NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JERMAINE RAWLINGS,	:	No. 1916 EDA 2015
Appellant	:	

Appeal from the PCRA Order, May 21, 2015,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0000731-2011

BEFORE: BOWES, J., DUBOW, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED APRIL 20, 2017**

Jermaine Rawlings appeals from the order of May 21, 2015, dismissing his PCRA[1] petition. Appellant alleges that direct appeal counsel was ineffective for failing to preserve his discretionary aspects of sentencing claim for appellate review. We affirm.

The underlying facts, which are not germane to the instant appeal, were set forth by this court in a prior memorandum disposing of appellant's direct appeal. ***Commonwealth v. Rawlings***, 64 A.3d 279, 2013 WL 11299461 at *1-2 (Pa.Super. Jan. 16, 2013) (unpublished memorandum). On October 19, 2011, following a jury trial, appellant was found guilty of robbery, conspiracy to commit robbery, theft by unlawful taking, receiving

[1] Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

stolen property, and possession of an instrument of crime ("PIC").[2] The charges related to the September 2, 2010 robbery of the victim, Manoj Vyas. On December 2, 2011, appellant was sentenced to consecutive terms of four to ten years' incarceration for robbery and two to five years' incarceration for PIC, followed by ten years' probation for conspiracy. The sentences for the remaining offenses merged into that imposed for robbery. Appellant filed a timely direct appeal, and this court affirmed the judgment of sentence. Significant to the instant appeal, this court found appellant's discretionary sentencing issue waived for failure to include the requisite Pa.R.A.P. 2119(f) statement in his brief. ***Id.*** at *5. Appellant did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On May 20, 2013, appellant filed a timely ***pro se*** PCRA petition, alleging, ***inter alia***, ineffectiveness of appellate counsel for failing to include the Rule 2119(f) statement in his brief. PCRA counsel was appointed and filed an amended petition on appellant's behalf. On March 26, 2015, the PCRA court issued a 20-day notice pursuant to Pa.R.Crim.P. 907 of its intention to dismiss the petition as meritless without further proceedings. Having received no response, appellant's petition was formally dismissed on May 21, 2015. A timely notice of appeal was filed on June 19, 2015.

[2] 18 Pa.C.S.A. §§ 3701(a)(1)(ii), 903, 3921(a), 3925(a), & 907(a), respectively.

Appellant complied with Pa.R.A.P. 1925(b), and the PCRA court filed a Rule 1925(a) opinion on October 1, 2015.

Appellant has raised the following issue for this court's review: "Did the Lower Court err in failing to grant PCRA relief where defense counsel on direct appeal failed to file the required 2119(f) statement in the brief?" (Appellant's brief at 9.)

Initially, we recite our standard of review:

> This Court's standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Halley***, 582 Pa. 164, 870 A.2d 795, 799 n. 2 (2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa.Super. 2001).

Commonwealth v. Turetsky, 925 A.2d 876, 879 (Pa.Super. 2007), ***appeal denied***, 940 A.2d 365 (Pa. 2007).

> [T]he right to an evidentiary hearing on a post-conviction petition is not absolute. ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa.Super. 2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. ***Id.*** It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing. ***Commonwealth v. Hardcastle***, 549 Pa. 450, 454, 701 A.2d 541, 542-543 (1997).

Id. at 882, quoting ***Commonwealth v. Khalifah***, 852 A.2d 1238, 1239-1240 (Pa.Super. 2004).

> "To prevail on a claim alleging counsel's ineffectiveness, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness." ***Commonwealth v. Wallace***, 555 Pa. 397, 407, 724 A.2d 916, 921 (1999), citing ***Commonwealth v. Howard***, 538 Pa. 86, 93, 645 A.2d 1300, 1304 (1994) (other citation omitted). In order to meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a "'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Commonwealth v. Kimball***, 555 Pa. 299, 308, 724 A.2d 326, 331 (1999), quoting ***Strickland v. Washington***, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A "'[r]easonable probability' is defined as 'a probability sufficient to undermine confidence in the outcome.'" ***Id.*** at 309, 724 A.2d at 331, quoting ***Strickland***, 466 U.S. at 694, 104 S.Ct. 2052.

Commonwealth v. Jones, 811 A.2d 1057, 1060 (Pa.Super. 2002), ***appeal denied***, 832 A.2d 435 (Pa. 2003). "In addition, where an appellant has not met the prejudice prong of the ineffectiveness standard, the claim may be dismissed on that basis alone." ***Commonwealth v. Harris***, 852 A.2d 1168, 1173 (Pa. 2004) (citations omitted).

We have held that a claim regarding the discretionary aspects of a sentence raised in the context of an ineffectiveness claim is cognizable under the PCRA. ***Commonwealth v. Whitmore***, 860 A.2d 1032, 1036 (Pa.Super.

2004), ***reversed in part on other grounds***, 912 A.2d 827 (Pa. 2006) ("a claim that counsel was ineffective for failing to perfect a challenge to the discretionary aspects of sentencing is cognizable under the PCRA" (citations omitted)); ***Commonwealth v. Watson***, 835 A.2d 786, 801 (Pa.Super. 2003) ("a claim regarding the discretionary aspects of [the defendant's] sentence, raised in the context of an ineffectiveness claim, would be cognizable under the PCRA"), discussing ***Commonwealth ex rel. Dadario v. Goldberg***, 773 A.2d 126 (Pa. 2001) (footnote omitted).

Appellant has satisfied the first two prongs of the ineffectiveness test. Presumably, the underlying issue had arguable merit or counsel would not have raised it on appeal. In addition, counsel could not have had a reasonable basis for failing to include a Rule 2119(f) statement in the brief, thereby waiving the issue for appellate review. However, appellant would still be required to show that there is a "substantial question" as to the appropriateness of the sentence for our review on appeal. ***See Whitmore***, 860 A.2d at 1036. We determine that no substantial question exists, and therefore, appellant was not prejudiced by counsel's error.

> To demonstrate that a substantial question exists, "a party must articulate reasons why a particular sentence raises doubts that the trial court did not properly consider [the] general guidelines provided by the legislature." ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617, 622 (2002), quoting, ***Commonwealth v. Koehler***, 558 Pa. 334, 737 A.2d 225, 244 (1999). In ***Mouzon***, our Supreme Court held that allegations of an excessive sentence raise a substantial question where the defendant alleges

> that the sentence "violates the requirements and goals of the Code and of the application of the guidelines . . . ." ***Id.*** at 627. A bald allegation of excessiveness will not suffice. ***Id.***

Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa.Super. 2005), ***appeal denied***, 897 A.2d 451 (Pa. 2006).

Most of appellant's argument is simply a regurgitation of decisional law and various sentencing statutes. (Appellant's brief at 12-18.) There are literally two sentences in the argument section of appellant's brief that could be construed as pertinent: "Specifically [appellant] alleged that the aggravated sentence of [4] to [10] years on the robbery charge and the consecutive nature of the conspiracy sentence was unfounded and excessive when [appellant] had been making a conscious effort to be a contributing member of society."; and "[w]hile the court in this case did consider some factors which were proper for its consideration, it cannot be determined the degree to which the court relied upon proper factors as opposed to impermissible factors[[3]] in its extreme deviation from the recommendations of the guidelines." (***Id.*** at 14, 17.)

Appellant's characterization of his 4 to 10-year sentence for robbery as an aggravated range sentence and an "extreme deviation" from the guidelines is simply not supported by the record. In fact, appellant's sentence for robbery fell at the top end of the standard range of the

[3] Nowhere in appellant's brief does he describe what "impermissible factors" the trial court relied upon.

sentencing guidelines. The record reflects that appellant was convicted of robbery as a felony of the first degree with an offense gravity score ("OGS") of 10. (Notes of testimony, 2/2/11 at 3, 6.) Appellant had a prior record score ("PRS") of 2. (***Id.***) The sentencing guidelines provided for a standard range of 36 to 48 months, plus or minus 12. (***Id.*** at 3.) 204 Pa.Code § 303.16(a). The trial court rejected application of the deadly weapon enhancement; therefore, appellant's sentence of 4 to 10 years' imprisonment for robbery was within the standard range of the guidelines. (***Id.*** at 14.) Appellant mischaracterizes the record.

Appellant's 2 to 5-year sentence for PIC does appear to exceed the aggravated range of the sentencing guidelines. Appellant was convicted of PIC under 18 Pa.C.S.A. § 907(a) which is a first-degree misdemeanor. With an OGS of 3 and appellant's PRS of 2, the guidelines provide for a standard range of RS (restorative sanctions) to 9 months, plus or minus 3. 204 Pa.Code §§ 303.15, 303.16(a). Therefore, appellant's sentence of 2 to 5 years, while legal, was well beyond the aggravated range. However, appellant does not raise this issue, nor does he set forth in his brief where his sentence for PIC fell within the applicable guidelines ranges. ***See Commonwealth v. Hartle***, 894 A.2d 800, 805 (Pa.Super. 2006) (an appellant who seeks to challenge the discretionary aspects of his sentence must specify where the sentence falls in relation to the sentencing guidelines

and what particular provision of the Sentencing Code has been violated (citation omitted)). As such, we consider that matter waived.

To the extent appellant complains about the consecutive nature of his sentences, he does not raise a substantial question for our review either. "In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." ***Commonwealth v. Perry***, 883 A.2d 599, 603 (Pa.Super. 2005) (citations omitted).

> Long standing precedent of this Court recognizes that 42 Pa.C.S.A. section 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. ***Commonwealth v. Graham***, 541 Pa. 173, 184, 661 A.2d 1367, 1373 (1995). . . . Any challenge to the exercise of this discretion ordinarily does not raise a substantial question. ***Commonwealth v. Johnson***, 873 A.2d 704, 709 n.2 (Pa.Super. 2005); ***see also Commonwealth v. Hoag***, 445 Pa.Super. 455, 665 A.2d 1212, 1214 (Pa.Super. 1995) (explaining that a defendant is not entitled to a "volume discount" for his or her crimes).

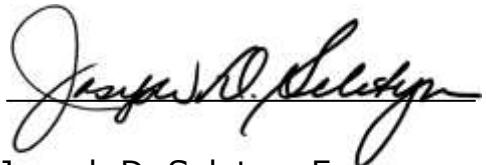
Commonwealth v. Mastromarino, 2 A.3d 581, 586-587 (Pa.Super. 2010), ***appeal denied***, 14 A.3d 825 (Pa. 2011), quoting ***Commonwealth v. Gonzalez-Dejusus***, 994 A.2d 595, 599 (Pa.Super. 2010). "[T]he key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears

upon its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Id.*** at 587, quoting ***Gonzalez-Dejusus***, ***supra***.

Here, appellant does not raise a substantial question for our review. The aggregate sentence of 6 to 15 years' imprisonment is neither grossly disparate to appellant's conduct nor does it "viscerally appear as patently 'unreasonable.'" ***Id.*** at 589, quoting ***Gonzalez-Dejusus***, ***supra***. Furthermore, the trial court set forth its reasons, on the record, for imposing the sentence, including appellant's refusal to accept responsibility for his criminal behavior and his high risk of recidivism. (Notes of testimony, 2/2/11 at 10-12; PCRA court opinion, 10/1/15 at 8.) Since the underlying claim does not raise a substantial question, appellant cannot demonstrate prejudice where the discretionary sentencing claim was unlikely to succeed. The PCRA court did not err in dismissing appellant's petition without a hearing.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/20/2017