

Commonwealth v. Carbaugh

PCRA - counsel's petition to withdraw - guilty plea - additional incarceration for parole violations - no meritorious issues

1. PCRA petition filed on basis that petitioner lacked knowledge about additional incarceration to be imposed for parole violations when he entered his guilty plea; counsel filed no-merit letter in support of petition to withdraw.
2. Because the Superior Court on direct appeal addressed petitioner's argument that terms of plea agreement were violated by the Commonwealth and that the Commonwealth unlawfully induced him to enter into the plea, issue was previously litigated and not cognizable under the PCRA.
3. Court reviewed argument that counsel was ineffective for failing to inform petitioner of possibility of additional incarceration even though it was raised on direct appeal because of complexities that exist when counsel raises his own ineffectiveness.
4. Because knowledge of possible additional incarceration for parole violations did not in any way implicate the truth-determining process and petitioner never asserted his innocence, ineffectiveness claim is not cognizable under PCRA

John F. Nelson, District Attorney

Julie Gray Dorsett, Esquire, Attorney for Defendant

Randy Carbaugh, Defendant

OPINION AND ORDER

Walker, P.J., March 18, 1998:

Factual and Procedural Background

On December 20, 1984, a jury found Randy Carbaugh ("petitioner") guilty of third degree murder, robbery, theft, and four counts of forgery. This conviction was appealed to the Superior Court, who remanded the case for a new trial based on that court's finding that statements made by petitioner had been illegally obtained and therefore had to be suppressed. A suppression hearing was held on October 6, 1987, before the Honorable William H. Kaye, who ordered the statements suppressed. Subsequently, petitioner through his attorney, the now Honorable Douglas W. Herman, entered into plea negotiations with John F. Nelson, District Attorney. An agreement was reached to enter into a *nolo contendere* plea to third degree murder, in exchange for not pressing the charges of theft, robbery, and forgery. (N.T. of proceedings of nolo contendere plea,

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November 16, 1987, at 2-3). After conducting a plea colloquy on November 16, 1987, the Honorable John W. Keller accepted the plea. Petitioner was subsequently sentenced to incarceration for ten to twenty years, the maximum permissible under the guidelines.

Two days after the sentencing, petitioner was served with a notice of parole violations triggered by the murder conviction. Petitioner, through his counsel, filed a timely motion to withdraw his guilty plea based on the argument that incarceration for the parole violations would be a violation of the plea agreement. Counsel also asserted his own ineffectiveness in failing to inform petitioner about the possibility of having to serve sentences for parole violations. A hearing was held on February 16, 1988, after which Judge Keller denied the motion to withdraw the plea and reinstated the sentence. Petitioner appealed this decision to the Superior Court, where it was affirmed. Petitioner filed a petition for allowance of appeal with the Pennsylvania Supreme Court, but this was denied on March 22, 1990.

In December 1996, petitioner filed a motion for post conviction collateral relief. By order of January 9, 1996, this court granted petitioner 90 days to file a supplemental PCRA petition. On May 29, 1997, this court appointed David Wertime as counsel for petitioner, and issued a rule to show cause upon the Commonwealth, which was timely answered. On June 12, 1997, David Wertime's appointment was rescinded due to a conflict and Julie Gray Dorsett was appointed as counsel. By (amended) order of September 26, 1997, this court gave notice to petitioner of its intent to dismiss his PCRA motion on the ground that petitioner did not state any factual allegations which would entitle him to relief. This court gave petitioner 20 days to file an amended motion. At the end of that period, petitioner's counsel filed a petition for leave to withdraw. In a letter accompanying this petition, she averred that she had thoroughly reviewed the rather voluminous record, as well as the Post Conviction Relief Act, and that she believed that there are no meritorious issues to be litigated.

In response to that letter, this court informed counsel that she needed to file a no-merit letter setting forth, in addition to the nature of her review of the case, a list of each issue petitioner wants to have reviewed, and her explanation as to why those issues are meritless. Upon receipt of counsel's no-merit letter, this court has conducted an independent review of the record, and this court concurs with

counsel's conclusion that there are no meritorious issues which would entitle petitioner to relief.

Discussion

Counsel in her no-merit letter states that petitioner has raised only one issue: that he entered into the *nolo contendere* plea believing that the sentence for the third degree murder would be the only punishment imposed. He argues that his counsel was ineffective for failing to inform him that the probation violations could cause additional incarceration. He furthermore argues that the imposition of additional incarceration for parole violation violated the terms of the plea agreement. Based on these arguments, petitioner alleges three grounds for relief in his petition for post conviction collateral relief: (1) a violation of the Constitution of Pennsylvania and the United States which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place; (2) ineffective assistance of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place; and (3) a plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty and the petitioner is innocent. See 42 Pa.C.S.A. §9543(a)(2).

Counsel states that she has reviewed the entire record twice, and that in her opinion, this issue is not a meritorious one because it has been thoroughly addressed by petitioner's previous counsel at the proceedings to withdraw the plea, as well as on appeal. The Superior Court, in its opinion, held that the terms of the plea agreement were not violated, because the probationary sentences were not part of the plea agreement. (Opinion dated August 9, 1989, Nos. 00581 and 00712 Harrisburg, 1988). The court furthermore held that the plea colloquy clearly shows that petitioner voluntarily entered into the plea with full understanding of it. Thus, it appears that petitioner's argument that his constitutional rights were violated because the Commonwealth did not adhere to the terms of the plea agreement, or that the Commonwealth unlawfully induced petitioner to enter into the plea, has been previously litigated and thus cannot be a basis for post conviction relief. 42 Pa.C.S.A. §9544(a).

Petitioner's remaining argument is the allegation that his plea was unlawfully induced as a result of his counsel's ineffective assistance.

Petitioner's trial counsel, the now Honorable Douglas Herman, has raised this issue on direct appeal, as evidenced by the statement of matters complained about on appeal. As such, this issue was previously litigated. However, because the Superior Court did not specifically address counsel's ineffectiveness in its opinion, and because of the complexities that arise when appellate counsel has to raise his own ineffectiveness at an earlier stage, this court nevertheless reviewed the merits of this issue.

For petitioner's claim of ineffectiveness of counsel to be cognizable under the Post Conviction Relief Act ("PCRA"), he must show that this ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S.A. §9543(a)(2)(ii). This language has been interpreted by the Pennsylvania Supreme Court as an additional substantive requirement which must be proved before relief under the PCRA can be granted. *Commonwealth v. Buehl*, 540 Pa. 493, 658 A.2d 771 (1995). Additionally, a claim of ineffective assistance of counsel must raise a question of whether an innocent individual has been convicted. *Commonwealth v. Moore*, 439 Pa. Super. 48, 52, 653 A.2d 24 (1995).

"Generally, where a party has entered a guilty plea, the truth-determining process is not implicated. This is particularly so where a PCRA challenge relates to an accused's understanding of sentencing." *Moore*, 439 Pa. Super. at 51 (citations omitted). In *Moore*, petitioner pleaded guilty to a charge of possession of cocaine. That conviction was a violation of his parole, and he was recommitted to serve the remainder of his sentence. Moore based his PCRA petition on the ground that his counsel was ineffective for failing to inform him that the parole board had the authority to require that his sentence on the cocaine offense would run consecutive to the recommitment sentence. *Moore*, 439 Pa. Super. at 50. The court found that Moore's understanding of the parole board's sentencing authority could not have aided him in persuading a fact finder of his innocence or guilt. *Moore*, at 53. Because Moore also did not allege how his counsel's failure to inform him about the parole board's authority to require a consecutive sentence was related to the truth-determining process that would have occurred absent his plea, Moore did not have a cognizable claim. Similarly, in the underlying case, petitioner's understanding that he would have to undergo additional

incarceration for his parole violations would not have had any effect on a finding of his guilt or innocence. Furthermore, petitioner's understanding regarding this matter does not in any way implicate the truth-determining process. Additionally, as counsel states in her no-merit letter, petitioner has never asserted that he was innocent of the charge he pleaded to. Thus, petitioner's ineffectiveness claim is not cognizable under the PCRA.

Counsel for petitioner furthermore asserts that the sentence was within the guidelines, and there does not appear to be any after-discovered exculpatory evidence which could provide a basis for relief. After its own review of the record, this court concurs with counsel that there are no meritorious issues that can be raised. Therefore, this court will permit counsel to withdraw and dismiss petitioner's motion for post conviction relief.

ORDER OF COURT

March 18, 1998, upon review of counsel's no-merit letter and the entire record in the above captioned case, this court finds that there are no meritorious issues that can be raised in a motion for post conviction relief and enters the following order:

1. Julie Gray Dorsett, Esquire, is granted leave to withdraw as counsel for Petitioner Randy Carbaugh.
2. The petition for post conviction relief of Randy Carbaugh, who has been given notice of this court's intent to dismiss his petition for post conviction collateral relief, is dismissed because no meritorious issues exist.