

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-0000386-2017  
vs. :  
: CRIMINAL DIVISION  
: DARNELL KELLAM,  
: Appellant : PCRA

**OPINION AND ORDER**

By Opinion and Order of Court dated November 12, 2020, the court notified the parties of its intention to deny Kellam’s PCRA petitions filed on January 6, 2020, May 29, 2020 and July 24, 2020. On December 1, 2020, Kellam filed a response to the intent to deny PCRA. By Order of Court dated January 5, 2021, the court filed an Order dismissing the PCRA petition. Kellam subsequently filed a motion for reconsideration on January 11, 2021.

On April 22, 2021, following a conference, the court provided Kellam with ninety (90) days within which to file a second supplemental PCRA petition. The purpose of allowing the second supplemental PCRA petition was to permit Kellam to clarify the issue he raised regarding *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020), to specify where in the existing records the facts supporting each ground appeared, and to plead any and all facts and circumstances necessary to support the suppression claim such as the lack of a warrant or exigent circumstances.

The court notes that it previously granted Kellam’s motion for reconsideration by Order of Court dated February 1, 2021.

While Kellam filed a supplemental amended petition for post-conviction relief on April 2, 2021, he also filed a supplemental amended petition for post-conviction relief on July 21, 2021 purportedly addressing the issues set forth in this Court's April 22, 2021 Order.

Kellam requests a new trial and a new suppression hearing based on the Supreme Court's decision in *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020). Kellam claims that the search which led to the discovery of the contraband used against him at trial was a violation of his rights under the United States and Pennsylvania constitutions which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. Kellam claims that counsel was ineffective in failing to raise the issue of a warrantless search of the vehicle to the trial court, on appeal, or even in the initial PCRA proceedings.

In essence, Kellam argues that because his case remained pending on direct appeal until December 9, 2019 and the *Alexander* issue had been pending before the Pennsylvania Supreme Court as of September 24, 2019, counsel should have been aware that the warrant requirement would be clarified, and was ineffective in failing to attempt to raise the issue before the Supreme Court, as the instant matter involved the search of a motor vehicle and the same legal issues and privacy protections were implicated, and the conviction was not yet final.

Kellam argues that counsel's ineffectiveness resulted in the failure of the suppression motion and denial of the appeal, which should have been granted due to the improper warrantless search and that the conviction was a result of a violation of Kellam's rights under the Fourth Amendment to the United States Constitution and Article I, Section 8

of the Pennsylvania Constitution. Kellam also argues that the ineffectiveness prevented viable claims from being considered by the appellate courts.

As Kellam notes, *Alexander* was decided during the pendency of the direct appeal in this matter. *Alexander* overruled the prior ruling in *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014), which had held that the search and seizure provision of Article I, Section 8 of the Pennsylvania Constitution provides no greater protection than does the Fourth Amendment of the United States Constitution with regard to warrantless searches of automobiles. *Commonwealth v. Moore*, 2021 PA Super 202, 2021 WL 4735335 (October 12, 2021). The court in *Gary* concluded that, in line with United States Supreme Court decisions interpreting the Fourth Amendment, the only prerequisite for a warrantless search of a motor vehicle is probable cause to search, with no exigency required beyond the inherent mobility of a motor vehicle. *Id.* at \*3.

In *Alexander*, however, the Supreme Court concluded that the Pennsylvania Constitution affords greater protection than the Fourth Amendment and reinstated the pre-*Gary* line of cases that required police to have both probable cause and exigent circumstances before conducting a warrantless search of an automobile. *Moore, id.*

Kellam argues in this case that while his case was proceeding both at the trial level and on appeal, counsel should have directly challenged the holding of *Gary* or argued that exigent circumstances existed. The *Alexander* decision while pending did not establish a new principle of law until after the disposition of this case concluded on direct review.

Kellam, while acknowledging that his counsel waived any argument under *Alexander* regarding exigent circumstances, asserts that counsel was ineffective in not doing

so. At no time did counsel argue, as they did in *Alexander*, that the state constitutional provision provided broader protection than the Fourth Amendment in the context of a vehicle search.

Contrary to Kellam's argument, the decision in *Gary* was established Pennsylvania precedent at the time this case was litigated in the trial court and on appeal. *Commonwealth v. Davis*, 188 A.3d 454 (Pa. Super. 2018). In *Gary*, the Supreme Court of Pennsylvania reinterpreted Article I, Section 8 as paralleling the Fourth Amendment's protections against warrantless searches of automobiles, because "it is desirable to maintain a single, uniform standard for warrantless search of a motor vehicle, applicable in federal and state court, to avoid unnecessary confusion, conflict, and inconsistency in this often-litigated area." *Commonwealth v. Gary*, 91 A.3d 102, 138 (Pa. 2014) (plurality opinion), *overruled by Commonwealth v. Alexander*, 243 A.3d 177 (2020). As the court noted in *Davis*, *supra.*, in light of *Gary* and subsequent decisions "adherence" to the federal law on searches of automobiles without warrants, the federal standard of review applies. *Davis*, 188 A.3d at 458.

Counsel cannot be deemed ineffective for failing to pursue a baseless claim. Further, the quality of counsel's stewardship is based on the state of law as it existed at the time of trial; counsel is not ineffective if he fails to predict future developments or changes in the law. *Commonwealth v. Gribble*, 863 A.2d 455, 464 (Pa. 2004) ("Counsel cannot be deemed ineffective for failing to predict developments or changes in the law"); *see also Commonwealth v. Hill*, 104 A.3d 1220, 1240 (Pa. 2014) ("review of counsel's conduct cannot indulge 'the distorting effects of hindsight', but instead, counsel's performance must be judged in light of the circumstances as they would have appeared to counsel at the time");

*Commonwealth v. Spatz*, 896 A.2d 1191, 1238 (Pa. 2006) (is well established that the effectiveness of counsel is examined under the standards existing at the time of performance).

**ORDER**

**AND NOW**, this 22<sup>nd</sup> day of October 2021, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting any further hearing, none will be scheduled. The court notifies the parties of its intention to deny the PCRA Petition. Kellam may respond to this proposed dismissal within twenty (20) days. If no response is received within that time, the court will enter an order dismissing the petition.

By The Court,

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Marc F. Lovecchio, Judge

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