

**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION**

FILED

JAN 17 2018

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Appeals/Post Trial**

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0002310-2016

V.

DARRYL ALLEN

OPINION

McDermott, J.

January 17, 2018

Procedural History

On December 11, 2016, the Petitioner, Darryl Allen, was arrested and charged with Aggravated Assault, Possession of a Firearm by a Prohibited Person (“VUFA 6105”), Firearms Not to be Carried Without a License (“VUFA 6106”), Carrying a Firearm on a Public Street in Philadelphia (“VUFA 6108”), Possession of an Instrument of Crime (“PIC”), Simple Assault, and Reckless Endangerment of Another Person (“REAP”). On February 28, 2017, the Petitioner appeared before this Court and elected to be tried by a jury. On March 2, 2017, the jury convicted the Petitioner of VUFA 6106 and VUFA 6108.¹ Upon the Petitioner’s request that this Court be the fact finder with respect to his VUFA 6105 charge, this Court held a bifurcated trial held immediately after the jury render its verdict and convicted the Petitioner of VUFA 6105. This Court deferred sentencing for the completion and review of the Petitioner’s pre-sentence and mental health reports.

On May 17, 2017, this Court imposed a five to ten year term of imprisonment for VUFA 6105, and no further penalty on the remaining charges, for a total sentence of five to ten

¹ The jury acquitted the Defendant of Aggravated Assault, PIC, Simple Assault, and REAP.

CP-51-CR-0002310-2016 Comm. v. Allen, Darryl
Opinion



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years of imprisonment.² On May 25, 2017, the Petitioner filed a Motion to Reconsider Sentence.³ On June 9, 2017, this Court granted the Petitioner's Motion to Reconsider Sentence, and imposed an identical five to ten period of incarceration for VUFA 6105, and no further penalty for VUFA 6108.⁴ The Petitioner did not file any further post-sentence motions or a Notice of Appeal.

On August 11, 2017, the Petitioner filed a timely Post-Conviction Relief Act ("PCRA") petition. On November 29, 2017, appointed PCRA counsel filed an Amended Petition. On December 19, 2017, this Court held an evidentiary hearing and reserved judgment for the Petitioner to file a Memorandum of Law. On January 2, 2018, the Petitioner filed a Memorandum of Law. On January 4, 2018, this Court dismissed the instant petition.

Facts

Shortly before 9:00 a.m. on November 6, 2015, Terrell Cooper visited 2013 Norwood Street in South Philadelphia, where his mother Viola Manning lived and his cousin Tremane was present. Having brought clothing for a job interview nearby and left them in the home, Cooper, wearing black Nike pants and Timberland boots, sat on the stairwell outside 2013 Norwood Street, where he encountered the Defendant, Darryl Allen, who had approached from his paramour's home at 2009 Norwood Street, two doors away. The Defendant wore a black

² On that date, the Petitioner consolidated his sentencing in the instant matter with his open bill in CP-51-CR-0006756-2014. In that matter, this Court imposed a one to two year term of imprisonment for Possession With the Intent to Deliver ("PWID"), to be served concurrently with his instant sentence.

³ In his Motion to Reconsider Sentence, the Petitioner challenged this Court's imposition of its VUFA 6105 sentence with an Offense Gravity Score ("OGS") of ten, which is reserved for convictions involving loaded firearms. The Petitioner based this claim on the absence of a clear jury determination that the firearm in question was loaded, and that he was entitled to a sentence reflecting an OGS of nine.

⁴ At the June 9, 2017 reconsideration hearing, this Court imposed an erroneous five to ten year sentence for VUFA 6106. On June 13, 2017, this Court vacated its five to ten year sentence for VUFA 6106 and imposed no further penalty on the charge.

polo jacket, black cargo pants, and black Nike sneakers. N.T. 2/28/2017 at 165, 211, 215–219; N.T. 3/1/2017 at 19.

The Defendant, standing in the middle of Norwood Street, engaged in a heated exchange with Cooper concerning an dispute that occurred the day before. Manning overhead the argument from inside 2013 Norwood and went to her front window to investigate the commotion. Shortly thereafter, Cooper approached the front door and warned Manning to get away from the window. Standing in the doorway, Cooper observed the Defendant walk southbound on Norwood Street towards a red Jeep Liberty parked between 2015 and 2017 Norwood Street, crouch behind it, and draw a black and silver pistol. Cooper shouted that the Defendant was getting ready to shoot, and the Defendant fired two shots. N.T. 2/28/2017 at 165–171, 216–224.

Cooper retreated into the home and armed himself with a .45 caliber pistol, sporting an obliterated serial number, from a closet inside. From there, Cooper, his cousin Tremane, and his mother Manning chased the Defendant, who ran southbound towards Snyder Avenue and escaped. As Cooper walked back to 2013 Norwood Street, he observed a bullet hole in the back of the red Jeep Liberty. N.T. 2/28/2017 at 172–175, 224–228,

At approximately 9:00 a.m., Philadelphia police officers Andrew Power and Rameen Johnson responded to a radio call for shots fired on the 2000 block of Norwood Street, where they secured the scene upon arrival. Between fifteen to twenty minutes later, Detective Michael McKenna arrived at the scene and discovered a single brass .45 caliber fired cartridge casing (“FCC”) and a video surveillance camera at the nearby law office of Michael Cohen, Esq. McKenna obtained the video from Cohen on November 11, 2015, and it revealed the Defendant wearing a black polo jacket, black cargo pants and black Nike shoes running

southbound on Norwood Street. The video also depicted Cooper, wearing black Nike pants and Timberland boots while carrying a .45 caliber pistol, and his cousin Tramane chase the Defendant towards Snyder Avenue. The video further showed Manning following behind Cooper at a distance, carrying a cellular phone. N.T. 2/28/2017 at 145–151; N.T. 3/1/2017 at 112–113, 120–128; Commonwealth Exhibit C-46.

On November 12, 2015, Detective McKenna showed the surveillance footage to to Officer Jason Troccoli, a bicycle patrolman for the area of the shooting, who was familiar with the Defendant and Cooper. Officer Troccoli identified both participants in the footage. In an interview with police detectives, Manning identified the Defendant as a participant via photo array. N.T. 2/28/2017 at 177; N.T. 3/1/2017 at 83–90, 128–131; Commonwealth Exhibit C-5.

Detective Gallagher obtained a search warrant for the Defendant's home at 2249 Cantrell Street while Detective McKenna secured a warrant for 2013 Norwood Street. On November 12, 2015, police officers executed the search at 2249 Cantrell Street and recovered the black polo jacket, black cargo pants, and black Nike shoes worn by the Defendant on the day of the shooting.⁵ The Defendant was not present. On that same date, police officers' search of 2013 Norwood Street revealed a red 2015 Subaru, which was rented to Cooper's cousin Keyon Clayton, parked behind the house. The Subaru contained a .45 caliber pistol with an extended magazine similar in appearance to the weapon carried be Cooper on the date of the shooting. Police officers further recovered the black Nike pants and Timberland boots worn by Cooper. N.T. 3/1/2017 at 131–142, 173–177; Commonwealth Exhibits C-14, C-19.

⁵ Officers further discovered a black .9mm Ruger handgun in a safe belonging to the Defendant's mother, Denise Allen. The Ruger was properly register in Denise Allen's name and ballistic testing revealed that it was not used in the instant shooting.

Officer Ronald Weitman of the Philadelphia Police Firearms Investigation Unit (“FIU”), an expert in ballistics, examined the .45 caliber pistol recovered from 2013 Norwood Street and the FCC recovered at the crime scene. Officer Weitman’s comparative analysis utilizing microscopic identification of the recovered pistol and the FCC revealed that the recovered FCC was not fired from the recovered pistol. N.T. 3/1/2017 at 181–182, 187–198; Commonwealth Exhibits C-29, C-30.

Cooper and Manning each provided statements to the Philadelphia Police Department implicating the Defendant as the shooter. Cooper entered into a cooperation agreement with the Commonwealth, agreed to testify against the Defendant, and ultimately pled guilty to Firearms Not to be Carried Without a License and Possession of an Instrument of Crime.⁶ On December 11, 2015, police officers arrested the Defendant. N.T. 2/28/2017 at 175–178, 234–238; Commonwealth Exhibits C-1, C-24, C-25, C-36; Defense Exhibit D-3.

Discussion

The Petitioner raises a single issue for review, alleging that trial counsel was ineffective for failing to consult with the Petitioner about perfecting a Notice of Appeal. To obtain relief based on ineffective assistance of counsel, a petitioner must show that such ineffectiveness in the circumstances of the particular case, “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” *Commonwealth v. Jones*, 912 A.2d 268, 278 (Pa. 2006); 42 Pa.C.S. § 9543(a)(2)(ii). Counsel is strongly presumed to have rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668 (1984); *Commonwealth v. Weiss*, 81 A.3d 767, 783 (Pa. 2013).

⁶ See CP-51-CR-0002842-2016.

To overcome this strong presumption, the Petitioner has to satisfy the performance and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987). The *Strickland/Pierce* test applies by looking to three elements—whether: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel’s actions or failure to act; and (3) the petitioner has shown that he suffered prejudice as a result of counsel’s lapse, i.e., that there is a reasonable probability that the result of the proceeding would have been different. *Commonwealth v. Bennett*, 57 A.3d 1185, 1195–96 (Pa. 2012). Failure to satisfy any prong of this test for ineffectiveness will require rejection of the claim. *Commonwealth v. Daniels*, 104 A.3d 267 (Pa. 2014). If a claim fails under any necessary element of the *Strickland/Pierce* test, the court may proceed to that element first. *Bennett*, 57 A.3d at 1196. A claim has arguable merit where the “factual averments, if accurate, could establish cause for relief.” *Commonwealth v. Pander*, 100 A.3d 626, 631 (Pa. Super. 2013).

Before a court will find ineffective assistance of counsel, a petitioner must plead and prove that he requested an appeal and that counsel disregarded that request. *Commonwealth v. McGarry*, 172 A.3d 60, 70 (Pa. Super. 2017) (*citing Commonwealth v. Touw*, 781 A.2d 1250, 1254 (Pa. Super. 2001)). Counsel has a constitutional duty to consult with a defendant about an appeal where counsel has reason to believe either: (1) that a rational defendant would want to appeal; or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Commonwealth v. Green*, 168 A.3d 173, 178 (Pa. Super. 2017) (*citing Commonwealth v. McDermitt*, 66 A.3d 810, 815 (Pa. Super. 2013))).

This Court notes that the Petitioner does not deny that he discussed his appellate rights with counsel, but rather counsel’s discussion was insufficient to adequately inform him of his

appellate rights. While neither the Supreme Court of the United States or the Supreme Court of Pennsylvania provide a test to determine the adequacy of the consultation required, counsel can be held ineffective for providing incorrect advice or failing to properly advise a client.

Commonwealth v. Markowitz, 32 A.3d 706, 716 (Pa. Super. 2011) (*citing Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Touw*, 781 A.2d at 1250). Where the petitioner can establish that, but for counsel's advice, he would have filed a direct appeal, he is entitled to the reinstatement of appellate rights. *Id.* However, counsel is not required to file an appeal that is not requested.

Id.

In *Commonwealth v. Green*, 168 A.3d 173 (Pa. Super. 2017), the Superior Court held that counsel's consultation with his client about filing a Notice of Appeal was inadequate. During an evidentiary hearing, trial counsel testified that he did not speak to his client about taking an appeal, despite preserving a suppression issue for the purposes of substantive appeal. *Id.* at 176–177. Reviewing *de novo*, the Superior Court concluded that counsel merely gave advice regarding issue preservation for the purposes of appeal, and not on an appeal itself. *Id.* at 177. Because that conversation merely informed the appellant that an appeal was possible, rather than demonstrating a reasonable effort to discover the appellant's wishes regarding an appeal, the Superior Court remanded the case.

The facts of the instant matter are distinguishable from *Green*. Unlike in *Green*, where defense counsel preserved a suppression issue for the purpose of appeal, independent review of this matter does not reveal any significant evidentiary issue the Petitioner preserved for review. At the December 19, 2017 evidentiary hearing, trial counsel Michael Caudo, Esq. testified that after both the May 17 and June 9, 2017 sentencing hearings, he consulted with the Petitioner, who explicitly indicated that he did not wish to file a Notice of Appeal. N.T. 12/19/2017 at 9,

12.⁷ Trial counsel further testified that after the June 9th sentencing hearing, the Petitioner failed to contact him or submit in writing any request to file an appeal. *Id.* at 18–19. Although the Petitioner had the ability to testify at this hearing, and despite bearing the burden of proof, he elected not to testify at the evidentiary hearing.

During the evidentiary hearing, this Court elucidated upon its concern that the Petitioner’s alleged desire to seek relief upon direct appeal contradicted his actions at the sentencing hearing, namely by consolidating the instant matter with his pending sentence for an unrelated PWID, to which he pled guilty. As this Court noted, defendants seeking to challenge their conviction or sentence typically do not consolidate that matter with another charge that was pending sentencing. N.T. 12/19/2017 at 19.

The record supports trial counsel’s testimony that the Petitioner did not request that a Notice of Appeal be filed on his behalf. At the conclusion of the June 9, 2017 sentencing hearing, this Court informed the Petitioner that if he wanted to file a Motion for Reconsideration of Sentence or a Notice of Appeal, he would have to inform trial counsel of his request. N.T. 6/9/2017 at 12. The Petitioner then indicated to this Court that he did not want trial counsel to file an appeal, and this Court further explained that under the current circumstances, trial counsel would not file a Notice of Appeal. *Id.* at 13. Since trial counsel was privately retained, this Court informed the Petitioner that if he changed his mind and sought to file an appeal, he would have to inform trial counsel, whereupon this Court would appoint appellate counsel to represent the Petitioner free of charge. *Id.*

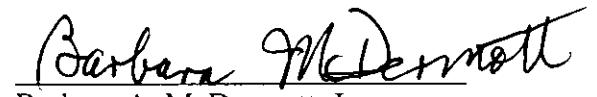
Trial counsel’s testimony at the evidentiary hearing, coupled with the Petitioner’s own averments at the June 9, 2017 sentencing hearing, demonstrably shows that the Petitioner did

⁷ Trial counsel testified that he filed the Motion to Reconsider Sentence after a discussion with the Petitioner’s fiancé. N.T. 12/19/2017 at 17–18.

not request that trial counsel file a Notice of Appeal on his behalf. Accordingly, the Petitioner fails to demonstrate that trial counsel's decision not to file a Notice of Appeal was unjustified.

For the foregoing reasons, the Defendant's judgment of sentence should be affirmed.

BY THE COURT,


Barbara A. McDermott, J

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing filing upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114:

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Dated: January 17, 2018

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Law Clerk to the
Honorable Barbara A. McDermott