

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
RICHARD BROADUS,	:	
	:	
Appellant	:	No. 7 WDA 2014

Appeal from the PCRA Order entered on December 3, 2013
in the Court of Common Pleas of Allegheny County,
Criminal Division, No. CP-02-CR-0011050-2010

BEFORE: PANELLA, JENKINS and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JULY 28, 2014

Richard Broadus ("Broadus") appeals from the Order dismissing his Petition for relief under the Post Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

Following a non-jury trial in November 2011, Broadus was convicted of one count each of possession with intent to deliver, possession of a controlled substance, possession of marijuana, duties at stop signs and driving an unregistered vehicle.¹ Broadus was sentenced to 5 to 10 years in prison, and the sentencing judge granted him 30 days to report to prison.

Broadus's counsel filed a timely Notice of Appeal. When Broadus failed to report to prison, the trial court issued a bench warrant. On March 19,

¹ 35 P.S. §§ 780-113(a)(30), (a)(16), (a)(31); 75 Pa.C.S.A. §§ 3323(b), 1301(a). Broadus was also charged with unauthorized use of a motor vehicle, 18 Pa.C.S.A. § 3928, which the Commonwealth withdrew at the preliminary hearing.

2012, this Court dismissed the appeal for failure to comply with Pennsylvania Rule of Appellate Procedure 3517.²

Broadus, who was a fugitive for the preceding 14 months, turned himself in on March 18, 2013, and his counsel filed the instant PCRA Petition the following day.³ The PCRA court dismissed the Petition without an evidentiary hearing. Broadus filed a timely Notice of Appeal. The PCRA court ordered Broadus to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Broadus filed a timely Concise Statement.

On appeal, Broadus raises the following questions for our review:

I. Whether the [PCRA] court erred in concluding that the record did not support a finding that [Broadus's] United States and Pennsylvania constitutional rights were not violated during the suppression hearing and non-jury trial?

II. Whether the [PCRA] court erred in concluding that the record did not support a finding that [Broadus] was provided with ineffective assistance of counsel throughout his suppression hearing, non-jury trial, and first Superior Court appeal?

Brief for Appellant at 4 (issues renumbered for ease of disposition).

We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court

² A docketing statement form must be filed within 10 days of filing a Notice of Appeal to the Superior Court. Pa.R.A.P. 3517.

³ Broadus's judgment of sentence became final on April 19, 2012. **See Commonwealth v. Doty**, 48 A.3d 451, 455-56 (Pa. Super. 2012) (stating that judgment of sentence became final 30 days after this Court quashed the direct appeal and time expired for seeking further review before our Supreme Court). Thus, the instant PCRA Petition was timely filed.

and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted).

In his first claim, Broadus asserts that his constitutional rights were violated because the arresting officer did not have probable cause to search his vehicle, and as a result, any evidence found during the vehicle search was inadmissible. Brief for Appellant at 33. Broadus also claims that the Commonwealth interfered with his right to a fair trial by citing incorrect facts. ***Id.*** at 35. Further, Broadus argues that the trial court interfered with his constitutional rights by incorrectly applying the Parol Evidence Rule, and by rendering verdicts on the charges of possession of a controlled substance and possession with intent to deliver without sufficient evidence. ***Id.*** at 36.

Generally, "a fugitive who returns to court should be allowed to take the system of criminal justice as he finds it upon his return: if the time for filing has elapsed, he may not file; if it has not; he may." ***Commonwealth v. Deemer***, 705 A.2d 827, 829 (Pa. 1997).

In ***Commonwealth v. Judge***, 797 A.2d 250 (Pa. 2002), the Pennsylvania Supreme Court concluded that a petitioner's previous forfeiture of his direct appeal rights by reason of fugitive status renders him ineligible for collateral relief on the same issues. ***Id.*** at 259-60. In holding petitioner's previous forfeiture of appeal rights as controlling, the Supreme

Court opined that “we refuse to permit [a]ppellant to resurrect issues that were raised, or which could have been raised and would have been addressed, on direct appeal, had [a]ppellant demonstrated some kind of respect for the legal process.” **Id.** at 260 (footnotes omitted).

Here, Broadus could have brought his claims regarding violations of his constitutional rights on direct appeal. While this Court dismissed Broadus’s direct appeal for failing to file a docketing statement, Broadus forfeited his right to a direct appeal due to his fugitive status. **See Commonwealth v. Hunter**, 952 A.2d 1177, 1178 (Pa. Super. 2008) (holding that because the appellant remained a fugitive from the time of his scheduled sentencing until after his counsel had filed an appeal and the appeal deadline passed, he is not entitled to pursue an appeal). Consequently, Broadus forfeited his right to seek collateral relief on those claims. **See Judge**, 797 A.2d at 259-60.

In his second claim, Broadus raises several ineffective assistance of counsel issues. **See** Brief for Appellant at 27-31.

Ineffective assistance of counsel claims are distinct from claims that may be brought on direct appeal. **See Commonwealth v. Collins**, 888 A.2d 564, 570 (Pa. 2005) (holding that an ineffectiveness claim raises a distinct legal ground for purposes of PCRA review). Therefore, because Broadus was no longer a fugitive when he filed his timely PCRA Petition, he did not forfeit his right to bring ineffective assistance of counsel claims under

the PCRA. **See** 42 Pa.C.S.A. § 9543(a)(2) (stating the claims cognizable under the PCRA); **see also Deemer**, 705 A.2d at 829.

To prevail on an ineffective assistance claim, a defendant must establish “(1) [the] underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his [client’s] interests; and (3) but for counsel’s ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different.” A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.

Commonwealth v. Luster, 71 A.3d 1029, 1039 (Pa. Super. 2013) (citations omitted).

The PCRA court addressed Broadus’s claims that previous counsel was ineffective for filing a tardy brief in support of the Motion to Suppress, failing to object to hearsay testimony and the admission of the rental agreement as evidence, failing to properly cross examine a witness and failing to argue that Broadus’s arrest and search was unlawful. **See** PCRA Court Opinion, 10/23/13, at 2, 4-5. We adopt the PCRA court’s Opinion regarding those claims for the purposes of this appeal. **See id.**

Broadus also claims that previous counsel was ineffective for failing to file a timely docketing statement to this Court, which resulted in a dismissal of his direct appeal. Brief for Appellant at 26-27. However, because Broadus was a fugitive, his right to direct appeal was forfeited. **See Judge**, 797 A.2d at 259-260. Therefore, filing a timely docketing statement would not have changed the outcome of his direct appeal, and Broadus is not entitled to relief. **See Luster**, 71 A.3d at 1039.

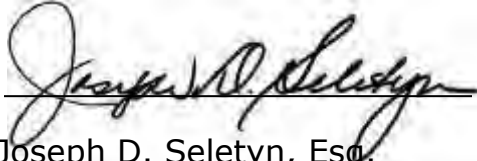
Further, Broadus, without citing any relevant authority, asserts that counsel was ineffective for stipulating to various facts, including the facts averred in the affidavit of probable cause, the existence and amount of narcotics, and the testimony presented during the suppression hearing and the non-jury trial. Brief for Appellant at 30-31. Here, Broadus fails to demonstrate that the stipulations of the facts averred in the affidavit of probable cause, and allowing all testimony from the preliminary hearing and the suppression hearing, would have changed the outcome of his case. Further, Broadus's counsel argued at trial that the narcotics in question were not found in plain view, and that Broadus did not possess the narcotics. **See *Commonwealth v. Howard***, 749 A.2d 941, 955 (Pa. Super. 2000) (stating that in order to be found ineffective, counsel's course of action must be "so lacking in reason that, in light of all the alternatives available, no competent attorney would have chosen it."). Therefore, Broadus's claims regarding the stipulations are also without merit.

Finally, Broadus claims that his counsel did not make a proper closing argument, and failed to object to mischaracterizations and false statements made by the Commonwealth. Brief for Appellant at 31. Broadus fails to cite any statements to which counsel should have objected, or to specify any additional statements counsel could have made in his own closing argument. He provides no evidence to indicate that counsel acted unreasonably, and his claim is without merit.

Based on the foregoing, the PCRA court did not err in concluding that the record does not support a finding of ineffective assistance of counsel.

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: 7/28/2014

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY

ORIGINAL
Criminal Division
Dept. of Court Records
Allegheny County, PA.

COMMONWEALTH
of PENNSYLVANIA

CRIMINAL DIVISION

v.

CC# 2010-11050

RICHARD BROADUS,

Defendant.

Rusheen Petit, *Assistant D.A.*
Thomas Will, *Defense Counsel*

DEPT. OF COURT RECORDS
CRIMINAL DIVISION
ALLEGHENY COUNTY, PA.

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OPINION

This is a post-conviction matter where Mr. Broadus claims entitlement to various forms of relief from his conviction and 5-10 year sentence. In Mr. Broadus' eyes he is in the present predicament because of his prior lawyer. According to him, that lawyer was constitutionally defective.

On March 19, 2013, Broadus filed a counseled *PCRA Petition*. The Commonwealth filed an *Answer*, which was followed by a *Reply* from Broadus on July 19, 2013. These 3 writings have crystalized the issues and the Court feels comfortable in expressing its view in this writing.

The Court appreciates the segmentation of the issues set forth in the government's *Answer*. It will follow that analytical approach. However, before jumping to those issues, the Court concludes the petition was timely filed and the issues have not been waived or previously litigated.

Tardy Brief in Support of Suppression

Prior to trial, a suppression hearing was held. Upon its conclusion, the Court issued a briefing schedule. The defense filing was due no later than September 23, 2011. It was not filed until November 14, 2011. Despite its tardy filing, the Court still considered the arguments made therein. That is where Broadus' argument breaks down. A tardy filing is not a non-existent filing. Broadus got his arguments before the decision maker. While clearly not consistent with the Court's desired schedule, it did not impact the consideration of the substantive merits of the claim. The footnote reference is just a comment to the *form* of the opinion not the substance of the suppression ruling. As such, the Court sees no merit and no prejudice to this assertion of ineffective assistance of counsel.

Dismissal of Direct Appeal

Broadus was sentenced on November 30, 2011. He was allowed to report 30 days later. A day before his report date, counsel for Broadus filed a *Notice of Appeal*.¹ The NOA was docketed on December 29, 2011. The next day – Broadus' report date – came and went without him showing up. A bench warrant was ultimately issued on January 9, 2012, for his failure to appear on December 30, 2011. Broadus remained a fugitive until March 18, 2013.

Initially, the Court needs to focus on the impact of Broadus' fugitive status regarding his rights to direct appeal. A pair of Pennsylvania Supreme Court decisions resolve the issue. In Commonwealth v. Jones, 610 A.2d 439 (Pa. 1992), the Court articulated a per se rule that a defendant irrevocably forfeits the right to appeal by being a fugitive at any time after his post-trial proceedings commence. See, Commonwealth v. Hunter, 952 A.2d 1177, 1178 (Pa. Super. 2008). Five years later, that rule was modified somewhat. Id. In Commonwealth v. Deemer, 705 A.2d 827 (Pa. 1997), the Court explained that, despite having lost the right to appeal, a fugitive who

¹ Counsel also sought an "Appeal Bond" on January 4, 2012. Interestingly, paragraph 18 of that motion states he "has never missed any court dates in this case." Six days earlier, Broadus failed to appear for the beginning of his sentence.

returns before the appeal deadline can effectively regain his appellate rights and may, therefore, file a timely appeal. Hunter, 952 A.2d at 1178. Deemer, also added that a fugitive who returns *after* the appellate deadline is not entitled to a direct appeal. Id. (emphasis added).

Broadus' fugitive status began the day after his NOA was filed. It continued for 14 months until March of 2013. In March, 2012, about 3 months after his NOA was filed, the Superior Court dismissed the appeal. The reason for the dismissal was failure to complete the rather pedestrian docketing statement as required by Pa.R.A.P. 3517. Based upon Jones, Deemer, and Hunter, this Court rules Broadus forfeited his right to appeal and his forfeiture trumped his counsel's below the line performance in handling his appeal.

The next issue this Court must tackle is what, if any impact, the forfeiture of his direct appeal rights has on his ability to obtain relief under the Post Conviction Relief Act. Let us begin with some basics. A direct appeal may bring various forms of relief. For instance, a suppression ruling might be reversed. A new trial may be awarded because inadmissible evidence was relied upon. The sentence could be deemed too harsh or illegal requiring a new sentencing hearing. These forms of relief may also be granted through a post-conviction proceeding. The identical forms of relief available on direct appeal and in post-conviction proceedings, is the background for the following discussion on the applicable law.

In Commonwealth v. Judge, 797 A.2d 250 (Pa. 2002), the petitioner, who previously forfeited his direct appeal rights because of his fugitive status, filed a petition seeking collateral relief. The PCRA court dismissed the petition and, on the appeal, the petitioner challenged the PCRA's court's determination that he was not entitled to collateral review of his convictions because he fled the jurisdiction prior to direct appeal. Id., at 257-258. The Supreme Court upheld the denial of PCRA relief. It concluded that the petitioner's previous forfeiture of his direct appeal rights by reason of his fugitive status rendered him ineligible for collateral relief. Id., at 259-260. In affirming the dismissal of the petitioner's PCRA claims, the Supreme Court made the following observation:

“[W]e refuse to permit Appellant to resurrect issues that were raised, or which could have been raised and would have been addressed, on direct appeal, had Appellant demonstrated some kind of respect for the legal process.” *Id.*, at 260 (footnotes omitted).²

In Commonwealth v. Doty, 48 A.3d 451, 457 (Pa. Super. 2012)(*Doty II*), Doty asserted, on direct appeal, sentencing based claims. These same claims appeared in his PCRA. “In *Doty I*, we held that Appellant’s fugitive status during the direct appeal period resulted in forfeiture of his right to direct review of these claims. Because Appellant previously forfeited review of his claims on direct appeal, he is now ineligible for collateral relief based on these contentions.”

The Court rules all of the present PCRA claims are matters that could have been brought on direct appeal. Based upon *Doty I* and *Doty II*, Broadus forfeited - not waived - his right to appeal those matters and, as such, he is not eligible to raise those claims in a collateral proceeding. In short, Broadus will not be rewarded for “thumbing his nose” at the Court.

Despite the Court’s blanket ruling, it will address Broadus’ remaining arguments nevertheless.

Hearsay Objections

Broadus claims his previous lawyer should have objected to certain testimony at the suppression hearing. PCRA Petition, pg. 18 (March 19, 2013). While he identifies it as “blatantly inadmissible”, *Id.*, his reply to the Commonwealth’s answer never takes the government’s position head on. The government said the statements were “not inadmissible hearsay”, Answer, pg. 6, (June 17, 2013), but offered to show the officer’s course of conduct. The government references Commonwealth v. Jones, 658 A.2d 746, 751 (Pa. 1995) and Commonwealth v. Matthews, 460 A.2d 362, 364 (Pa. Super 1993). The

² *See also*, Commonwealth v. Doty, 997 A.2d 1184 (Pa. Super. 2010)(*Doty I*).

government's position is correct. That conclusion dooms the meritorious prong of an ineffective assistance of counsel challenge.

Rental Agreement

Broadus also believes his prior lawyer should have objected to the rental agreement being offered as an exhibit. PCRA Petition, pg. 18. The only justification is a lack of an authentication witness. *Id.*

The weakness in Broadus' position is the reasonable basis prong. Broadus' strategy was that he received an oral extension of the rental agreement. He had an Enterprise witness testify to that circumstance. However, once the suppression ruling was made, the rental agreement and its contents faded into the land of inconsequential clutter. Simply put, the record supports an acceptable inference that his lawyer made a reasoned decision regarding the admission of the rental agreement.

Cross Examination

Broadus also takes issue with how the prior lawyer cross-examined the Commonwealth's key witness, Officer Boyko. PCRA Petition, pg. 5. Broadus is now saying his lawyer should have asked questions that would have shown a lack of "due diligence". *Id.* The government's response was multi-pronged. *Answer*, pg. 9-10. The Court need only address one – the lack of these questions would not have been outcome determinative. The record reveals the officer called an Enterprise official and made an inquiry about the status of this particular vehicle. That was enough to justify the officer's subsequent actions. His lack of further inquiry or, as Broadus likes to describe it, his lack of due diligence does not move the meter. The officer did enough for probable cause purposes. End of story.

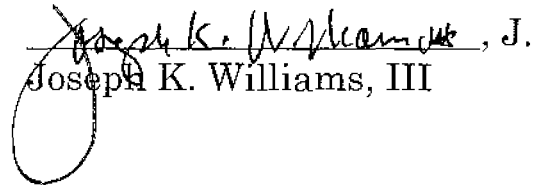
Unlawful Arrest and Search

This claim is foreclosed by the Court's findings of fact and conclusions of law set forth in its opinion of November 16, 2011. The claim lacks merit.

In conclusion, the Court finds Broadus is not entitled to PCRA relief because he was a fugitive during his direct appeal and that status contaminates his ability to raise the claims he has set forth in his petition. The Court also addressed Broadus' individual claims and concludes they are not worthy of anymore judicial attention.

An order consistent with our Rules of Criminal Procedure will be docketed along with this opinion.

BY THE COURT :


Joseph K. Williams, III