IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**CR-1472-2009**
	:	
v.	**:**	
	:	**CRIMINAL DIVISION**
DAVID ROGER PROBST,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

I. Background

On January 16, 2014, the Defendant filed a timely petition for relief under the Post-Conviction Relief Act (PCRA). The Defendant was appointed PCRA counsel. He argued that his trial counsel was ineffective because counsel failed to inform him that the Commonwealth would potentially seek imposition of a twenty-five year mandatory minimum prison sentence if he was found guilty at trial. The Defendant asserted that he did not take a plea offer for a five-year minimum prison sentence because trial counsel advised him that five years was the maximum sentence. The Defendant proceeded to trial, was found guilty, and received the twenty-five year mandatory minimum. He argued that he is prejudiced because trial counsel's failure is causing him to serve a twenty-five year minimum sentence instead of a five-year minimum sentence.

On April 10, 2015, this Court dismissed the petition. In an Opinion filed on November 9, 2015, the Superior Court determined that the Defendant's claim had arguable merit and "there was no reasonable basis for trial counsel not to inform [the Defendant] of an applicable twenty-five-year mandatory minimum." The Superior Court remanded the case for an evidentiary hearing to determine whether the Defendant was prejudiced by trial counsel's mistake. The court determined that whether the Defendant was prejudiced "hinges upon whether the Commonwealth had offered a plea for a five-year sentence . . . or whether the only offered plea

was the two-year sentence that the Commonwealth rescinded." The court, however, did not "intend to foreclose any other avenue by which [the Defendant] may prove prejudice." This Court held the evidentiary hearing on January 26, 2016.

A. Attorney Michael Morrone's Testimony during the January 26, 2016 Hearing

Michael Morrone (Morrone) represented the Defendant in the above-captioned case. District Attorney Eric Linhardt (Linhardt) "nixed" a plea agreement which called for the Defendant to serve a two-year minimum sentence. Linhardt "came in [the courtroom] and said this is not going through." Morrone thinks that Linhardt told an assistant district attorney that the "plea was not going to happen." Morrone did not talk with Linhardt, but there was conversation about a new plea. There were "discussions of we will not let you plea to mandatory two [years] but a five [year plea] was discussed." Morrone did not receive a written plea offer for a five-year sentence. There was discussion about a five-year mandatory, but a twenty-five-year mandatory was not discussed. Morrone testified that he was "not saying that five years was the offer."

B. Defendant's Testimony during the January 26, 2016 Hearing

The District Attorney pulled the two-year plea agreement. The Defendant received a letter from Morrone saying that the "two-year plea was no longer valid." Morrone told the Defendant that there was an offer for a five-year sentence. Morrone told the Defendant about the five-year offer either when the Defendant was in court or when Morrone was visiting the Defendant in prison. Morrone told the Defendant not to take the five-year offer because he would get five to ten years if he was found guilty at trial.

C. District Attorney Eric Linhardt's Testimony during the January 26, 2016 Hearing

On December 7, 2009, Linhardt would have been doing guilty pleas in the courtroom. He "nixed" an agreement for the Defendant to serve a two-year sentence. He "nixed" it because there was a twenty-five year mandatory. Linhardt does not recall making a plea offer after the two-year agreement was nixed. There is no record of a five-year offer in the District Attorney's case file. On direct examination, Linhardt testified that it is "extremely unlikely" that he would have made an offer "for a serious case" without writing it somewhere in the case file. On cross examination, Linhardt testified that he "would not have made an offer of 5 years without noting it in the file."

December 7, 2009 "seems to be" the only time when Linhardt wrote something in the case file. The file indicates that, on December 7, 2009, the case was continued to January 11, 2010. The phrase "speak to Morrone" is written on the file in Linhardt's handwriting. The case file also includes a note about the twenty-five year mandatory in Linhardt's handwriting. The note was written by Linhardt likely on December 7, 2009. Linhardt likely would have explained why he withdrew the plea offer on December 7, 2009, but he does not recall telling Morrone about the twenty-five year mandatory. Linhardt would not have spoken with the Defendant directly. Mary Kilgus (Kilgus) was the assistant district attorney assigned to the case after the two-year plea agreement was nixed. She was authorized to make plea offers, but it is unlikely that she would have made an offer without discussing it with Linhardt, who has no recollection of talking to Kilgus about a plea offer for the Defendant.

D. Arguments

The Defendant argues that there is considerable testimony about an offer for a five-year minimum sentence. He notes that he testified that Morrone advised him not to take the five-year

offer because he would get five to ten years if he was found guilty at trial. He argues that he was prejudiced because he could have advised counsel to pursue an offer if he knew about the twenty-five year mandatory. The Defendant claims that he would have pursued a different path if he knew about the twenty-five year mandatory.

The Commonwealth argues that the Defendant is the only witness to mention a five-year offer. It notes that Morrone recalled conversation about five years but he did not recall a five-year offer. It also notes that Linhardt testified that he would have noted a plea offer in the case file but there is no record of a five-year offer in the file. The Commonwealth also directs the Court to the following testimony from the January 14, 2011 hearing on the Defendant's post-sentence motion:

> **Assistant District Attorney Kilgus**: Do you recall Mr. Morrone discussing with you that the plea offer was revoked?
>
> **Defendant**: I had been notified but I don't know how it was, either through – he told me of sent me a letter.
>
> **Kilgus**: And what was your understanding of what was going to happen next? What was applicable next?
>
> **Defendant**: That I was going to go to court and if I lost I was going to have to do a five-year mandatory.
>
> **Kilgus**: So it was in your mind that you would go to trial because of the mandatory.
>
> **Defendant**: It was my mind I was going to go to trial because the plea was revoked.

N.T., 1/14/2011, at 30-31. The Commonwealth argues that the above testimony shows that the Defendant did not receive another offer after the two-year offer was withdrawn.

II. Discussion

This Court finds credible Attorney Morrone and District Attorney Linhardt's testimony that there was not an offer for a five-year sentence. Attorney Morrone was in a better position

than the Defendant to know whether there was an offer because the prosecutor would have communicated an offer to him, not the Defendant. Moreover, this Court finds credible District Attorney Linhardt's testimony that he nixed the two-year plea offer because of the twenty-five year mandatory minimum. There is a note about the twenty-five-year mandatory in the case file, and Linhardt testified that it was written by him likely on December 7, 2009, the day that the two-year offer was withdrawn.

"[T]o be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must satisfy a three-pronged test and demonstrate that: (1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of that counsel's deficient performance." Commonwealth v. McGill, 832 A.2d 1014, 1020 (Pa. 2003). "Trial counsel is presumed to be effective, and a PCRA petitioner bears the burden of pleading and proving each of the three factors by a preponderance of the evidence." Commonwealth v. Steckley, 2015 PA Super 250 (2015).

A post-conviction petitioner seeking relief on the basis that ineffective assistance of counsel caused him or her to reject a guilty plea must demonstrate the following circumstance:

> [B]ut for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012)).

In Steckley, a defendant was charged with two counts of possession of child pornography and one count of prohibited offensive weapons. Id. Immediately before jury selection, the Commonwealth offered a plea for a two to six-year prison sentence, but the defendant rejected

the offer because "the sentencing guidelines called for a sentence of nine to sixteen months' imprisonment for each count of possession of child pornography, with an aggravated range of sixteen to nineteen months' imprisonment." Id. The defendant's attorney did not inform him of the potential that the Commonwealth would seek imposition of a twenty-five year mandatory minimum sentence if he was found guilty at trial of possession of child pornography. Id. A jury found the defendant guilty of both counts of possession of child pornography. Id. Nearly seven months after trial, the Commonwealth discovered the statute providing for twenty-five year mandatory minimum. Id. It then sought the mandatory, and the trial court imposed it. Id.

In a PCRA petition, the defendant alleged that he was prejudiced by his attorney's failure to inform him of the potential that the Commonwealth would seek the twenty-five year mandatory minimum. Id. Based on the Commonwealth not discovering the minimum until nearly seven months after trial, "the PCRA court found it to be reasonably probable that [the defendant] would have accepted the plea offer long before the Commonwealth sought imposition of the mandatory minimum sentence." Id. The court also "found reasonably probable [the defendant's] contention that he would have accepted the Commonwealth's plea offer without . . . the trial court rejecting it." Id. In addition, the PCRA court found "that [the defendant] demonstrated a reasonable probability that, had he accepted the Commonwealth's plea offer, the court would have imposed a sentence less severe than the one he received following trial." Id. Based on its findings, the PCRA court determined that the defendant was prejudiced by counsel's error. Id.

On appeal, the Superior Court held that the PCRA court did not err in finding "reasonably probable [the defendant's] contention that he would have accepted the Commonwealth's plea offer without either the Commonwealth withdrawing it or the trial court rejecting it." Id. The

court noted that "even if the Commonwealth had learned of the applicable statute earlier, it does not inevitably follow that it would have withdrawn the plea offer. It is just as likely that the Commonwealth would have used the draconian mandatory sentence as a means to encourage [the defendant] to plead guilty, thereby avoiding the expense and uncertainty of a jury trial." Id.

Here, the Court finds that the Defendant has not proven the prejudice prong of the ineffective assistance of counsel test. Unlike the situation in Steckley, there was never an offer that would have been presented to the Court had the Defendant accepted it. Since the Commonwealth knew about the twenty-five year mandatory before trial, the Court does not have to speculate about what the Commonwealth would have done with the knowledge. Because there was never an offer that would have been presented to the Court had the Defendant accepted it and because the Commonwealth knew about the twenty-five year mandatory before trial, the Defendant has not proven that he was prejudiced by his trial counsel's failure to inform him of the mandatory.

III. Conclusion

This Court finds that the Defendant has not proven the prejudice prong of the ineffective assistance of counsel test. Therefore, he is not entitled to the relief requested in his PCRA petition.

ORDER

AND NOW, this _____ day of February, 2016, pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified that this Court intends to dismiss his PCRA petition filed on January 16, 2014 for the reason discussed in the foregoing Opinion. The Defendant may respond to the proposed dismissal within 20 days of the date of the notice.

By the Court,

Nancy L. Butts, President Judge