

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

LEON BODLE,

:
:
: CR-1997-2008;
: CR- 2072-2008
: CRIMINAL DIVISION
: PCRA

ORDER

Before the Court is a Third Petition for Post-Conviction Relief filed by Defendant, Leon Bodle, filed on June 2, 2016, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546, treated as Mr. Bodle's Second PCRA petition.¹ For the reasons provided below, after a comprehensive review of the claims, the Court intends to deny and dismiss this second PCRA petition because it was untimely filed, all claims were previously litigated or are deemed waived, and/or the claims lack merit. The Court concludes that the petition is without merit to warrant an evidentiary hearing. Accordingly, no attorney shall be appointed pursuant to Pa. R. Crim. P. 904(D); *See also, Comment to Pa. R. Crim. P. 904(D)*. Mr. Bodle is hereby notified of the Court's intention to dismiss the PCRA Petition, unless he files an objection to dismissal within twenty days (20) of today's date.

I. Factual and Procedural Background

On January 2, 2009 the Commonwealth charged Bodle at docket no. 1997-2008 with five counts of sexual offenses against a seven year old boy as follows: count 1, criminal solicitation, a felony of the first degree; count 2, unlawful contact, a felony of the first degree; count 3, obscene and other sexual material, a felony of the third degree; count 4, indecent assault, a misdemeanor of the first degree; and count 5, corruption of the morals of

¹ Mr. Bodle's first PCRA petition resulted in the reinstatement of Mr. Bodle's direct appeal rights. Therefore, his second PCRA petition was treated as his first and Mr. Bodle was appointed counsel for that petition and this third petition is treated as the second PCRA.

a minor, a misdemeanor of the first degree.² On December 10, 2008, the Commonwealth charged Bodle at docket no. 2072-2008 with sexual offenses against a nine year old boy, a nine year old girl and a six year old boy as follows: count 1, criminal solicitation, a felony of the second degree, count 2, criminal solicitation, a felony of the third degree, count 3, obscene and other sexual materials, count 4, obscene and other sexual materials, a felony of the third degree, count 5, unlawful communication with a minor, a felony of the third degree, and count 6, unlawful communication with a minor, a felony of the third degree, count 7 indecent exposure, a misdemeanor of the first degree, count 8 indecent exposure, a misdemeanor of the first degree, count 9 corruption of minors, a misdemeanor of the first degree, and count 10 corruption of minors, a misdemeanor of the first degree.³

The Court consolidated these cases for purpose of trial. The Undersigned presided over a two-day jury trial held on December 6-7, 2011. On December 7, 2011, the jury rendered a verdict of guilty on all counts at both docket numbers for a total of 15 counts.

The Court sentenced Bodle on April 6, 2011 to serve an aggregate sentence at a State Correctional Institution, the minimum of which was 242 months and the maximum of which was 484 months. Mr. Bodle did not file post-sentence motions.

On May 5, 2011, Mr. Bodle filed a notice of appeal from his sentence of April 6, 2011. On July 6, 2012, the Superior Court granted the Commonwealth's motion to dismiss the appeal for failure to include the relevant transcripts.

² 18 Pa. C.S. § 902(a); 18 Pa. C.S.A. § 6318(A); 18 Pa. C.S. § 5903(c)(1); 18 Pa. C.S.A. § 3126(A)(7); 18 Pa.C.S.A. § 6301 (a)(1).

³ 18 Pa. C.S. § 902(a); 18 Pa. C.S. § 5903(c)(1); 18 Pa. C.S.A. §6318(A); 18 Pa. C.S. §3127 (A); 18 Pa. C.S.A. §6301(a)(1).

First PCRA Petition – August 20, 2012

On August 20, 2012, Bodle filed his first PCRA petition and petition for leave to proceed in forma pauperis. On August 24, 2012, the court appointed the public defender to represent Bodle in that PCRA matter. On November 27, 2012, this Court reinstated Bodle's direct appeal rights. On December 24, 2012, Bodle filed a direct appeal to the Superior Court. On January 8, 2014, the Superior Court affirmed the judgment of sentence. Bodle did not file a further direct appeal.

Second PCRA Petition – February 3, 2014 - Treated as First PCRA Petition

On February 3, 2014, Bodle filed his second PCRA petition pro se. The Court treated that as a first PCRA petition and on April 24, 2014, the Court appointed Jerry Lynch, Esq. to represent Bodle and directed PCRA counsel to file an amended petition or *Turnery/Finley*⁴ letter on or before June 20, 2014. Following an initial conference on July 1, 2014, the court granted Petitioner's request for an extension of time to file an amended PCRA petition to August 11, 2014 and directed the preparation of transcripts of jury selection pursuant to the request of Bodle. PCRA counsel was also directed to attach certifications concerning any witnesses that were not called at trial. A conference was scheduled for August 28, 2014. Upon Petitioner's application, the matter was continued from August 25, 2014 to October 23, 2014. Again, upon Petitioner's application, the matter was then continued from October 23, 2014 to November 25, 2014.

⁴ *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)

On November 24, 2014, Petitioner filed an amended PCRA. Upon Petitioner-Bodle's motion, the matter was again continued on November 26, 2014 to allow PCRA counsel to meet with trial counsel. PCRA counsel was ordered to file a supplemental amended petition on or before January 10, 2015. On January 14, 2015, Petitioner-Bodle filed a supplemental PCRA. In his amended supplemental PCRA, Bodle sought relief on the grounds that trial counsel was ineffective for failure to call certain witnesses. Following a conference on February 4, 2015, an evidentiary hearing was Ordered and held on March 17, 2014. Following an evidentiary hearing and upon consideration of the testimony, arguments and case-law, the Court denied Bodle's petition for relief on June 26, 2015.

On July 20, 2015, Mr. Bodle filed an appeal from the June 26, 2014 denial of his PCRA petition to the Superior Court. On April 20, 2016, the Superior Court affirmed the denial of Mr. Bodle's PCRA petition. In that affirmance, the Superior Court adopted this Court's June 25, 2014 and September 18, 2015 opinion as its own for purposes of disposition of the appeal and concluded that this Court committed no error or abuse of discretion in dismissing Mr. Bodle's second PCRA petition. (Commonwealth v. Bodle, 1234 MDA 2015 at 10.)

Third PCRA Petition – June 2, 2016 - Treated as Second PCRA Petition

One June 2, 2016, Bodle filed the instant third PCRA petition pro se, which this Court treats as his second PCRA petition.

II. Issues Raised in June 2, 2016 (Second) PCRA Petition

Mr. Bodle made the following claims in the instant June 2, 2016 PCRA petition. Without elaboration, Mr. Bodle contends that the conviction and sentence violated his rights

under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article One Section 9 of the Pennsylvania Constitution. Petitioner-Bodle specifically asserts that he is entitled to relief under 42 Pa. C.S. § 9543(a)(2)(i), (ii), (vi) and (vii). (*Bodle's Petition* (Petition), ¶¶ 13 & 14). Mr. Bodle raises claims of ineffective assistance of trial counsel as to discrepancies in the prosecution's time-line and a ruling of the trial court about evidence as to such discrepancies and as to the failure to obtain a psychologist as an expert witness. *Petition* ¶¶ 15-16. Mr. Bodle raises claims of ineffective assistance of PCRA counsel as to the failure to elicit testimony from witnesses at the PCRA evidentiary hearing to support his claim and as to the filing of a vague concise statement of matters complained of on appeal. *Petition* ¶¶ 17-18. Mr. Bodle further contends that the trial Court and District Attorney should have recused themselves due to a parent of one of the victims working at the courthouse. *Petition* ¶¶ 19-20. And finally, Mr. Bodles asserts that new evidence is available to establish that Mr. Bodle did not reside at 2027 Newlawn Avenue at the time of the offenses. Such evidence purportedly includes driver's license, vehicle registration, mail, tax returns and company records and witnesses. *Petition* ¶¶ 22.

As explained further below, these issues are untimely, have been waived and lack merit.

III. Time for Filing PCRA Petitions

42 Pa. C.S. § 9545(b)(1) requires that all petitions filed pursuant to the Post Conviction Relief Act be filed within *one (1) year* of the date that Defendant's judgment becomes final; this one-year requirement includes second and/or subsequent PCRA petition(s). 42 Pa.C.S. §9545(b)(1); Pa.R.Crim.P. Rule 901. In the present case, the

Superior Court affirmed the judgment of sentence on January 8, 2014. As Mr. Bodle did seek further review from the Superior Court's Order, the judgment in this case became final thirty days later, or on February 8, 2014.⁵ *See* 42 Pa. C.S. § 9545(b)(3). Defendant filed the instant petition on June 2, 2016, well beyond the one-year filing requirement. Therefore, on its face, the petition appears to be untimely. 42 Pa.C.S. §9545(b)(1); Pa.R.Crim.P. Rule 901.

However, the PCRA statute provides for three (3) exceptions to the timeliness requirement. *See* 42 Pa. C.S. § 9545(b)(1). These exceptions include:

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. 42 Pa. C.S. § 9545(b)(1)(i)-(iii).

Petitioner must plead and prove one of the timeliness exceptions. In this instance, Defendant failed to affirmatively plead one of the PCRA timeliness exceptions. *See Taylor*, 993 A.2d at 1039. In addition to failing to affirmatively plead one of the timeliness exceptions, Defendant did not provide any genuine issue of material fact regarding the

⁵ Thirty days falls on Sunday, February 7, 2014 so that the appeal deadline passed on the following Monday, February 8, 2014.

timeliness of his PCRA petition. Therefore, his June 2, 2016 petition should be dismissed pursuant to 42 Pa. C.S. § 9545(b).

In the instant petition, the only potential claim of new facts relates to evidence of Mr. Bodle's residence and refers to documentation that would be available to Mr. Bodle at the time of trial (e.g., driver's license, vehicle registration, mail, tax returns and company records and witnesses). Even assuming arguendo that some facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence, the exceptions to the timeliness requirement have a timeliness requirement that has not been plead or met. Any PCRA petition raising one of these timeliness exceptions should be "filed within 60 days of the date the claim could have been presented." 42 Pa. C.S. § 9545(b)(2). If a PCRA petitioner attempts to file an untimely PCRA petition, it is the burden of the petitioner to plead and prove one of the exceptions to the one-year timeliness requirement. *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999); *Commonwealth v. Taylor*, 933 A.2d 1035, 1039 (Pa. Super. Ct. 2007). If a PCRA petition is found to be untimely, "[u]nder the plain language of Section 9545 [of the Post Conviction Relief Act], the substance of [petitioner's] PCRA petition must yield to its untimeliness." *Taylor*, 933 A.2d at 1043. In the present case, the petitioner has not plead and proven an exception to the one-year timeliness requirement or that the petition fell within 60 days of the date the claim could first be made.

IV. Previous PCRA Proceeding and Waiver

In addition to the instant petition being untimely, the Court finds that the issues raised in the instant petition are waived. Defendant must plead and prove that an allegation

of error has not been previously litigated or waived. 42 Pa. C.S. § 9543(a)(3). The issues raised have either been litigated or could have been previously raised and are therefore waived. Pursuant to 42 Pa. C.S. § 9544(b), if a PCRA petitioner could have raised an issue during a prior post-conviction proceeding and failed to do so that issue is deemed waived.

Id.

In this instance, the claims of ineffective assistance of trial counsel and recusals and evidence as to Mr. Bodle's address certainly could have been raised in Mr. Bodle's Second Amended PCRA Petition, filed February 3, 2014, or in his amended petition filed November 24, 2014 and/or in the supplemental amended petition filed January 14, 2015. Mr. Bodle raises claims of ineffective assistance of PCRA counsel as to the failure to elicit testimony from witnesses at the PCRA evidentiary hearing to support his claim and as to the filing of a vague concise statement of matters complained of on appeal were considered and ruled upon by the Superior Court. By memorandum opinion filed on April 20, 2016, our Superior Court affirmed this Court's denial of Mr. Bodle's previous PCRA petition. (1234 MDA 2015). In note 3 of the opinion, the Superior Court noted that even if the first issues was not waived by its absence in the 1925 a statement, the Superior Court would "adopt the PCRA court's findings and analysis as an alternative basis for affirming" essentially that the witness's testimony did not establish that she would be a viable character witnesses and that trial counsel did explore the possibility of calling her as a witness but ultimately deferred to Appellant's decision not to do so. Therefore, all of the issues raised have been waived.

V. **Eligibility for Post-Conviction Relief**

The PCRA provides specific requirements for eligibility for post-conviction relief. 42 Pa. C.S. § 9543. Section 9543(a) provides that in order to be eligible for relief, a Defendant must be convicted and serving a sentence of incarceration. *Id.* In this matter, it is uncontested that Defendant is currently serving a state sentence of incarceration. However, section 9543(a) also lists three (3) other eligibility requirements; these requirements include:

- (2) That the conviction or sentence resulted from one or more of the following:
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
 - (iv) [sic]The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
 - (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
 - (vii) The imposition of a sentence greater than the lawful maximum.
 - (viii) A proceeding in a tribunal without jurisdiction.
- (3) That the allegation of error has not been previously litigated or waived.

and

- (4) That the 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. *Id.*

VI. Legal Standards

Ineffective Assistance of Counsel

Trial counsel is presumed to be effective. *Commonwealth v. Martin*, 5 A.3d 177, 183 (Pa. 2010). In order to succeed on a claim for ineffective assistance of counsel, Defendant must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Defendant's underlying claim has arguable merit, (2) trial counsel had no reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Defendant. *Commonwealth v. Chimel*, 1111, 1127 (Pa. 2011) (referencing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987)). *See also Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. Ct. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (citing *Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003)). Actual prejudice must occur; that is, trial counsel's ineffectiveness must have been so evasive that it is reasonable it had an adverse impact on the proceeding's outcome. *Sampson*, 900 A.2d at 890 (citing *Commonwealth v. Howard*, 645 A.2d 1300, 1307 (Pa. 1994)).

Reasonable Basis for Trial Strategy

To succeed in an ineffective assistance of counsel claim, trial counsel must not have had a reasonable basis for the act or omission at issue. *Chmiel, supra*, 30 A.3d at 1127. The Pennsylvania Supreme Court has concluded that "counsel's chosen strategy lacked a

reasonable basis *only if* the petitioner proves that the alternative strategy not selected offered a potential for success *substantially greater than the course actually pursued*.

Commonwealth v. Koehler, 614 Pa. 159, 36 A.3d 121, 132 (Pa. 2012)(emphasis added).

“Where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests.” *Commonwealth v. Colavita*, 606 Pa. 1, 993 A.2d 874, 887 (Pa. 2010) (quoting *Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 237 (Pa. 1998)). “A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.” *Id.*

Prejudice

“Prejudice in the context of ineffective assistance of counsel means demonstrating there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different.” *Commonwealth v. Champney*, 65 A.3d 386, 396 (Pa. 2013), citing, *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 332 (Pa. 1999).

With these standards in mind, the Court will address Mr. Bodle’s PCRA claims.

V. Discussion

In the present petition, Petitioner-Bodle asserts entitled to relief under 42 Pa. C.S. § 9543(a)(2)(i), (ii), (vi) and (vii). (Petition, ¶¶ 13 & 14). Mr. Bodle has not overcome the presumption of counsel effectiveness by pleading and proving all of the three factors required. A claim of ineffectiveness will be denied when defendant fails to establish any

one of the three factors. *Busanet, supra*, 54 A.3d at 45. Bodle has not proven any of the required factors. Even bypassing the first and second prongs, as to the third prong, the Court concludes that none of the ineffectiveness claims would have prejudiced Bodle. The lack of prejudice is supported by the Superior Court's analysis of claims in its memorandum opinion filed on April 20, 2016. (1234 MDA 2015).

VI. Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's June 2, 2016 PCRA Petition. As the Court finds that no purpose would be served by conducting any further evidentiary hearing regarding this matter, a hearing will not be scheduled. Pa.R.Crim.P. 909(B)(2); *See Commonwealth v. Walker*, 36 A.3d 1, 17 (Pa. 2011) (holding that a PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only when the PCRA petition presents genuine issues of material facts). *See also Commonwealth v. McLaurin*, 45 A.3d 1131, 1135-36 (Pa. Super. 2012). Since this is Defendant's second PCRA petition and the court has concluded that the petitioner is not entitled to an evidentiary hearing as the petition clearly lacks merit, Defendant is not entitled to the appointment of counsel. *See*, Pa.R.Crim.P. 904(D) and *Comment*.

Pursuant to Pennsylvania Rules of Criminal Procedure 908, Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of

Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.A.P. 903.

If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues. A copy of this order shall be mailed to Defendant by regular and certified mail, return receipt requested.

ORDER

AND NOW, this 3rd day of **November 2016**, Mr. Bodle's request to proceed as a poor person, without the payment of costs, is GRANTED. Mr. Bodle's motion to compel documents is DENIED. Defendant is hereby notified that it is the Court's intention to **dismiss** his PCRA Petition, unless he files an objection to that dismissal *within twenty days (20) of today's date*. This Opinion and Order will be served on Defendant as set forth in Pa.R.Crim.P. 908(E).

Pursuant to Pennsylvania Rules of Criminal Procedure 908(E), Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.A.P. 903.

If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues. A copy of this order shall be mailed to Defendant by regular and certified mail, return receipt requested.

BY THE COURT,

November 3, 2016

Date

Richard A. Gray, J.

cc: DA (KO)
Leon D. Bodle, JV-4596 (by certified and regular mail)
SCI Houtzdale
P.O. Box 1000
Houtzdale, PA 16698-1000
Prothonotary (Please see the requirement for certified mail.)