

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-2107-2015
 :
 DUSTIN HEDDINGS, : Opinion and Order Denying Counsel's
 Defendant : Motion to Withdraw and Directing Counsel
 : to File an Amended PCRA Petition

OPINION AND ORDER

This matter came before the court on Defendant's pro se Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Defendant was charged with driving under the influence of a controlled substance (DUI), a misdemeanor of the first degree, and several summary traffic offenses. On February 4, 2016, Defendant pled guilty to DUI and driving under a suspension related to a prior DUI offense (DUS-DUI related).

On May 6, 2016, the court sentenced Defendant to pay a mandatory fine of \$2,500 and to undergo incarceration for a minimum of one year and a maximum of five years for DUI, and to pay a mandatory fine of \$1,000 and undergo a consecutive 90 days incarceration for DUS-DUI related. The court found Defendant was not eligible for a Recidivism Risk Reduction Incentive (RRRI) due to his prior burglary convictions and his pending simple assault charge.

Defendant filed a timely PCRA petition in which he asserted that he is eligible for RRRI. He alleged that he asked his attorney to notify the court that his simple assault conviction was dismissed, which would make him eligible for RRRI.

As this was Defendant's first PCRA petition and it appeared that he was indigent, the court appointed counsel to represent Defendant and gave counsel an opportunity to file either an amended PCRA petition or a no merit letter pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)(en banc).

Counsel filed a *Turner/Finley* no merit letter based on the fact that there was no correspondence in plea counsel's file from Defendant and the fact that at the time of his sentencing his pending simple assault charge made him ineligible for RRRI. PCRA counsel noted that plea counsel could not be deemed ineffective for a change in the factual scenario that occurred after his sentencing.

While the court acknowledges that Defendant was sentenced on May 6, 2016 and his Northumberland County simple assault charge (see CP-49-CR-0000583-20215) was not dismissed until June 13, 2016, this does not mean that Defendant's PCRA petition could not be amended to possibly make him eligible for relief.

"A challenge to a court's failure to impose a RRRI sentence implicates the legality of the sentence." *Commonwealth v. Hodge*, 144 A.3d 170, 172 (Pa. Super. 2016)(quoting *Commonwealth v. Hanna*, 124 A.3d 757, 759 (Pa. Super. 2015)); see also *Commonwealth v. Tobin*, 89 A.3d 663, 669 (Pa. Super. 2014). A claim that a sentence is illegal is cognizable under the PCRA. 42 Pa. C. S. §§9542, 9543(a)(2)(vii); see also *Commonwealth v. Jackson*, 30 A.3d 516, 521 (Pa. Super. 2011). Furthermore, the comment to Rule 720 of the Pennsylvania Rules of Criminal Procedure indicates that "after-discovered

evidence discovered after completion of the direct appeal process should be raised in the context of the PCRA.” Pa. R. Crim. P. 720, cmt.

Here, the dismissal of Defendant’s simple assault charge after the deadline for filing an appeal could constitute after-discovered evidence that should be raised in a PCRA petition.

At the conference on this matter, the prosecutor noted that the court’s order also stated that Defendant’s prior burglary convictions made him ineligible for RRRI; therefore, Defendant did not suffer any prejudice from counsel’s inaction and/or his sentence without a RRRI minimum is not illegal. The court initially was inclined to agree with the prosecutor. Upon further reflection, however, that might not be the case.

From the sentencing transcript, it appears that Defendant has one burglary conviction graded as a felony of the second degree and two convictions for conspiracy to commit burglary graded as felonies of the second degree. Transcript, at 3-4; see also CP-47-CR-0000148-2011; CP-49-CR-0000200-2011; CP-49-CR-0000265-2011. The Superior Court has held that a conviction for second-degree burglary by definition does not involve the risk of violence or injury to another person; it is solely a property crime that does not disqualify an individual from a RRRI sentence. *Commonwealth v. Gonzalez*, 10 A.3d 1260, 1262-1263 (Pa. Super. 2010). If the actual burglary of an unoccupied structure not adapted for overnight accommodation is not a crime of violence, it stands to reason that a conspiracy to commit such an offense also would not be a crime of violence. Plea counsel did not object or in any way contest the court’s statement that Defendant was not eligible for RRRI due to

his prior burglary convictions.

Therefore, the court directs PCRA counsel to file an amended PCRA petition on Defendant's behalf alleging that his sentence without RRRI is illegal based on the combination of after-discovered evidence and ineffective assistance of counsel. This does not necessarily mean that the court believes Defendant is entitled to relief. It simply means that there may be a colorable claim such that counsel should not be permitted to withdraw and the Commonwealth should be given an opportunity to respond to Defendant's claims that he is now eligible for RRRI. If the Commonwealth agrees that Defendant is now eligible for RRRI, the parties may submit a stipulated amended order regarding such.

ORDER

AND NOW, this ___ day of October 2017, the court DENIES PCRA counsel's motion to withdraw. A conference is scheduled for November 8, 2017 at 2:15 p.m. PCRA counsel shall file an amended PCRA petition on Defendant's behalf prior to the conference.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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Work File