

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1050-2014; CR-1387-2014
	:	CR-20161-2014
vs.	:	
	:	
	:	
CARL MOYER, JR.,	:	Notice of Intent to Dismiss PCRA
Defendant	:	Without Holding An Evidentiary Hearing

OPINION AND ORDER

This matter came before the court on Carl Moyer’s Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Moyer committed three DUI offenses within a six-month period. Specifically, the offenses occurred on March 15, 2014, May 3, 2014 and August 30, 2014. Moyer pled guilty to all three DUIs. On March 10, 2015, the court initially imposed an aggregate sentence of 15 years of Intermediate Punishment with the first 17 months to be served at the county work release facility. The primary basis for the court sentencing below the standard guideline ranges was information presented by Moyer regarding the extraordinary steps he had taken to address his alcohol abuse. Following the imposition of sentence, however, the court overheard discussions between Moyer and his significant other as well as Moyer and a representative of the Adult Probation Office. It appeared to the court that the information provided by Mr. Moyer during his sentencing hearing may not have been accurate. Accordingly, the court stopped Moyer, directed him to return to the courtroom and re-opened the record. The court immediately vacated the initial sentence and proceeded with taking additional testimony.

In questioning Moyer, it became evident to the court that much if not all of the

information provided by Moyer and upon which the court based the initial sentence, was incorrect. Specifically, Moyer admitted that he only attended one AA meeting, he went to church only once, and he drank as recently as “last Friday.”

Moyer’s significant other indicated that Moyer was still drinking. She looked at Moyer and stated: “You can only go so long, because when you get fidgety, I know when you are going to want to drink. And I know the signs. I’ve been around you long enough, Carl, I can’t...you can’t hide it from me. You can’t even hide a can of beer unless I find it.”

The court then entered a sentence, the aggregate of which was a minimum of six years and a maximum of which was 15 years, to be served in a state correctional facility. Moyer did not file a timely appeal.

Through the filing of a PCRA petition, the court reinstated Moyer’s appeal rights nunc pro tunc. In the appeal, Moyer claimed the sentence imposed by the court was unduly harsh and excessive. The Superior Court affirmed Moyer’s judgment of sentence on November 15, 2017.

On February 2, 2018, Moyer filed his current PCRA petition. The court appointed counsel to represent Moyer and directed counsel to file either an amended PCRA petition or a no merit letter pursuant to *Commonwealth v. Tuner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 198)(en banc). Counsel filed a *Turner/Finley* no merit letter and a motion to withdraw as counsel.

After an independent review of the record, the court finds that Moyer’s petition lacks merit.

Moyer asserts that the trial court erred and engaged in misconduct and counsel

was ineffective in failing to litigate various issues related to the court vacating his original sentence and re-sentencing him. First, Moyer contends “the trial court illegally sentenced him *ex post facto* in violation of Section 1, Act of June 19, 1911, P.L. 1055 and Act of March 21, 1806, 1 Purdon (13th ed.) p. 271.” The *ex post facto* clause of the Pennsylvania Constitution states: “No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.” Pa. Const. Art. 1, §17. The legislature passes laws; the court does not. The court did not pass any law when it resentenced Moyer; it merely prevented Moyer from committing a fraud on the court. Therefore, there was no *ex post facto* violation in this case.

Furthermore, the court did not do anything illegal when it revoked Moyer’s sentence and re-sentenced him on the same date, after the court discovered that Moyer lied to the court during his original sentencing hearing. The law allows a court to modify its order within 30 days. 42 Pa. C.S. §5505(“a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court if no appeal from such order has been taken or allowed.”). Even beyond 30 days, the court has inherent power to modify or rescind orders that are procured by fraud or misinformation. *Commonwealth v. Harper*, 890 A.2d 1078, 1082 (Pa. Super. 2006). The court also gave the parties notice before it changed its sentencing order. In fact, the court called the parties back to the courtroom and conducted a hearing before it imposed the new sentence.

Moyer also alleges that the “trial court engaged in misconduct and violation of due process in accepting *ex post facto* testimony from the Commonwealth’s witness, Cathy

Embick, in violation of Pa. R. Crim. P. 573(d) and 602 and, Pa. R. E. 614.” Rule 573(D) states:

If, **prior to or during trial**, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party shall promptly notify the opposing party or the court of the additional evidence, material, or witness.

Pa. R. Crim. P. 573(D)(emphasis added). Rule 573(D) is not applicable to this situation. Rule 573 deals with pretrial discovery. Moyer waived his right to trial and pled guilty. This incident occurred immediately after sentencing. Furthermore, the court promptly brought the parties back into the courtroom to address the fraud that Moyer committed on the court. If anyone engaged in misconduct at sentencing, it was Moyer.

Rule 602 of the Rules of Criminal Procedure also was not violated. Rule 602 requires the defendant to be present at every stage of the trial and at the imposition of sentence. Moyer was present at, and participated in, both sentencing proceedings.

Rule 614 of the Rules of Evidence also was not violated. Rule 614 permits the court to call a witness on its own. The court questioned both Moyer and Ms. Embick based on what was overheard in the hallway.

Moyer next contends the trial court engaged in misconduct and a violation of due process in vacating Moyer’s previous sentence and resentencing Moyer in violation of Pa. R. Crim. P. 721. Rule 721 concerns the procedure for Commonwealth challenges to sentences. The Commonwealth was not required to file a motion to vacate Moyer’s sentence; the court had the authority to vacate the sentence *sua sponte*, or on its own. 42 Pa.

C.S. §5505; see also *Commonwealth v. Glass*, 718 A.2d 804, 814 (Pa. Super. 1998)(“the court had the inherent power to vacate the sentence *sua sponte*....”).

Moyer next asserts that the trial court erred and violated due process in ignoring the obvious conflict of interests through the Office of the Public Defender after ruling on November 1, 2016 to the ineffectiveness of that same office of attorneys. The court believes that Moyer misconstrues the order reinstating his appeal rights. The court never ruled that his attorney was ineffective. No hearing was held and no findings of fact were made. Mr. Moyer’s attorney, Mr. Frankenburger, had left the area for a different attorney position and was no longer employed with the Public Defender’s Office, and the Commonwealth stipulated or agreed that Moyer’s appeal rights could be reinstated. Furthermore, even if the court assumes for the sake of argument that Mr. Frankenburger was ineffective, Moyer suffered no prejudice or harm from the court appointing Mr. Marfatia to represent Moyer on his direct appeal. Mr. Frankenburger was no longer with the Lycoming County Public Defender’s Office during Moyer’s direct appeal; therefore, he could not have possibly done anything to affect its outcome.

Moyer alleges that the trial court engaged in misconduct, cumulatively, as set forth above, in violation of U.S. Code of Judicial Conduct, Canon 2(A) and the Pennsylvania Code of Judicial Conduct, Canons 1 and 2(A).

Initially, the court notes that the U.S. Code of Judicial Conduct is not applicable in this case. Those canons only apply to federal court judges. The Lycoming County Court of Common Pleas is not a federal court, and the undersigned is not a federal judge.

The Pennsylvania Code of Judicial Conduct is broken down into individual rules numbered sequentially, for example Rule 1.1, Rule 1.2, etc. Moyer has not specified any specific rule that the court has allegedly violated. Moreover, as set forth above, the court did not illegally sentence Moyer or engage in any misconduct. Furthermore, it is well-settled that “no number of failed claims may collectively attain merit if they could not do so individually.” *Commonwealth v. Bracey*, 568 Pa. 264, 795 A.2d 935, 948 (2001)(quoting *Commonwealth v. Williams*, 532 Pa. 265, 615 A.2d 716, 722 (1992)).

Moyer makes similar claims against the Commonwealth. He asserts that the prosecution engaged in misconduct and a violation of due process by violating Rule 573(D) and Rule 721(A)(1), and that the prosecution and the court equally and together violated the due process provisions provided by Rules 702 through 704 concerning sentencing in wanton violation of established law and Double Jeopardy. As previously explained, neither Rule 573(D) nor Rule 721 were violated. The re-sentencing was not initiated by the Commonwealth. It was done by the court, which the court had the authority to do pursuant to 42 Pa. C.S. §5505.

Moyer mistakenly believes that once sentence was imposed, it could not be modify or rescinded. This simply is not the case. Not only did the parties have the right to file post sentence motions to modify the sentence, see Pa. R. Crim. P. 720 and 721, but the court also had the right to modify or rescind the sentence within 30 days of its issuance.

The resentencing did not violate due process. The parties were brought into the courtroom, and a hearing was held. Both Mr. Moyer and defense counsel were given an opportunity to speak at the resentencing hearing.

The resentencing also did not violate double jeopardy. Where one deceives the sentencing authority or thwarts the sentencing process he can have no legitimate expectation of finality regarding the sentence. *Commonwealth v. Kunish*, 529 Pa. 206, 602 A.2d 849, 853 (1992).

Moyer also asserts that defense counsel and appellate counsel were ineffective and incompetent. In order to prevail on an ineffective assistance of counsel claim, a petitioner must plead and prove: (1) the underlying claim has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) prejudice, i.e., but for counsel's act or omission there is a reasonable probability that the outcome of the proceedings would have been different. *Commonwealth v. Koehler*, 614 Pa. 159, 36 A.3d 121, 132 (2012); *Commonwealth v. Lesko*, 609 Pa. 128, 15 A.3d 345, 373 (2011).

First, Moyer asserts that defense counsel was ineffective in "advising him to enter an open plea on the premise that the information provided in the Pre-Sentence Investigation would mitigate and grant leniency from the court, yet made no objection to the prosecution's ambush with the after-the-fact witness and petitioner's resentencing." This claim lacks merit. Defense counsel's alleged advice regarding entering an open plea was not ineffective. As is evidenced by the transcript of the initial sentencing hearing, the Commonwealth clearly was seeking a sentence of state incarceration which was supported by the sentencing guidelines. The court initially imposed a mitigated sentence and granted Moyer leniency based on information contained in the Pre-Sentence Investigation (PSI) regarding Moyer's efforts at addressing his problems and issues with alcohol. Unfortunately, the information in the PSI was based on Moyer's misrepresentations regarding his recovery

efforts.

Despite Moyer's arguments to the contrary, defense counsel was not ineffective for failing to object to "the prosecution's ambush with the after-the-fact witness and petitioner's resentencing." The court vacated the initial sentencing order and resentenced Moyer on its own. The court questioned Ms. Embick, not the prosecution. The objections Moyer contends defense counsel should have made do not accurately represent what occurred in this case and would have been overruled by the court. Therefore, not only does this claim lack merit, but Moyer was not prejudiced because even if defense counsel had objected the outcome of the proceedings would have been the same; the court still would have vacated the initial sentencing order and resentenced Moyer.

Moyer next contends that defense counsel was ineffective in failing to advise him "to withdraw his guilty plea under objection to the misconduct of the prosecution's ambush and introduction of after-the-fact evidence that the state never provided to the defense." This claim also lacks merit. Moyer was well aware of Ms. Embick and what she was going to say. The resentencing occurred due to the discussions or argument between Ms. Embick and Moyer in the hallway. Moreover, even if defense counsel had advised Moyer to withdraw his guilty plea, the court would not have granted a motion to withdraw the guilty plea. Quite simply, Moyer's misrepresentations would not be a legitimate reason to allow him to withdraw his plea.

Moyer also asserts that defense counsel and appellate counsel were ineffective and incompetent in failing to preserve and properly appeal the obvious misconduct and violations of law and due process by the court and the prosecution. There was no such

misconduct by the prosecution or by the court. Moyer is the only one who committed misconduct in this case when he misrepresented his recovery efforts.

Finally, Moyer contends appellate counsel was ineffective and engaged in misconduct for failing to notify the court of the conflict or potential conflict of interest with the Office of the Public Defender and for violating Pennsylvania Rules of Professional Conduct 1.10 and 1.16. This claim lacks merit. The assistant public defender who handled Moyer's appeal did not have a conflict of interest in this case. Any alleged ineffectiveness of Mr. Frankenburger was cured by the reinstatement of Moyer's direct appeal rights nunc pro tunc. As previously noted, when Moyer's appeal rights were reinstated, Mr. Frankenburger was no longer a member of the Office of the Public Defender; therefore, he could not have possibly done anything to affect the outcome of Moyer's appeal.

ORDER

AND NOW, this ___ day of October 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this court's intention to dismiss Moyer's PCRA petition without holding an evidentiary hearing. Moyer 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.

The court also grants PCRA counsel's motion to withdraw. Moyer may represent himself or hire private counsel but the court will not appoint counsel to represent

Moyer further in this matter.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Ryan Gardner, Esquire
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Work file