

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-1462-2012  
:   
vs. : CRIMINAL DIVISION  
:   
:   
:   
SHYNELL WALKER, : Notice of Intent to Dismiss PCRA  
Defendant : Without an Evidentiary Hearing and  
: Granting Counsel’s Motion to Withdraw

**OPINION AND ORDER**

This matter came before the court on Defendant’s Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

At approximately 4:45 p.m. on August 14, 2012, Officer Thomas Bortz and Officer Brian Chilson were on an “interdiction” detail in the 500 block of Memorial Avenue near Flanagan Park in Williamsport. The officers observed a dark blue or black Volvo parked at the entrance of 565 Memorial Avenue. The vehicle raised Officer Bortz’ suspicions because there is no residence on that side of the street, it is a predominantly minority neighborhood, and the vehicle was occupied by two Caucasian males. The Volvo also had a sticker on the back of it, indicating it had been purchased from a dealer in Berwick or Danville. The driver was laid back in his seat and the passenger was on a cell phone and his “head was on a swivel” – turning as if he was looking for someone. As the officers drove past in their marked vehicle, the driver sat up, backed the Volvo out of its parking spot, and drove west on Memorial Avenue.

The officers turned around to follow the Volvo. Just before the Volvo reached Walnut Street, the driver pulled the vehicle over to the curb and Defendant Shynell Walker got into the rear passenger seat. The Volvo then turned onto Walnut Street. When

the vehicle reached the intersection of Walnut and Fourth Streets, it stopped at the red light and the officers were right behind it. The light changed to green and the vehicle proceeded into the intersection a few feet as if it was going to continue south on Walnut Street. There was another vehicle traveling north with its left turn signal on. The vehicle in which Walker was a passenger stopped, and the driver waved to signal the driver of the oncoming vehicle to turn left in front of him. After that vehicle turned left, the driver of the Volvo quickly turned on his right turn signal and turned right onto Fourth Street. The police stopped the Volvo, because the driver, who was not a police officer or his designee, unlawfully directed traffic by signaling the oncoming driver to turn left in front of him, and the driver failed to activate his turn signal at least 100 feet before the intersection.

When the officers walked up to the Volvo to speak to the occupants, they immediately noticed an odor of marijuana. After they got the driver and the front seat passenger out of the vehicle to speak to them separately, the officers could still smell the odor of marijuana inside the vehicle. The front seat passenger and the driver told the police that they drove to Williamsport so that the front seat passenger could buy heroin from Walker. The front seat passenger was going to pay the driver for the ride to Williamsport by giving him some of the heroin. The police took Walker into custody and searched him. They found ten bags of heroin, four bags of marijuana, some money and a cell phone on Walker's person.

Walker was charged with possession with intent to deliver a controlled substance (heroin), possession of a small amount of marijuana, possession of drug paraphernalia, and possession of a controlled substance (heroin).

Walker filed a motion to suppress on the basis that the police unlawfully stopped the Volvo. The court held a hearing and argument on Walker's suppression motion on December 14, 2012, and it denied the motion in an Opinion and Order entered December 18, 2012.

Walker waived his right to a jury trial. A bench trial was held on March 8, 2013, and the court found Walker guilty of all the charges.

On May 30, 2013, the court sentenced Walker to 30 to 60 months of incarceration in a state correctional institution. Walker filed a timely notice of appeal.

Walker presented two issues on appeal: (1) the court erred in denying his motion to suppress; and (2) the court erred by permitting Officer Bortz to testify as an expert concerning possession with intent to deliver on the basis that the evidence was cumulative in light of the testimony of the two others in the vehicle who testified that they picked up Walker and intended to purchase heroin from him. In a memorandum decision filed May 29, 2014,<sup>1</sup> the Superior Court rejected Walker's claims and affirmed his judgment of sentence. Walker did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

Walker filed a timely pro se PCRA petition, in which he again asserted claims that the court erred in denying his suppression motion and permitting Officer Bortz to testify as an expert concerning possession with intent to deliver, as well as a claim that counsel was ineffective for not appealing his "mandatory sentence." The court appointed counsel to represent Walker and gave counsel an 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)

---

<sup>1</sup> 1019 MDA 2013.

and *Commonwealth v. Finley*, 379 Pa. Super. 390, 550 A.2d 213 (1988). Counsel corresponded with Walker about his claims. In his correspondence to counsel, Walker raised three additional issues: counsel was ineffective for failing to file a motion to suppress the in-car video from the police vehicle; the sentence imposed was in violation of or inconsistent with the Fair Sentencing Act; and counsel was ineffective for failing to question Officer Bortz regarding his smelling marijuana inside the vehicle during the traffic stop. Counsel reviewed these claims and, finding that none of them entitled Walker to relief, filed a no merit letter.

Following an independent review of the record, the court agrees with counsel's assessment that none of Walker's claims entitle him to an evidentiary hearing or relief.

In order to obtain relief pursuant to the PCRA, a petitioner must establish by a preponderance of the evidence that his or conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa. C.S. § 9543 (a) (2). *Commonwealth v. Reid*, 99 A.3d 427, 435 (Pa. 2014). Such enumerated circumstances include constitutional violations which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place; ineffectiveness of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place; and the imposition of a sentence greater than the lawful maximum. 42 Pa. C.S. § 9543 (a) (2)(i), (ii) and (iii).

To succeed on an ineffectiveness claim, a petitioner must prove that (1) the underlying legal claim has arguable merit; (2) that counsel had no reasonable basis for his act

or omission; and (3) that the petitioner suffered prejudice as a result. *Commonwealth v. Baumhammers*, 92 A.3d 708, 719 (Pa. 2014), citing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987).

The petitioner must also be able to plead and prove that “the allegation of error has not been previously litigated or waived.” 42 Pa.C.S.A. §9543(a)(3). An issue is considered 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.A. §9544(a)(2).

The highest appellate court in which Walker could have had review as a matter of right was the Pennsylvania Superior Court. The first two issues in Walker’s PCRA petition were asserted in Walker’s direct appeal and rejected by the Pennsylvania Superior Court.<sup>2</sup> Therefore, they were previously litigated.

In Walker’s third issue he claims ineffective assistance of counsel for not appealing his mandatory sentence. Based on the memo and case attached to his pro se petition, it appears that Walker believes he has a claim pursuant to *Alleyne v. United States*, 133 S.Ct. 2151 (2013). This claim lacks merit. The court did not impose a mandatory minimum sentence; rather, the court imposed a sentence in the aggravated range of the sentencing guidelines because Walker was on parole supervision for a federal conviction when he committed the offenses in this case. N.T., May 30, 2013, at 3-4, 8. Since no mandatory sentence was imposed in this case, Walker does not have a valid claim pursuant to *Alleyne*.

---

<sup>2</sup> Although Walker could have filed a petition for allowance of appeal to the Pennsylvania Supreme Court, such an appeal does not entitle Walker to review as a matter of right. Instead, the Pennsylvania Supreme Court has

Walker next asserts that counsel was ineffective for failing to file a motion to suppress the in-car video from the police vehicle. The court cannot agree. Walker has not alleged any basis on which the video could be suppressed. Therefore, he has not pled sufficient facts to show that this issue has merit. Furthermore, the video was not introduced at Walker's trial. Therefore, he cannot show that he was prejudiced by counsel's alleged ineffectiveness.

Walker also contends the sentence imposed was in violation of the Fair Sentencing Act. This claim lacks merit. The Fair Sentencing Act was passed to reduce the disparity between sentences for powder cocaine and crack cocaine for **federal** drug offenses. It does not apply to Pennsylvania drug offenses or Pennsylvania's sentencing guidelines which provide for the same sentence based on the amount of the cocaine regardless of whether it is in the form of powder or crack.

Finally, Walker claims that counsel was ineffective for failing to question the credibility of Officer Bortz regarding his smelling marijuana in the vehicle in which Walker was a passenger. Cross-examining Officer Bortz on this issue would not have changed the outcome of Walker's trial. Based on the occupants' actions and mannerisms before Walker got into the vehicle and the fact that it appeared they were from out of town, Officer Bortz suspected that they were looking or waiting for someone to engage in drug activity. When the driver committed a traffic violation shortly after Walker got into the car, Officer Bortz had reason to stop the car. The officers stopped the vehicle and removed the other occupants from the vehicle and spoke to them. They admitted that they had intended to purchase heroin

---

the discretion to allow or disallow the appeal.

from Walker. Officer Bortz then went over to the vehicle and asked Walker if he possessed any marijuana or narcotics. Walker responded that he had “weed” in his pocket. Officer Bortz arrested Walker and discovered both marijuana and heroin on Walker’s person during a search incident to his arrest. In light of these facts and circumstances, the court agrees with PCRA counsel’s assessment that “it would not have made sense nor would it have been effective for trial counsel to question Officer Bortz’s credibility concerning his smelling marijuana in the vehicle” because Walker, who was still sitting in the vehicle, admitted possessing marijuana and marijuana was in fact recovered from Walker’s person during a search incident to his arrest.

For the foregoing reasons, the court concludes that there are no material issues of fact and Walker is not entitled to relief on any of his claims. Accordingly, the court will grant counsel’s motion to withdraw and give Walker notice of its intent to dismiss his PCRA petition without holding an evidentiary hearing.

### **ORDER**

AND NOW, this \_\_\_ day of March 2015, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that no purpose would be served by conducting any further hearing, and none will be scheduled. The parties are hereby notified of the court’s intention to dismiss Walker’s PCRA petition. Walker 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.

The court also grants counsel's motion to withdraw.

By The Court,

---

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Donald F. Martino, Esquire  
Shynell Walker, LB-5065  
SCI Pine Grove, 191 Fyock Road, Indiana PA 15701  
Gary Weber, Esquire (Lycoming Reporter)  
Work file