

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA	:	CR-357-2012
	:	
v.	:	
	:	
BASIL GARCIA,	:	
Defendant	:	PCRA

OPINION AND ORDER

On August 4, 2016, Counsel for the Defendant filed a Petition to Withdraw from Representation of Post-Conviction Collateral Relief pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

Background

After a jury trial on April 22-23, 2013, Defendant was found guilty of firearms not to be carried without a license¹, fleeing and eluding², possession of a controlled substance³, possession of drug paraphernalia, unauthorized use of an automobile⁴, tampering with evidence⁵, criminal mischief⁶, receiving stolen property⁷ and various summary offenses. Defendant was sentenced on November 14, 2013, to an aggregate period of incarceration of 69 to 138 months, followed by two years county probation consecutive to two years state probation, and to pay fines. Post-sentence motions were denied and a direct appeal followed. By Order dated October 7, 2014, the

¹ 18 Pa.C.S. § 6106(a)(1).

² 18 Pa.C.S. § 3733.

³ 35 P.S. § 780-113(a)(16).

⁴ 18 Pa.C.S. § 3928.

⁵ 18 Pa.C.S. § 4910.

⁶ 18 Pa.C.S. § 3304.

⁷ 18 Pa.C.S. § 3925.

conviction and sentence was affirmed by the Pennsylvania Superior Court. By Order dated May 1, 2015, a petition for allowance of appeal was denied by the Pennsylvania Supreme Court. Petitioners have 90 days from a denial of a petition for allowance of appeal to seek a writ of certiorari from the Supreme Court of the United States.⁸ No such appeal was sought and as such Defendant's sentence became final on August 1, 2015.

Under the Post Conviction Relief Act (PCRA), Defendant has one year after his judgment of sentence becomes final to request Post Conviction Relief unless circumstances exist that prevented Defendant from filing within one year and he files within 60 days of when his claim could have been presented. Defendant's judgment of sentence became final on August 1, 2015, and he thus had until August 1, 2016, to file a request for Post Conviction Relief. The petition, filed February 3, 2016, is timely.

Petitioner claims ineffectiveness assistance of counsel in four respects:

- (1) the cross-examination of witness Jennifer Colon,
- (2) the level of communication with Defendant prior to trial,
- (3) failure to argue weight of the evidence in a post-sentence motion and
- (4) poor trial strategy.

To succeed in an ineffective assistance of counsel claim, Defendant must show by a preponderance of the evidence that Defendant's conviction resulted from ineffective assistance of counsel that so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S. § 9543. The court finds that Defendant has not shown such ineffectiveness with respect to any of the claims raised herein.

⁸ USCS Supreme Ct. R.13.

(1) The cross-examination of witness Jennifer Colon

Defendant claims that trial counsel was ineffective for failing to bring out that a witness, Jennifer Colon, had a history of convictions for crimes of dishonesty, had been charged in the incident in which he was involved and had sold a firearm in the past. The Commonwealth introduced, through the testimony of a police officer, that Colon had been arrested and charged in connection with the incident for which Defendant was on trial, N.T. 4/22/2014, at 38-39, and also brought out on direct examination of Colon that she had been convicted of various felonies, including theft of a handgun. Id. at 72-73. She also admitted on direct examination that she had sold the stolen handgun. Id. at 79. On cross-examination, Defense Counsel had Ms. Colon admit that those crimes were crimes of dishonesty. Id. at 83-84. Defense counsel also had her admit that she gave police a false name when she was arrested. Id. at 84-85. The jury did know that Colon had a history of criminal convictions for crimes of dishonesty, had been charged in the incident from which the charges against Defendant arose, and that she had sold a firearm in the past and yet it found the Defendant guilty. The truth determining process was not undermined as the jury was made aware of all potential reasons to find Colon incredible and yet it still found her credible. The jury did not credit [Defendant's] version of events, and it was within its province as fact finder to assess the credibility of the witnesses and accept, all, part, or none of the evidence. Commonwealth v. Garcia, No. 498 MDA 2014, at 10 (non-precedential decision).

(2) The level of communication with Defendant prior to trial

Defendant has not indicated how the alleged lack of communication affected his defense but has made only general accusations that there was insufficient communication. Without any specific instances to examine, the court cannot find that the truth determining process was undermined. PCRA Counsel reviewed the Public Defender's file on Garcia which contained

thirteen letters by the Public Defender to Garcia, which stands contrary to Defendant's assertion in his "Brief of Post Conviction Relief" that "Counsel failed in every aspect with making a decision of the Defendant without responding to letters and during the interview process his focus was to move on to the next case." Brief of Post Conviction Relief, 2/16/2013, at 2.

(3) Failure to argue weight of the evidence in a post-sentence motion

To prevail on a petition for relief under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546, a petitioner must plead and prove, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2). These circumstances include a constitutional violation or ineffectiveness of counsel, either of which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. § 9543(a)(2)(i) and (ii). In addition, a petitioner must show that the claims of error have not been previously litigated or waived. § 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.C.S. § 9544(a)(2). An issue has been waived if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state post conviction proceeding. § 9544(b). Generally speaking, any claim deriving from an event at trial could have been challenged at trial and raised on direct appeal. To the extent such a claim was not raised at trial, it is waived under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546, unless an exception applies.

The Court finds that Defendant's Counsel did challenge the weight of the evidence in a Post Sentence Motion. The Court fully addressed Defendant's weight of the evidence challenge in an Opinion and Order dated February 19, 2014. Trial Court Opinion, 2/19/2014, at 5-7. Julian Allatt, Esq. was Defendant's Counsel on his appeal to the Superior Court. The Superior

Court found only one issue was raised for the review, that of sufficiency of the evidence in regards to firearms not to be carried without a license and receiving stolen property.

Commonwealth v. Garcia, No. 498 MDA 2014, at 4 (non-precedential decision) and that

Appellate Counsel failed to preserve his issue properly in his Pa.R.A.P. 1925(b) statement.

However, the Superior Court when on to address the merits of the sufficiency of the evidence claim and found it without merit. As such this issue regarding the adjudication of guilty on the charge of carrying a firearm without a license has been fully litigated and is not a basis for post conviction relief.

(4) Poor trial strategy

Again, Defendant has not made any specific allegation of how the trial strategy affected the truth-determining process. Defendant testified to a different version of events and the jury apparently did not believe his testimony. The court cannot find any ineffectiveness in the trial strategy pursued.

Conclusion

The court under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546, has discretion to dismiss a petition without a hearing when the court 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 further proceedings. To 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.

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting

any further hearing. As such, no further hearing will be scheduled. Pursuant to Pa.R.Crim.P. 907(1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA 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 _____ day of October, 2016, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed August 4, 2016, is hereby **GRANTED** and Jerry Lynch, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, President Judge

cc: DA
Jerry Lynch, Esq.
Basil Garcia LH 9212
SCI Benner Township
301 Institution Dr.
Bellefonte, PA 16823
Gary Weber, Lycoming Law Reporter
Work File (Law Clerk)