

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-76-2015
	:	
ANDRE MULLEN,	:	PCRA
Defendant	:	

OPINION AND ORDER

On August 31, 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.

On June 10, 2016, the Defendant filed a Petition for Post Conviction Relief requesting release from custody and a trial. Counsel was appointed to Petitioner in accordance with Pa.R.Crim.P. 904(C). A court conference was held on September 19, 2016, to review the petition. After thorough review, the Court finds that there are no genuine issues of material fact and that the Defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings.

Background

Andre Mullen (Mullen) was charged on February 6, 2015, with Possession with Intent to Deliver (Heroin), an ungraded felony¹, Criminal Use of a Communication Facility² a felony of the third degree, Possession of a Controlled Substance (two counts: Heroin and

¹ 35 P.S. § 780-113(a)(30).
² 18 Pa.C.S. § 7512.

Hydrocodone, each an ungraded misdemeanor)³ and Possession of Drug Paraphernalia⁴ an ungraded misdemeanor.

Mullen subsequently entered a guilty plea on the both Possession of a Controlled Substance charges and the Possession of Drug Paraphernalia, the misdemeanor charges not the felony charges.

On August 20, 2015, the Court having satisfied itself of 1) the factual basis for such plea and 2) that the Defendant was, in fact, guilty of Counts 3 and 4, both Possession of a Controlled Substance (second or subsequent conviction), an ungraded misdemeanor and Count 5, Possession of Paraphernalia, an ungraded misdemeanor, the Sentence of the Court as to Count 3 was 12-24 months in a state correctional institution (SCI). Sentence as to Count 4 was 12-24 months in a SCI. Sentence as to Count 5 was 3 months to 6 months. All of the sentences are consecutive. It was the intent of the Court to sentence the Defendant to an aggregate sentence, the minimum of which shall be twenty-seven (27) months, the maximum of which shall be fifty-four (54) months to be served at a State Correctional Institution. Defendant had been detained at Lycoming County Prison on a Pennsylvania Board of Probation and Parole (PBPP) detainer since the date of his arrest, 12/18/2014, as a result of these charges and elected at the time of sentencing for any time served to be credited to his parole violation rather than the current charges. N.T., 8/20/2015, at 13-17.

Discussion

Under the Post Conviction Relief Act (PCRA), Defendant has one year after his judgment of sentence becomes final to request Post Conviction Relief unless

³ 35 P.S. § 780-113(a)(16).

circumstances exist that prevented Defendant from filing within one year and he files within 60 days of when his claim could have been presented. Mullen was sentenced on August 20, 2015. He did not file post sentence motions nor take a direct appeal to the Superior Court and as such his Judgment of Sentence became final on September 21, 2015. The PCRA Petition filed June 20, 2016, is timely.

Incarcerated defendants, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by the preponderance of the evidence the following four components:

- 1) Defendant has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.
- 2) Conviction or sentence resulted from one or more of the following
 - i. Violation of the US or PA Constitution that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.
 - ii. Ineffective assistance of counsel – same undermining the truth determining process standard as above “undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place”.
 - iii. Plea of guilty induced where inducement caused Defendant to plead guilty when he is innocent.
 - iv. Improper obstruction by government officials of petitioner’s appeal right where a meritorious appealable issue was properly preserved in the Trial Court.
 - v. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial had it been introduced.
 - vi. Imposition of sentence greater than the lawful maximum.
 - vii. Proceeding in a tribunal without jurisdiction.
- 3) Allegation of the error has not been previously litigated or waived; and
- 4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel.

42 PA.C.S. § 9543. ELIGIBILITY FOR RELIEF.

Here the Defendant alleges his Fourth Amendment rights were violated in an illegal search and seizure. Defendant also alleges that his Trial Counsel was ineffective for failing to recognize the Fourth Amendment issue and file a motion to suppress. He also complains that Trial Counsel allowed him to remain in pretrial incarceration longer than 180 days, without filing a motion for nominal bail, in violation of Rule 600 of the Pennsylvania Rules of Criminal Procedure as well as his federal and state rights to a speedy trial. He complains that Trial Counsel told him that if he went to trial he would be sentenced to more than the standard range⁵. The maximum sentence for what he pled guilty to was 84 months. He was sentenced to a maximum of 54 months. He believed at the time of the plea he was saving himself 40 months of incarceration. Defendant also states now that he was not in possession of heroin, though he pled guilty to it.

1) *Ineffective Assistance of Counsel – Failure to PreTrial Motions*

Exhibits (2)(b) and (2)(c) of Defendant's original PCRA petition show that the discussion regarding suppression of cell phone contents was fully explored with Trial Counsel. Trial Counsel explained to the Defendant that he believed that the cell phone contents were collected via valid search warrant and for him to present otherwise to the court would be in violation of his duty to not present frivolous motions.

In the PCRA petition, Defendant has developed a new suppression issue based on facts that were known to him at the time of his pretrial incarceration on the above captioned matters; to wit: that he was detained in violation of his Fourth Amendment rights on the day of his arrest. Upon review of the Preliminary Hearing transcript provided

⁵ It is of note that Defendant was sentenced within the guideline range for

to the Court by Defendant in the form in Exhibit 1(a) the Court finds that Affiant in the case against Defendant did have reasonable suspicion when he detained Defendant on October 4, 2014. Defendant was seen coming out of his place of employment talking to an individual who had just been in and out of the store, using his cell phone, and did not appear to have made a purchase while in the store. The store, a Sunoco A Plus, was in a location known for having drug transactions take place in the parking lot. The Affiant was on a stationary patrol at that site and ran the plates of a White Cavalier registered to a Clinton County address. Upon making contact with both individuals, the Affiant recognized one as someone who he had arrested for shooting up heroin in the parking lot of a Weis some weeks prior. At the officer's approach, Defendant became angry and argued with the police officer. Then Defendant left the scene, only to return to the scene, be detained by South Williamsport police, and went on to tell police where he had disregarded some Vicodin. The police had also found baggies of heroin in the spot that Defendant vacated when fleeing the scene. Further evidence of a drug transaction was found when the Defendant's cell phone was searched and text messages between him and the other individual detained in the parking lot were found. Defendant explained via text message he could get anything that you wanted, among other things.

Even if there were a colorable motion to suppress, or habeas as it would likely have been styled if Trial Counsel found it arguable, Defendant waived all rights to such pretrial motions when he knowingly, intelligently and voluntarily entered his plea. On page three of the written guilty plea colloquy Defendant answered in the affirmative to the query 15a. "Do you understand that by pleading guilty you are waiving, or giving up, your right to file

any pre-trial motions and waiving any such motions already filed?” Additionally, the Motion in Limine filed by Defense Counsel on 8/3/2015, scheduled to be heard prior to trial was rendered moot by virtue of the fact the Defendant has entered a plea of guilty to the charges. N.T., 8/20/2015, at 17. Moreover, eligibility for relief for failure to file a motion is not available under the Post Conviction Relief Act when it could have been filed during the proceeding and was not, unless failure to file the motion could not have been due to a strategic decision by counsel. The evidence Petitioner provided to the Court shows that Trial Counsel was strategic in all the decisions he made with Petitioner.

2) Ineffective Assistance of Counsel – Lack of Competence, Diligence and Zeal

Quite to the contrary of Defendant’s position, the Court finds that Trial Counsel did represent attorney with competence, diligence and zeal. The evidence Defendant provided in his petition shows the letters Trial Counsel sent to Defendant while incarcerated at Lycoming County Prison on a detainer for a parole violation (Defendant was on parole when the charges in the above captioned matter were filed). As Trial Counsel explained to the Court at the guilty plea/sentencing hearing

He [Defendant] would like to be sentenced as soon as possible...I had have a chance to visit with Mr. Mullen over the course of the past two evenings at the prison where we talked about not only just this plea, actually, he was kind of the one who came up with the majority, I thought was quite creative also to discuss the trial. I have given him discovery before, but he’s moved around to Tioga County back to here so I brought it again and I think he’s doing everything knowingly, intelligently and would like to be sentenced today...

N.T. 8/20/2015 at 11.

When given an opportunity to speak at this sentencing, Defendant said “I guess I’d just like to thank the Commonwealth, Ms. Kalas for giving me the opportunity to take this plea, Mr. Frankeburger [Trial Counsel] for helping me be here.

Id. at 14.

Defendant was correct in his regard for the counsel involved in this case. It is not often one sees felonies “go away” and he got quite the benefit of his plea bargain. If Petitioner went to trial and was found guilty on all counts he would have been convicted of two additional felonies with maximum punishments of up to of 15 years and 7 years respectively (for the Possession with Intent to Deliver (Heroin) and Criminal Use of a Communication Facility.)

...The proper standard for attorney performance is that of reasonably effective assistance. The Court [Supreme Court of the United States] directly recognized as much when it stated in McMann v. Richardson, supra, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, (U.S. 1984).

For the reasons stated above, the Court finds that Trial Counsel met the objective standard of reasonableness. Trial counsel met with client; sent letter to client explaining the role of attorney and the role of client; explained why he could not file motions that he believed were without merit; fashioned a plea bargain with the assistance of Petitioner that likely saved Petitioner from incurring any further felony convictions.

3) Ineffective Assistance of Counsel – Failure to File Motion for Nominal Bail

Defendant is correct that more than 180 days had elapsed since the date of his incarceration on these charges and the time for trial (on that date identified for jury selection, the Defendant pled). The continuance in his trial was requested by the Commonwealth, and such continuance was granted over the objection of the Defendant. The Court however does not believe that Defendant was entitled to release on bail. He

was being held in prison on a PBPP detainer for incurring these charges which made him a presumptive parole violator. Parole is benefit to parolees as it allows them to serve their sentence outside of prison; however, it does come with conditions, obeying the law being one of them.

Even if Defendant were entitled to a release on nominal bail, which is unlikely given the Board's detainer on him, he now, after a knowing, intelligent and voluntary plea cannot fault his attorney for not filing a Motion for Release for Nominal Bail because as above he waived his right to file such a motion on the date of his guilty plea. Commonwealth v. Riviera, 254 Pa. Super. 196, 385 A.2d 976, 1978 Pa. Super. LEXIS 2656 (Pa. Super. Ct. 1978) (holding that a Trial Court's decision to allow a continuance of the trial at the request of the Commonwealth is not reviewable as a plea of guilty constitutes a waiver of all nonjurisdictional defects and defenses and the only legally cognizable claims after a guilty plea are the legality of the sentence and the voluntariness of the plea).

4) Coerced Guilty Plea

In its review of the Guilty/Plea and Sentence hearing the Court finds that the Petitioner understood the nature of the charges to which he was pleading guilty. N.T., 8/20/2015, at 2-3. At that time the Court reviewed with Petitioner the maximum sentence. The factual basis for the plea was reviewed at the time of the guilty plea and sentence. Id. at 5-7. The Court asked Defendant directly whether anyone was forcing him or threatening him any way to give up his right to jury trial. Id. 8-9. Question 9 of the guilty plea colloquy asks "Do you understand that if you were to choose to go to trial that you are presumed to be innocent and that the Commonwealth must prove your guilt beyond a reasonable doubt to each element of every crime charged?" To which Defendant wrote

“yes” and initialed the bottom of the page. The totality of the circumstance under which Defendant pled, the Court finds that Defendant was not coerced into pleading guilty. All of the facts he asserts now were of record at the time of his plea, and the record supports the inference that all issues were discussed and decided with the benefit of competent counsel. Moreover, Defendant was sentenced in the standard range and he did receive the benefit of the plea bargain.

ORDER

AND NOW, this 16th day of December, 2016, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified, pursuant to Pa.R.Crim.P. 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 31, 2016, is hereby GRANTED and Donald Martino, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Donald Martino, Esq.
DA (KO)
Andre Mullen [KB03082]
SCI Rockview Box A Bellefonte, PA 16823
Susan Roinick, Law Clerk