NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TOM HAL CORNELISON, III Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 891 WDA 2016

Appeal from the PCRA Order April 5, 2016
In the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0000769-2011

BEFORE: GANTMAN, P.J., MOULTON, J., and STEVENS, P.J.E.*

MEMORANDUM BY GANTMAN, P.J.: **FILED DECEMBER 5, 2016**

Appellant, Tom Hal Cornelison, III, appeals from the order entered in Cambria County Court of Common Pleas, which denied his petition filed pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

The relevant facts and procedural history of this case are as follows. In March 2011, Appellant was dating Dora Vetter. On March 26, 2011, Appellant broke open the front door of Ms. Vetter's apartment while she was away. Appellant caused additional property damage inside the apartment and left the residence in disarray. A jury convicted Appellant of burglary, criminal trespass, and criminal mischief. The trial court sentenced Appellant

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[1] 42 Pa.C.S.A. §§ 9541-9546.

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*Former Justice specially assigned to the Superior Court.

on July 19, 2012, to an aggregate term of twenty (20) to forty (40) months' incarceration. On June 7, 2013, Appellant filed a PCRA petition seeking reinstatement of his post-sentence and direct appeal rights *nunc pro tunc*, which the PCRA court granted. This Court affirmed the judgment of sentence on November 17, 2014. ***See Commonwealth v. Cornelison***, No. 1913 WDA 2013, unpublished memorandum (Pa.Super. filed November 17, 2014).

On May 18, 2015, Appellant timely filed a *pro se* PCRA petition raising a multitude of claims challenging his sentence and the effectiveness of prior counsel. The PCRA court appointed counsel. Following an evidentiary hearing, the court granted in part and denied in part Appellant's PCRA petition on April 5, 2016. The court denied relief with respect to all issues except Appellant's claim that the trial court sentenced him based on an inadequate presentence investigation ("PSI") report and without stating reasons on the record for the sentence imposed.[2] The PCRA court's order directed the court administrator to schedule a resentencing hearing. The trial court resentenced Appellant on May 19, 2016, and re-imposed the same aggregate sentence of twenty (20) to forty (40) months' incarceration. Appellant filed a post-sentence motion on May 24, 2016, which the court denied on May 27, 2016. On June 1, 2016, Appellant filed a notice of appeal

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[2] The PCRA court's partial sentencing relief is not at issue in this appeal.

from the PCRA court's April 5, 2016 order denying other aspects of his petition. The court ordered Appellant to file a concise statement of errors complained of on appeal per Pa.R.A.P. 1925(b), and Appellant timely complied.

As a preliminary matter, the timeliness of an appeal is a jurisdictional question and this Court may raise the issue *sua sponte*. ***Commonwealth v. Trinidad***, 96 A.3d 1031 (Pa.Super. 2014), *appeal denied*, 627 Pa. 758, 99 A.3d 925 (2014). "[T]he notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). Absent extraordinary circumstances such as fraud or some breakdown in the processes of the court, this Court has no jurisdiction to entertain an untimely appeal. ***Commonwealth v. Patterson***, 940 A.2d 493 (Pa.Super. 2007), *appeal denied*, 599 Pa. 691, 960 A.2d 838 (2008).

> In general, appeals are properly taken from final orders. ***See*** Pa.R.A.P. 341(b)(2) (stating…appeal lies from…order that "is expressly defined as a final order by statute[]"). … Pennsylvania Rule of Criminal Procedure 910 governs PCRA appeals and provides as follows.
>
> > An order granting, denying, dismissing, or otherwise finally disposing of a petition for post-conviction collateral relief shall constitute a final order for purposes of appeal.
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> Pa.R.Crim.P. 910. By its plain text, Rule 910 has no exceptions. It is absolute.

Commonwealth v. Gaines, 127 A.3d 15, 17 (Pa.Super. 2015) (*en banc*)

(holding PCRA court's order, which granted defendant's sentencing claim and denied all other claims, was final appealable order; time to file appeal began to run on date of that order, rather than on date of resentencing).

Pennsylvania Rule of Criminal Procedure 908 governs the disposition of a PCRA petition following a hearing and provides in pertinent part:

> **Rule 908. Hearing**
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> * * *
>
> (E) If the judge disposes of the case in open court in the presence of the defendant at the conclusion of the hearing, the judge shall advise the defendant on the record of the right to appeal from the final order disposing of the petition and of the time within which the appeal must be taken. If the case is taken under advisement, or when the defendant is not present in open court, the judge, by certified mail, return receipt requested, shall advise the defendant of the right to appeal from the final order disposing of the petition and of the time limits within which the appeal must be filed.

Pa.R.Crim.P. 908(E). ***See also Commonwealth v. Meehan***, 628 A.2d 1151 (Pa.Super. 1993), *appeal denied*, 538 Pa. 667, 649 A.2d 670 (1994) (excusing untimeliness of appeal from denial of PCRA petition, where PCRA court failed to advise petitioner of his right to appeal pursuant to Rule 908(E)).

Instantly, the PCRA court entered an order granting in part and denying in part Appellant's PCRA petition on April 5, 2016. A copy of the order was mailed to Appellant and Appellant's counsel on that same date. The PCRA court's order disposed of all claims in Appellant's PCRA petition,

ending the PCRA proceedings. The fact that the order provided for resentencing did not toll the appeal period, as resentencing is a trial court function. Therefore, the April 5, 2016 order was final and immediately appealable. ***See Gaines, supra***. The time to file an appeal from the order expired on May 5, 2016. ***See*** Pa.R.A.P. 903(a). Appellant filed his notice of appeal on June 1, 2016, shortly after the trial court denied his post-sentence motion following resentencing. Thus, Appellant's notice of appeal was facially untimely. Nevertheless, the certified record contains no indication that the PCRA court advised Appellant of his right to appeal from the April 5, 2016 order or the deadline for filing an appeal, as required by Pa.R.Crim.P. 908(E). The PCRA court's failure to comply with Rule 908 constituted a breakdown in the operations of the court, which excuses Appellant's late filing of his notice of appeal. ***See Patterson, supra***; ***Meehan, supra***. Under these circumstances, we decline to dismiss the appeal as untimely and proceed to address the issues raised in Appellant's brief.

Appellant raises the following issues for our review:

> WHETHER TRIAL COUNSEL…PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INFORM [APPELLANT] OF THE COMMONWEALTH'S PLEA OFFER TO CRIMINAL TRESPASS PRIOR TO PROCEEDING TO JURY TRIAL.
>
> WHETHER TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT TRIAL BY:
>
> A) FAILING TO CROSS-EXAMINE JUDITH LITKO REGARDING AN INCONSISTENT STATEMENT;

> B) FAILING TO CROSS-EXAMINE [DORA] VETTER REGARDING WITNESS INTIMIDATION AND BRIBERY;
>
> C) FAILING TO ADEQUATELY EXPLAIN THE UNAVAILABILITY OF AN "INTOXICATION DEFENSE" TO [APPELLANT] PRIOR TO TRIAL.

(Appellant's Brief at 3).

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101, 108 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513, 515 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). We owe no deference, however, to the court's legal conclusions. ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa.Super. 2012).

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Gonzalez***, 858 A.2d 1219, 1222 (Pa.Super. 2004), *appeal denied*, 582 Pa. 695, 871 A.2d 189 (2005). When asserting a claim of ineffective assistance of counsel, the petitioner is required to make the following showing: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and, (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Kimball, 555 Pa. 299, 312, 724 A.2d 326, 333 (1999). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Gonzalez***, ***supra***.

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Linda Rovder Fleming, we conclude Appellant's issues 1, 2(a), and 2(b) merit no relief. (***See*** PCRA Court Opinion, filed April 5, 2016, at 1-6) (finding: **(1)** Appellant produced two copies of unsigned and unfiled plea agreement form stating, "[Appellant] will plead guilty to…Criminal Trespass"; counsel testified regarding his policy to notify clients of plea offers and his specific recollection that Appellant repeatedly proclaimed his innocence and strong interest in going to trial; Commonwealth corroborated counsel's testimony with letter from Appellant proclaiming his innocence and firm intent to proceed to trial, unless charges of burglary **and** criminal trespass were dropped; existence of unsigned, unfiled plea form does not prove counsel failed to inform Appellant of plea offer; further, Appellant was not prejudiced because counsel reasonably believed Appellant would refuse any plea offer based on his adamant proclamations of innocence and intent to proceed to trial; **(2a-b)** trial counsel questioned eyewitness Ms. Litko regarding how she knew Appellant as "the boy across the street," if she allegedly saw him for first time on night of incident; counsel also extensively cross-examined Ms. Vetter regarding alleged police intimidation and her continued profession

of love for Appellant after incident; Appellant incurred no prejudice where counsel thoroughly cross-examined witnesses on exact issues Appellant now claims went unaddressed at trial). Accordingly, we affirm those issues on the basis of the PCRA court opinion.

In issue 2(c), Appellant argues he believed the jury would acquit him of the burglary charge based on an intoxication defense. Appellant asserts trial counsel failed to advise Appellant that voluntary intoxication was not a viable defense. Appellant claims he was unaware of his mistaken belief until counsel's closing argument. Appellant concludes counsel's neglect constituted ineffective assistance. We cannot agree.

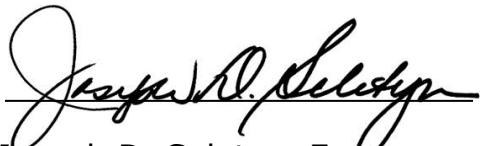
Instantly, at the PCRA evidentiary hearing, Appellant expressly narrowed his collateral challenges to sentencing issues and claims that trial counsel was ineffective for failing to (1) inform Appellant of a plea offer from the Commonwealth before trial; (2) confront Ms. Litko with a prior inconsistent statement; and (3) cross-examine Ms. Vetter regarding letters she wrote to Appellant after the incident. The court's April 5, 2016 order confirmed that Appellant had consented to dismissal of other claims initially raised in his PCRA petition. Therefore, Appellant abandoned any claim concerning trial counsel's failure to explain to Appellant before trial that an intoxication defense was unavailable to him.

Moreover, having abandoned this claim, Appellant offered no direct PCRA testimony that trial counsel had failed to discuss with Appellant the

unavailability of the defense.[3] Likewise, Appellant elicited no testimony from trial counsel on the issue. Thus, the record provides no grounds to conclude counsel was ineffective in this respect. ***See Commonwealth v. Weiss***, 622 Pa. 663, 81 A.3d 767 (2013) (rejecting claim that trial counsel was ineffective for failing to request cautionary instruction, where PCRA petitioner did not question counsel on his reasons for forgoing request). Consequently, Appellant is not entitled to relief with respect to issue 2(c). Based on the foregoing, the court properly denied Appellant's PCRA petition. Accordingly, we affirm.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/5/2016

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[3] During cross-examination, Appellant stated the following in response to the question of whether he was asserting his innocence: "I was believed to be innocent because I was under the impression I had an intoxication defense and I had the affirmative defense to criminal trespass and I also indicated there that any sentence I would get would have to be concurrent." (N.T. PCRA Hearing, 10/22/15, at 28). That statement constituted Appellant's sole reference to an intoxication defense and was unrelated to whether counsel advised him of the unavailability of the defense.