IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	:	**No. CP-41-CR-0001030-2017**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
CHRISTOPHER MULLEN,	:	
Petitioner	:	**PCRA**

OPINION AND ORDER

Petitioner, Christopher Mullen (Mullen), was charged by Information filed on July 6, 2017 with persons not to possess firearms, resisting arrest, possession of controlled substances and possession of drug paraphernalia. The charges arose out of an incident on June 7, 2017, where parole agents, United States Marshals, and police officers went to 408 Anthony Street based on an anonymous tip that Mullen, who was wanted on a warrant for absconding from parole supervision, was presently living at that location and he was in possession of firearms and controlled substances.

On August 10, 2017, Mullen filed a motion to suppress, in which he alleged that the authorities lacked a reasonable belief that he was located inside the residence at 408 Anthony Street and accordingly, the entry on June 7, 2017 was illegal. Arguing that the entry was illegal, Mullen followed with the argument that all evidence obtained as a result of the entry should be suppressed. The court denied the motion by Opinion and Order filed on October 13, 2017.

The case was scheduled for jury selection on January 17, 2019 and a trial on February 15, 2019. On January 22, 2019, however, Mullen filed a motion in limine in which

he sought suppression of the evidence based on the Pennsylvania Supreme Court's decision in *Commonwealth v. Romero,* 183 A.3d 364 (Pa. 2018). Specifically, Mullen argued that the evidence seized following the entry and apprehension of him at 408 Anthony Street should be suppressed because law enforcement did not obtain a search warrant to enter said residence. The court summarily denied Mullen's motion in limine as untimely and waived. The court noted among other things that Mullen's counsel was informed of the *Romero* decision no later than April 30, 2018.

On February 19, 2019, Mullen waived his right to a jury trial and elected to proceed to a non-jury, case-stated trial. The court found Mullen guilty of possession of a controlled substance, possession of drug paraphernalia, and two counts of persons not to possess firearms. The court acquitted Mullen of resisting arrest.

On April 2, 2019, the court sentenced Mullen to an aggregate term of six (6) to thirteen (13) years' incarceration in a state correctional institution.

On April 17, 2019, Mullen filed a Post Sentence Motion nunc pro tunc, in which he asked the court to award him a new trial and suppress the evidence based on *Romero.* On June 4, 2019, the court denied the nunc pro tunc motion, as the failure to file the post-sentence motion in a timely manner was not the result of fraud, a breakdown in the court's operation or non-negligent circumstances. *See Criss v. Wise*, 566 Pa. 437, 781 A.2d 1156 (2001).

On or about June 19, 2019, Mullen filed a pro se PCRA petition. Counsel was appointed and an amended petition was filed on August 5, 2019. By Order dated October 3, 2019, the PCRA petition was granted and the court reinstated Mullen's appeal rights nunc pro tunc.

In Mullen's concise statements of matters complained of on appeal, Mullen asserted that the trial court erred in failing to suppress evidence obtained pursuant to a warrantless search in a third-party residence.

By Opinion and Order of the Superior Court dated May 22, 2020, the judgement of sentence was affirmed. The Superior Court concluded that Mullen's challenge to the search on the basis that law enforcement lacked a search warrant authorizing entry into the residence or exigent circumstances, was not raised before the trial court and hence was not preserved.

Mullen filed a subsequent PCRA petition on June 8, 2020. Counsel was appointed and on September 9, 2020 filed a motion to withdraw with a *Turner/Finley* letter. By Order of Court dated December 14, 2020, the court denied the motion and scheduled a hearing for February 5, 2021.

In its Order scheduling the hearing, the court noted that the suppression hearing in the case occurred prior to the Pennsylvania Supreme Court's decision in *Romero.* Therefore, the court noted, the focus of the evidence presented at the hearing was whether law enforcement had "reason to believe" that Mullen was physically present at the address. The hearing did not focus on whether the address was Mullen's residence or that of a third party or whether there were exceptions to the warrant requirement, such as consent or exigent circumstances.

At the hearing held on February 5, 2021, State Parole Board Agent Michael Barvitskie testified consistent with his previous testimony.

As of June 7, 2017, Mullen's approved address was 412 Anthony Street in Williamsport. An arrest warrant was active for Mullen's absconding from supervision.

On June 7, 2017, the Board received an anonymous call that Mullen was residing at 408 Anthony Street. The caller indicated that address was his past paramour's address and that he had kicked her out. According to the call, Mullen was in the house the night before and there were possibly guns and drugs in the residence.

Through further investigation, the Board determined that the house was half a double with Mullen's mother living on the other side. Soon thereafter, in order to corroborate the information received from the caller, agents and other law enforcement officers went to the residence.

Upon their arrival, the agents and officers surrounded the residence and some agents knocked on the front door. Agent Barvitskie saw Mullen in the window from about one foot away and directed him to come out two or three times saying "State Parole, Come to the door."

Other agents continued knocking on the door. A male answered. Agents asked if Mullen was in the house. The male answered "no" but then agents indicated they had just seen him after which the male "nodded yes."

Agents entered the house looking for Mullen. They cleared the house without finding him. They then cleared the other half of the house without finding Mullen.

Soon thereafter, Mullen's girlfriend pulled up in a car and asked if they got all of the guns. Agent Barvitskie indicted "yes, we got two" after which the girlfriend indicated that "no there are three."

Mullen was eventually located in the upper attic area over his mother's half of the house.

Josh Bower next testified on behalf of Mullen. He indicated that he previously

represented Mullen while employed by the Lycoming County Public Defender's office and he filed a suppression motion on August 10, 2017. The motion was denied by the court following a hearing. He left the office in late 2017. He did not argue the issues raised in *Romero*, noting that *Romero* was not decided until April 26, 2018.

Jeana Longo next testified on behalf of Mullen. She was assigned to represent Mullen as a conflict attorney through Lycoming County.

She represented Mullen in connection with his initial PCRA. She obtained reinstatement of his appeal rights and filed a notice of appeal and brief in support with the Superior Court of Pennsylvania.

She acknowledged that the Superior Court's Opinion concluded that because her challenge was not raised before the trial court, it was not preserved. Accordingly, she acknowledged that she made an error in not preserving the issue before the trial court (presumably by not filing a 10-day motion). She also acknowledged that "previous counsel" made an error which resulted in a genuine issue being waived.

Following the hearing, the parties were given an opportunity to submit briefs. The briefs have been submitted and the Petition is now ripe for review and a decision.

Mullen argues that had appellate counsel initiated post-trial motions after the appeal rights were reinstated instead of directly appealing, the Superior Court would not have deemed the issue waived. The claim relates to a *Romero* issue. According to Mullen, trial counsel was ineffective for failing to appropriately raise *Romero* in a timely manner and failing to preserve it for appeal. Further, Mullen argues that appellate counsel was ineffective for failing to appropriately preserve/pursue the issue on appeal.

A claim of ineffective assistance of counsel is cognizable under the PCRA as

an enumerated ground for relief. 42 Pa. C.S. § 9543 (a) (2) (ii); *Commonwealth v. Pierce,* 527 A.2d 973, 975-76 (Pa. 1987).

Counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves three prongs of ineffectiveness:

> (1) the underlying legal claim is of arguable merit;
>
> (2) counsel's actions or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and
>
> (3) as a result of counsel's action or inaction, the petitioner suffered prejudice.

Commonwealth v. Little, 246 A.3d 312, 323 (Pa. Super. 2021), citing *Pierce,* 527 A.2d at 975-76.

The court may deny an infectiveness claim if "the petitioner's evidence fails to meet a single one of these prongs." *Little, id.*

A claim has arguable merit where the factual averments, if accurate, could establish cause for relief. Whether the facts rise to the level of arguable merit is a legal determination. *Commonwealth v. Hawkins,* 2020 PA Super 280, 2020 WL 7251072, *5 (December 10, 2020), citing *Commonwealth v. Stewart,* 84 A.3d 701, 707 (Pa. Super. 2013).

The test for deciding whether counsel had a reasonable basis for his/her action or inaction is whether no competent counsel would have chosen that action or inaction, or, the alternative, not chosen, offered a significant greater potential chance of success. Counsel's decisions will be considered reasonable if they effectuated the client's interests. The courts do not employ a hindsight analysis in comparing trial counsel's action with other efforts he/she may have taken. *Hawkins, id.*; *Stewart, id.*

Prejudice is established if there is a reasonable probability that, but for

counsel's errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Hawkins, id.*; *Stewart, id.*

Because Mullen is seeking post-conviction collateral relief, he bears the burden of production and persuasion in this case. *Hawkins, id.* at *4; *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010). Mullen is required to prove that, if his trial counsel had filed a motion to suppress and/or if his appellate counsel had properly preserved the issue, the Commonwealth would have been unable to prove that the entry into the residence was lawful. *Hawkins, id.* at *7; *Commonwealth v. Kemp,* 961 A.2d 1247, 1261 (Pa. Super. 2008) (en banc).

Certainly, trial counsel should have raised the *Romero* issue in a timely fashion and the failure to do so was without a reasonable basis. As well, appellate counsel should have properly raised the issue and there was no reasonable basis for failing to do so.

However, the court cannot conclude that as a result of counsels' action or inaction, Mullen suffered prejudice. There is not a "reasonable probability" that the "result of the proceeding" would have been different but for counsels' inactions. *Commonwealth v. King,* 57 A.3d 607, 613 (Pa. 2012).

Further, the court cannot conclude that the result of the proceeding is unreliable because of a breakdown in the adversarial process that the system counts on to produce just results. *Little, id.* at *3, citing *Strickland v. Washington,* 466 U.S. 668, 696 (1984).

Even if the issue had been properly raised in a timely motion to suppress or motion to reconsider, the court does not believe that *Romero* applies to the facts and

circumstances of this case because *Romero* is factually distinguishable and there were exceptions to the warrant requirement in this case.

Romero is factually distinguishable in that *Romero* dealt with the rights of third parties who were not the subject of the arrest warrant and law enforcement lacked probable cause to believe that the subject of the warrant was currently inside the premises. Additionally, *Romero* appears to only be a binding, majority Opinion with respect to third parties. The concurring Opinion by Justice Mundy and the concurring and dissenting Opinion by Justice Dougherty which was joined by Chief Justice Sailor and Justice Bear clearly indicate that four out of the seven Justices do not view as dictum the relevant language in *Payton v. New York,* 445 U.S. 573 (1980) with respect to the subject of an arrest warrant.

Here, unlike *Romero,* Mullen was the subject of the warrant and law enforcement had probable cause to believe that Mullen was inside the residence based on the tip, Agent Barvitskie's observations and the confirmation by the individual who answered the door.

Romero also does not negate the recognized exceptions to the warrant requirements such as exigent circumstances and consent. See, 183 A.3d 405-406 (absent a warrant reflecting the magisterial determination of probable cause to search that home, whether by a separate search warrant or contained within the arrest warrant itself, an entry into a residence is excused only by a recognized exception to the search warrant requirement).

In this case, there were exigent circumstances. The tip indicated that Mullen was staying with his girlfriend or ex-girlfriend at 408 Anthony Street and that he possessed firearms and controlled substances. Agent Barvitskie's observations of Mullen inside the

residence and a confirmation of Mullen's presence by the male who answered the door corroborated the information provided in the anonymous tip. In light of the contents of the tip and the corroboration of Mullen's presence inside the house, law enforcement officers had reason to believe that Mullen was armed and that there were other individuals inside the residence.

Mullen obviously heard the knocking and was aware that law enforcement officers were present and telling him to come to the door because he moved the blind to peer out of the window and Agent Barvitskie was only about one foot away from the window when he observed Mullen and said "State Parole, Come to the door." Nevertheless, Mullen failed or refused to come to the door.

408 Anthony Street is also a half-double house with 406 Anthony Street. These residences are connected such as there is a way to pass through from one to another in the space where the roof trusses are located.

In light of the totality of the circumstances, waiting to obtain a search warrant prior to entering the residence would risk Mullen harming any of the occupants of either side of the half-double, taking them as a hostage, or using them as a shield.

ORDER

AND NOW, this ____ day of April 2021 following a hearing and consideration of briefs, Defendant's PCRA petition is **DENIED**.

Defendant 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 Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal

shall conform to the requirements 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, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Donald Martino, Esquire
Christopher Mullen, #QE5315 (certified mail)
SCI Rockview, Box A, 1 Rockview Place, Bellefonte PA 16823
Judge Marc Lovecchio
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)