

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : **CR-2010-2012**
 :
 :
 TIRELL WILLIAMS, :
 Petitioner : **PCRA/WITHDRAWAL**
 : **GRANTED**

OPINION AND ORDER

On February 11, 2019, Attorney Ryan Gardner filed a Motion to Withdraw as Counsel pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) in the above docketed information. After an independent review of the entire record, this Court agrees with PCRA Counsel and finds that Tirell Williams (Petitioner) has failed to raise any meritorious issues in his PCRA Petition, and that his petition should be dismissed.

Background

This case's history has already been laid out by this Court in its October 6, 2017 Notice of Intent to Dismiss:

On October 24, 2013, [Petitioner] was found guilty by a jury of two counts of Robbery, a felony of the first degree and a felony of the second degree; one count of Theft By Unlawful Taking, a misdemeanor of the first degree; and one count of Simple Assault, a misdemeanor of the second degree [Petitioner] was found Not Guilty of Criminal Conspiracy to Commit Robbery, a felony of the first degree. [Petitioner] 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.

[Petitioner] 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. [Petitioner] filed Post Sentence Motions that were denied by this Court. [Petitioner] 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 The Superior Court upheld the decision of this Court in an unpublished memorandum filed March 20, 2015.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. [Petitioner] had one year from the date to file a PCRA petition.

On April 15, 2016, [Petitioner] filed a timely *pro se* PCRA petition. Donald Martino, Esquire was originally appointed to represent [Petitioner]. On April 22, 2016, Jerry Lynch, Esquire was appointed to represent [Petitioner] for the PCRA petition. Attorney Lynch proceeded to request four continuances of [Petitioner]’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, [Petitioner]’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.

Opinion and Order Oct. 6, 2017, at 1-3 (footnotes omitted).

The Court ordered a final dismissal of Petitioner’s PCRA on November 8, 2017, which Defendant appealed. The Pennsylvania Superior Court remanded the issue finding Defendant did not receive notice of intent to dismiss in accordance with Rule 907. This Court reissued a notice of intent to dismiss in accordance with Rule 907 on October 16, 2018. Upon receiving a response from Petitioner, this Court scheduled an in-chambers conference and had original PCRA counsel Attorney Ryan Gardner look into one issue that raised potential concern. After investigation, Attorney Gardner filed a timely Motion to Withdraw as Counsel and sent Defendant a *Turner/Finley* letter on February 11, 2019. After consideration this Court agrees with Attorney Gardner that Petitioner failed to raise any meritorious issues in his PCRA Petition. All issues

were previously addressed in the Opinion and Order filed by this Court on October 6, 2017 with the exception of the issue Attorney Gardner was asked to evaluate, discussed below.

Whether Trial Counsel was Ineffective for not Objecting to a Hearing Deficit Juror at Trial

Petitioner alleges that trial counsel was ineffective for failing to object to a “hearing impaired juror,” which denied him a right to a fair trial. “It is well-settled that counsel is presumed to have been effective and that the petitioner bears the burden of proving counsel's alleged ineffectiveness.” *Commonwealth v. Wholaver*, 177 A.3d 136, 144 (Pa. 2018) (citing *Commonwealth v. Cooper*, 941 A.2d 655, 664 (2007)). To overcome this claim a petitioner must establish “(1) the underlying substantive claim has arguable merit; (2) counsel did not have a reasonable basis for his or her act or omission; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance.” *Id.* Failure to meet any of these three requirements must result in denial of the petitioner’s claim. *Id.*

The seminal case in Pennsylvania dealing with the issue of hearing impaired jurors is *Commonwealth v. Brown*. In that case the court determined that “[f]undamental to the right of an ‘impartial’ jury is the necessity that participating jurors be competent and qualified.” *Commonwealth v. Brown*, 332 A.2d 828, 831 (Pa. Super. 1974). A juror with a physical impairment that “interferes with the juror's ability to hear and understand the presented testimony and evidence precludes a verdict by all jurors. Such a disability would render the juror incompetent to serve and would deny appellant's right to an impartial jury and a fair hearing.” *Id.* A juror will not be “disqualified per se because of his deafness,” but when the condition affects the juror to such a degree “that the juror may have not heard material testimony, the juror must be disqualified, rendering any verdict he gave as meaningless.” *Id.* (internal citation omitted). In *Brown* the record substantiated that the juror had difficulty hearing, “[h]e admitted inability to

hear questions and his responses were inconclusive as to whether he had heard all the testimony.” *Id.* at 437-38. Although the issue does not arise often, the precedent has been reiterated in subsequent opinions. *See Commonwealth v. Golson*, 456 A.2d 1063, 1065 (Pa. Super. 1983); *Commonwealth v. Greiner*, 455 A.2d 164, 166-67 (Pa. Super. 1983).

Defendant’s allegation is that “trial counsel was ineffective in failing to object or challenge service of a ‘hearing impaired’ juror who interrupted trial on a numerous of occasions due to hearing deficit. Thus denying Petitioner a fair trial.” Motion for Post-Conviction Collateral Relief 04/15/16, at 31-33. Not only does the record reflect there were not numerous trial interruptions, there are no interruptions related to a hearing deficiency of a juror. Prior to Petitioner’s trial the Court made prefatory remarks to the jury outlining the importance of hearing and understanding everything and what to do in the event a juror could not hear or understand the testimony:

So it’s imperative that you’re able to hear, see, and understand everything that is being presented by way of exhibits, facts, information. So if a loud truck goes by on Third Street and that interrupts something that you can’t hear, just raise your hand and we will make sure that the witness restates the information. If they need to speak up, sometimes I have a tendency to speak a little fast, if somebody is speaking too quickly or not loud enough, all we ask is that you let us know so we have the witness slow down, speak more closely into the a microphone so you are able to see, hear, and understand everything.

Jury Trial Transcript 10/24/13, at 26.

The only time an issue of potential hearing deficiencies occurred during trial was when the assistant district attorney played a 911 recording and when a juror asked to get rid of a humming noise, both of which were affirmatively addressed on the record. *Id.* at 111-12. Upon playing an audio recording the assistant district attorney stated “I don’t think anyone is hearing this,” which the Court responded “Jurors are nodding their heads that they can hear.” *Id.* at 111. In addition to avoid any further audio issues, when a subsequent interview was played the jurors were provided

a transcript of the portion of the interview that was being played, which was accompanied by the Court's limiting instruction. *Id.* at 117-18. Lastly the only juror interruption through the entire trial was:

JUROR: Excuse me, can you get rid of that humming?

THE COURT: That's his computer. When you run the audio through the system, we had this problem before in another trial juror.

JUROR: Thank you.

Id. at 112.

There is no evidence from the trial record to substantiate the claim Petitioner raises and instead the transcript directly refutes that there were any trial interruptions for a hearing deficient juror. Therefore any disturbances, indicated in the trial transcript were not of the nature which was considered in *Brown* and following precedent. *See Brown*, 332 A.2d at fn. 1, 2 (glaring evidence of a hearing deficiency and Juror stated he "heard practically everything"); *Golson*, 456 A.2d at 1065 (when asked if the juror had been following along she stated "not everything" but she heard most of the witnesses); *Greiner*, 455 A.2d at 166 (juror admitted he could not hear parts of the past testimony).

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant Petitioner'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 deny Petitioner's PCRA Petition. Petitioner 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 March, 2019, it is hereby ORDERED and DIRECTED as follows:

1. Petitioner is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed February 11, 2019, is hereby **GRANTED** and Ryan Gardner, Esq. may withdraw his appearance in the above captioned matter.
3. **Petitioner Tirell Williams will be notified at the address below through means of certified mail.**

By the Court,

Nancy L. Butts, President Judge

xc: DA
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NLB/kp