

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**DERRICK WAYNE MOYER,
Defendant**

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CP-41-CR-0000244-2015

PCRA

OPINION AND ORDER

On October 13, 2017, Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Turner/Finley letter pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

Factual and Procedural Background

On September 15, 2015, Derrick Moyer (Defendant) was found guilty by a jury of Intimidation of a Witness¹, a felony of the first degree; Criminal Use of a Communication Facility, a felony of the third degree²; and Possessing an Instrument of a Crime³, a misdemeanor of the first degree. Defendant was represented by Kirsten Gardner, Esquire of the Public Defender's office at trial and at direct appeal.

Defendant was sentenced by the Court on the charge of Intimidation of a Witness, to a state correctional institution for an indeterminate period of time, the minimum of which shall be five (5) years, and the maximum of which shall be ten (10) years, and a consecutive sentence of one (1) to (2) years on the conviction for

¹ 18 Pa.C.S.A. § 4952(a)(1).

² 18 Pa.C.S.A. § 7512.

³ 18 Pa.C.S.A. § 907(a).

Criminal Use of a Communication Facility. The aggregate sentence is for a minimum of six (6) years and a maximum of twelve (12) years. The Defendant filed Post Sentence Motions that were denied by this Court. The Defendant appealed the Judgment of Sentence to the Superior Court of Pennsylvania. The Superior Court upheld the decision of this Court in an unpublished memorandum filed November 10, 2016. No appeal was taken to the Supreme Court and thus Defendant's Judgment of Sentence became final on December 10, 2016. Defendant had one year from that date to file a PCRA petition and thus the Motion for Post Conviction Relief filed July 7, 2017 is timely.

Donald Martino, Esquire was appointed to represent Defendant. A court conference was scheduled for October 16, 2017. Attorney Martino filed a Motion to Withdraw as Counsel and letters pursuant to Turner/Finley *supra*. After an independent review of the record, the Court agrees with Attorney Martino that Defendant failed to raise any meritorious issues in his PCRA Petition.

Discussion

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) 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) 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.
 - (v) Deleted.
 - (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) 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 counsel.

42 Pa.C.S. § 9543 (eligibility for relief).

Defendant is currently incarcerated. Defendant cites as bases for relief (i) a violation of the Constitution that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place and (ii) ineffective assistance of counsel. More specifically in correspondence with PCRA Counsel the Defendant argues that the Commonwealth did not prove his guilt beyond a reasonable doubt, that the Trial Court erred in denying Post Sentence Motions specifically, the Motion for Reconsideration of Sentence; and lastly, that trial counsel was ineffective for representing Defendant at trial and on appeal.

The first two issues Petitioner presents to the Court have already been litigated and thus are not amenable to post conviction relief. Petitioner through Counsel

requested that the judgment of guilty be arrested and that a new trial be granted based upon a sufficiency of the evidence claim. The Trial Court denied these motions and the Superior Court affirmed the decision of the Trial Court. Thus as the sufficiency of the evidence to find Defendant guilty beyond a reasonable doubt has already been litigated by the Trial Court and the Superior Court it is not an issue that can be raised on collateral review.

To the extent that the Defendant attacks the length of the sentence, this too has already been litigated and therefore is not amenable to be re-litigated via the PCRA. Moreover, discretionary aspects of a sentence are not a basis for PCRA relief even if the issue had not already been litigated. The Defendant's sentence is a legal sentence and only an illegal sentence, not a discretionary sentence, can be corrected on collateral review.

The last issue Defendant raises is ineffective assistance of counsel claiming it was ineffective assistance of counsel for trial counsel to represent Defendant on direct appeal. In order to prevail on a claim of ineffective assistance of counsel, a Defendant must demonstrate that that underlying claim is of arguable merit, and that counsel's actions had not reasonable basis designed to effectuate the Defendant's interests and that counsel's actions prejudiced the Defendant. Commonwealth v. Correa, 664 A.2d 607 (Pa. Super. 1995). "It is well established that counsel is presumed effective and the defendant bears the burden of proving ineffectiveness." Commonwealth v. Cooper, 941 A.2d 655 (Pa. 2007). Any complaint that it was inappropriate for trial counsel to represent Defendant on appeal is without merit as trial counsel is in the best position to determine issues for review. After a review of the record, the Court

finds no error with the Public Defender's effectiveness at trial and that the Public Defender developed sufficient and adequate issues for the trial court and appellate court's review such that any claim of ineffectiveness is without merit.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to dismiss the Defendant's PCRA Petition. The Defendant 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.

ORDER

AND NOW, this _____ day of December, 2017, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss the PCRA petition unless Defendant files an objection to that dismissal within twenty (20) days of today's date.
2. The **Motion to Withdraw as Counsel** filed **October 13, 2017**, is hereby **GRANTED** and Don Martino, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

cc: Don Martino, PCRA Counsel
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