

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

CR – 126 - 2014

v.

NAFIS ANTUAN FAISON,
Faison

PCRA – INTENT TO DISMISS

OPINION AND ORDER

Before the Court is a petition for post-conviction relief filed by Nafis Antuan Faison on December 1, 2016, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546, and a motion to withdraw as counsel filed by Faison’s court-appointed counsel pursuant to the mandates of Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988), and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). After conducting an independent review of Faison’s petition, and fully considering appointed counsel’s motion, for the reasons provided below, the Court concludes that the petition lacks merit and that counsel’s motion to withdraw should be granted. Faison is 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.

PROCEDURAL BACKGROUND

The Commonwealth charged Faison on December 13, 2013, and filed the criminal information on February 7, 2014, charging Faison with one felony count of possession with intent to deliver, three misdemeanor counts of possession of a controlled substance, one misdemeanor count of possession of drug paraphernalia, and one misdemeanor count of possession of a small amount of marijuana.¹ As noted by PCRA Counsel, “other than motions for modification of bail, no pretrial motions were filed on [Faison’s] behalf.” A jury trial was held on January 21, 2015. On the day of trial, the Commonwealth dropped one count of

¹ 35 P.S. § 780-113(a)(30); 35 P.S. § 780-113(A)(16); 35 P.S. § 780-113(A)(32); 35 P.S. § 780-113(A)(16); 35 P.S. § 780-113(A)(31)(i).

possession of a controlled substance. On January 21, 2015, the Jury found Faison guilty of all remaining counts. On March 25, 2015, the court sentenced Faison to serve not less than five nor more than ten years at State Correctional Institute for count 1. The sentence for all remaining counts were concurrent to count 1.

On March 31, 2015 the Court granted trial counsel's motion to withdraw and an assistant public defender entered an appearance. The assistant public defender filed a post sentence motion on April 1, 2015. Following oral argument held on July 1, 2015 on the post-sentence motion, the Court denied the motion on July 10, 2015. No direct appeal was filed at that time.

FIRST PCRA PETITION – SEPTEMBER 11, 2015

On September 11, 2015, Faison filed his first PCRA petition. The court appointed Don Martino to represent Faison. On November 17, 2015, Faison prevailed in that petition when this Court reinstated Faison's direct appeal rights.

DIRECT APPEAL

On November 20, 2015, Faison filed a direct appeal, challenging the sufficiency and weight of the evidence. On May 17, 2016, the Superior Court affirmed the conviction. Commonwealth v. Faison, No. 2037 MDA 2015 (Pa. Super. May 17, 2016) J-S39022-16. The Superior Court concluded that there was ample evidence indicating Faison's involvement in drug activity and connection to the drugs found. Specifically, the evidence fully supported the jury's finding that Faison "constructively possessed the cocaine found in the Apartment." Id. at 8. The Superior Court further concluded that "the evidence plainly reflected that the cocaine was in the area of the Apartment where [Faison] stayed, in and next to his personal possessions, and that he

fled from police with drugs and a significant amount of cash on his person.” Id. at 9.

Accordingly, the Superior Court affirmed the judgment of sentence.

On June 15, 2016, Faison filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. Faison filed a PCRA petition on July 13, 2016, which was dismissed while the matter was pending before the Supreme Court. Faison withdrew his petition for allowance of appeal and refiled his PCRA petition on December 1, 2016.

THIS PCRA PETITION - DECEMBER 1, 2016.

Faison filed this instant PCRA petition on December 1, 2016. The Court appointed Ryan C. Gardner, Esquire to represent Faison and file an amended petition or a letter and motion to withdraw pursuant to the mandates of Turner / Finely, supra. On May 10, 2017, attorney Gardner filed a motion to withdraw as counsel and indicated that there are no meritorious claims for relief. This Court agrees.

ISSUES RAISED BY FAISON.

Faison’s PCRA petition asserts a claim of trial counsel’s alleged ineffectiveness for failing to investigate and file motions to suppress evidence in three respects.²

- (1) First, Faison claims that trial counsel was ineffective for failing to file a motion to suppress evidence because a trap and trace of his phone was authorized based upon an allegedly insufficient affidavit and application.
- (2) Second, Faison claims that trial counsel was ineffective for failing to investigate an eye-witness³ and file a motion to suppress evidence seized from that witness’s apartment.

² Faison filed his pro se PCRA petition on December 1, 2016, and a nearly identical pro se PCRA petition on July 13, 2016 and a pro se supplemental PCRA petition on May 15, 2017, which all essentially raised the same issues.

³ Faison fails to develop the claim with respect to an allegedly inadequate investigation of an eye-witness and/or how it allegedly related to the failure to file a motion to suppress. As such, the claim is waived. *See, e.g., Commonwealth v. Steele*, 599 Pa. 341, 361, 961 A.2d 786, 797 (Pa. 2008) (“[U]ndeveloped claims, based on boilerplate allegations, cannot satisfy Appellant’s burden of establishing ineffectiveness.”)

(3) Lastly, Faison claims that trial counsel was ineffective for failing to move to suppress evidence because an affidavit of probable cause allegedly contained false averments.

ELIGIBILITY FOR POST-CONVICTION RELIEF

The PCRA provides specific requirements for eligibility for post-conviction relief. Section 9543(a) provides that in order to be eligible for relief, a petitioner must be convicted and serving a sentence of imprisonment, probation or parole for the crime; *Id.* In this matter, it is uncontested that Faison is currently serving a sentence of imprisonment. Section 9543(a) lists additional eligibility requirements as follows.

(2) That the conviction or sentence resulted from one or more of the following:

* * *

(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.

* * *

(3) That the allegation of error has not been previously litigated or waived.

(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.*

LEGAL STANDARDS

Ineffective Assistance of Counsel

All of Faison's PCRA claims assert ineffective assistance of counsel. In order to succeed on a claim for ineffective assistance of counsel, Petitioner must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Petitioner'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 Petitioner. Commonwealth v. Chmiel, 612 Pa.

333, ___, 30 A.3d 1111, 1127 (Pa. 2011); Commonwealth v. Pierce, 527 A.2d 973, 975-76 (Pa. 1987)). *See also*, Strickland v. Washington, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); 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)). A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs. Commonwealth v. Busanet, 618 Pa. 1 54 A.3d 35, 45 (Pa. 2012).

DISCUSSION

The Claims Lack Merit

All of Faison's claims of ineffective assistance of trial counsel lack merit. Faison claims ineffective assistance of counsel because no motion to suppress was filed on his behalf. Faison claims a motion to suppress should have been filed based on three separate grounds. Preliminarily, the Court notes that Faison directed his attorney not to file any pre-trial motions in the hopes of obtaining relief pursuant to Rule 600 and has not raised any dispute as to that fact.⁴ Even had Faison not directed his attorney to refrain from filing motions to suppress, such motions would have lacked merit.

First, Faison claims ineffectiveness for failing to move to suppress based upon law enforcement's authorized use of a pen register and trap and trace device to locate him. Such a motion would have been without merit. Faison was a fugitive, had evaded law enforcement and had an active warrant out for his arrest. Law enforcement obtained an Order on November 19, 2013 authorizing the disclosure of mobile communication tracking information and/or installation and use of a pen register and trap and trace device and telecommunication identification interception device. Law enforcement obtained the Order authorizing the use of

⁴ *See*, letter by attorney Gardner dated May 9, 2017, and pro se filings by Faison.

such means to locate Faison based upon an application and attached documents in support of the application. The Court believes that the application for the Order and documents in support were sufficient to permit the Court to issue the Order it did. Trooper Robert J. Lombardo averred that a valid arrest warrant was obtained for Faison because Faison sold heroin for money to a confidential informant. In addition, a NCIC/CLEAN database check revealed that Faison was a wanted person. Attempts to locate Faison had been unsuccessful. Accordingly, a motion to suppress based upon a challenge to the legality of that Order would have lacked merit.

Second, Faison claims ineffectiveness for failing to move to suppress evidence found at the apartment. Such a motion would have been without merit. Law enforcement was lawfully at the apartment, a large quantity of cocaine was seen in plain view in a partially unzipped backpack on the couch. Law enforcement had good reason to secure the apartment. A fugitive was seen there, a witness just purchased drugs from the apartment, and a runner jumped out the second floor window.

Lastly, Faison claims that trial counsel was ineffective for failing to move to suppress evidence because an affidavit of probable cause allegedly contained false averments. Faison failed to support his claim of false averments, and certainly not of significant or material misstatement of facts, by his quotations to the record. In his pro se petition, Faison quotes testimony that this Court does not believe supports his claim of false averments in the affidavit of probable cause, and certainly does not establish significant or material misstatements of fact. As such, a motion to suppress evidence claiming that the affidavit of probable cause contained false averments would have lacked merit.

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.*

In the present case, counsel adopted a trial strategy, directed by Faison himself, to avoid any delay and focus instead on the possibility of Rule 600 speedy trial motions.⁵ Faison requested that his attorney not file any pre-trial motions. In addition, the defense strategy was that the items seized from the apartment did not belong to Faison. That theory would be undermined by claiming ownership in a pre-trial motion. Id.

As Faison failed to establish **two** of the three prongs required for ineffectiveness claims his petition must be denied. A claim of ineffectiveness will be denied if the petitioner's evidence

⁵ See, Letter by Attorney Garder, at page 3 (unnumbered).

fails to satisfy any **one** of these prongs. Commonwealth v. Busanet, 618 Pa. 1 54 A.3d 35, 45 (Pa. 2012).

Waiver

To be eligible for relief, a petitioner must establish 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.” 42 Pa. C.S. §9543(a)(4). In the present case, Faison waived any ineffectiveness claims based upon his attorney’s failure to file motions to suppress because Faison directed trial counsel not to file any pre-trial motions. Faison chose not to litigate such issues.

CONCLUSION

Based upon the foregoing, the Court finds no basis upon which to grant the Faison’s 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).

Pursuant to Pennsylvania Rules of Criminal Procedure 907(1), the parties are hereby notified of the Court’s intention to deny the petition. The Faison 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.

Accordingly, the Court enters the following Order.

ORDER

AND NOW, this **22nd** day of **June 2017**, for the foregoing reasons, it is ORDERED and DIRECTED that the Faison 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*. It is further Ordered that Ryan C. Gardner's motion to withdraw is GRANTED. This Opinion and Order will be served on Faison as set forth in Pa.R.Crim.P. 907(1). **The Prothonotary is ORDERED AND DIRECTED to serve Faison by certified and regular mail.**

BY THE COURT,

June 22, 2017

Date

Richard A. Gray, J.

c: DA (KO)
Ryan C. Gardner, Esquire (PCRA Counsel)
Nafis A. Faison, Inmate # LZ1119
SCI – Smithfield, 1120 Pike Street, PO Box 999, Huntingdon, PA 16652
Prothonotary (please serve Faison by certified and regular mail)

