

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR- 1643-2010
:
vs. : CRIMINAL DIVISION
:
:
MARKALE SOWELL, :
Defendant : PCRA

OPINION AND ORDER

This matter came before the court on Markale Sowell’s Post Conviction Relief Act (PCRA) petition. The factual background and procedural history of this case follows.

On September 26, 2010, at approximately 1:00 p.m. Tamika Moore and some of her female relatives were fighting with some other females, including one or more of Sowell’s female relatives. The fight broke up and the group of females dispersed. Sowell, who resided in Harrisburg, came to Williamsport in his aunt’s vehicle, arriving in the later afternoon around supper time.

Ms. Moore was in a residence cooking dinner when her son ran into the house and said, “Ma, Aunt Fe is getting jumped.” As Ms. Moore went to go outside to see what was going on, she was met at her front screen door by Sowell, who had a gun in the front of his waistband. Sowell pulled a revolver with brown grips from his waistband, pointed it at Ms. Moore’s hip and said, “Bitch, you are coming to the other side.” Ms. Moore took this to mean that Sowell wanted her to fight on the side of his wife and relatives, instead of with her relatives, who were now engaged in a second fight. Ms. Moore grabbed her eleven year old son who was standing near her, and slammed the front door shut. She called the police, and then she went outside.

She saw Sowell leaving in a silver sedan just as a police officer was arriving in the area in an unmarked maroon police vehicle. She recognized the vehicle and began yelling and gesturing to the officer that Sowell was leaving in the silver sedan. The officer activated his lights and sirens, but Sowell sped off.

Sowell took the police on a high speed chase through busy intersections in the City of Williamsport. He ran numerous red lights and stop signs. When he attempted to turn left from Fourth Street onto Campbell Street, Sowell lost control of the silver sedan, striking a tree and the Weightman apartment building. Two pedestrians, Emily Moon and Alicia Binando, had to jump out of the way to avoid being hit by the vehicle. Although the vehicle was disabled, Sowell continued to flee from the police. He jumped out the vehicle and ran away on foot. The police yelled for him to stop, but Sowell did not. The police chased him on foot, and ultimately apprehended him by utilizing their tasers.

The police received consent from the owner of the vehicle and searched the vehicle. They found a .22 caliber H&R revolver with brown grips wrapped in a gold scarf. The police ran the serial number on the gun and discovered that it had been reported stolen. The police also ran a criminal history check on Sowell and discovered that he had a robbery conviction from New Jersey, which made it unlawful for him to possess a firearm and rendered him ineligible to obtain a license to do so.

Following a jury trial, Sowell was convicted of Fleeing or Attempting to Elude a Police Officer (75 PA. CONS. STAT. ANN. §3733), Persons Not to Possess or Control Firearms (18 PA. CONS. STAT. ANN. §6105), Firearms Not to be Carried Without a License (18 PA. CONS. STAT. ANN. §6106), two (2) counts of Recklessly Endangering Another

Person (18 PA. CONS. STAT. ANN. §2705), Simple Assault by Physical Menace (18 PA. CONS. STAT. ANN. §2701), Reckless Driving (75 PA. CONS. STAT. ANN. §3736), and Driving Without a License (75 PA. CONS. STAT. ANN. §1501). On November 30, 2011, the court sentenced Sowell to 8 ½ to 17 years' incarceration.

The Pennsylvania Superior Court affirmed Sowell's judgment of sentence in a decision filed on November 26, 2013.¹ On July 30, 2014, the Pennsylvania Supreme Court denied Sowell's petition for allowance of appeal.

Sowell filed a timely PCRA petition. Thereafter, he filed additional motions and documents, which the court is treating as supplements to his PCRA petition. See *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002) ("We have repeatedly held that the PCRA provides the sole means for obtaining collateral review, and that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition).

In his filings, Sowell has asserted claims of ineffective assistance of counsel, violations of his rights, violations of the rules of professional conduct by counsel, the imposition of an excessive sentence, and a lack of subject matter jurisdiction.

After a review of the record in this case, the court finds that Sowell is not entitled to relief or an evidentiary hearing on any of his claims, because they were previously litigated or waived or are utterly lacking in merit.

¹ 845 MDA 2012.

A petitioner is not eligible for relief if the allegation of error has been previously litigated or waived. 42 PA. CONS. STAT. ANN. §9543(a)(3). An 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. CONS. STAT. ANN. §9544(a)(2). An 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. CONS. STAT. ANN. §9544(b).

Petitioner asserts claims and issues related to the police officers’ failure to fingerprint, photograph, and Mirandize him following his arrest; the officers’ allegedly breaking the chain of custody and tampering with evidence when they removed the revolver from its evidence envelope and test-fired it; and the Commonwealth’s failure to turn over discovery prior to trial. Petitioner asserted these claims in the trial court and in his direct appeal, and they were rejected. Therefore, these issues were previously litigated, and petitioner is not eligible for relief through the PCRA.

Petitioner’s attempts to reframe these issues as ineffective assistance of counsel claims are also unavailing. To prevail on a claim of ineffective assistance of counsel, a petition must plead and prove that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered prejudice as a result. *Commonwealth v. Spatz*, 84 A.3d 294, 311 (Pa. 2014). To establish prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the

outcome of the proceeding. *Id.* at 312. Petitioner cannot satisfy any of the elements of an ineffective assistance of counsel claim, because the Superior Court found the underlying claims lacked merit. Counsel cannot be ineffective for failing to raise a meritless claim. *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 603 (Pa. 2007); *Commonwealth v. Jones*, 590 Pa. 202, 912, A.2d 268, 278 (Pa. 2006).

Petitioner also asserts that counsel was ineffective for failing to file timely motions such as an omnibus pretrial motion, a suppression motion and a motion for bail modification. Petitioner is not entitled to relief on this claim. Petitioner directed his counsel to file a motion to withdraw and chose to represent himself because counsel would not file the motions that petitioner wanted him to file. Once petitioner elected to represent himself, he filed numerous motions. The court did not preclude the petitioner from filing any motion. The court reviewed the petitioner's motions and denied them, not because they were untimely but because they lacked merit. The Superior Court affirmed the trial court's rulings.

Petitioner next alleges that counsel was ineffective for waiving his arraignment without his knowledge or consent. This issue is waived. Petitioner could have raised it before trial once he was representing himself, but he did not do so.

Even if counsel improperly waived Petitioner's arraignment, Petitioner has not suffered any prejudice. The main purposes of arraignment are to advise a defendant: of the charges; of his right to be represented by counsel; of his right to file motions and the time limits within which the motions must be filed; and if he fails to appear for a proceeding without cause, the proceeding may be conducted in his absence. Pa.R.Crim.P. 571(C), Comment.

Petitioner was aware of the charges against him. He filed multiple motions in which he set forth arguments why he believed the Commonwealth's evidence was insufficient to hold him on the charges or why the charges should be dismissed.

Petitioner was also aware of his right to counsel and, following a colloquy, he knowingly and voluntarily waived that right.

It is readily apparent that Petitioner was aware of his right to file motions, as the record is littered with motions filed by him. Although Petitioner might not have been aware of the time limits for filing motions, he was not prejudiced, because the court addressed the issues raised in his motions on the merits.

Finally, Petitioner was incarcerated so he was transported to each and every proceeding by constables or deputy sheriffs.

In light of these facts and circumstances, any alleged procedural defect in the waiver of Petitioner's arraignment was harmless.

Petitioner next contends he is entitled to relief because his counsel violated the Rules of Professional Conduct. The court cannot agree. The Rules of Professional Conduct do not have the force of law. A violation of the rules neither gives rise to a cause of action nor creates any presumption that a legal duty has been breached. *Smith v. Morrison*, 47 A.3d 131, 135 (Pa. Super. 2012).

Petitioner also avers that his sentence was excessive. This claim is also waived. Petitioner had to present any challenge to the discretionary aspects of his sentence in a post sentence motion filed no later than ten (10) days after imposition of sentence. Pa.R.Crim.P. 720. Petitioner represented himself for pretrial motions, trial, and post

sentence motions. He filed a post sentence motion, but did not present any claim that his sentence was excessive. Furthermore, his claim is boilerplate. Petitioner does not state any factual or legal basis to show how or why his sentence is allegedly excessive.

Finally, Petitioner asserts that the court lacked jurisdiction because: (1) the arresting officer lied about fingerprinting him; (2) the criminal complaint does not contain the signature of the prosecuting attorney; (3) the Magisterial District Judge (MDJ) never issued a warrant for his arrest; (4) the alleged victims never signed the criminal complaint or gave a signed statement; and (5) the criminal complaint number for petitioner's charges is the same as Tamika Moore's criminal complaint. None of these assertions entitle Petitioner to relief.

The court does not know how many times Petitioner must be told that his fingerprinting issue does not entitle him to dismissal of the charges or any other relief. Whether he was fingerprinted is not material to his guilt or innocence. Petitioner foolishly waived his right to counsel, because he was convinced he was knew more than his attorney and he was entitled to relief on this frivolous issue. The court denied his claims. He asserted this issue on appeal, and then requested counsel. Appellate counsel filed an *Anders* brief and asked for leave to withdraw because all of Petitioner's issues, including his fingerprinting issue, were frivolous. The Superior Court agreed that the issue was frivolous, and granted appellate counsel's request to withdraw. Any variations of this issue in his current PCRA petition are equally frivolous.

The fact that the criminal complaint does not contain the signature of the prosecuting attorney also does not entitle Petitioner to any relief. Rule 507 governs the

approval of criminal complaints by the attorney for the Commonwealth. Pa.R.Crim.P. 507. Notably, the rule does not require that the approval be in writing. In part due to the fact that the police make many arrests after normal business hours, the attorney for the Commonwealth typically gives approval by telephone. Moreover, Rule 507 clearly states: “No defendant shall have the right to relief based solely upon a violation of this rule.” Pa.R.Crim.P. (D).

The court also does not lack subject matter jurisdiction because the MDJ failed to issue a warrant for Petitioner’s arrest. “Criminal proceedings in court cases are instituted by 1) the filing of a complaint, followed by the issuance of a summons or arrest warrant; or by 2) a warrantless arrest, followed by the filing of a complaint.” Pa.R.Crim.P. 502, Comment. The proceedings were instituted against Petitioner by a warrantless arrest, followed by the filing of a complaint.

A police officer is authorized to arrest without a warrant in many situations, including when the offense is a felony or misdemeanor committed in the presence of the officer making the arrest. Pa.R.Crim.P. 502(2). Here, Tamika Moore called the police and reported that Petitioner was threatening her with a firearm. When the police responded, Ms. Moore pointed out Petitioner to the police. The information provided by Ms. Moore gave the police reasonable suspicion to believe that a crime had been committed and Petitioner was the perpetrator. This reasonable suspicion provided the police with a basis to detain Petitioner and investigate Ms. Moore’s claims. Petitioner, however, got into a silver vehicle and drove away. He did not respond to the police lights, sirens and signals to stop his vehicle. Instead, Petitioner engaged in a high-speed chase. By failing or refusing to bring

his vehicle to a stop and engaging in a high-speed chase, Petitioner committed the offense of fleeing or attempting to elude a police officer in the presence of the arresting officer, which provided the officer with authority to make a warrantless arrest.

Petitioner also contends the court lacked jurisdiction and his rights were violated because the victims never signed a written statement or the criminal complaint. This issue is frivolous. There is no requirement that a victim or a witness provide a written statement or sign the criminal complaint. Rule 504 states that the criminal complaint shall contain the signature of the affiant. Pa.R.Crim.P. 504(12). The affiant in this case, though, was Officer Jeffrey Paulhamus of the Williamsport Bureau of Police, not one of the victims or witnesses. Officer Paulhamus signed and dated the criminal complaint.

It also is of no moment that Petitioner's and Tamika Moore's cases have the same criminal incident number. Although Petitioner and Ms. Moore were not co-defendants, their charges arose out of the same incident – the fighting between their relatives outside the residence.

Accordingly, the following order is entered:

ORDER

AND NOW, this ___ day of August 2015, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that an evidentiary hearing is not necessary because the claims were previously litigated, waived, or lack merit.

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this court's intention to deny the Petition. Petitioner Markale Sowell 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.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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Gary Weber, Esquire (Lycoming Reporter)
Work file