

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CR-1056-2012
v. :
CHAD WILCOX, : CRIMINAL DIVISION
Petitioner : PCRA
OPINION AND ORDER

On January 22, 2016, Chad Wilcox (Petitioner) was found guilty of Statutory Sexual Assault, Rape of a Child, Unlawful Contact with a Minor, and accompanying charges following a jury trial. Petitioner was then sentenced on that same day to an aggregate sentence of twenty-one to seventy years. Petitioner then filed Post-Sentence Motions on February 1, 2016, which were subsequently denied by operation of law. An appeal was filed by Petitioner to the Pennsylvania Superior Court on June 20, 2016. The Superior Court then affirmed this Court's sentence on July 18, 2017, and review was denied by the Pennsylvania Supreme Court on January 31, 2018. *See Commonwealth v. Wilcox*, 1032 MDA 2016 (Pa. Super. 2017), *appeal denied* 558 MAL 2017 (Pa. 2018). Therefore, Petitioner's sentence became final on May 1, 2018. *See* U.S. Sup. Ct. Rule 13 (Appellant has ninety days from a final order in the highest court of a state to petition United States Supreme Court). On April 29, 2019, Petitioner filed a timely Petition for Post-Conviction Collateral Relief. Petitioner, through counsel filed amended petitions on June 28, 2019 and October 28, 2019. PCRA conferences were held on August 2, 2019, January 3, 2020, and March 6, 2020.

Petitioner advances the following four issues in his petition: (1) Trial counsel was ineffective for failure to present school records disproving the existence of a *quid pro quo* relationship between Petitioner and the victim; (2) Appellate counsel was ineffective for failure to raise the issue of the Commonwealth's disregard of Judge Lovecchio's pretrial order barring Kyle Mowery's testimony regarding the victim's hearsay statements; (3) Appellate counsel was

ineffective for failing to appeal the application of Judge Lovecchio's order against Petitioner on cross examination; and (4) Appellate counsel was ineffective for failing to appeal the admissibility of the victim's forensic interview as a violation of Petitioner's Confrontation Clause rights. After review of the entire record in the above captioned case this Court disagrees with Petitioner, and dismisses Petitioner's Second Amended PCRA Petition without affording him an evidentiary hearing.

Discussion

An individual seeking relief under the PCRA "must plead and prove by a preponderance of the evidence" all requirements under the statute. 42 Pa. C.S. § 9543(a). Therefore a petitioner must plead and prove:

(2) That the 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.

42 Pa. C.S. § 9543(a)(2).

Additionally, Petitioner must not have previously litigated or waived the claim at issue. 42 Pa. C.S. § 9543(a)(3). A claim is deemed previously litigated when "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa. C.S. § 9544(a)(2). To establish a claim for ineffective assistance of counsel, a

petitioner must show 1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. *Commonwealth v. Cooper*, 941 A.2d 655, 664 (Pa. 2007); *see also Commonwealth v. Carpenter*, 725 A.2d 154, 161 (Pa. 1999). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. *Cooper*, 941 A.2d at 664; *see Commonwealth v. Sneed*, 899 A.2d 1067, 1076 (Pa. 2006). Finally, "counsel is presumed to be effective and a [petitioner] has the burden of proving otherwise." *Commonwealth v. Williams*, 570 A.2d 75, 81 (Pa. 1990).

Trial Counsel's Ineffectiveness

The first issue Petitioner contends is that trial counsel was ineffective for failure to present school records which reflected that Petitioner never signed the victim's behavioral reports. Petitioner argues this evidence would have directly contradicted the evidence provided at trial of *quid pro quo*. The Court finds that Petitioner's argument is factually meritless. No evidence provided at trial ever alleged that Petitioner signed the victim's behavioral reports at school. To the contrary the undisputed evidence presented by both Mr. Mowery and Petitioner shows that the victim's mother was the only one who signed the reports. *See* N.T. 1/21/16, at 23, 47-48, 120. Additionally, the victim's forensic interview, which Petitioner points to as alleging such *quid pro quo*, never alleged that Petitioner would sign the victim's reports in exchange for sexual favors. Instead, the interview shows that when the victim was in trouble with the mother, Petitioner would allow the victim to play with her video games when the mother was asleep in exchange for sexual favors. Transcript of Interview 3/5/12, at 27-29. Therefore, Petitioner's issue one is meritless and he is not entitled to relief and/or an evidentiary hearing.

Testimony of Kyle Mowery

Next, Petitioner's claims for issues two and three regard the testimony of Kyle Mowery. Judge Lovecchio made a pretrial ruling disallowing the hearsay evidence of the victim through the testimony of Kyle Mowery on May 2, 2014. At the time of trial the Commonwealth then elicited testimony regarding "the secret" the victim had told Mr. Mowery, and a lengthy discussion was conducted on the record where the Court found the statement was improperly elicited by the Commonwealth, but was harmless error in light of the remainder of the testimony that would be provided. N.T. 1/21/16, at 27-46. It is clear that the issues regarding Mr. Mowery's testimony have already been previously litigated and therefore are not eligible for relief. The Pennsylvania Superior Court has already made a determination on the merits of the issue and found "any error in Mr. Mowery's testimony was harmless." *Commonwealth v. Wilcox*, 1032 MDA 2016, at *6 (Pa. Super. 2017). Petitioner is not entitled to relief and/or an evidentiary hearing on his second and third issues.

Forensic Interview Inadmissible on Confrontation Clause Grounds

The last issue Petitioner advances is that appellate counsel was ineffective for not preserving the claim that the victim's forensic interview should not have been permitted through the testimony of Sherry Moroz on Confrontation Clause grounds. As with the above issues, the Court similarly finds this issue has been previously litigated and therefore Petitioner is ineligible for relief. In Petitioner's Statement of Matters Complained of on Appeal, counsel for Petitioner raised the issue "[Petitioner]'s right to confrontation, as guaranteed by the Pennsylvania and United States Constitutions, was violated by the alleged victim's failure to testify." Statement of Matters Complained of on Appeal 7/7/17, at 1. Additionally, the Pennsylvania Superior Court noted that an issue raised by Petitioner on appeal was whether

“[t]he lower court erred by ruling that the alleged victim was unavailable to testify, thereby violating [Petitioner]’s right to confrontation as guaranteed by the Pennsylvania and United States Constitutions.” *Commonwealth v. Wilcox*, 1032 MDA 2016, at *1 (Pa. Super. 2017). Petitioner contends that he should be permitted to litigate the claim because only the availability of the victim under the Tender Years Doctrine was addressed on its merits, but this Court disagrees. Although the Pennsylvania Superior Court did not delve into the reasoning for its decision it addressed the above issue together with the victim’s unavailability and “affirm[ed] the trial court’s decision regarding [the victim]’s unavailability *and the admissibility* of testimony from . . . Sherry Moroz, based upon the thorough opinions and orders filed by the Honorable Marc F. Lovecchio.” *Id.* at 4 (emphasis added). Additionally, the Superior Court instructed the parties to attach Judge Lovecchio’s Opinion to any subsequent action in the case. *Id.* at fn. 5. In the Opinion and Order rendered on May 2, 2014, Judge Lovecchio addressed the issue of the Confrontation Clause and found that Petitioner had a fair and adequate opportunity to cross-examine the victim at the preliminary hearing and at an interview by trial counsel prior to the preliminary hearing. Opinion and Order 5/2/14, at 8-10. As the Superior Court seemingly adopted that opinion in finding Ms. Moroz’s testimony admissible, it is deemed previously litigated. *See* 42 Pa. C.S. § 9544(a)(2) (A claim is deemed previously litigated when “the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue.”).¹

Conclusion

¹ This Court points out that Petitioner argues that Judge Lovecchio’s finding was in error for the application of *Commonwealth v. Holton*, which Petitioner contends has been superseded by *Crawford v. Washington*, *Davis v. Washington*, and *Commonwealth v. Bazeman*. Petitioner’s reasoning is severely flawed for the simple reason that *Commonwealth v. Holton* was decided subsequently to all of the cases cited by Petitioner.

Petitioner's claims of ineffective assistance of counsel have no merit. Three of his claims have been previously litigated and therefore not eligible for relief. As for Petitioner's last claim regarding school records, the underlying claim has no merit as the trial record clearly established that Petitioner never signed off on the victim's school records for bad behavior. Therefore, Petitioner's Second Amended PCRA Petition is dismissed.

ORDER

AND NOW, this 3rd day of September 2020, upon review of the record, Petitioner's Second Amended PCRA Petition is hereby **DISMISSED**. Petitioner is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa. R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Petitioner may lose forever his right to raise these issues.

By The Court,

Nancy L. Butts, President Judge

CC: DA (RG)
Craig Kauzlarich, Esq.
2 West High St.
Carlisle, PA 17013

NLB/kp