

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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|------------------------------|---|-------------|
| COMMONWEALTH OF PENNSYLVANIA | : | |
| | : | CR-835-2015 |
| v. | : | |
| | : | |
| IRVIN COOK, | : | PCRA |
| Defendant | : | |

OPINION AND ORDER

On May 1, 2017, PCRA Counsel for the Defendant filed a Petition to Withdraw as Counsel pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1 988). After an independent review of the entire record, the Court agrees with PCRA Counsel that the Defendant is ineligible for PCRA relief as he is not currently serving a sentence of probation or parole for the above captioned docket number and that his petition should be dismissed.

Background

On April 4, 2016, a Lycoming County jury returned a verdict of “Not Guilty” on the charge of Simple Assault¹, a misdemeanor of the third degree and “Guilty” of Disorderly Conduct², engage in fighting, also a misdemeanor three. The Court additionally found Defendant “Guilty” on the charge of Public Drunkenness, a summary offense. During trial, Defendant admitted that he was drunk on the date and time of the incident, May 7, 2015. Jury Trial, 4/4/2016, at 59, 67-68. Sentence of the Court was that the Defendant would serve twelve (12) months’ probation. Verdict/Sentence, 4/4/2016, at 1.

¹ 18 Pa.C.S. § 2701(a)(1).

² 18 Pa.C.S. § 5503(a)(1).

On November 23, 2016, Defendant filed a Motion for Post Conviction Relief, alleging ineffective assistance of counsel and the unavailability at the time of trial of exculpatory evidence. On December 1, 2016, this Court issued an Order appointing counsel in accordance with Pa.R.Crim.P. 904(C),³ and scheduled a court conference for February 27, 2017. At the time of conference, PCRA requested a 60 day extension within which to file an Amended Petition or a Turner/Finley letter. The request was granted.

Defense Counsel filed a Turner/Finley letter and a Petition to Withdraw from Representation on May 1, 2017.

Jurisdiction

1) *Eligibility for Relief Under the PCRA.*

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 a 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.

³ “when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant’s first petition for post-conviction collateral relief.” Pa.R.Crim.P. 904.

- 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 counsel⁴.

Defendant is not eligible for relief under the Post Conviction Relief Act as he fails to satisfy the first prong of the Act since he is not currently serving a term of sentence for his conviction. Defendant completed his sentence on April 4, 2017.

Even if Defendant were serving a term of sentence and thus eligible for Post Conviction Relief, the Court would find his request would be without merit. Defendant believes that because he missed his preliminary hearing that failure affected the outcome of his case. It did not. After a jury trial, any claim of insufficiency of the evidence of the Commonwealth's case becomes moot. Commonwealth v. Sanchez, 82 A.3d 943, 984 (Pa. 2013) ("once a defendant has gone to trial and has been found guilty of the crime or crimes charged, any defect in the preliminary hearing is rendered immaterial.")

Moreover, the Court finds that his trial counsel was effective as she was able to win a "not guilty" verdict from the jury on the Simple Assault charge Involving Danger to the Person. Trial Counsel's theory of the case was Defendant was the victim which the jury accepted and adjudicated him not guilty of this crime.

⁴ 42 Pa.C.S. § 9543.

Defendant was however found guilty of a public order charge, Disorderly Conduct. Defendant asserts that his mental health history would have been an adequate defense to the charges and was exculpatory evidence. It is clearly not after discovered exculpatory evidence as the Defendant argues in his Petition. It was known about and actually testified to at trial. The jury was apprised of his mental illness through his own testimony. Jury Trial, 5/5/2016, at 64. The adjudication of "Not Guilty" on the Simple Assault charges shows that the Jury did not believe that Defendant was the aggressor; however, he was drunk and he did engage in fighting and the verdict of the jury reflects that fact. The sentence of 12 months' probation by the Court appropriately reflects both the seriousness of the crime and the Defendant's involvement in the incident.

ORDER

AND NOW, this 4th day of August, 2017, it is hereby ORDERED and DIRECTED as follows:

1. The **Petition to Withdraw from Representation of Post-Conviction Collateral Relief** filed May 1, 2017 is hereby **GRANTED**.
2. 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.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA (KO)
Julian Allatt, Esq. PCRA Counsel
Mr. Irvin Cook
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Williamsport, PA 17701
Law clerk (S. Roinick)