

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-877-2010
vs. :
 : CRIMINAL DIVISION
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 :
 :
 : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's order dated November 29, 2014, which denied the Post Conviction Relief Act (PCRA) petition filed by Appellant Robert Graham (“Graham”) without holding an evidentiary hearing. The relevant facts follow.

On June 22, 2009 at approximately 2:20 a.m., an individual wearing sunglasses and a camouflaged sweatshirt with the hood pulled up entered the Uni-Mart on West Fourth Street in Williamsport and approached the clerk, who was behind the counter doing some paperwork. The clerk asked, “Can I help you?” The individual pulled out a handgun and demanded that the clerk open the register. The clerk opened the register and placed the cash drawer on the counter. The robber grabbed the back of the cash drawer with his left hand and removed \$117 in cash, but no coins. The robber then told the clerk to open the safe. When the clerk told him that she couldn’t, the robber threatened to shoot her. Again, the clerk told the robber that she couldn’t open the safe. The robber then demanded

cigarettes. When the clerk started to grab packs of cigarettes, the robber said, “No, cartons.”

The clerk placed 10 cartons of cigarettes on the counter. The robber went through them and took 5 cartons of Newport cigarettes and left. The clerk immediately called the police.

According to the store’s surveillance videotape, the entire incident lasted approximately one minute and eleven seconds.

The police responded to the Uni-Mart. As part of their investigation, the police dusted for fingerprints. Latent fingerprints were obtained from the cash drawer and two cartons of cigarettes. The latent prints were sent to the Pennsylvania State Police Wyoming Regional Laboratory for analysis. Sergeant Floyd Bowen, who analyzed the latent prints, determined that the latent fingerprint on the back of the cash drawer matched Graham’s left thumb print.

About ten months after the incident, the clerk saw a photograph of Graham in a newspaper article and recognized the person in the photograph as the individual who robbed her.

Graham was arrested and charged with robbery by threatening to inflict serious bodily injury, robbery by threatening to inflict bodily injury, theft by unlawful taking, receiving stolen property, terroristic threats, and possessing an instrument of crime.

On November 23, 2010, Graham filed an omnibus pre-trial motion which included a request for a Frye hearing to challenge the admissibility of the Commonwealth’s expert testimony on the application of latent fingerprint analysis in this case. The court denied this motion in an Opinion and Order dated February 4, 2011. A jury trial was held March 5, 7 and 8 of 2012. Following convictions on all counts, the court sentenced Graham

to an aggregate term of 11 – 22 years' incarceration. Graham filed post-sentence motions, which the court denied on September 11, 2012.

Graham appealed on September 24, 2012. He asserted the following issues in his direct appeal: (1) whether the Commonwealth failed to provide sufficient evidence to prove his guilt since the cash drawer was never sent for proper fingerprint analysis and one witness at the scene was never called to testify; (2) whether the verdict was against the weight of the evidence since the clerk was inconsistent in her testimony and based her identification on a newspaper story; (3) whether the court erred in failing to allow testimony that Graham was employed at the time of the robbery and allowing the affiant to use inexact methods to calculate the height of the robber; (4) whether the court erred in the denial of a Frye hearing regarding expert testimony in fingerprinting; and (5) whether the court erred in determining that no Batson claim existed after the Commonwealth struck the only African-American juror in the jury panel. The Pennsylvania Superior Court affirmed Graham's judgment of sentence in a memorandum decision on October 30, 2013.

Graham filed a pro se PCRA petition on January 8, 2014. The court appointed counsel to represent Graham and gave counsel the opportunity to file either an amended PCRA petition or 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). Counsel filed a motion to withdraw, which included a Turner/Finley "no merit" letter. PCRA counsel's no merit letter addressed several additional issues that were not asserted in Graham's pro se PCRA petition, but that Graham apparently brought to counsel's attention and wanted counsel to raise in an amended petition.

The court conducted an independent review of the record and found that Graham's issues were previously litigated, waived or lacked merit. Therefore, the court gave Graham notice of its intent to dismiss his PCRA petition without holding an evidentiary hearing.

Graham filed a response and an "amended petition" that raised additional issues. The court reviewed those issues and dismissed Graham's PCRA petition. Graham filed a timely notice of appeal.

On appeal, Graham first asserts that PCRA counsel was ineffective for failing to file an amended PCRA petition raising layered ineffective assistance of counsel reaching back to trial counsel's ineffectiveness for failing to raise prosecutorial misconduct due to the Commonwealth's failure to turn over all relevant and admissible evidence pertaining to the method used to conduct AFIS/IAFIS searches. Graham did not assert this issue in his response to the court's notice to dismiss; therefore, this claim is waived. *Commonwealth v. Rigg*, 84 A.3d 1080, 1085(Pa. Super. 2014).

Graham next asserts that PCRA counsel was ineffective for failing to raise in an amended PCRA petition all prior counsels' ineffectiveness reaching back to trial counsel's failure to argue or properly argue the *Batson* claim, where the Commonwealth did not have a race neutral basis for striking the only African American juror. As with his first issue, Graham failed to assert this issue in his response to the court's notice to dismiss; therefore it is waived. *Rigg*, supra. Moreover, even if this claim wasn't waived, it lacks merit because the Pennsylvania Superior Court reviewed Graham's *Batson* claim in his direct appeal and found the court did not err when it found that the Commonwealth had a race neutral reason

for striking the only African American juror. 1714 MDA 2012 at 17-19.

Graham contends the court abused its discretion and obstructed his access to PCRA proceedings by denying him transcripts of the September 6, 2011 telephone testimony of his expert witness. The court cannot agree.

Graham first requested transcripts after the completion of his direct appeal, but before he filed his PCRA petition. The court denied his request based on *Commonwealth v. Crider*, 735 A.2d 730, 733 (Pa. Super. 1999) and *Commonwealth v. Martin*, 705 A.2d 1337 (Pa. Super. 1998). See Order dated December 16, 2013.

When Graham filed requests for this transcript after he filed his PCRA petition, he was represented by counsel; he was not pro se. These requests were not signed by his counsel. Therefore, the court denied his requests and directed the Prothonotary to forward copies of Graham's written requests to PCRA counsel and the attorney for the Commonwealth in its order dated June 10, 2014. See Pa.R.Crim.P. 576(A)(4) and comment; see also *Commonwealth v. Ali*, 10 A.3d 282, 293 (Pa. 2010)(explaining that hybrid representation is not permitted).

Graham also claims the court erred as a matter of law and abused its discretion in denying him leave to amend his PCRA petition or conduct a hearing regarding a conflict of interest of PCRA counsel prior to dismissal of his PCRA petition. Again, the court cannot agree.

The court reviewed the issues that Graham asserted in his "amended petition" filed on October 3, 2014. If any of those issues had merit, the court would have granted Graham leave to amend, because the one year period for filing a timely PCRA petition had

not yet expired. Unfortunately, all of the issues asserted by Graham lacked merit. In the “amended petition” Graham merely reasserted issues that were previously litigated on direct appeal and added a sentencing claim that lacked merit because the “fact” that increased his sentence was a prior conviction, which a jury previously found him guilty of beyond a reasonable doubt.

Graham also never alleged that PCRA counsel had a conflict of interest; he simply disagreed with PCRA counsel’s *Turner/Finley* no merit letter. After PCRA counsel sent Graham the letter, Graham filed a response on April 21, 2014 in which he asked the court to “look closely” at his issues and, if the court agreed with Graham’s assessment that there was merit to them, to appoint new counsel to represent him. The court, however, did not agree with Graham’s assessment of his issues. The court permitted PCRA counsel to withdraw and advised Graham that he could represent himself or hire private counsel, but the court would not appoint new counsel to represent him.

Graham next asserts that the court erred as a matter of law in sentencing him to both mandatory minimum and maximum sentences in violation of his Sixth Amendment right to trial by jury as announced in *Apprendi v. New Jersey* and clarified in *Alleyne v. United States*. This issue is without merit.

The court imposed a mandatory 10-year minimum sentence for robbery, because Graham had a prior conviction for a crime of violence. The robbery conviction was graded as a felony of the first degree. The statutory maximum sentence for this crime was 20 years. 18 Pa.C.S.A. §1103(1). The minimum sentence cannot exceed one-half the maximum sentence. 42 Pa.C.S.A. §9756(b). Therefore, the court also was required to impose a

maximum sentence of 20 years for the robbery conviction.

The United States Supreme Court has 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, 102 A.3d 988, 995 n.5 (Pa. Super. 2014). Therefore, this issue clearly lacks merit.

Graham also avers that PCRA counsel was ineffective for failing to raise all prior counsels’ ineffectiveness reaching back to trial counsel’s ineffectiveness for failing to request an interlocutory appeal of the trial court’s denial of a *Frye* hearing. Graham did not raise any claims of PCRA counsel’s ineffectiveness in his response to the court’s notice to dismiss; therefore, this claim is waived. *Rigg*, supra. Furthermore, any interlocutory appeal would not have been successful. Graham raised the issue regarding the lack of a *Frye* hearing in his direct appeal, but the Pennsylvania Superior Court rejected his claim.

Finally, Graham contends PCRA counsel was ineffective for failing to raise direct appeal counsel’s ineffectiveness for failing to properly develop the prejudicial effect of the denial of a *Frye* hearing. As with his other claims of ineffectiveness of PCRA counsel this issue was waived because it was not raised in response to the court’s notice to dismiss

and would not have been successful in light of the Superior Court's decision on Graham's direct appeal.

DATE: June 3, 2015

By The Court,

Marc F. Lovecchio, Judge

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