

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ERIC DOWLING

Appellant

No. 3406 EDA 2013

Appeal from the PCRA Order November 12, 2013
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0004032-2003

BEFORE: MUNDY, J., OLSON, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.:

FILED JULY 31, 2015

Appellant, Eric Dowling, appeals from the November 12, 2013 order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA) 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

We summarize the relevant procedural background of this case as follows. On June 17, 2005, following a bench trial, the trial court convicted Appellant of six counts of possession of a controlled substance, five counts of possession with intent to deliver a controlled substance, and one count of possession of drug paraphernalia.¹ The trial court sentenced Appellant to an aggregate term of ten to 20 years' imprisonment on December 8, 2005.

* Retired Senior Judge assigned to the Superior Court.

¹ 35 P.S. §§ 780-113(a)(16), (a)(30), and (a)(32), respectively.

Appellant timely appealed his judgment of sentence, this Court affirmed on January 8, 2007, and our Supreme Court affirmed on November 19, 2008. **Commonwealth v. Dowling**, 924 A.2d 690 (Pa. Super. 2007) (unpublished memorandum), *affirmed*, 959 A.2d 910 (Pa. 2008). Appellant did not seek a writ of *certiorari* from the Supreme Court of the United States.

Appellant timely filed a *pro se* PCRA petition on June 10, 2009, and the PCRA court appointed counsel to represent Appellant. On February 26, 2010, counsel filed an amended petition; however, the PCRA court found said petition “broad and vague” and granted leave for counsel to file a second amended petition. PCRA Court Order, 5/11/10. Counsel filed a second amended PCRA petition on Appellant’s behalf on December 16, 2010, and the Commonwealth filed its response on April 27, 2011. The PCRA court filed its notice to dismiss the petition without an evidentiary hearing, pursuant to Pennsylvania Rule of Criminal Procedure 907, on June 1, 2011, and the PCRA court entered an order dismissing the petition on August 3, 2011. Appellant timely appealed², and on February 1, 2013, this Court affirmed in part and vacated in part the dismissal of Appellant’s PCRA

² Appellant represented himself in the first appeal from the dismissal of the PCRA petition, after the PCRA court determined he made a knowing, intelligent, and voluntary waiver of his right to appellate counsel pursuant to **Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998). PCRA Court Order, 3/2/12.

petition. ***Commonwealth v. Dowling***, 68 A.3d 353 (Pa. Super. 2013) (unpublished memorandum) (***Dowling II***). Specifically, this Court remanded for a hearing solely on the issue of counsel's alleged ineffectiveness for failure to file requested post-sentence motions, in all other aspects, we affirmed. Acknowledging that the Commonwealth agreed that this claim involved an issue of disputed fact, this Court vacated that portion of the PCRA court's order and remanded for an evidentiary hearing limited to that claim. ***Id.*** at 9-10, 20. On July 25, 2013, the PCRA court held an evidentiary hearing, and on November 12, 2013, the PCRA court denied Appellant's petition.³ On December 6, 2013, Appellant filed the instant, timely appeal.⁴

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

Whether the PCRA [c]ourt erred in failing to find that sentencing counsel rendered ineffective assistance of counsel by virtue of counsel's failure to timely file a post-sentence motion, or otherwise preserve the claim relative to his right to request reconsideration of the discretionary aspects of the sentences imposed by the trial court, which resulted in a complete waiver of Appellant's right to challenge the discretionary aspects of the consecutively imposed mandatory minimum sentences on direct appeal, which, given the severity of the aggregate sentence, was unduly harsh and excessive?

³ On remand, pursuant to Appellant's request, the PCRA court appointed counsel to represent Appellant. PCRA Court Order, 4/5/13.

⁴ Appellant and the PCRA court have complied with Pennsylvania Rule of Appellate Procedure 1925.

Appellant's Brief at 4.

When reviewing PCRA matters, we are mindful of the following principles.

We consider the record in the light most favorable to the prevailing party at the PCRA level. This review is limited to the evidence of record and the factual findings of the PCRA court. We afford great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. Accordingly, as long as a PCRA court's ruling is free of legal error and is supported by record evidence, we will not disturb its ruling. Nonetheless, where the issue pertains to a question of law, our standard of review is *de novo* and our scope of review is plenary.

Commonwealth v. Pander, 100 A.3d 626, 630 (Pa. Super. 2014) (*en banc*) (internal quotation marks and citation omitted), *appeal denied*, 109 A.3d 679 (Pa. 2015). Further, 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 Section 9543(a)(2) of the PCRA. 42 Pa.C.S.A. § 9543(a)(2). One such error, which provides a potential avenue for relief, is ineffective assistance of counsel. ***Id.*** § 9543(a)(2)(ii). The issues raised must be neither previously litigated nor waived. ***Id.*** § 9543(a)(3).

Additionally, "[i]n order to obtain relief on a claim of ineffectiveness, a PCRA petitioner must satisfy the performance and prejudice test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***Commonwealth v.***

Reid, 99 A.3d 427, 436 (Pa. 2014). In Pennsylvania, adherence to the **Strickland** test requires a PCRA petitioner to satisfy three prongs. **Id.** Specifically, the petitioner must demonstrate “(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel’s actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel’s error[.]” **Id.** (citation omitted). “[I]f a claim fails under any required element of the **Strickland** test, the court may dismiss the claim on that basis.” **Commonwealth v. Bomar**, 104 A.3d 1179, 1188 (Pa. 2014) (citation omitted).

We presume counsel has rendered effective assistance. **Commonwealth v. Rivera**, 108 A.3d 779, 789 (Pa. Super. 2014). Moreover, “[t]he reasonableness of counsel’s conduct is objectively measured.” **Commonwealth v. Daniels**, 104 A.3d 267, 281 (Pa. 2014) (citation omitted). We also observe, “review of counsel’s conduct cannot indulge the distorting effects of hindsight, but instead, counsel’s performance must be judged in light of the circumstances as they would have appeared to counsel at the time.” **Commonwealth v. Hill**, 104 A.3d 1220, 1240 (Pa. 2014) (citations and internal quotation marks omitted). With regard to the third prong, “prejudice [is] measured by whether there is a reasonable probability that the result of the proceeding would be different.” **Daniels, supra**.

In Appellant's sole issue before this Court, he argues counsel was ineffective for failing to file a post-sentence motion challenging the discretionary aspects of his sentence, resulting in a waiver of such challenge on direct appeal.⁵ Appellant's Brief at 10.

As noted, a prior panel of this Court remanded the matter for a hearing limited to the issue of whether or not Appellant in fact requested sentencing counsel to file post-sentence motions on his behalf. This Court concluded, "it was error for the PCRA court not to conduct an evidentiary hearing to establish a record on material issues of fact and credibility determinations necessary to decide the claim, including whether Dowling in fact requested trial counsel to do so." ***Dowling II, supra*** at 10 (footnote

⁵ Appellant also attempts to argue this Court should vacate his sentence, as illegal, based on ***Alleyne v. United States.***, 133 S. Ct. 2151 (2013) and ***Commonwealth v. Bizzel***, 107 A.3d 102 (Pa. 2014). Appellant's Brief at 13. As noted, our Supreme Court affirmed Appellant's judgment of sentence on November 19, 2008. Therefore, Appellant's judgment of sentence became final on February 17, 2009, when the period for Appellant to file a petition for a writ of *certiorari* in the United States Supreme Court expired. **See** 42 Pa.C.S.A. § 9545(b)(3) (stating, "a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review[]"); U.S. Sup. Ct. R. 13(1) (stating "a petition for a writ of *certiorari* to review a judgment in any case ... is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment[]"). As the decision in ***Alleyne*** was announced on June 17, 2013, after Appellant's judgment of sentence became final, he is not entitled to its application. **See *Commonwealth v. Riggle***, --- A.3d ---, 2015 WL 4094427, *4-7 (Pa. Super. 2015) (noting ***Alleyne*** applies retroactively to cases pending on direct appeal, but concluding that ***Alleyne*** did not announce a substantive or watershed constitutional procedural rule, and therefore, is not entitled to retroactive application in the PCRA setting).

and citation omitted). Accordingly, at the hearing, the PCRA court limited its scope to “the factual issue [of whether Appellant] requested counsel to file a [p]ost[-][s]entence [m]otion for [r]econsideration.” N.T., 7/25/13, at 5.

At the evidentiary hearing, sentencing counsel testified that he had no recollection of a conversation with Appellant immediately following the sentencing proceeding or within ten days thereof. **Id.** at 18-19. He further testified that “if [Appellant] asked me [to file a post-sentence motion], I would absolutely[]” have a duty to file such motion. **Id.** at 27. The PCRA court then specifically asked counsel, “if he had asked you[,] would you have done it[?]” Counsel replied, “I would have done it.” **Id.** On cross-examination, sentencing counsel reiterated that had Appellant asked him to file post-sentence motions, “I would have done it and preserved it.” **Id.** at 36. Counsel reemphasized, again, on direct examination, “I was never asked to [file a post-sentence motion for reconsideration].” **Id.** at 41. Appellant testified at the hearing that, following the imposition of his sentence in court, he requested counsel “to file reconsideration.” **Id.** at 46. Appellant acknowledged that he wrote letters to counsel, but he could not recall if he ever made a request to file post-sentence motions in a letter, nor did Appellant produce any letters at the hearing. **Id.** at 49. At the conclusion of the hearing, the PCRA court found that Appellant never requested counsel to file any post-sentence motions. **Id.** at 56; **see also**

PCRA Court Opinion, 11/12/13, at 4. The PCRA court thereafter dismissed Appellant's petition. Trial Court Order, 11/12/13.

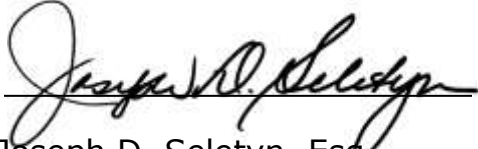
We conclude this factual finding is amply supported by the testimony of record. **See Pander, supra.** Aside from Appellant's bald assertion in his PCRA petition that he asked counsel to file a post-sentence motion, the evidence presented at the PCRA hearing failed to prove such a request was made. Further, PCRA counsel testified to having no recollection of being asked to file a motion and that if he had been asked, he would have done so. On this basis, Appellant's stated ground for the relief requested, *i.e.*, that his counsel failed to file a requested post-sentence motion, was not credited by the PCRA court. PCRA Court Opinion, 11/12/13, at 4. Given the factual finding that there was no request of counsel to file said motion and that was the basis for Appellant's claim of ineffectiveness pleaded in his petition, Appellant has failed to prove, by a preponderance of the evidence, that sentencing counsel provided ineffective assistance of counsel. **See Bomar, supra; Reid, supra; Pander, supra.**

Based on the foregoing, we conclude Appellant's sole issue on appeal is devoid of merit. Accordingly, we affirm the November 12, 2013 order dismissing Appellant's PCRA petition.⁶

⁶ Appellant attempted to explore sentencing counsel's legal obligation to Appellant, in the absence of a request to file a post-sentence motion, and the PCRA court addressed the same in its opinion dismissing Appellant's
(Footnote Continued Next Page)

Order affirmed.

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: 7/31/2015

(Footnote Continued) _____

petition. N.T., 7/25/13, at 29; PCRA Court Opinion, 11/12/13, at 4-5. However, such legal conclusions are not before this Court, as the remand was limited to developing a record upon which the PCRA court could make factual and credibility determinations. **See Dowling II, supra** at 10. Further, Appellant's pleaded claim of ineffectiveness was that sentencing counsel failed to file the requested motion; his petition does not allege that sentencing counsel should have filed said motion absent a request from Appellant. Therefore, this aspect of Appellant's argument is waived. **See** Pa.R.A.P. 302 ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal").