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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

The Pittsburgh Legal Journal Opinions *are published fortnightly by the*
Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org

Circulation 5,300

PLJ Editorial Staff

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Commonwealth of Pennsylvania v. Melvin Hudson

Criminal Appeal—Petition for Return of Property

Defendant providing evidence of earnings on pay stubs, tax filings, and unemployment compensation documentation is not sufficient to overcome the rebuttable presumption that currency found in "close proximity" to a controlled substance is the proceeds derived from the sale of a controlled substance.

No. CC: 2021-01734. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Driscoll, S.J.—December 6, 2021.

MEMORANDUM AND ORDER REGARDING RETURN OF CURRENCY

I. The Commonwealth's Information contains eight counts, as follows:

Count 1:	35780-113A30:	POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE
Count 2:	35780-113A31:	POSSESSION OR DISTRIBUTION – MARIJUANA OR HASHISH
Count 3:	35780-113A32	POSSESSION OF DRUG PARAPHERNALIA
Count 4:	753802D2*:	DRIVING UNDER THE INFLUENCE OF ALCOHOL OR CONTROLLED SUBSTANCE: DRUG OR COMBINATION OF DRUGS
Count 5:	751543A:	DRIVING WHILE OPERATING PRIVILEGE IS SUSPENDED OR REVOKED
Count 6:	751501A:	DRIVING WITHOUT A LICENSE
Count 7:	753714A:	CARELESS DRIVING
Count 8:	754302A1:	OPERATING WITHOUT A LIGHTS

In disposition of all charges the defendant entered pleas of guilty to Counts (Possession of a controlled substance), Count 4 (operating his vehicle while under the influence of a controlled substance), Count 5 (operating a vehicle while his privileges are suspended). Count (possession with intent to deliver) was withdrawn as part of the negotiated plea.

Following the defendant's sentence of DUI and possession, the defendant filed a motion for return of property, and the matter was submitted to the count for disposition on the basis of the Commonwealth's factual assertions in the affidavit to the complaint and the defendant's factual assertions as set forth in the Petition For return of Property. Those facts can be summarized as follows:

FACTS

While operating his vehicle at about 11:40 PM on November 14, 2020, the defendant was stopped by the officer for swerving and having no headlights on. On approaching the vehicle, the officer smelled an overwhelming odor of burning marijuana. The officer then observed fresh ashes on the defendant's hoodie and a plume of smoke emanating from the vehicle. He then asked he defendant to exit the vehicle. As the defendant exited, he advised the officer that he had been "just smoking weed." The officer patted down the defendant for weapons and discovered "two large wads of cash in his jeans pockets (front left and right)."

The defendant admitted to having a couple ounces of marijuana in the vehicle, an amount deemed by the officer as a "considerable amount" if only for personal use. The officer then searched the vehicle and recorded his findings in his affidavit as follows:

Ex. 1. Black/multicolored bag with a large amount of marijuana inside a cellophane bag (rear passenger seat floorboard)

Ex. D. Black digital scale (front center console)

Ex. E. Cigarillo packs

Ex. F. Silver and white Newer iPhone in a black case

Ex. G. Smoked blunt (center Console)

Ex. H. Clear cellophane bag labelled "Cake" (Rear silver map Pocket)

After conducting a field sobriety test and placing the defendant under arrest, a search of the defendant's person was conducted. This search uncovered the following:

Ex. A. $1638.00 in various loose bills (Folded up in left front pocket)

Ex. B. $896 in various bills (folded in half and rubber banded)

Ex. C. $12,300.00 various bills (stacked and found in his groin area rubber banded)

The officer's interpretation of the above was set forth as follows:

"Due to the multiple paraphernalia items, smoking while being pulled over, the large bag of loose marijuana, empty cellophane bag with residue, large amounts of currency which was separated, folded and distributed for easier access, I believe that Hudson was selling marijuana as well as smoking and driving."

The defendant contends that the currency is lawfully his, not derivative contraband, and in support of his claim submits pay stubs, from October 19- November 20, 2019, showing net pay of $1034.33. He also provides a 2019 IRS Form 1040 worksheet showing earnings of $4206. In addition, he provided an unemployment check voucher for the week of 5/23/2020 showing a payment of $3040.00. Thus, the defendant demonstrated income during 2019-2020 of approximately $7246. The currency in his possession on November 14, 2020, was $14,834.

DISCUSSION

The return of this currency, in the sum of $14,834, is sought by the defendant. Its forfeiture is sought by the Commonwealth as derivative contraband.

Currency used or intended to be used in exchange for a controlled substance is subject to forfeiture. When currency is found in "close proximity' to a controlled substance it is to be "rebuttably presumed" to be proceeds derived from the sale of a controlled substance. (42 PS. C.S.A. Sec,.5802 (6) (ii)). This presumption can be rebutted by evidence that arises from the totality of the facts and circumstances.[1]

The Commonwealth does not provide evidence of an actual transaction, but the facts as stated in the affidavit are compelling:

Within the defendant's vehicle were (1) a bag containing a large amount of marijuana (an amount deemed by the experienced officer as too much for just personal use) inside a second bag lying on the rear floorboard (2) a digital scale in the front center console, (3) another bag with residue therein, and (4) a cell phone. These items were all within the defendant's reach at the very same time as he had on his person three separately folded, wrapped, and loaded bills.

The defendant's contention that the source of the currency was his 2019 earnings of $4206, and an unemployment check of $3040 received on May 13, 2021, does not provide a basis to rebut the presumption. It would be unreasonable to accept his explanation as sufficient to rebut the presumption that all these items and the currency were anything other than contraband, particularly in view of the presence of the digital scale.

Essentially, he has asked the court to accept his receipt of $7200 during 2019-2020 as the basis for inferring that the $14,834 is not contraband, and as a rebuttal of the proximity presumption. The defendant's minimal explanation (which is not a reasonable explanation) actually affirms the soundness of the proximity presumption.

Accordingly, I have concluded that the Commonwealth has met its burden of proof on the basis of the proximity presumption set forth in Sec. 5802, IBID.

An order is attached.

[1] See Comm. V $34,440 U.S Currency 644 PA 118, 174 A. 3d 1031 (2017), which held that the Commonwealth's overall burden of proving a substantial nexus between the controlled substance and the currency can be established on the basis of only the presumption that arises from proximity. However, the case also holds that the presumption can be rebutted by the force of contradictory circumstances, such as those which demonstrate that the money had no connection with an illegal drug transaction. The burden of showing a nexus between the currency and a drug transaction is met if shown by a preponderance of the evidence. A nexus can be presumed on the mere basis of proximity but rebutted by other facts and circumstances. The validity of the statutory provision (42PA.C.S.A. Sec 5802 (6) (ii)), allowing forfeiture on the basis of a rebuttable presumption, is grounded in the persuasiveness of the inference that arises from the proximity of the currency to the controlled substance and paraphernalia. As noted in Leary v. U.S., 395 U.S. 6, 89 S. Ct 1532,23 L. Ed. 2d 57 (1969) a permissive interference is constitutional if it can "be said with substantial assurance that the presumed fact is more likely than not to follow from the proved fact on which it is made to depend." Pennsylvania adopted the Leary holding in Commonwealth v. Hall, 574 PA. 233, 830 A. 2d 537 (2003) and it is codified in 42 PA. C.S.A. sec. 5802 (6) (ii)).

And now, December 6, 2021, after consideration of the defendant's Petition for Return of Property Pursuant to Pa. R. Crim. P. 588, and the facts contained in the affidavit of probable cause and stipulations there to, the petition is denied.

The commonwealth's request for forfeiture of the following seized items is granted:

1 – Black/multicolored bag with large amount of marijuana inside a cellophane bag.
D – Black digital scale (front center console)
E – Cigarillo packs
F – Silver and white Newer iPhone in a black case (front seat)
G – Smoked blunt (center console)
H – Clear cellophane bag labelled "cake" (rear map pocket)
A – $1638 in various denominations
B – $896 in various denominations
C – $12,300 in various denominations.

BY THE COURT:
/s/Driscoll, S.J.

Commonwealth of Pennsylvania v. Robert Mickens

Criminal Appeal—PCRA—Timeliness Exceptions

Petitioner's requests for relief pursuant to the Post Conviction Relief Act (PCRA) is time-barred and the court will not address the substantive merits of the claims when it is filed more than one year after the sentence became final and includes only restatements of allegations raised in previous PCRA petitions, thus failing to prove any of the three enumerated timeliness exceptions.

No. CP-02-CR-02554-1995, CP-02-CR-15959-1994. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Rangos, J.—May 17, 2019.

OPINION

This matter was before the Court for disposition of Appellant Robert Mickens' fifth request for relief pursuant to the Post Conviction Relief Act (PCRA).[1] Mickens' underlying conviction became final on August 21, 1998, after the Superior Court affirmed the judgment of sentence.

Appellant first filed a PCRA on January 4, 1999, the denial of which became final October 30, 2001, after the Superior Court affirmed the lower court without a hearing and no petition for review was filed with the Supreme Court. Appellant's second PCRA was disposed of when the Superior Court, on December 27, 2007, affirmed the trial court's denial of the petition. Appellant's third PCRA was disposed of when the Superior Court, on June 23, 2017, dismissed the petitioner's appeal because Appellant did not plead facts that would establish an exception to the PCRA's timeliness requirements.

In this fourth petition, Appellant asserted that actions of the trial judge denied Appellant access to the courts and violated his due process. Furthermore, Appellant raised claims of Brady violations, including fabricating evidence, withholding and altering evidence, as well as claims of miscarriage of justice and unlawful conviction. This Court filed its Opinion on May 17, 2019. The Superior Court of Pennsylvania quashed the appeal on September 13, 2019 and the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal on March 3, 2020.

Next, Appellant filed his fifth PCRA on July 13, 2021. This Court again found the Petition untimely without exception and dismissed the Petition on September 14, 2021. Appellant filed a Notice of Appeal on September 27, 2021 and a Concise Statement on October 25, 2021.

Generally, to obtain merits review of a PCRA petition filed more than one year after the sentence became final, the petitioner must allege and prove at least one of the three timeliness exceptions. See 42 Pa C.S. § 9545(b)(1)(i)-(iii). The petitioner must prove:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1)(i)-(iii). "[W]hen a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." Commonwealth v. Gamboa-Taylor, 562 Pa. 70, 77, 753 A.2d 780, 783 (2000).

Appellant's current allegations of governmental interference and miscarriage of justice are nothing more than restatements of issues raised in prior PCRA Petitions. As a result, the claims are time-barred as they could have been raised in an earlier PCRA. A review of a record indicates that the PCRA Petition filed in the within action is clearly beyond the one-year time limitation and does not satisfy one of the limited exceptions. Given these circumstances this Court was without jurisdiction to address the substantive merits of the petitioner's PCRA claims. Commonwealth v. Balance, 203 A.3d 1027 (Pa. Super. 2019).

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

[1] Appellant's first three PCRA petitions were disposed of by the Honorable Donna Jo McDaniel. As a result of her retirement, this case was reassigned to this Court.

Commonwealth of Pennsylvania v. Timothy Vales

Criminal Appeal—PCRA—Ineffective Assistance of Counsel

Appellant does not meet the burden of demonstrating ineffective assistance of counsel at a probation violation hearing when counsel argued, and the court considered, prior treatment compliance and a history of sexual abuse, but also current noncompliance, the fact appellant disabled EHM equipment, and appellant's extensive criminal history.

No. CP-02-CR-02843-2016, CP-02-CR-09847-2016, CP-02-CR-05066-2017, CP-02-CR-06039-2017, CP-02-CR-00672-2017. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—November 1, 2021.

OPINION

On August 18, 2017, Appellant, Timothy Vales entered a guilty plea at five criminal informations. At CP-02-CR-02843-2016, Appellant pled guilty to one count of theft by deception and three counts of bad checks. At CP-02-CR-09847-2016, Appellant pled guilty to one count of theft by deception. At CP-02-CR-05066-2017, he pled to theft by deception, forgery, and unauthorized practiced of law. He pled to theft by deception at CP-02-CR-06039-2017. Lastly, at CP-02-CR-00672-2017, Appellant pled guilty to theft by deception. On July 16, 2019, this Court found Appellant to have violated his probation sentences as a result of convictions for new crimes and for technical violations. This Court imposed an aggregate sentence of 4.5 to 13.5 years of incarceration. Appellant's Post Sentence Motion was denied on July 29, 2019. Appellant filed a direct appeal on August 15, 2019 but discontinued the appeal on August 28, 2019.

Next, on April 9, 2020, Appellant filed a pro se PCRA Petition. Appointed counsel filed an Amended PCRA Petition on March 5, 2021. This Court gave Notice of Intent to Dismiss on July 21, 2021 and dismissed without a hearing on August 16, 2021. Appellant filed a Notice of Appeal on September 9, 2021 and a Concise Statement of Errors Alleged on Appeal on October 8, 2021.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges one error on appeal. Appellant alleges that this Court erred in dismissing the PCRA Petition without a hearing when probation violation counsel was ineffective for failing to introduce available treatment records that would have resulted in a more favorable result for Appellant. (Concise Statement of Errors Complained of on Appeal at 4).

DISCUSSION

Appellant asserts his counsel at his probation violation hearing provided ineffective assistance of counsel. Counsel is presumed to be effective and "the burden of demonstrating ineffectiveness rests on [A]ppellant." Commonwealth v. Rivera, 10 A.3d 1276, 1279 (Pa. Super. 2010). To meet this burden, Appellant must, by a preponderance of evidence, plead and prove that:

> (1) His 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 interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different.

Commonwealth v. Fulton, 830 A.2d 567, 572 (Pa. 2003). Appellant asserts that if counsel had introduced Appellant's available treatment records, this Court would have given Appellant a more lenient sentence. Appellant is incorrect.

Counsel for Appellant argued for a more lenient sentence by emphasizing Appellant's prior compliance with JRS and his history of sexual abuse. (Transcript of Probation Violation and Sentencing Hearing, July 16, 2019, hereinafter "PT" at 13). This Court noted that it had considered Appellant's need for mental health and substance abuse treatment at a prior hearing. (PT 16-17). Appellant responded to this Court's leniency with noncompliance. Appellant failed to maintain contact with his probation officer, cut off his leg band, unplugged the EHM equipment to go AWOL, and failed to pay restitution. (PT 20). This Court further noted that after over thirty-five years of criminal behavior, with numerous interventions attempted by the Court, Appellant has demonstrated a longstanding unwillingness or inability to refrain from criminal behavior. (PT 26). Appellant's history of abuse, while tragic, does not excuse or justify his subsequent criminal acts. This Court did not lack sufficient evidence to sentence Appellant to 4.5 to 13.5 years of incarceration. Furthermore, counsel for Appellant was not ineffective as the additional evidence Appellant believes counsel should have offered would not have impacted this Court's sentencing order.

CONCLUSION

For all above reasons, the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.