

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No's. CR-1472-2011; CR-1767-2011
vs. :
:
LARRY L. BURDEN, : Notice of Intent to Dismiss PCRA
Defendant :
:

OPINION AND ORDER

Under Information No's.: CR-1472-2011 and CR-1767-2011, the relevant facts and case history are as follows:

At approximately 9:50 a.m. on October 9, 2011, the Rite-Aid store on Fifth Street was robbed. The robber approached the clerk and told the clerk to get behind the register and give him all the money. As the clerk was walking around the counter, the robber said "hurry up or I'll hurt you." The clerk noticed that the robber kept his hands inside the pouch of his hoodie, where there was a bulge that the clerk recognized as the outline of a gun. The clerk opened the cash drawer and handed the robber \$149, which consisted primarily of \$1 bills.

A customer observed the robbery take place and, while calling 9-1-1, the customer followed the perpetrator on his escape path. The customer observed the robber remove some of his clothing and discard it. When the police arrived, the customer pointed out the robber to them.

Officers took the robber into custody and he was identified as the Petitioner, Larry Burden. As a result of a search incident to arrest, the officers discovered a .357 revolver loaded with four rounds of live ammunition in Burden's waistband, the \$149 in cash stolen from Rite-Aid, and nine baggies of crack cocaine. The police also recovered a hat and

hoodie that Burden discarded along the route he took after he left the store. During booking, Burden commented to the officers, “You got the money; you got what you want.”

The police charged Burden with persons not to possess a firearm, possession of a firearm without a license, terroristic threats, theft by unlawful taking, receiving stolen property (CR-1767-2011), possessing instruments of crime, simple assault by physical menace, and three counts of robbery.

A jury trial was held on all of the counts except one count of robbery, which was withdrawn by the Commonwealth, and the persons not to possess a firearm charge, which was severed and tried non-jury. Burden was convicted of all the charges.

On July 3, 2012, the court imposed an aggregate sentence of 9 ½ to 20 years incarceration in a state correctional institution. Burden filed post-sentence motions, which the court denied.

Burden filed a timely notice of appeal in which he asserted sufficiency and weight of the evidence challenges to his convictions for robbery and simple assault. The Pennsylvania Superior Court affirmed Burden’s convictions in a memorandum opinion filed on April 19, 2013.

Trial counsel sent Burden a letter dated April 23, 2013, advising him that the Superior Court denied his appeal and that he could file a Post Conviction Relief Act (PCRA) petition alleging ineffective assistance of counsel. Trial counsel did not discuss the possibility of filing a petition for allowance of appeal with the Pennsylvania Supreme Court. Nevertheless, on May 15, 2013, Burden wrote a letter to counsel requesting that she file such

a petition. On May 28, 2013, trial counsel sent a letter to Burden advising that she received his letter requesting that she file a petition for allowance of appeal after the date that the filing was due; however, he could file a PCRA petition alleging ineffective assistance of counsel.

On March 19, 2014, Burden filed a timely pro se PCRA petition in which he asserted numerous claims, including a claim that trial counsel was ineffective for failing to file a petition for allowance of appeal to the Pennsylvania Supreme Court.

By Order dated December 5, 2014, the court reinstated Burden's right to file a petition for allowance of appeal nunc pro tunc. Burden subsequently filed said petition but it was denied by the Supreme Court of Pennsylvania.

Following the denial of the petition for allowance of appeal, Burden's original PCRA petition was reinstated and on January 20, 2016, new counsel was appointed to represent Burden. Through new counsel, on June 6, 2106, Defendant filed an Amended PCRA Petition.

On July 28, 2016, defense counsel filed a motion to withdraw and a Turner/Finley "no merit" letter (motion to dismiss). On August 24, 2016, Defendant filed his objections to counsel's motion to withdraw and Turner/Finley letter. Argument on said motions was held on September 7, 2016. This opinion and order shall address said motions.

As defense counsel notes, Petitioner raises three claims of ineffective counsel. First, Petitioner claims that trial counsel did not explore the opportunities for a plea agreement. Second, Petitioner alleges that trial counsel did not present a surveillance video

or photos during the trial phase which would have been exculpatory. Third, Petitioner claims that trial counsel did not object to prosecutorial misconduct in the prosecution's opening statements.

As defense counsel properly asserts: "In order to be eligible for relief on a claim alleging ineffective assistance of counsel, a defendant must establish that counsel's representation fell below accepted standards of advocacy and that as a result thereof, prejudice resulted." *Commonwealth v. Miller*, 605 Pa. 1, 987 A.2d 638 (Pa. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). The Supreme Court of Pennsylvania has interpreted the *Strickland* standard as requiring proof that: (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice. *Miller*, supra (citing *Commonwealth v. Collins*, 957 A.2d 237, 244 (Pa. 2008)).

The prongs of an ineffectiveness claim need not be analyzed in any particular order. *Commonwealth v. Johnson*, 139 A.3d 1257, 1272 (Pa. 2016). A court may discuss first any prong that a petitioner cannot satisfy under the prevailing law and the applicable facts and circumstances of the case. *Id.*; *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 701 (1998).

The court may dismiss a petition without a hearing if it is satisfied that there are no genuine issues concerning any material fact, the defendant is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by any further proceedings. Pa. R. Crim. P. 907(1). "[T]o obtain reversal of a PCRA court's decision to

dismiss a petition without a hearing, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing.” *Commonwealth v. D’Amato*, 579 Pa. 490, 856 A.2d 806, 820 (2004).

There is no merit in Petitioner’s first or third claims. In his first claim Petitioner asserts that counsel was ineffective for failing to explore opportunities for a plea agreement. Petitioner, however, has not alleged that he was willing to plead guilty to the offenses. Furthermore, the Commonwealth was under no obligation to make any offer. See *Commonwealth v. Smith*, 664 A.2d 622, 626 (Pa. Super. 1995)(“Simply put, ‘the Commonwealth is never under any legal obligation to plea bargain with any defendant.’”); *Commonwealth v. Losch*, 535 A.2d 115, 125 (Pa. Super. 1987)(“Appellant has no right to a deal with the Commonwealth; the district attorney is ordinarily free to choose with whom he will negotiate.”). Therefore, Petitioner has not pled sufficient facts to show that he was prejudiced by counsel’s alleged failure to explore a plea agreement.

In his third issue, Petitioner contends that trial counsel was ineffective for failing to object during the prosecutor’s arguments which compared Petitioner to “John Dillinger, a known mafia murderer.” During opening statements, the prosecutor did make references to John Dillinger. He did not, however, refer to Dillinger or Petitioner as a “mafia murderer.” The prosecutor stated:

Morning folks. John Dillinger once said in an interview with the Associated Press, my buddies wanted to be firemen, farmers or policemen, but not me. All I wanted to do was steal people’s money, and that’s what he did. John Dillinger became one of the most famous depression era

gangsters that that time knew. Throughout his crime spree he knocked over – off over two dozen banks, and got away with over \$300,000, which in today’s money, would be 4.5 million dollars. He was made famous in the serial comic books and in the new [reels] at the time that they played in the movie theaters, and he was made public enemy number one by the Bureau of Investigation, which was the precursor to the FBI.

Now although he gained a certain amount of fame, and a certain amount of fortune from his actions and his gang’s actions, it doesn’t take away from the fact that he was robbing people, and was terrorizing the people that he was robbing.

Now just as in depression era time in America, we have people in this community who are willing to rob other people of their money, and it’s the Commonwealth’s belief, and the Commonwealth intends to prove beyond all doubt that the defendant is one of those people.

The prosecutor then outlined the evidence that he was going to present to show that the clerk at the Rite-Aid was robbed and the Petitioner was the person who robbed him.

While the court may not agree with the prosecutor’s comparison of the Petitioner’s robbery of the Rite-Aid of \$149 to Dillinger’s numerous and vastly more profitable bank robberies, it was merely oratorical flair.

“Not every unwise, intemperate, or improper remark made by a prosecutor mandates the grant of a new trial. Reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict.” *Commonwealth v. Watkins*, 108 A.3d 692, 720-721 (Pa. 2014)(quoting *Commonwealth v. Spatz*, 47 A.3d 63, 97-98 (Pa. 2012)). Prosecutorial comments that merely constitute oratorical flair are not objectionable. *Commonwealth v. Hutchinson*, 25 A.3d 277, 307 (Pa. 2011).

Furthermore, in light of the overwhelming evidence of Petitioner’s guilt, the court

finds that Petitioner was not prejudiced by the prosecutor's opening statements.

The issue in dispute relates to trial counsel's alleged failure to present exculpatory video surveillance or photos.

Defense counsel claims that this issue has no merit. Defense counsel asserts that he attempted to view the video surveillance but that there was "no sound or imagery." Defense counsel further asserts that he located six still photos in the "file" that "may have been from another camera or taken off the video surveillance before it became corrupted." These photos do not exculpate Petitioner because, according to defense counsel, they are not clear enough to determine that there was no weapon in Burden's hoodie type sweatshirt. Finally, defense counsel asserts that he was unable to get information on the security cameras from the Rite-Aid that was robbed by the Defendant.

Defense counsel attached a written verification from trial counsel noting that trial counsel was "unable to open the video and may have needed a special program to open it." She also asserted that the Commonwealth "was also unable to open the video" and that "it is not clear that there was any video on the CD's."

With respect to the photographs, trial counsel determined not to use them because they "were blurry and dark." She further determined from a strategic standpoint not to use the photos because the "figure could appear to be menacing to the jury."

Burden claims that trial counsel told him that she was unable to open the CD because she needed a special program. Trial counsel also allegedly told Burden that the video was "blurry" inferring that she viewed it. Finally, a few days prior to trial, when defense

counsel was allegedly confronted by Burden with respect to the surveillance video and photographs, trial counsel supposedly stated “I can’t handle all this right now...I am hungover.”

The Commonwealth provided a copy of the videos at issue to the court and to defense counsel. The video was subsequently opened by the parties and viewed by the court, albeit with some difficulty. A special program was needed to open the video and the steps that needed to be taken within that program to view the surveillance clips were somewhat confusing and convoluted.

The first video depicted an individual matching the description of the Petitioner at the counter with the clerk. The individual’s hands were in his hoodie pocket toward the opening on each side. There also appeared to be something else in his hoodie pocket, but the angle and distance of the surveillance camera precluded a clear view of the pocket’s contents. Generally, however, the video tended to corroborate the clerk’s testimony.

The second surveillance video was also viewed by the parties and the court. Burden is seen entering the Rite-Aid. This surveillance video may have actually been inculpatory. Again, it appeared that there was an object inside Burden’s hoodie pocket in addition to his hands.

Under all of the facts and circumstances, the court concludes that the Defendant is not entitled to a hearing on this issue. It is clear to the court that Petitioner’s claim is not of arguable merit. Furthermore, even if trial counsel was ineffective, the Petitioner suffered no prejudice.

Burden claims that defense counsel should have opened the videos, viewed them and then them played to the jury. Even assuming that defense counsel did open the videos but chose not to play them as contended by Petitioner, they were not exculpatory. They did not prove Burden's claim that he did not possess a firearm or refute the clerk's testimony that he saw an outline of a firearm through the hoodie pocket. The angle and distance of the video precluded a clear view of the pocket.

Moreover, when Burden was apprehended shortly after the incident, he was in possession of a handgun as well as the exact sum of money in the exact denominations that were taken from the Rite-Aid. Furthermore, he confessed.

It is clear that Petitioner has not met the merit and prejudice prongs of the ineffectiveness standard. This court can and will dismiss on these bases alone.

Commonwealth v. Travaglia, 661 A.2d 352, 357 (Pa. 2016), *Commonwealth v. Treiber*, 121 A.2d 435, 451 (Pa. 2015).

ORDER

AND NOW, this ___ day of October 2016, the parties are hereby notified of this court's intention to dismiss Burden's PCRA petition without holding an evidentiary hearing. Burden 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)
Jerry Lynch, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file