

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA**

**v.**

**TIRELL WILLIAMS,  
Defendant**

:  
:  
:  
:  
:  
:  
:

**CP-41-CR-0002010-2012**

**PCRA**

**OPINION AND ORDER**

On July 24, 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 October 24, 2013, Tirell Williams (Defendant) was found guilty by a jury of two counts of Robbery<sup>1</sup>, a felony of the first degree and a felony of the second degree<sup>2</sup>; one count of Theft By Unlawful Taking<sup>3</sup>, a misdemeanor of the first degree; and one count of Simple Assault<sup>4</sup>, a misdemeanor of the second degree. The Defendant was found Not Guilty of Criminal Conspiracy to Commit Robbery<sup>5</sup>, a felony of the first degree. Defendant was initially represented by Nicole Ippolito, Esquire at the preliminary hearing and pretrial motions, Julian Allatt, Esquire at trial and on post sentence motions, and by Jeffrey Frankenburger, Esquire, on his direct appeal.

---

<sup>1</sup> 18 Pa.C.S. § 3701(a)(1)(ii) (Robbery-threatens SBI). Count 1.

<sup>2</sup> 18 Pa.C.S. § 3701(a)(1)(iv). (Robbery-inflicts/threatens BI). Count 3.

<sup>3</sup> 18 Pa.C.S. § 3921(a). (<=\$2,000/from indiv./by threat/breach). Count 4.

<sup>4</sup> 18 Pa.C.S. § 2701(a)(1). Count 5.

<sup>5</sup> 18 Pa.C.S. § 903(a)(1). Count 2.

Defendant was sentenced by the Court on the charge of Robbery, felony of the first degree to a split sentence. He was to undergo incarceration in a state correctional institution for an indeterminate period of time, the minimum of which shall be six (6) years, and the maximum of which shall be twelve (12) years, with consecutive eight years probation under the supervision of the Pennsylvania Board of Probation and Parole. Order of Sentence, 3/27/2017. 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 The Superior Court upheld the decision of this Court in an unpublished memorandum filed March 20, 2015. No appeal was taken to the Supreme Court and thus his Judgment of Sentence became final on April 20, 2015. Defendant had one year from the date to file a PCRA petition.

On April 15, 2016, the Defendant filed a timely *pro se* PCRA petition. Donald Martino, Esquire was originally appointed to represent Defendant. On April 22, 2016, Jerry Lynch, Esquire was appointed to represent the Defendant for the PCRA petition. Attorney Lynch proceeded to request four continuances of Defendant's initial scheduled PCRA conference, all of which were granted by the Court with no objection by the Commonwealth.

In an Order filed December 30, 2016, Defendant's PCRA petition was reassigned to Ryan C. Gardner, Esquire, as Attorney Lynch would no longer be serving in the role as conflict counsel for the court. After a court conference on January 30, 2017, Attorney Gardner was ordered to file an Amended Petition or a Turner Finley letter within 30 days. Attorney Gardner filed a "First Amended Petition for Post Conviction Relief Pursuant to 42 Pa.C.S.A. § 9501 *et. seq.*" on March 1,

2017. A court conference on the amended petition was scheduled for July 24, 2017. On that date, Attorney Gardner filed a Petition to Withdraw from Representation of PCRA and a Memorandum Pursuant to Turner/Finley. After an independent review of the record and a PCRA conference, the Court agrees with Attorney Gardner 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's PCRA petition alleges ineffective assistance of counsel and it was proper for the Defendant to preserve these issues to collateral review. Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002) ("Deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel."). The PCRA Court is left to determine whether trial/appellate counsel was ineffective for the reasons set forth in his petition.

The Court's standard of review when evaluating a claim of ineffective assistance of counsel is unambiguous and has remained relatively unaltered since its promulgation in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987), in which the Supreme Court of Pennsylvania adopted the standard of review developed by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The court in Commonwealth v. Sneed, 899 A.2d 1067, 1076 (Pa. 2006) held, in relevant part:

The constitutional ineffectiveness standard requires the defendant to rebut the presumption of professional competence by demonstrating that:

- (1) his underlying claim is of arguable merit;
- (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and
- (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different.

Id. (citations omitted).

If any of the three prongs necessary to succeed on a claim of ineffective assistance of counsel is not satisfied, the claim must be rejected as a whole. Id. (citing Pierce, 786 A.2d at 221-23). Further, trial counsel is presumed effective, and the burden of proving otherwise is on the defendant. Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999).

The Defendant has raised a number of issues in his petition which the Court will address *seriatim*.

***Failure to object to prospective juror's comments during voir dire***

During jury selection prospective Juror #29 stated in open court and in front of all other prospective jurors that she had heard about the Defendant from Cody Beck who works at the prison. Transcript of Potential Juror 29 Voir Dire, 10/2/2013, at 2. Judge Lovecchio then took Prospective Juror #29 into chambers to discuss further. After that discussion she was removed from the prospective juror pool. There was no need for trial counsel to object to preserve the issue after the prospective juror made the statement, because the trial court judge immediately addressed the situation in chambers. Her simple statement merely indicated that she had heard something about the incident but nothing in detail and nothing about the Defendant himself. Id. It was not until the Judge inquired of the prospective juror outside of the hearing of the remaining jurors that the information she revealed was about the Defendant. The brief statement indicating that she knew something about the incident without any further information could not have so infected the jury panel that they would have been

unable to make a fair and impartial decision regarding Defendant's innocence or guilt. Therefore this claim is without merit.

***Failing to argue to the Superior Court that the evidence was insufficient to convict the Defendant of Theft by Unlawful Taking (Count 4) and Robbery (bodily injury) (Count 3).***

On direct appeal, Defense counsel presented only two issues for the Superior Court to review: whether the jury's verdict regarding Count 1 (robbery-threatening serious bodily injury) was against the weight of the evidence and whether the evidence the Commonwealth presented was sufficient to find the Defendant guilty of Count 1. The decision as to which issues to pursue on appeal are within the professional discretion of appellate counsel. Commonwealth v. Johnson, 139 A.3d 1257, 1276 (Pa. 2016). In this case, appellate counsel sought review of the most serious crime for which Defendant was adjudicated guilty, the Robbery, a felony of the first degree. An assessment of appellate counsel's ineffectiveness for failing to raise a claim on appeal involves the same type of proof required for any claim of ineffective assistance of counsel. Commonwealth v. Williams, 141 A.3d 440, 470 (Pa. 2016).

The first prong for the Court to consider when determining an ineffective assistance of counsel claim is whether the issue has merit. The Superior Court wrote in its unpublished memorandum:

Williams all but conceded that he was guilty, as a principal or accomplice, of the other charges for which he was convicted i.e. robbery pursuant to subsection 3701(a)(1)(iv) [Count 3] ("if, in the course of committing a theft, he...inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury").

Commonwealth v. Tirell Williams, No. 1434 MDA 2014, at 8.

As the Superior Court has already determined that there was sufficient evidence regarding Counts 3 and 4, the claim lacks merit. The Superior Court went on to adopt the trial court's interpretation of the testimony, 1925a, 7/28/2014, at 5, and found it sufficient for the jury to have found the Defendant guilty of Count 3. Having addressed Count 3 in its opinion, it went on to conclude that because the evidence was sufficient to support the verdict of guilty in the robbery [Count 3], the verdict of guilty in the theft [Count 4] was necessarily supported by sufficient evidence as theft is an element of Robbery.

***Failing to call Nicole Ippolito, Esq. or Melissa Stoner as witnesses***

PCRA Counsel reviewed Defendant's issues with trial counsel, Nicole Ippolito, Esquire in making the determination whether Defendant could show by the preponderance of the evidence that counsel was so ineffective that the truth determining process was undermined. Trial Counsel did discuss with Attorney Ippolito about testifying at trial. He found after speaking with her that her testimony would not differ from the witnesses already were called for trial. PCRA counsel and the Court finds that trial counsel had a reasonable basis for not calling Attorney Ippolito as a witness as her proposed testimony would neither add new or different testimony nor result in a different trial outcome.

The Court applies the same reasoning to the proposed testimony of Melissa Stoner. After PCRA counsel interviewed Stoner, he found she had nothing to offer by way of testimony that would have advanced the inquiry, in other words, she told PCRA counsel that "she did not know what occurred on the night at issue as she was not present". Trial counsel also determined that if Melissa Stoner were called to testify

for her client as he believed that it would be detrimental to the Defense. Therefore, Counsel had a more than reasonable basis for failing to call her as a witness.

***Failing to file a Motion to Suppress various items of information including a partial confession***

Rule of Professional Conduct 3.1 allows criminal defense attorney to bring a claim even if there is no nonfrivolous basis for the claim.<sup>6</sup> Defendant alleges that trial counsel, Allatt was ineffective for failing to try and suppress various items of information including the Defendant's partial confession. After reviewing the record and interviewing Allatt, PCRA counsel determined Defendant executed a valid waiver of Miranda<sup>7</sup> and subsequently admitted to the assault of the victim. Since trial counsel reviewed the evidence and found that Defendant's waiver of his Miranda rights was knowing, intelligent and voluntary, he did not ask the Court to suppress them, even though he could have.

However, had a motion been litigated and Defendant's statement been suppressed, the other testimony presented by the Commonwealth at trial would still have been sufficient to convict. In this Court's view, and agreed upon by the Superior Court as reflected in their Opinion, it was not the partial confession that allowed the

---

<sup>6</sup> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established. Rule of Professional Conduct 3.1 (meritorious claims and contentions). Rule 3.1 *Comment* "in a criminal case or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for the defense."

<sup>7</sup> Miranda v. Arizona, 384 U.S. 436 (1966).



jury to find Defendant guilty beyond a reasonable doubt, it was the testimony of witnesses Baird and Stewart.

***Failing to file a Motion with the Court to recuse itself from presiding over the trial as the Court had a relationship with the Commonwealth's witness Amy Baird***

Regarding the testimony of Baird, Defendant complains of two errors: 1) that the Court did not recuse itself when it had a known relationship with Baird through Treatment Court and 2) that trial counsel erred by not attempting to present the criminal history of Baird to impeach her credibility and to show potential bias.

Defendant first complains that the Court should have recused itself in presiding over the trial. Initially, this claim of error is waived because it could have been raised earlier on direct appeal and was not. To the extent it could be claimed it was "ineffective assistance of counsel" for trial counsel not to have petitioned the Court for recusal, such a claim is baseless.

"Recusal" is the act of removing or absenting oneself in a particular case because the judge concludes that the prevailing facts or circumstances could engender a substantial question in reasonable minds whether the judge can be impartial. 207 Pa. Code § 15-4. There is simply nothing in the record or any allegation set forth by the Defendant to support a finding regarding the Court's inability to be impartial in presiding over the case. A jurist's former affiliation, alone, is not grounds for disqualification. Commonwealth v. Abu-Jamal, 720 A.2d 79, 91 (Pa. 1998).

There is nothing in the PCRA petition to allege that the Court had any particular connection with witness Baird other than being the presiding judge over the treatment court. To recuse the Court for having contact with a party only in the course of employment would be the equivalent of requiring a judge to recuse itself every time it

handled a given criminal case should that witness appear in a subsequent trial. Since PCRA counsel could not allege exactly how the trial court's knowledge of Baird prejudiced him, especially as the Defendant was being tried by a jury, the claim has no merit.

***Failure to challenge the Prior Record Score the Court used in fashioning its sentence along with failing to bring to the Court's attention during sentencing mitigating factors of the Defendant's learning disability and that he had been a recipient of SSDI***

In recognition of the claims Defendant is making regarding his sentence, the Court first notes that none of these claims are cognizable under the PCRA. Defendant was sentenced to a legal sentence. Only an illegal sentence may be challenged in a request for collateral relief. See 42 Pa.C.S. § 9543 viii, *supra*. The maximum sentence allowable by law for the crimes for which he was found guilty was thirty-seven (37) years. His maximum sentence imposed by the Court is twenty (20) years; therefore, it is below the statutory maximum and legal.

**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 6th day of October, 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 **July 24, 2017**, is hereby **GRANTED** and Ryan C. Gardner, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Ryan C. Gardner, PCRA Counsel  
DA (KO)  
S. Roinick, file  
Gary Weber, Esq.