

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CR-192-2011
	:	
v.	:	OTN: L 609960-1
	:	
CHAKHANNAH DUPREAY SMITH.	:	PCRA HEARING

ORDER

Before the Court is a Petition for Post-Conviction Relief filed by Defendant, Chakhannah Duprey Smith, pro se on September 21, 2012, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546. An evidentiary hearing was held and testimony was received on February 27, 2014 and May 13, 2014. Upon consideration of the testimony, arguments and case-law, and for the reasons provided below, the Court DENIES the petition for relief.

I. Factual and Procedural Background

On January 27, 2011, Smith was charged with two criminal counts. Under Count I, Smith was charged pursuant to 18 Pa.C.S. §6105 (Persons Not to Possess a Firearm), a felony in the second degree and under Count II he was charged pursuant to 35 P.S. 780-113(31) (Possession of a Small Amount of Marijuana), a misdemeanor. At that time, Mr. John Gerardi, a Pennsylvania State Parole Agent, supervised Smith related to a life sentence Smith received in New York State for a drug conviction in 1997. Subsequent to the New York conviction, Smith was also convicted for drug related charges locally. In 2004, Smith was convicted in Clinton County for possession with intent to deliver. Smith was convicted twice in Lycoming County for selling drugs. Smith received a 2-5 year sentence for a drug related conviction in Lycoming County on 2007 charges. On January 27, 2011, Girardi had been supervising Smith for New York State for about 8 months.

The Search

While under the supervision of Agent Girardi, Smith resided with his mother at 617 High Street in Williamsport, Pennsylvania. The residence was subject to a home approval by parole and an agreement permitting searches. As the agent supervising Smith related to Smith's life sentence, Girardi was well aware of Smith's criminal convictions for selling and possessing drugs. Agent Girardi received 3 tips from 3 separate individuals over the course of 3 weeks about Smith using or selling drugs. The most recent tip came from an anonymous female who left a message stating that Smith was selling drugs. On January 27, 2011, Agent Girardi orchestrated a home visit of Smith's residence. Girardi requested assistance from the Williamsport Police to use their K-9 drug detection dog. (Lycoming parole agents lost their drug detection dog because of funding.) Agent Girardi conducted a home visit of Smith's residence. Girardi knocked on the door and was granted permission to enter the residence. The K-9 officer, Officer Roy Snyder, did not enter the residence at that time. Upon entry into the residence, Girardi smelled marijuana. Shortly thereafter Girardi requested that Snyder deploy the drug detection dog. Once in the residence, the dog alerted to a black nylon luggage bag. A search of the bag revealed an automatic pistol and New York State Correction paperwork with Smith's information. The dog also found a partially smoked marijuana cigarette in plain view on a dresser in a bedroom at the residence where Smith lived. The cigarette tested positive for marijuana. As a convicted felon on parole, it was unlawful for Smith to possess a firearm and a parole violation to have marijuana at his residence.

Legal Proceedings

On February 4, 2011, a preliminary hearing was held before Magisterial District Judge Allen Page, III. On March 14, 2012, Defendant waived his formal arraignment. On April 25,

2011, Defendant filed an Omnibus Pretrial Motion which included a Petition for Writ of Habeas Corpus/Motion to Dismiss charges. On May 25, 2011, the Court entered an Order denying Defendant's Petition for Writ of Habeas Corpus. On or about July 29, 2011, Defendant requested that guilty plea counsel file a suppression motion. Guilty plea counsel responded that there was no motion to file and that she did not believe any evidence was obtained illegally. That conclusion was based upon her knowledge of the facts of the case.

Guilty Plea

On September 20, 2011, Defendant plead guilty to Count 1, persons not to possess, a felony of the second degree. Count 2, possession of a controlled substance, small amount, was dismissed. Defendant was sentenced on that date to incarceration in a State Correctional Institution for a minimum of four (4) years and a maximum of eight (8) years. Smith was not RRRRI eligible. He received credit for time served from January 27, 2011 until September 19, 2011. The written guilty plea colloquy identifies the OGS as 9 and the PRS as 5, potential of 10 years and \$25,000 fine. The standard sentence guideline range was listed as 48-60 months. The term of the plea agreement was for 4-8 years. Defendant indicated that it was his decision to plead guilty because he "can't win the case." Defendant indicated that he was satisfied with the representation and advice of his attorney. Defendant further indicated on the colloquy that he thoroughly discussed the facts and circumstances surrounding the charges against him. His attorney certified that the Smith expressed a desire to enter a plea of guilty to the charges, and that she thoroughly explained everything.

Post-Sentence Motion

Defendant did not file any Post-Sentence Motion in this matter

Direct Appeal

Defendant did not file a direct appeal in this matter.

PCRA Petition

On September 20, 2012, Smith filed a pro se motion for post-conviction collateral relief, alleging a violation of the State and Federal Constitutions, ineffective assistance of counsel, and that his guilty plea was unlawfully induced under circumstances that make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent. The Court appointed Amy Boring, Esq. to represent Smith in this matter.

A conference was held on December 10, 2012. Since transcripts had been requested, the Court directed Defense counsel to file an amended PCRA petition specifying alleged errors within sixty days. On February 7, 2013, Attorney Boring moved for an extension of time to file an amended petition for post-conviction collateral relief as Counsel had not received a signed certified statement from the defendant as of that date. On February 11, 2011, the Court granted the extension and Ordered and Directed that the amended petition be filed on or before February 28, 2013. On March 4, 2013, Smith filed an Amended Petition for Post-Conviction Collateral Relief and Certified Statement of Defendant. Smith asserted that he was denied his constitutionally guaranteed right to effective representation when guilty plea counsel advised Defendant that there was no reason to request a suppression hearing. Smith further alleged that this so undermined the truth determining process that no reliable adjudication of guilty of innocence could have taken place. Smith alleged that his guilty plea was not voluntary, knowing, and intelligent. An evidentiary hearing was requested.

On April 16, 2013, the Court appointed Jerry Lynch, Esq. to represent Smith regarding the PCRA petition because attorney Boring no longer had a contract with the County to perform conflict work. Following a pre-trial conference on May 13, 2013, the Court scheduled an

evidentiary hearing in this matter for July 3, 2013. Due to scheduling conflicts, the matter was continued to October 1, 2013. On October 1, 2013, due to miscommunication with a necessary witness, the remainder of the hearing was continued to November 5, 2013. Due to witness unavailability, the matter was continued to December 10, 2013. Due to witness unavailability, the matter was again continued to February 27, 2014. An evidentiary hearing was held and testimony was received on February 27, 2014 and May 13, 2014. Defendant's mother, Lisa Renee' Smith, guilty plea counsel, former police officer, Roy Snyder, and former parole officer, Agent John Girardi, testified at the PCRA hearing.

II. Issues Raised

The Court restates the issues as follows:¹

1. Whether guilty plea counsel was ineffective for failing to file a motion to suppress evidence and advising defendant that no evidence was obtained illegally where the evidence was obtained after a search of a parolee's residence which resulted from the smell of marijuana upon entering the parolee's home pursuant to a home visit spurred by 3 tips in a span of 3 weeks by 3 separate individuals that defendant was selling drugs and breaking curfew coupled with defendant's extensive criminal drug history?
2. Whether the admissibility of the incriminating evidence was defendant's primary motivation for entering a guilty plea, whether there was there a reasonable basis for

¹ Upon request of the Commonwealth, at the start of the PCRA hearing defense counsel clarified the issues as whether there was reasonable suspicion to search a parolee's residence and whether there was a "stalking horse" relationship between the parole agent and the Williamsport Police Department. Defendant's March 4, 2013 petition averred a violation of Miranda as to the admission that the black bag belonged to the defendant. Defendant appears to have been abandoned this claim. In any event, the Court finds that the admission that the bag, containing his New York State Corrections paperwork, belonged to Smith was a voluntary spontaneous statement made by defendant during processing/booking.

counseling defendant to accept a plea rather than proceed to trial or challenge the admissibility of the evidence, and whether the defendant suffered prejudice?

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 incarceration. *Id.* In this matter, it is uncontested that Defendant is currently serving a state sentence of incarceration. 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:
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States 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.
 - (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.
 - (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

* * * * *

- (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

Ineffective Assistance of Counsel

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. Chimel, 1111, 1127 (Pa. 2011) (referencing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987)). *See also Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. Ct. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (citing *Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003)). Actual prejudice must occur; that is trial counsel's ineffectiveness must have been so evasive that it is reasonable it had an adverse impact on the proceeding's outcome. *Sampson*, 900 A.2d at 890 (citing *Commonwealth v. Howard*, 645 A.2d 1300, 1307 (Pa. 1994)).

Reasonable Suspicion

While a parolee may be subject to a *home visit* at the discretion of his parole officer, a *search* of a parolee's property is governed by 61 Pa.C.S. § 6153 (2) and (6). "A property search may be conducted by an agent if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision." 61 Pa.C.S. § 6153(2). The following factors may be taken into account when determining the existence of reasonable suspicion to search.

- (i) The observation of agents.
- (ii) Information provided by others.
- (iii) The activities of the offender.

- (iv) Information provided by the offender.
- (v) The experience of the agents with the offender.
- (vi) The experience of agents in similar circumstances.
- (vii) The prior criminal and supervisory history of the offender.
- (viii) The need to verify compliance with the conditions of supervision.

61 Pa.C.S. § 6153(6).

In Commonwealth v. Smith, 85 A.3d 530 (Pa. Super. 2014) the Superior Court explained that when a parole agent is lawfully at a location, such as when he or she is conducting a home-visit of a parolee's residence, the smell of marijuana provides the agent with reasonable suspicion to search the property for contraband.²

Ineffective Assistance of Counsel - Guilty Plea

While “the PCRA authorizes a grant of post-conviction relief based on the violation of constitutional rights, ineffective assistance of counsel, or an unlawfully induced guilty plea[.]” the Courts have added requirements set forth in the Marsh I test. Commonwealth v. Nelson, 574 A.2d 1107, 1110 (Pa. Super. 1990). That test first requires that the constitutionally infirm

² In the context of vehicle stops, the Pennsylvania Supreme Court held that a **police officer** had **reasonable suspicion** based on a tip from a known informant to conduct an investigative stop of a vehicle pursuant to Terry v. Ohio, 392 U.S. 1 (1968). Commonwealth v. Brown, 996 A.2d 473 (Pa. 2010). In that case, the Pennsylvania Supreme Court recognized that reasonable suspicion for a stop is less stringent than probable cause. The Court considered the reliability of an anonymous tip as compared to a known informant and the need to consider the totality of the circumstances when determining the legality of a stop. The United States Supreme Court concluded that “under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent’s car.” Alabama v. White, 496 U.S. 325 at 332 (1990). *See also*, Commonwealth v. Moore, 805 A.2d 616 (2002)(An anonymous tip is more suspicious than an informer known to police.) It should be noted, however, that vehicle stops usually involve ordinary citizens and not probationers. Courts have noted that “the very assumption of the institution of probation” is that the probationer “is more likely than the ordinary citizen to violate the law.” *See*, Commonwealth v. Moore, 805 A.2d 616 (Pa. Super. 2002) *citing*, United States v. Knights, 122 S.Ct. 587, 592 (2001). As further outlined in this opinion, the Court believes that the analysis of reasonable suspicion in this case included the totality of circumstances and not just one anonymous tip.

evidence must have so “undermined the truth-determining process that no reliable determination of guilt or innocence could have taken place.” Second, the guilty plea must be primarily motivated by the existence of the constitutionally infirm evidence. Third, “the Marsh I test requires that the defendant have been incompetently advised by counsel to plead guilty rather than stand trial, while the PCRA adds the requirement that counsel's incompetence "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” Nelson, supra, 574 A.2d at 1111, *citing*, 42 Pa.C.S.A. § 9543(a) (2) (ii). Relief is provided pursuant to 42 Pa.C.S. § 9543(2)(iii) when “[a] plea of guilty [was] unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent. Id.

In Nelson, supra, both the guilty plea counsel and the defendant testified that the existence of the incriminating testimony was the *sole* motivating factor for the guilty plea. Nelson, supra, 574 A.2d at 1113. The Superior Court also concluded that there was no reasonable basis for counseling appellant to plead guilty to perjury rather than proceed to trial and challenge the admissibility of the evidence because guilty plea counsel had not even considered whether the evidence was admissible and was unaware that his client had been unrepresented when he incriminated himself in his testimony. Nelson, supra, 574 A.2d at 1114.

“It is a matter of federal law and state law that parole and probation officers cannot act like "stalking horses" for the police.” Commonwealth v. Pickron, 634 A.2d 1093, 1097 (Pa. 1993), *superseded in part by statute on other grounds*. Parole agents do not act as “stalking horses” for the police when police assist parole officers to determine a violation of parole. Commonwealth v. Altadonna, 817 A.2d 1145, 1153 (Pa. Super. Ct. 2003)

With these standards in mind, the Court will address Smith’s PCRA claims.

Failure to File Motion to Suppress

Defendant claims that the evidence of the gun in his bag and the marijuana at his residence were obtained from an illegal search and should have been suppressed. The Court disagrees.

While being supervised under a life sentence in New York for drugs, Smith was convicted three times for selling drugs in Lycoming and Clinton Counties. Officer Girardi was charged with supervising Smith after these convictions. After receiving 3 tips in a span of 3 weeks by 3 separate individuals indicating that the defendant was using and/or selling drugs, Agent Girardi set up a home visit. As in Commonwealth v. Smith, 85 A.3d at 536, the Court believes that the home visit in this case did not constitute a search. Instead, the Court believes that the agent was performing his supervisory duty by visiting Smith's residence to ensure compliance with the conditions of parole. Girardi testified that he smelled marijuana upon entering Smith's residence. The odor of marijuana was consistent with the tips that Smith was using or selling drugs, particularly given his drug related criminal history. The Court concludes that at that point, there was reasonable suspicion to search Smith's residence, which he did. It was also at that point that the drug detection dog went into the residence and alerted to the black nylon bag and the marijuana cigarette.

The Court believes that the instant case is factually very similar to Commonwealth v. Smith, supra, where a parole agent developed the requisite reasonable suspicion to conduct a search upon the smell of marijuana during a lawful home visit. Id. at 537. Furthermore, the Court believes that there were 5 statutory factors present: the observation / smell by the agent of marijuana, the information provided by 3 separate individuals, the experience of the agent in similar circumstances, the prior criminal and supervisory history of the offender and the need to

verify compliance with the conditions of supervision all weighed in favor of a determination of reasonable suspicion to search the residence. 61 Pa.C.S. § 6153(6)(i),(ii),(vi),(vii), and (viii). Lastly, the totality of the circumstances - including 3 tips in a span of 3 weeks by 3 separate individuals, Smith's extensive criminal drug history –much of which was committed while being supervised, Agent Girardi's experiences in supervising parolees and the odor of marijuana in Smith's residence - provided Agent Girardi with reasonable suspicion to search Smith's residence.

As to the “stalking horse” allegation, this Court finds the testimony of Agent Girardi and Officer Snyder credible. That testimony established that Agent Girardi requested the assistance of the Williamsport Police drug detection dog because the parole officers no longer had access to their own dog due to funding. After agents entered the house and smelled marijuana, they summoned Officer Snyder and the drug detection dog to the residence. Officer Snyder had been waiting about a half block away. The only advice Officer Snyder provided was about how to keep the 4 adults and children safe once the dog entered the house. In this respect, Officer Snyder advised that everyone should be collected into one room and should be informed that the dog was a trained bite dog. The Court finds that there was no evidence that Agent Girardi was assisting Officer Snyder; the Court finds that the reverse was true: Officer Snyder was assisting Agent Girardi in determining whether a Smith was violating the conditions of his parole. Had the parole officers had their own drug detection dog, the police dog would not have been needed.

Motivation, Reasonable Basis and Prejudice of Guilty Plea

In addition to establishing a constitutional basis for challenging the evidence, Smith must also establish that the admissibility of the evidence was defendant's primary motivation for entering a guilty plea, that there was no reasonable basis for counseling defendant to accept a

plea rather than proceed to challenge the admissibility of the evidence or proceed to trial and that Smith suffered prejudice. *See, Commonwealth v. Nelson*, 574 A.2d 1107 (Pa. Super. 1990); *see also, Place, Ineffective Assistance of Counsel Under The Pennsylvania Post Conviction Relief Act*, 69 Temp. L. Rev. 1389, 1402-1403 (1996).

In the instant case, Smith failed to establish that the failure to file a suppression motion caused him to plead guilty or that there was no reasonable basis to counsel him to accept a plea. Smith did not testify that he was innocent of the charges. Smith did not explicitly testify that he would have filed a motion to suppress or proceeded to trial to challenge the evidence had he been counselled that doing so would cause the District Attorney to seek a harsher sentence if Smith lost. Based upon her knowledge of the facts of the case, guilty plea counsel did not believe evidence was obtained illegally. It has not been established that there was no reasonable basis to counsel Smith to accept a plea to obtain a better sentence than he would have otherwise gotten under the plea agreement. Smith took the plea because he did not want to risk getting more than the 4-8 years he got. Specifically, the Court finds that the failure to file a motion to suppress evidence did not undermine the truth-determining process so that no reliable adjudication of guilt could have taken place.

VI. Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA Petition.

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 petition.

ORDER

AND NOW, this 29th day of May, 2014, Defendant is hereby notified that it is the Court's intention to dismiss his 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).

BY THE COURT,

May 29, 2014
Date

Richard A. Gray, J.

cc: DA (KO)
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