Commonwealth of Pennsylvania vs. Vernon Ealy, Jr., Defendant, Franklin County Branch, Criminal Action, No. 985 of 1995 Charges: Delivery, Criminal Conspiracy Post conviction Relief Act Petition

Commonwealth v. Vernon Ealy, Jr.

Petition for post-conviction collateral relief alleging ineffective assistance of counsel, guilty plea unlawfully induced and sentence greater than the lawful maximum.

1. A plea of guilty is unlawfully induced where circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent. 42 Pa.C.S.A. section 9543(a)(2)(iii).

2. The petitioner must prove his plea was unlawfully induced by a preponderance of the evidence. 42 Pa.C.S.A. section 9543(a).

3. Where a petitioner alleges ineffectiveness of counsel in connection with the entry of a guilty plea, he must show that counsel was ineffective and that such ineffectiveness caused the petitioner, who was innocent, to plead guilty.

4. It is presumed that counsel was effective and the petitioner has the burden of overcoming that presumption.

5. Where the petitioner spoke several times with counsel about the Commonwealth's plea offer, which provided that in exchange for serving a minimum of two years, a charge with a mandatory three-year minimum sentence would be nol-prossed, and the petitioner accepted the offer, pled guilty and never claimed to be innocent at either the plea colloquy or the sentencing, he failed to prove his plea was unlawfully induced or that counsel was ineffective.

6. Where the maximum sentence which the court could impose for each count to which the petitioner pled guilty was ten years, and the court sentenced him to twelve-to-sixty months on both counts, if the petitioner has not been paroled after the two-year minimum sentence, that is a matter for the parole board, not this court.

Tyrone G. Johnson, Esquire, Counsel for Defendant
John F. Nelson, Esquire, District Attorney

OPINION

Herman, J., March 17, 1998:

INTRODUCTION

The appellant Vernon Ealy, Jr. pled guilty on March 11, 1996 to delivery and conspiracy charges pursuant to a negotiated plea. He was represented through sentencing by William Tully, Esquire. Attorney Tully's law partner, David Hershey, Esquire appeared on the appellant's behalf at the sentencing. The appellant was sentenced

on July 24, 1996 to 12-60 months on each charge, to be served consecutively at a state correctional institution.

The appellant filed a petition for post-conviction collateral relief. The petition alleged ineffective assistance of counsel, a guilty plea unlawfully induced and that the sentence imposed was unlawful because it was greater than the statutory maximum. Counsel was appointed to represent the appellant and a hearing was held on December 15, 1997. At the conclusion of the evidence, the court made findings of fact on the issues and entered an Order denying the relief sought in the petition.

The appellant filed a notice of appeal on January 7, 1998. The court directed him to file a concise statement of matters complained of on appeal and he filed his statement on January 22, 1998. A review of his statement reveals that the appeal issues are identical to the issues he raised in his post-conviction relief petition and which this court thoroughly addressed on the record at the conclusion of the hearing. We file this supplemental Opinion to facilitate appellate review of this matter.

FACTS ESTABLISHED AT THE POST-CONVICTION HEARING

Attorney Tully met with the appellant in prison several times to discuss the charges and the Commonwealth's plea offer. That offer provided that if the appellant pled guilty to delivery and conspiracy, the Commonwealth would nol-pros the third charge which carried a three-year mandatory minimum sentence. The appellant would serve a minimum of 12-60 months on each charge, after which he would be eligible for parole. They also discussed the maximum penalties on the charges. Attorney Tully investigated the charges and discovered there were police witnesses as well as another witness to the transaction. The appellant was intercepted by police within minutes of the transaction and the identification evidence was strong. Counsel advised the appellant to plead guilty because he believed the plea offer was reasonable and that the appellant's chances of prevailing at trial were slim. The appellant agreed to accept the plea offer.

Attorney Tully and the appellant reviewed the plea agreement in the courthouse on March 11, 1996 immediately before the plea proceeding. The appellant completed a written plea colloquy. During

the colloquy with the court he acknowledged his guilt and indicated a desire to accept the Commonwealth's plea offer. He made no statement to the court either before, during or after the colloquy that his plea was the product of pressure or coercion or that he was in fact innocent of the charges. (N.T. March 11, 1996, Proceedings of Guilty Plea).

Sometime after the plea was entered the appellant wrote to Attorney Tully expressing a desire to withdraw the plea and go to trial. Attorney Tully visited him at the prison to discuss this request. The appellant was afraid of going to prison and wanted to know if there was any way counsel could get him out of the charges. He and counsel discussed at length the consequences of going to trial on all three charges and that his chances of acquittal were poor. The conversation ended with the appellant agreeing to maintain his guilty plea.

Thereafter the appellant wrote counsel a second time, again expressing concern about the upcoming sentencing and the fact that he would be spending a minimum of two years in prison. This letter also indicated a belief that Attorney Tully was not doing his utmost on the appellant's behalf to overcome the charges. Attorney Tully again visited the appellant in prison. At the onset of their conversation the appellant repeated his desire to withdraw his plea and expressed a lack of confidence in counsel's handling of the case. Counsel told the appellant that in light of this lack of confidence he would have to withdraw as counsel if the appellant desired to proceed to trial. The defendant eventually agreed to maintain his plea. Attorney Tully and the appellant devoted most of the meeting to reviewing the presentence investigation report and discussing how the appellant should conduct himself during his incarceration so as to maximize his chances of qualifying for early release.

The appellant was sentenced on July 24, 1996. The court considered the presentence investigation report and sentenced the appellant in conformity with the plea agreement. The appellant gave no indication to the court of his desire to withdraw his plea or that he had been coerced into pleading guilty. (N.T. July 24, 1996, Proceedings of Sentencing).

DISCUSSION

Issue One: Unlawful Inducement of Guilty Plea

A plea of guilty is unlawfully induced where circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent. 42 Pa.C.S.A. section 9543(a)(2)(iii). The petitioner must prove his plea was unlawfully induced by a preponderance of the evidence. Section 9543(a).

The evidence showed the appellant spoke several times with counsel at length about the plea offer and its consequences before he agreed to accept it. One of those consequences was a two-year minimum period of incarceration. Counsel advised the appellant that pleading guilty to delivery and conspiracy would ensure that the Commonwealth would dismiss the third and more serious delivery charge which carried a three-year mandatory minimum sentence. Counsel made no threats before the plea was accepted to induce the appellant to plead. It was only after the plea was entered and the appellant expressed a lack of confidence in his representation that Attorney Tully indicated it would be necessary for him to withdraw as counsel.

The appellant acknowledged his guilt on the charges in the written colloquy and during the colloquy with the court. (Commonwealth exhibit #1). He has never claimed to be an innocent individual. He cannot now renounce those representations. *Commonwealth v. Jones*, 596 A.2d 885 (Pa.Super. 1991). In addition, he never protested the propriety of the plea at sentencing. Under these circumstances we conclude the appellant failed to prove his plea was unlawfully induced.

Issue Two: Ineffective Assistance of Counsel

Where a petitioner alleges ineffectiveness of counsel in connection with the entry of a guilty plea, he must show that counsel was ineffective and that such ineffectiveness caused the petitioner, who was innocent, to plead guilty. *Commonwealth v. Edrington*, 464 A.2d 456 (Pa.Super. 1983). It is presumed that counsel was effective and the petitioner has the burden of overcoming that presumption. *Commonwealth v. Sneeringer*, 668 A.2d 1167 (Pa.Super. 1995).

The appellant claims counsel did not make the presentence investigation report available to him before his sentencing. However,

Attorney Tully testified he reviewed the report with the appellant on two occasions before the sentencing. The report dated April 22, 1996 was considered by this court during the sentencing proceeding. (Commonwealth exhibit #2). The ineffectiveness claim on this ground was not proven.

The appellant also contends counsel was ineffective for not moving to withdraw the plea after he twice requested that relief. As previously discussed, after face-to-face discussions with counsel about the wisdom of having pled guilty, the appellant agreed to stand by that plea. In any event, he had ample opportunity to request the withdrawal of his plea to the court at sentencing but did not do so. On the contrary, he told the court he had been given sufficient time to speak with counsel, that he understood the plea and possible sentence and wished to proceed with the sentencing. Again, he cannot now disown those representations, which are a matter of record. *Commonwealth v. Lewis*, 1998 WL 84407 (Pa.Super.).

Issue Three: Sentence Beyond the Lawful Maximum

The maximum sentence which the court could impose for each count to which the appellant pled guilty is ten years. This information appeared on the written plea colloquy form which the appellant signed. He indicated to the court during the colloquy that he understood these maximum penalties. That information also appeared in the presentence report which counsel reviewed with him. The court sentenced the appellant to 12-60 months on both counts. He did not protest at the sentencing about either the plea or the sentence. If he has not been paroled after the two-year minimum sentence, that is a matter for the parole board, not this court. This claim is not a ground for relief in this case.

We submit that no error was committed in any aspect of these proceedings and request that the decision to deny the appellant post-conviction relief be affirmed.