

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

WILLIAM JOHN TIERNO

Appellant

No. 1462 MDA 2012

Appeal from the Order Entered August 3, 2012
In the Court of Common Pleas of Schuylkill County
Criminal Division at No(s): CP-54-CR-0000866-2009
CP-54-CR-0001290-2009

BEFORE: SHOGAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.:

FILED MAY 24, 2013

Appellant, William John Tierno, appeals from the August 3, 2012 order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546.¹ After careful review, we affirm.

The PCRA court summarized the relevant facts and testimony presented at the March 29, 2012 PCRA hearing as follows.

[Appellant] has an extensive criminal history of approximately 13 different cases, beginning with a burglary of an occupied building in 1980 in

* Retired Senior Judge assigned to the Superior Court.

¹ We note that Appellant filed multiple amended and supplemental PCRA petitions, which the PCRA court dismissed by way of its August 3, 2012 order.

Philadelphia. On August 30, 2010, [Appellant] pled guilty and was sentenced in two separate new incidents, namely, No. 866-09, which involved charges of felony conspiracy and robbery, felony robbery and a misdemeanor theft by unlawful taking and receiving stolen property; and No. 1290-09, which involved charges of felony conspiracy and robbery and a misdemeanor for theft by unlawful taking and terroristic threats. In No. 866-09, [Appellant] was represented by the Public Defender's office, Attorney Tim Pellish ("Pellish"), and in No. 1290-09, he was represented by private counsel, Attorney James Conville ("Conville"), who was appointed by [the trial court's] President Judge due to a possible conflict of interest in that case with the public defender's office also representing hi[s] co-defendant. The guilty plea paperwork indicates [Appellant] faced a mandatory sentence of 25 years to life, pursuant to 42 Pa.C.S.[A.] § 9714, because it was his third felony or third "strike". The plea bargain reached caused [Appellant] to be sentenced [on August 30, 2010] to a total sentence of 12 to 24 years['] incarceration at a state correctional facility, after the Commonwealth reduced the grading of the felonies charged from a level 1 to a level 3 as part of a plea bargain on the two cases.

[Appellant] filed a timely post-sentence motion and then appealed its denial to the Pennsylvania Superior Court, which dismissed his appeal for failure to file a brief on December 29, 2011.

On February 5, 2012, [Appellant] filed a timely PCRA petition¹ in which he asserts that his two attorneys were ineffective because both misinformed him of the maximum sentence that could be imposed if he went to trial, as did the Commonwealth, which contributed to his decision to plead guilty. He also states that he was given improper instructions by a government official about his right to an appeal. [Appellant] requested to proceed *pro se*. [Appellant] seeks to be allowed to withdraw his guilty plea and proceed to trial. [The PCRA court] appointed the

Public Defender's office to represent [Appellant] by Order dated February 16, 2012.

On March 1, 2012, [Appellant] requested that the upcoming hearing be held by way of video conference. [The PCRA court] granted this request on March 7, 2012.

On March 8, 2012, [Appellant], acting *pro se*, filed an amended PCRA petition including a citation to 42 Pa.C.S.[A.] § 9714(a)(2) in his claim of ineffective assistance of counsel. [Appellant] again requested a hearing, although one was already scheduled.

[The PCRA court] held a hearing on March 29, 2012. At that hearing, [Appellant] was represented by Attorney Michael Stine of the Public Defender's office. At the very beginning of the hearing, [the PCRA court] agreed to consider the amended PCRA petition even though it was filed *pro se*, and requested that [Appellant] file all further papers through his counsel, to which [Appellant] agreed. [Appellant] explained to the [PCRA c]ourt that he only filed the paper himself because he did not know that he had been appointed counsel at that point.

During the entire hearing, Attorney Stine represented [Appellant] with no objection by [Appellant]. Both Attorneys Conville and Pellish were called and examined by Attorney Stine on behalf of [Appellant]. Both Conville and Pellish testified that they told [Appellant] that if he was convicted of the charges, he would face 25 years to life imprisonment. Both explained to him that this was the mandatory sentence for a third violent crime. At the time of their conversation, [Appellant] disagreed and told Conville that was not correct. [Appellant] believed that one burglary in Philadelphia involved a home which was unoccupied. Conville then saw documentation from the District Attorney substantiating that the Philadelphia burglary occurred in an occupied home. It was after the District Attorney produced paperwork substantiating

the fact that the prior burglary was in an occupied home, that [Appellant] decided to accept the plea offer. Conville testified that the District Attorney also made it very clear that they intended to seek a 25 years to life sentence. Conville also documented the same in a written letter to [Appellant] dated November 16, 2009. Conville stated that the District Attorney offered a 6 to 12 year sentence on his case, which combined with the other case, resulted in an offer of 12 to 24 years, and also reduced the felony from an F1 to an F3 which greatly reduced the standard sentencing guideline range.

On cross-examination, Conville stated that the reduced sentence was not the only reason [Appellant] pled guilty. The Commonwealth had an extremely strong case against [Appellant] which included both written and verbal confessions to the crimes by [Appellant].

After Conville finished testifying, [Appellant] asked for and received a private conference with Attorney Stine.

Attorney Pellish's testimony confirmed that in No. 866-09, [Appellant] had the same question about whether the third strike rule was going to come into play. Pellish reviewed the paperwork the District Attorney had obtained on the earlier burglary, which confirmed that a person was present in the home burglarized by [Appellant]. Pellish relayed this information to [Appellant] and reviewed the sentencing guidelines with him, telling him of the possibility that if he was convicted, he may face a mandatory 25 years to life sentence, which Pellish believed would be the case. Pellish believed that [Appellant] never accepted that he was subject to the third strike rule, and planned to challenge the sentence if he was convicted. Most of their conversations, in fact, centered on whether or not the third strike applied, as opposed to [Appellant]'s guilt or innocence. In this case, in addition to written and verbal confessions given by [Appellant], a victim was able to identify [Appellant].

At the end of Pellish's testimony, [Appellant] again asked for a private conference with Stine, after which Stine asked Pellish a few more questions about the confessions by [Appellant] and [Appellant]'s unsuccessful pre-trial suppression motion, and whether the confessions could still be challenged during a trial. Stine also asked about the strength of the victim's identification of [Appellant].

Stine then called [Appellant] to testify. [Appellant] stated that he disagreed with Conville that he was subject to a mandatory 25 years to life sentence. [Appellant] testified that after a joint visit with both attorneys, he rejected the District Attorney's plea offer and told them to file a suppression motion, which they did. When the motion was denied, they again visited him and advised him of the prior burglary and proof that a person was present in the home, and advised him to take the plea bargain because he was facing a third strike sentencing. [Appellant] testified that he believed both Conville and Pellish when they said they had seen this paperwork on the prior burglary. [Appellant] stated that he became scared that he was going to spend the rest of his life in jail, because they both advised him of that, but that neither attorney threatened him to take the deal. [Appellant] therefore accepted the District Attorney's offer and pled guilty. [Appellant] disputed that either attorney ever told him that the voluntariness of his confessions could be challenged at trial. [Appellant] also disputed that he was ever told that the testimony of a co-defendant could be challenged as well. Finally, [Appellant] emphasized that he had never personally seen the documentation provided by the District Attorney regarding the prior burglary.

¹ [The PCRA court is] treating this as the original PCRA petition. [Appellant] calls it an amended PCRA petition because [Appellant] believes he first filed a PCRA petition in his direct appeal. [The trial court] treated that so-called PCRA petition as a petition to reinstate his appeal *nunc pro tunc*.

PCRA Court Opinion, 8/3/12, at 1-6 (footnote in original).

On June 14, 2012, the PCRA court held a second evidentiary hearing during which the Commonwealth introduced certified records of Appellant's prior burglary convictions, indicating that individuals were present in the homes at the time of each crime. **See** N.T., 6/14/12, at 3, 5, 11. During this hearing, Appellant indicated via videoconference that he wished to represent himself. **Id.** at 6. On June 21, 2012, while still represented by Attorney Stine, Appellant filed a *pro se* "Motion for Leave to File Supplemental Amended PCRA Petition." That same day, Appellant filed a 17-page handwritten *pro se* "Supplemental Amended PCRA Petition," again requesting that he be permitted to proceed *pro se*. Thereafter, on July 23, 2012, Appellant filed a *pro se* "Third Request to Waive Counsel and Proceed *Pro Se*." On July 27, 2012, Appellant filed a *pro se* "PCRA Petition/With Amended PCRA Petition."

As noted, the PCRA court entered an order dismissing Appellant's initial PCRA petition, as well as his amended and supplemental petitions, on August 3, 2012. **See** PCRA Court Order, 8/3/12, at 1-2, ¶ 1. A subsequent motion to withdraw filed by Attorney Stine was also granted by the PCRA court on August 3, 2012. On August 13, 2012, Appellant filed a timely *pro*

se notice of appeal.² Thereafter, Appellant retained private counsel, Jerome M. Brown, Esquire (Attorney Brown), who entered his appearance on September 25, 2012.³

On appeal, Appellant raises the following issues for our review.

1. Did the [PCRA c]ourt err in finding that Appellant's trial [c]ounsel were not ineffective when the [PCRA c]ourt's decision was based

² Although not ordered to do so by the PCRA court, Appellant filed a *pro se* statement of errors complained of on appeal, in accordance with Pa.R.A.P. 1925(b), on August 28, 2012. The PCRA court, in turn, adopted the opinion it drafted in support of its August 3, 2012 order as its Rule 1925(a) opinion.

³ Although it is evident from the certified record that Appellant requested to proceed *pro se* multiple times through the PCRA proceedings below, the PCRA court failed to properly conduct a hearing in accordance with ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998), prior to granting Attorney Stine's request to withdraw. In ***Commonwealth v. Robinson***, 970 A.2d 455 (Pa. Super. 2009) (*en banc*), this Court held that "in any case where a defendant seeks self-representation in a PCRA proceeding and where counsel has not properly withdrawn, a [***Grazier***] hearing must be held." ***Id.*** at 456. More specifically, "a colloquy [under Pa.R.Crim.P. 121(A)] must be held by the PCRA court of its own accord ... once the defendant has expressed a desire to proceed *pro se* as long as PCRA counsel has not properly withdrawn by complying with the dictates of ***Turner/Finley***." ***Id.*** at 460. Nonetheless, in light of the fact that permission for Appellant to proceed *pro se* was not granted by the PCRA court until August 3, 2012, the very same day his counseled PCRA petition, as well as his amended and supplemental petitions, were dismissed, **and** in careful consideration of the fact that Appellant is currently represented by privately retained counsel, Attorney Brown, on appeal, we do not find this procedural defect fatal to our appellate review. Thus, we decline to vacate the PCRA court's August 3, 2012 order and remand this case for what, in this Court's estimation, would constitute a superfluous hearing. In reaching this decision, we note that we may raise the issue of a ***Grazier*** hearing and Rule 121 colloquy *sua sponte*. ***Commonwealth v. Stossel***, 17 A.3d 1286, 1290 (Pa. Super. 2011).

upon the fact that they provided appropriate advice as to whether Appellant was a third-strike offender when it is clear from the case law that he was only a second-strike offender?

2. Did the [PCRA c]ourt err in not permitting Appellant to present his claim that the Commonwealth had presented perjured testimony during the hearing on the motion to suppress his statements when Appellant asserted in his PCRA Motion that the statement had been unlawfully induced by a promise of concurrent sentencing and there was evidence that such a promise had been made?

Appellant's Brief at 2.

"Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." **Id.** In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). "However, this

Court applies a *de novo* standard of review to the PCRA court's legal conclusions." **Id.**

Appellant first argues that his trial counsel "were ineffective for advising [him] that [he] was a third-strike offender." Appellant's Brief at 9. Appellant avers that "[i]f he was not facing time as a third strike offender, then the total sentence could have been 10-20 years on both cases[,] and the plea was not knowing, intelligent or voluntary, and [he] should have been permitted to withdraw his plea due to the improper advice of [c]ounsel." **Id.** For the following reasons, we disagree.

To prevail on a claim of ineffective assistance of counsel under the PCRA, a petitioner must plead and prove by a preponderance of the evidence that counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii). A petitioner must establish "(1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission." **Koehler, supra** at 132, citing **Commonwealth v. Pierce**, 527 A.2d 973, 975 (Pa. 1987). "Counsel is presumed to be effective and Appellant has the burden of proving otherwise." **Commonwealth v. Rivers**, 786 A.2d 923, 927 (Pa. 2001) (citations omitted). Furthermore, "[i]f an appellant fails to prove by a preponderance of the evidence any of the ... prongs, the Court need not address the remaining prongs of the test."

Commonwealth v. Fitzgerald, 979 A.2d 908, 911 (Pa. Super. 2009), *appeal denied*, 990 A.2d 727 (Pa. 2010).

In the instant matter, the PCRA court authored a comprehensive opinion that thoroughly analyzed Appellant's ineffectiveness claim and concluded it was devoid of merit. Specifically, the PCRA court stated as follows.

We find the testimony of Attorneys Conville and Pellish to be credible, in that they both correctly told [Appellant] that he was going to be subject to a three strike mandatory sentence if he was convicted of these charges. [Appellant] had the benefit of two separate attorneys advising him, one from the public defender's office and one a private counsel appointed by [the PCRA c]ourt to avoid a potential conflict of interest with a co-defendant in No. 1290-09. Both told [Appellant] the same thing as far as his exposure to the mandatory sentencing. Both accomplished a reduction in the charges through the plea negotiation process which significantly reduced his actual sentence.

PCRA Court Opinion, 8/3/12, at 10.

Upon careful review of the record, including the parties' respective briefs and the applicable law, and in light of this Court's scope and standard of review, we agree with the PCRA court's determination. This Court has long recognized that "counsel cannot be considered ineffective for failing to raise a claim that is without merit." ***Rivers, supra***. Instantly, Appellant's trial counsel advised him that he was subject to a mandatory term of 25 years' imprisonment if convicted of a "third-strike," pursuant to 42 Pa.C.S.A. § 9714(a)(2). Section 9714(a)(2) provides, in relevant part, as follows.

Where the person had at the time of the commission of the current offense previously been convicted of two or more such crimes of violence arising from separate criminal transactions, the person shall be sentenced to a minimum sentence of at least 25 years of total confinement

42 Pa.C.S.A. § 9714(a)(2). This statute further notes that the burglary of a structure “adapted for overnight accommodations in which at the time of the offense any person is present[,]” qualifies as a “crime of violence.” **See id.** § 9714(g); 18 Pa.C.S.A. § 3502(a)(1).

Contrary to Appellant’s assertion, the law of this Commonwealth does not mandate that a defendant be sentenced to the mandatory term on a second-strike before being sentenced as a third-strike offender, but rather, simply requires that said defendant be convicted of the necessary underlying “crimes of violence” to trigger the application of section 9714(a)(2). **See Commonwealth v. Ford**, 947 A.2d 1251, 1253-1255 (Pa. Super. 2008), *appeal denied*, 959 A.2d 319 (Pa. 2008). Herein, the record contradicts Appellant’s assertion that the requirements for a third-strike offender were not established. Specifically, the record reflects that the Commonwealth demonstrated that Appellant had the necessary underlying violent convictions to trigger application of section 9714(a)(2), by introducing certified records of his prior burglary convictions, indicating that individuals were present in the home at the time of each crime. **See** N.T., 6/14/12, at 3, 5, 11.

As such, we conclude that trial counsels' advice to Appellant to accept a plea deal was competent, and thus, his guilty plea was knowing, voluntary and intelligently entered. As the PCRA court further noted in its opinion,

[d]uring [Appellant's] guilty plea, [Appellant] received a lengthy colloquy from [the trial c]ourt, including extensive dialogue with [the trial] court and his two attorneys, Conville and Pellish. We made the finding at that time that [Appellant's] guilty plea was made knowingly, understandingly and intelligently. [Appellant] knew precisely what he was doing and what he was pleading to,³ and his very experienced trial counsel, who are known to this writer to be experienced and faithful to their obligations, concluded and opined that [Appellant] was wrong in his assertion that he did not know the import of his actions in court at the time of his plea.

³ [Appellant's] understanding surrounding his potential sentence if convicted and his sentence according to his plea bargain must be considered in light of his decades of experience with the criminal justice system, which began at least 32 years ago in Philadelphia.

PCRA Court Opinion, 8/3/12, at 10-11 (footnote in original). Based on the foregoing, Appellant is not entitled to relief on his ineffectiveness claim.

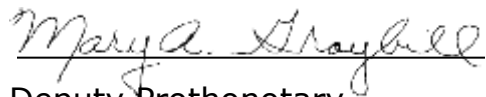
Appellant next argues that the PCRA court erred in preventing him from "present[ing] evidence that the police testified falsely during [his June 22, 2010] suppression hearing." Appellant's Brief at 14. Appellant contends "[t]his evidence should have been permitted to demonstrate that the police testified in error ... when they testified that there were no deals for [Appellant] to testify in this case." *Id.* We note that Appellant could have

raised this evidentiary challenge on direct appeal, but failed to do so; thus, it is not cognizable under the PCRA. **See Commonwealth v. Bond**, 819 A.2d 33, 39 (Pa. 2002) (issues are waived under PCRA if appellant could have presented them on direct appeal but failed to do so); 42 Pa.C.S. § 9544(b) (stating, “an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding[]”).

Based on the foregoing discussion, we discern no error on the part of the PCRA court in dismissing Appellant’s PCRA petition. Accordingly, we affirm the August 3, 2012 order of the PCRA court.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/24/2013