IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1972-2017; CR-2139-2017**
	:	
vs.	:	
	:	**PCRA Decision and Order re**
KASAN SANDERS,	:	**Withdraw of Attorney Stolinas**
Petitioner	:	**and Appointment of Attorney Jasper**

OPINION AND ORDER

On September 6, 2019, Kasan Sanders ("Petitioner") pled guilty under CR-1972-2017 to Counts 2, 6, 10 and 14, all delivery of controlled substances counts. A jury had been selected and the trial was set to begin. At the last moment, however, the parties reached a plea agreement of a recommended 2 to 4 years on each count to run concurrent to each other along with dismissal of the remaining counts.

At the time Petitioner entered his guilty plea, Matthew Welickovitch, Esquire, represented him. Petitioner had completed a written guilty plea colloquy form that was signed and verified on September 6, 2019. Among other things verified by Petitioner, he stated that he was pleading guilty to: "take responsibility, accept [his] role." He acknowledged that he thoroughly discussed with Mr. Welickovitch all of the facts and circumstances surrounding the charges but was not satisfied with his attorney's representation and advice.

Petitioner was also colloquied orally by the court. During the colloquy, Petitioner indicated that: he did not want to go to trial (Transcript, 9/6/19, at 10); he wanted to take responsibility for what he did (Id. at 4); they both were getting high in the house (Id.); he already "accepted" his guilt and there was no need to hide it (Id. at 6); he was "the middle man" (Id.); he was willing to take responsibility for four deliveries (Id. at 8); and they were

all "in cohorts" (Id. at 9). He admitted as well that the Confidential Informant (CI) bought heroin from him probably 90 times (Id. at 20). He noted that it was his decision to plead guilty and that he wanted to accept "his part." (Id. at 11, 12).

As for Mr. Welickovitch, Petitioner declined the offer to take more time to discuss the plea offer with him and admitted that Mr. Welickovitch was not forcing him to plead guilty. (Id. at 14).

He did say that he thought Mr. Welickovitch could have fought more for him and that during the suppression hearing he didn't do a background on the CI (Id. at 14-15). He was, however, satisfied with Mr. Welickovitch's representation in the district attorney giving him a deal. (Id. at 16). He specifically admitted that Mr. Welickovitch was not making him plead guilty (Id.). Other than thinking Mr. Welickovitch could have done a better job with the legal issues, he didn't do anything wrong or fail to do anything that was causing him to plead guilty. (Id. at 16-17). As for his guilty plea, he stated, "ain't nobody making me do it." (Id. at 18).

Under CR-2139-2017, Petitioner was charged with numerous persons not to possess charges, which were severed for trial purposes from possession with intent to deliver and possession charges. He proceeded to trial on these charges on October 12, 2018 before Senior Judge Dudley Anderson, Specially Presiding.

On October 11, 2018, the court conducted a pretrial hearing on Petitioner's claim that in 2013, the CI utilized in Petitioner's case committed theft during an undercover buy. Among other things, Petitioner argued that he should be able to raise a *Franks* motion to suppress evidence seized against him pursuant to a warrant that allegedly omitted material

information. Petitioner also wanted additional discovery from the Commonwealth to "potentially add ammunition" to Petitioner's argument. Petitioner was looking for "possible" other acts of "malfeasance."

The Commonwealth argued that the officer who authored the warrant did not withhold any highly relevant facts within her knowledge but even if so, the affidavit of probable cause would have nonetheless provided the requisite probable cause if it was included. According to the Commonwealth, the search warrant was for the location, not the particular Petitioner.

Following the argument, the court denied Petitioner's motion for a *Franks* hearing. The trial commenced and following it, Petitioner was found guilty on all four persons not to possess counts.

On December 11, 2019, the court sentenced Petitioner to an aggregate term of 12 to 24 years' incarceration, consisting of 2 to 4 years' incarceration under 1972-2017 and two consecutive terms of 5 to 10 years' incarceration on two of the persons not to possess counts under 2139-2017.

Petitioner filed a post-sentence motion on December 23, 2019. In the post-sentence motion, Petitioner argued, among other things, that the trial court erred in denying a *Franks* hearing and that a lesser sentence was warranted.

On January 23, 2020, the court held a hearing and argument on Petitioner's post-sentence motion. Consistent with the court's decision on Petitioner's motion to suppress, by Opinion and Order dated January 23, 2020, the court denied Petitioner's post-sentence motion on the *Franks* issue. The court noted that Petitioner did not have a

reasonable expectation of privacy in the residence that entitled him to suppression. Moreover, even assuming arguendo that Petitioner had such an expectation of privacy, if the information had been included, the affidavit of probable cause still would have established probable cause to search the premises.

With respect to Petitioner's sentencing claim, the court in its discretion modified the sentence. The court resentenced Petitioner to concurrent terms of 5 to 10 years on all of the persons not to possess charges. Thus, the aggregate term was lowered to 7 to 14 years' incarceration.

Petitioner did not appeal the court's denial of his post-sentence motion. Instead, he filed a pro se Post Conviction Relief Act (PCRA) petition on November 19, 2020. The court appointed Helen Stolinas, Esquire to represent him, and Ms. Stolinas filed an amended PCRA petition.

The court held evidentiary hearings on July 6, 2021 and July 22, 2021. The issues litigated during the hearings included: (A) whether under 2139-2017 (gun case) trial counsel was ineffective in failing to timely assert the *Franks* motion and in failing to fully develop the record and argument with respect to that motion; and (B) whether under 1972-2017 (drug case), plea counsel was ineffective in failing to develop a defense, failing to communicate and/or meet with Petitioner, and failing to file motions as requested because if counsel had done such, Petitioner allegedly would not have entered a guilty plea. During the hearings, an additional issue was raised and accepted for determination, namely: (C) whether counsel was ineffective under 2139-2017 in not taking an appeal of the court's denial of his post-sentence motion.

At the July 6, 2021 hearing, Matthew Welickovitch testified that he represented Petitioner in both of his cases in his capacity as the First Assistant Public Defender. During this time, he had a heavy caseload and his office was understaffed.

He admitted that he filed the *Franks* motion late on the eve of trial. He did not file the motion earlier because he was not aware of the applicable law and he had recently discovered the details about the CI's conviction in 2013. He admitted that he did not raise a *Franks* issue in his original omnibus pretrial motion.

As for the delivery of controlled substances case, he did meet and communicate with Petitioner but "not as much as he does now." His caseload and the lack of support in the Public Defender's office contributed to such. He described Petitioner as very invested in his case and that Petitioner was constantly requesting that Mr. Welickovitch take actions such as the filing of motions, further discovery requests and DNA testing.

Mr. Welickovitch also testified at the hearing on July 22, 2021. Following Petitioner's sentencing on December 11, 2019, he filed a post-sentence motion on Petitioner's behalf with "the intent to file an appeal." He acknowledged that following the sentencing, Petitioner was advised of his right to file a post-sentence motion as well as his right to file an appeal.

Following the denial of the post-sentence motion but the reconsidering of the sentence and the imposition of the lesser sentence, he recalled meeting with Petitioner in the holding cell at the courthouse.

During this meeting, he could not recall if Petitioner asked him to file an appeal or whether Petitioner would be pursuing a PCRA. He could not recall anything

specifically being discussed about filing an appeal but was sure that if Petitioner had requested him to file an appeal, he would have. His "thinking" was that Petitioner was "happy" with the re-sentence. He did note that following the conversation in the holding cell, Petitioner never contacted him regarding the filing of an appeal.

With respect to requesting a continuance to further investigate the CI issue, he "always knew" that the CI "had a record" but did not "think" that he had pending charges. From what he could recall, the assistant district attorney assigned to the case represented that the CI did not have any "pending charges."

Petitioner testified at both hearings. Significantly, he indicated that he did not want to pursue the PCRA on any issues related to the narcotics charges or case no. 1972-2017. He was "cool" with his deal and considered it "the best" he could get.

He recalled discussing both sets of charges with Matthew Welickovitch prior to taking the "deal" on the drug charges. Mr. Welickovitch specifically told him that if he took the deal that he could not appeal the drug charges but could appeal the gun charges, including the Rule 600 denial and the suppression issue.

Robin Dent, the mother of Petitioner's girlfriend, Isis Dent, testified that she tried to get a hold of Mr. Welickovitch "at least four times" by calling his office and leaving messages regarding an appeal but that he never called back.

After his re-sentencing on January 23, 2020, Petitioner met with Mr. Welickovitch in the holding cell. He told him that he wanted to appeal. He asked Mr. Welickovitch to go to the jail afterwards to specifically discuss the appeal on the gun charges. He recalled "saying on the record" that he wanted to appeal and Mr. Welickovitch

responding that he was already "on it."

With respect to the *Franks* suppression issue, he always wanted Mr. Welickovitch to address it both before and after his trial. He was convinced that there was either misinformation or the deliberate omission of critical information regarding the CI's criminal history and activities. With respect to Petitioner's "connection" to the property that was the subject of the search and in which the guns were found, he described it as a "trap house" where individual drug transactions would take place and people would "get high." He noted that he lived next door in his apartment and never lived in the trap house. He did, however, pull all-nighters at the house and sometimes watched it. He described it as a "den for men" where he and others would "chill," order and eat food, drink, watch TV and play video games.

During Petitioner's sentencing hearing on December 11, 2019, he acknowledged that he was "living next door to the trap house" with Isis Dent and that "they" left a gun for him to "protect the house in case people came [in]." (Transcript, 12/11/19, at 25, 26). During Petitioner's guilty plea on September 6, 2019, he also indicated that while he lived next door, he would stay in the house "sometimes and watch it so nobody [would] come in… and steal stuff", and that it was the house that people went into to "get high." (Transcript, 9/6/19, at 19, 22).

To be eligible for relief under the PCRA, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the seven, specifically enumerated circumstances listed in the PCRA. *Commonwealth v. Hawkins,* 2020 PA Super 280, 2020 WL 7251072, *4 (December 10, 2020); 42 Pa. C.S.A.

§9543(a)(2).

One of these statutorily enumerated circumstances is the "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." *Hawkins*, *id.;* 42 Pa. C.S.A. § 9543(a)(2)(ii).

Counsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on the petitioner. *Commonwealth v. Rivera,* 10 A.3d 1276, 1279 (Pa. Super. 2010). In order to prevail on a claim of ineffectiveness, a petitioner must plead and prove by a preponderance of the evidence that: (1) the claim has arguable merit; (2) counsel lacked any reasonable basis for the action or inaction; and (3) the petitioner suffered prejudice as a result. *Commonwealth v. Diaz,* 226 A.3d 995, 1007 (Pa. 2020); *Commonwealth v. Miller,* 231 A.3d 981, 991 (Pa. Super. 2020).

A failure to establish any one of the prongs warrants a denial of the ineffectiveness claim. *Commonwealth v. Harper,* 230 A.3d 1231, 1236 (Pa. Super. 2020), citing *Commonwealth v. Becker,* 192 A.3d 106, 113 (Pa. Super. 2018), *appeal denied*, 200 A.3d 11 (Pa. 2019). The court need not analyze the elements of an ineffectiveness claim in any particular order; if a claim fails under any prong of the ineffectiveness test, the court may proceed to that element first. *Commonwealth v. Supulveda,* 55 A.3d 1108, 1117-18 (Pa. 2012). Counsel's assistance is deemed constitutionally effective once the court determines that the Petitioner has not established any one of the prongs of the ineffectiveness test. *Commonwealth v. Rolan*, 964 A.2d 398, 406 (Pa. Super. 2008).

Petitioner's claim regarding the alleged ineffectiveness of counsel to pursue

the *Franks* motion fails to have arguable merit. A claim has arguable merit where the factual averments if accurate, could establish cause for relief. *Commonwealth v. Stewart,* 84 A.3d 701, 706-707 (Pa. Super. 2013) (en banc). Whether the facts rise to the level of arguable merit is a legal determination. *Commonwealth v. Saranchak,* 866 A.2d 292, 304 n. 14 (Pa. 2005).

A defendant may challenge the validity of a warrant based on false statements and omissions in the affidavit. *Franks v. Delaware,* 438 U.S. 154 (1978). The suppression court must conduct a *Franks* hearing "where the defendant makes a preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement in an affidavit." *Id*. at 155-156; *Commonwealth v. James,* 69 A.3d 180, 188 (Pa. 2013). The burden is on the defendant to provide allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. *Franks,* 438 U.S. at 171. If the defendant meets this burden, then the affidavit's false material is disregarded; however, the search warrant will only be voided, and the fruits thereof excluded, if the remaining content is not sufficient to establish probable cause. *James,* 69 A.3d at 188.

With respect to omissions, a defendant has the right to challenge omissions in the affidavit of probable cause. *James,* 69 A.3d at 189. Challenges of this nature must be resolved with evidence beyond the affidavit's four corners. *Id.* The task of the court is to determine whether the omitted facts need to be included in determining probable cause. *Id.*

Where omissions are the basis for a challenge to an affidavit of probable cause, the following test is applied: "(1) whether the officer withheld a highly relevant fact

within his knowledge, or any reasonable person would have known that this was the kind of thing the judge would wish to know; and (2) whether the affidavit would have provided probable cause if it would have contained a disclosure of the omitted information." *Commonwealth v. Taylor,* 850 A.2d 684, 689 (Pa. Super. 2004).

However, in connection with a motion to suppress, in order for an individual to invoke the protections of the constitutions, the defendant bears the burden of demonstrating that he personally had an expectation of privacy in the area searched, and that this expectation is reasonable, i.e., one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

An expectation of privacy will be found to exist when the individual exhibits an actual or subject of expectation of privacy, and that expectation is one that society is prepared to recognize as reasonable. *Commonwealth v. Viall,* 890 A.2d 419, 422 (Pa. Super. 2005).

Petitioner has failed to meet this burden and cannot meet this burden. First, the record is devoid of any evidence whatsoever as to Petitioner's actual or subjective expectation of privacy in the trap house.

Secondly, the court cannot conclude on the record, that Petitioner's expectation of privacy, if any, is one that society is prepared to recognize as reasonable.

As the court noted in its prior Orders, Petitioner did not have a reasonable expectation of privacy in the residence that entitled him to suppression. Petitioner was not residing at the property; he resided next door. He went to the property to conduct drug

transactions and to hang out and watch the property if need be. There was no testimony whatsoever that Petitioner owned or leased the property; in fact, the testimony was to the contrary. Instead, the "trap house" was a structure that Petitioner and others were utilizing to conduct drug transactions and to use controlled substances. Petitioner did not have a reasonable expectation of privacy in these premises; therefore, he was not entitled to the remedy of suppression. See *Commonwealth v. Peterson*, 636 A.2d 615 (Pa. 1993)(appellant did not have a reasonable expectation of privacy in abandoned storefront being utilized as a gate house); *Commonwealth v. Cameron*, 561 A.2d 783 (Pa. Super. 1989), *appeal denied*, 575 A.2d 108 (Pa. 1989)(despite presence of a tv, couch and a platter of food, appellant did not have a legitimate expectation of privacy in abandoned house that was not his residence). Accordingly, Petitioner's *Franks* claim based on alleged ineffectiveness of counsel fails to have merit.

On the other hand, the court finds as credible Petitioner's testimony that he requested his counsel to file an appeal both following his sentencing and re-sentencing. Petitioner's claims are consistent with Petitioner's position throughout where he was willing to accept the plea agreement in connection with the drug case but always wanted to preserve and attack the denial of his Rule 600 motion and the search of the trap house.

Mr. Welickovitch could not specifically recall whether Petitioner asked him to take an appeal. His belief was that Petitioner was satisfied with the disposition but he was not sure. He believed that if asked, he would have filed an appeal but again could not recall.

A defendant has an absolute right to appeal and counsel is ineffective if a defendant requests an appeal and counsel fails to do so. Pa. Const. Art. V, §9;

Commonwealth v. Lantzy, 736 A.3d 564, 572 (Pa. 1999); *Commonwealth v. McGarry*, 172 A.3d 60, 71 (Pa. Super. 2017). It is not at all relevant whether Petitioner's appeal would have been successful. Accordingly, Petitioner's claim has merit, there was no reasonable basis for not filing the appeal, and prejudice is presumed. *Lantzy*, supra.

ORDER

AND NOW, this ___ day of September 2021, under CR-1972-2017 (narcotics case), Petitioner's PCRA claim is WITHDRAWN.

Under CR-2139-2017, Petitioner's PCRA claim with respect to the failure of counsel to file an appeal is GRANTED. In all other respects, Petitioner's PCRA is denied.

As Helen Stolinas' conflicts contract with Lycoming County has expired, the court permits her to withdraw as counsel for Petitioner at this time. The court thanks Ms. Stolinas for agreeing to complete the PCRA hearings in this matter at a reduced hourly rate.

The court appoints Trisha Jasper as counsel for Petitioner with respect to his appeal. Ms. Jasper's contact information is listed below. Within 30 days of the date of this Order, she shall file a notice of appeal nunc pro tunc.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Helen Stolinas, Esquire
2790 W. College Ave, Suite 800
State College PA 16801
Trisha Jasper, Esquire
325 Market Street,

Williamsport PA 17701
(570)-980-9948
Kasan Sanders, #QB1402 (certified mail)
SCI Benner Township
301 Institution Drive
Bellefonte PA 16823
Gary Weber, Esquire
Judge Marc F. Lovecchio