 (Pa. Super. 2008).<sup>2</sup> Therefore, the Court finds that no prejudice could occur where the Court focused on and there existed reasonable suspicion that had nothing to do with the headlights being off.

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<sup>2</sup> Defendant also argues that he should have had a substitute counsel for the hearing on his suppression issue. The Court believes this argument rises or falls on whether counsel was ineffective and defendant was prejudiced by such ineffectiveness. Since the Court concludes that there was not prejudice to defendant, this argument also fails to raise a genuine issue of fact requiring an evidentiary hearing.

### **Failure to File Direct Appeal**

In his pro se petition, Defendant claims trial counsel was ineffective for failure to file a direct appeal of his sentence. At the time of sentencing however, trial counsel was granted permission and withdrew as counsel at the request of defendant. Therefore, the Court concludes the claim against trial counsel for failure to file an appeal is without arguable merit.

### **Prior Conviction – West Virginia DUI**

To the extent that Defendant alleges that an error in sentencing is alleged to involve counsel ineffectiveness, the Court notes that defendant had terminated his attorney and his attorney withdrew at sentencing. In any event, this Court agrees with appointed counsel that defendant is not entitled to PCRA relief based upon the Court's consideration of a DUI conviction in West Virginia as a prior conviction for sentencing purposes. As appointed counsel noted, since the West Virginia statute and the Pennsylvania statute prohibit driving under the influence of alcohol and require almost identical blood alcohol levels, the statutes are substantially similar. Therefore the Court did not err by considering a conviction under West Virginia Code 17C-5-5 as a prior conviction when sentencing the defendant. Accordingly, the Court concludes that there is no arguable merit to this claim.

### **Failure to Object to Affidavit of Probable Cause**

Defendant raised the failure of pre-trial counsel to object to the affidavit of probable cause before the preliminary hearing because it was unsigned and not sealed. As appointed counsel noted, however, this is a defect that would have been easily remedied by the Commonwealth had it been timely raised and therefore could not prejudice the defendant for not raising it. Furthermore, as noted by appointed counsel, the second page contains the affiant's signature. As a result, the Court concludes the defendant is not entitled to PCRA relief on this basis.

#### **IV. Conclusion**

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's July 17, 2014 PCRA Petition. As the Court finds that no purpose would be served by conducting any further evidentiary hearing regarding this matter, a hearing will not be scheduled.

Pa.R.Crim.P. 909(B)(2); *See Commonwealth v. Walker*, 36 A.3d 1, 17 (Pa. 2011) (holding that a PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only when the PCRA petition presents genuine issues of material facts). *See also Commonwealth v. McLaurin*, 45 A.3d 1131, 1135-36 (Pa. Super. 2012).

***Pursuant to Pennsylvania Rules of Criminal Procedure 907(1), the parties are hereby notified of the Court's intention to deny the petition. The 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 July 17, 2014 petition.***



**ORDER**

AND NOW, this 16<sup>th</sup> day of **October**, Defendant is hereby notified that it is the Court's intention to dismiss his July 17, 2014 PCRA Petition, unless he files an objection to that dismissal *within twenty days (20) of today's date*. This Opinion and Order will be served on Defendant as set forth in Pa.R.Crim.P. 907(1). **The Prothonotary is ORDERED AND DIRECTED to serve defendant by certified and regular mail.**

BY THE COURT,

October 16, 2014  
Date

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Richard A. Gray, Judge

cc: DA (KO)  
William J. Miele, Esq., Public Defender / Appointed Counsel  
/ Joshua Bower, Certified Legal Intern, Public Defender's Office  
Justin Rosato, Lycoming County Pre-Release Center (**certified and regular mail**)  
546 County Farm Road  
Montoursville, PA 17754

**Prothonotary (to serve defendant by certified and regular mail)**