

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

RUSSELL ROBERT SPENCE, JR.,

Appellant

No. 1669 WDA 2013

Appeal from the PCRA Order Entered September 20, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015696-1997

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and OTT, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED JULY 29, 2014

Appellant, Russell Robert Spence, Jr., appeals from the trial court's September 20, 2013 order denying his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Because we conclude that Appellant waived all of the issues he presents herein, we affirm.

The PCRA court set forth the facts and procedural history of this case as follows:

The criminal information charged [Appellant] with ten (10) counts of Manufacture, Distribution or Possession of Devices for Theft of Telecommunication Services, in violation of 18 Pa.C.S. §[]910, and two counts of Sales of Firearms, in violation of 18 Pa.C.S. § []6111. The Commonwealth filed a Motion to Amend the Information to include another twelve (12) counts of manufacture, distribution or possession of devices for theft of communication services, which was granted by this Court.

On December 9, 1999, [Appellant] pled guilty before this Court [to all counts with which he was charged]. On March 22, 2000, this Court sentenced [Appellant] to consecutive terms of

one (1) to seven (7) years for each count of Sales of Firearms. Additionally, this Court imposed consecutive terms of two year periods of probation for each count one (1) through (10), and counts thirteen (13) to twenty-four (24) [of Manufacture, Distribution or Possession of Devices for Theft of Telecommunication Services], for an aggregate sentence of two (2) to fourteen (14) years of incarceration followed by forty-four (44) years of probation.

[Appellant] filed a Motion to Withdraw Guilty Plea and a Motion for Modification of Sentence on April 3, 2000, which this Court denied after a hearing. On July 12, 2000, [Appellant] filed a motion for Reconsideration of Sentence *Nunc Pro Tunc*, which this Court treated as a first PCRA Petition, and appointed new counsel to represent [Appellant]. This Court reinstated [Appellant's] appellate rights on September 25, 2000. [Appellant] filed a timely appeal to the Pennsylvania Superior Court on October 24, 2000.

On February 20, 2002, the Pennsylvania Superior Court affirmed [Appellant's] judgment of sentence, but remanded the case for an evidentiary hearing on the issue of whether sentencing counsel was ineffective in failing to challenge the applicability of 18 Pa.C.S. §[6]111(g)(2), and whether counsel's inaction caused [Appellant] actual prejudice. [**See Commonwealth v. Spence**, 1780 WDA 2000, unpublished memorandum (Pa. Super. filed February 20, 2002).] This Court held an evidentiary hearing on May 8, 2002, and thereafter the parties filed briefs. On November 12, 2002, this Court filed an Opinion denying relief on the merits because this Court determined that counsel's inaction did not prejudice [Appellant].

On December 11, 2002, [Appellant] filed a *pro se* "Motion for Notice of Appeal and For Extension of Time to File Notice of Appeal & Concise Statement of Matters[.]" This appeal was never perfected by [Appellant], quashed or terminated by any court.

On September 8, 2010, [Appellant] filed a counseled PCRA petition. The Commonwealth filed an Answer on September 10, 2010. On June 9, 2011, this Court denied the PCRA petition because it was untimely and this Court lacked jurisdiction to consider [Appellant's] claims. [Appellant] filed an appeal to the Pennsylvania Superior Court on July 11, 2011. The Pennsylvania Superior Court quashed the appeal on February 22, 2012,

because it found that the *pro se* appeal filed December 11, 2002, was still pending before the [C]ourt. [***Commonwealth v. Spence***, 46 A.3d 824 (Pa. Super. 2012) (unpublished memorandum).] [Appellant] was instructed to either perfect his appeal, or to withdraw his appeal and take any other legal actions available for relief.

[Appellant] withdrew the appeal in April of 2012 and filed the instant counseled PCRA petition on October 26, 2012. Pursuant to the Superior Court's determination, judgment of sentence did not become final until after [Appellant] withdrew his appeal. Therefore, the instant PCRA petition is timely.

The Commonwealth filed an Answer on April 11, 2013. [Appellant] filed a Response to the Commonwealth's Answer on April 17, 2013. This Court held a hearing on September 17, 2013, and denied the PCRA petition on September 20, 2013. [Appellant] filed a timely Notice of Appeal to the Pennsylvania Superior Court on October 17, 2013. On November 1, 2013, this Court Ordered [Appellant] to file a [Pa.R.A.P.] 1925(b) Statement of Errors Complained of on Appeal. The [Rule] 1925(b) Statement was filed on November 6, 2013, alleging ineffective assistance of counsel.

PCRA Court Opinion, 2/28/14, at unnumbered first page – 2.

In his brief to this Court, Appellant presents the following six questions for our review:

1. Did the [PCRA] court err in denying Appellant's PCRA petition since the instant PCRA claims were not waived[?]
2. Did the [PCRA] court err in denying Appellant's PCRA petition since plea counsel[, Sumner] Parker[, Esq.,] was ineffective for failing to inform Appellant that he was pleading [guilty] to two felony gun charges rather than two misdemeanor gun charges, for failing to inform him of the possible sentences[,] and for failing to inform him that the sentences could be run consecutively[?] Moreover, Appellant was never informed at the plea hearing that he was pleading [guilty] to felony gun charges, and there was no recitation of the facts at the plea hearing. Additionally, [Attorney] Parker promised Appellant that he would receive an aggregate sentence of 9-23 months[' incarceration]

for all 24 counts. Hence, Appellant's plea was involuntary and he desires to withdraw the same.

3. Did the [PCRA] court err in denying Appellant's PCRA petition since plea counsel was ineffective for continuing to represent Appellant at the 12/9/09 plea hearing after the two men had a serious disagreement, resulting in a poisoning of the attorney/client relationship and an irreconcilable conflict...[?] Sentencing/post[-]sentencing counsel[, Joseph] Hudak[, Esq.,] was ineffective for failing to raise this claim.

4. Did the [PCRA] court err in denying Appellant's PCRA petition since ... [Attorney] Hudak was ineffective for total unpreparedness at the sentencing hearing, for failing to inform Appellant that he was being sentenced to gun felonies (and in fact [was] telling him that he had pled [guilty] to gun misdemeanors), for failing to inform him of the possible sentences or that they could be imposed consecutively[?] Additionally, he was ineffective for informing Appellant that the two gun charges were misdemeanors and the maximum that he would receive for each was two years['] imprisonment. Moreover, [Attorney] Hudak was ineffective for failing to raise the ineffectiveness of plea counsel[, Attorney] Parker.

5. Did the [PCRA] court err in denying Appellant's PCRA petition since direct appeal counsel[, Diana] Stavroulakis[, Esq.,] was ineffective for failing to raise the aforementioned ineffectiveness claims regarding plea counsel Parker and sentencing/post[-]sentencing counsel Hudak, and involuntariness of plea claims (due to ineffectiveness), in the direct appeal at No. 1780 WDA 2000 since the appeal was filed pre-**Grant** and ineffectiveness of counsel claims were permissible[?]

6. Did the [PCRA] court err in denying Appellant's PCRA petition since direct appeal remand counsel[, Chris] Eyster[, Esq.,] was ineffective for failing to call plea counsel Parker as a witness at the 5/8/02 remand hearing so that he could be questioned regarding [Attorney] Parker's omissions for failing to inform Appellant that he was pleading [guilty] to felony gun charges, for failing to inform him of possible sentences, failing to inform [Appellant] of possible consecutive sentences, for promising him an aggregate sentence of 9-23 months and for continuing to represent Appellant after a conflict developed...[?]

Appellant's Brief at 4-6.

Initially, we note that our standard of review regarding an order denying post-conviction relief under the PCRA is whether the determination of the court is supported by the evidence of record and is free of legal error. **Commonwealth v. Ragan**, 923 A.2d 1169, 1170 (Pa. 2007). This Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. **Commonwealth v. Touw**, 781 A.2d 1250, 1252 (Pa. Super. 2001). 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).

In Appellant's first issue, he challenges the PCRA court's conclusion that he waived his claims of plea and sentencing counsels' ineffectiveness (issues two through four, above). In deeming these claims waived, the PCRA court relied on our Supreme Court's decision in **Commonwealth v. Hutchinson**, 25 A.3d 277 (Pa. 2011). There, the Court stated:

Because Appellant's direct appeal was decided in October 2002, approximately two months before this Court's decision in **Commonwealth v. Grant**, 572 Pa. 48, 813 A.2d 726 (2002), Appellant was required to raise claims of trial counsel ineffectiveness at the time that he obtained new counsel. **See Commonwealth v. Hubbard**, 472 Pa. 259, 372 A.2d 687 (1977) (requiring that a petitioner raise claims of trial counsel ineffectiveness at the time he or she obtained new counsel). Although this Court overruled **Hubbard** in **Grant**, **Hubbard** was the prevailing law when Appellant's direct appeal was decided. **See Commonwealth v. Clark**, 599 Pa. 204, 961 A.2d 80, 85 (2008). Therefore, because the record shows that new counsel was appointed to represent Appellant on direct appeal, Appellant was required to raise claims of trial counsel ineffectiveness at

that time. Accordingly, pursuant to the [PCRA]'s statutory mandates, any claims of trial counsel ineffectiveness not raised on direct appeal have been waived. **See** 42 Pa.C.S. § 9544(b); **Commonwealth v. Tedford**, 598 Pa. 639, 960 A.2d 1, 13 (2008).

Id. at 285-286 (footnote and unnecessary capitalization omitted).

In the present case, Appellant filed his notice of appeal from his judgment of sentence on October 24, 2000. He was represented by new counsel (Attorney Stavroulakis) on appeal, and he presented one claim of sentencing counsel's (Attorney Hudak) ineffectiveness for this Court's review. Specifically, Appellant argued that

counsel was ineffective for failing to challenge the trial court's application of the penalty set forth at 18 Pa.C.S.A. § 6111(g)(2) (felony) rather than 18 Pa.C.S.A. § 6111(g)(1) (misdemeanor). According to [Appellant], he would not have entered a guilty plea had he known that the Commonwealth had inappropriately charged him with a felony, rather than a misdemeanor.

Spence, 1780 WDA 2000, unpublished memorandum at 3. Appellant does not explain why he could not have also presented on direct appeal the other claims of plea and sentencing counsels' ineffectiveness that he asserts herein. Accordingly, because Appellant's direct appeal predated **Grant**, and he was represented by new counsel in that appeal, we agree with the PCRA court that, under the rationale of **Hutchinson**, Appellant's claims of plea and sentencing counsels' ineffectiveness are waived.

While in his fifth issue, Appellant attempts to aver that Attorney Stavroulakis was ineffective for not raising these claims of plea and sentencing counsels' ineffectiveness on direct appeal, our review of the

record confirms that Appellant did not raise this claim in his counseled PCRA petition filed on October 26, 2012. Instead, he first asserted this claim - as well as his sixth issue involving Attorney Eyster's ineffectiveness - in his "Response to Commonwealth's Answer to PCRA Petition, And Amended Petition Pursuant to the Post Conviction Relief Act." Therein, Appellant stated that he "hereby amends the instant PCRA Petition[,]" and then added his assertions of Attorney Stavroulakis' and Attorney Eyster's ineffectiveness.

It is apparent from our Supreme Court's recent decision in ***Commonwealth v. Baumhammers***, 2014 WL 2208082 (Pa. 2014), that Appellant's unauthorized attempt to amend his petition and add these substantive claims was invalid. In ***Baumhammers***, the Court found that the petitioner waived a substantive claim that he did not raise in his PCRA petition but, instead, asserted in a responsive pleading to the Commonwealth's answer. The Court reasoned:

Our criminal procedural rules reflect that the PCRA judge "may grant leave to amend ... a petition for post-conviction collateral relief at any time," and that amendment "shall be freely allowed to achieve substantial justice." Pa.R.Crim.P. 905(A); ***see Commonwealth v. Williams***, 573 Pa. 613, 633, 828 A.2d 981, 993 (2003) (noting that the criminal procedural rules contemplate a "liberal amendment" policy for PCRA petitions). Nevertheless, it is clear from the rule's text that **leave to amend must be sought and obtained**, and hence, amendments are not "self-authorizing." ***Commonwealth v. Porter***, 613 Pa. 510, 523, 35 A.3d 4, 12 (2012). Thus, for example, **a petitioner may not "simply 'amend' a pending petition with a supplemental pleading."** *Id.* Rather, Rule 905 "explicitly states that amendment is permitted only by

direction or leave of the PCRA Court.” ***Id.*** at 523–24, 35 A.3d at 12; ***see also Williams***, 573 Pa. at 625, 828 A.2d at 988 (indicating that the PCRA court retains discretion whether or not to grant a motion to amend a post-conviction petition). **It follows that petitioners may not automatically “amend” their PCRA petitions via responsive pleadings.**

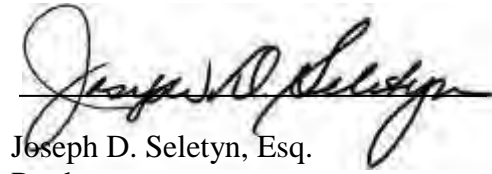
Id. at *16 (emphasis added).

In this case, as in ***Baumhammers***, Appellant did not raise his assertions of Attorney Stavroulakis’ or Attorney Eyster’s ineffectiveness in his PCRA petition. Appellant also never sought leave to amend his petition to add either of these claims. Instead, he presented them in his responsive pleading to the Commonwealth’s answer, “self-authorizing” that document as an amendment to his petition. The PCRA court did not accept this document as an amendment. ***See*** PCRA Court Opinion at 7 (stating that Appellant’s claim of Attorney Stavroulakis’ ineffectiveness “was not previously raised before this Court”). In light of the Court’s decision in ***Baumhammers***, it is clear that Appellant’s attempt to amend his petition to add these claims was improper. Accordingly, Appellant’s fifth and sixth issues are also waived for our review. ***See*** Pa.R.A.P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”).

Order affirmed.

J-S34025-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/29/2014