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**COMMONWEALTH OF PENNSYLVANIA vs. OTHA
LEROY FOREST, DEFENDANT, Franklin County Branch,
Criminal Action - Nos. 242 and 889 of 1991**

Commonwealth v. Forest

*Post Conviction Relief Act - Ineffective Assistance of Counsel - Prosecutorial Misconduct
- Right of Appeal - appeal Nunc Pro Tunc*

1. To make a valid claim of ineffective assistance of counsel, the defendant must show that there was merit to the claim that the attorney was allegedly ineffective for failing to pursue.
2. A defendant's mere assertion that a prosecutor acted improperly by speaking to defense witnesses before his trial does not state a meritorious basis for a mistrial.
3. In order for prosecutorial misconduct to be the basis for a mistrial, a defendant must show not only that the prosecutor acted improperly, but also that this improper conduct caused prejudice to the defendant to such an extent that he was denied a fair trial.
4. Prosecutorial misconduct is a meritless issue where a prosecutor merely speaks with defense witnesses and there is no evidence of any attempt to influence these witnesses or recover defense work product.
5. Although issues relating directly to the discretionary aspects of a sentence are not cognizable under the Post Conviction Relief Act ("PCRA"), an attorney's failure to preserve for appeal the propriety of the discretionary aspects of a sentence is reviewable under the PCRA since this failure violates the defendant's right to a direct appeal.
6. If counsel's ineffectiveness deprived a petitioner of an appeal right, the defendant should be granted the right to appeal *nunc pro tunc*.
7. The defendant's plea of *nolo contendere* to charges against him does not preclude his appeal of the discretionary aspects of the sentence imposed for those charges.

Franklin County District Attorney

H. Anthony Adams, Esquire, Attorney for Defendant

OPINION AND ORDER

Kaye, J., March 26, 1997:

**OPINION SUR DEFENDANT'S PETITION FOR RELIEF
UNDER THE POST CONVICTION RELIEF ACT**

We have before us a petition seeking relief under the Post Conviction Relief Act, 42 Pa.C.S.A. §9541 et seq. ("PCRA"), alleging ineffective assistance of counsel. Counsel have submitted memoranda following a hearing held on the petition, and the matter is now ripe for disposition. The background of this case will hereafter be set forth.

In criminal action number 242 of 1991, a jury found Otha Forest ("defendant") guilty to two counts of delivery of crack cocaine, and one count of conspiracy to deliver crack cocaine. In criminal action number 889 of 1991, defendant entered a plea of *nolo contendere* to one count of delivery of crack cocaine. Judgments of sentence were imposed and defendant appealed. The Superior Court affirmed on August 19, 1993 [No. 00493 Harrisburg 1992], 427 Pa.Super. 672, 629 A.2d 1032, and the Supreme Court denied the petition for allowance of appeal, 536 Pa. 642, 639 A.2d 28.

At trial, during the entry of his plea, and at sentencing, defendant was represented by Michael Toms, Esquire, his court-appointed counsel. Following sentencing, Mr. Toms filed a motion to modify sentence and a motion challenging the validity of defendant's *nolo contendere* plea. Thereafter, defendant was represented by Mr. Neil Jokelson, Esquire of Philadelphia, with Mr. Stephen Kulla, Esquire acting a local counsel.

Defendant's motion for post-conviction relief alleges that both trial counsel, Mr. Toms, and appellate counsel, Mr. Jokelson, were ineffective. It is alleged that Mr. Toms was ineffective for abandoning and failing to brief the issue of prosecutorial misconduct in his post-verdict motions. It is alleged by defendant that appellate counsel, Mr. Jokelson, was ineffective for failing to properly raise the issue of trial counsel's ineffectiveness and for failing to preserve for appeal any challenge to the discretionary aspect of sentence. We will now address the defendant's claims.

DISCUSSION

Claims of ineffectiveness of counsel are evaluated according to the rule established in *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967): 1/ the issue underlying the claim of ineffectiveness of counsel is of arguable merit; 2/ whether the course chosen by counsel has a reasonable basis designed to serve [the accused's] interest; and 3/ whether resultant prejudice occurred. Therefore, our first inquiry must be whether there was merit to the issue that defendant claims trial counsel was ineffective for failing to pursue.

Defendant asserts that trial counsel should not have abandoned the issue of prosecutorial misconduct in his post-verdict motions. In defendant's Motion in Arrest of Judgment and for a New Trial, paragraph 4 read as follows: "The Court erred in denying Defendant's Motion for a Mistrial on the basis of prosecutorial misconduct". However, his brief in support of this motion said that this issue was withdrawn. In defendant's statement of matters complained of on appeal, the misconduct issue was phrased as follows:

It was improper for the court not to grant a mistrial after the Commonwealth had sheriffs unilaterally require 2 defense witnesses without their counsel to come to the District Attorney's office and be questioned by the District Attorney. This was immediate prior [sic] to their testimony at trial and outside the presence of the defense counsel and after one or more of the witnesses had requested the right to have counsel present, which request was disregarded by the District Attorney who did the questioning. Such overreaching was a basis for a motion for a mistrial which should have been granted and constituted an improper Commonwealth attempt to discovery [sic] and/or interfere with the defense's case.

Commonwealth v. Walls, 261 Pa.Super. 321, 326, 396 A.2d 419, (1978) [citations omitted]. See also *Commonwealth v. Dill*, 278 Pa.Super. 462, 420 A.2d 633 (1980). The defendant has not demonstrated, nor even alleged, that the actions of the district attorney in this case in any way prejudiced him or rendered his trial unfair. There is nothing in the record to show that the witnesses' testimony was altered or inhibited as a result of their meeting with the district attorney. In order for prosecutorial misconduct of this nature to cause a mistrial, there must be evidence that the witnesses were influenced. *Commonwealth v. Barnyak*, 432 Pa.Super. 483, 492, 639 A.2d 40 (1994). See also *Commonwealth v. Wilson*, 538 Pa. 485, 649 A.2d 435 (1994). For the sake of argument, even if the actions of the district attorney amounted to misconduct (which we do not believe to be the case), the defendant has failed to prove that he was deprived of a fair adjudication because of that misconduct since he has not shown that the witnesses were influenced against him in any way.

Further, Mr. Toms testified that when he spoke with the two witnesses following their meeting in the district attorney's office, he was given no indication from them that there was any attempt to recover defense work product. Therefore, he found nothing improper about the district attorney's actions. Based on this, he made the reasonable and correct determination that it would be futile to pursue this meritless claim.

We find that the defendant has failed to show that there was any merit to his assertion that the actions of the district attorney amounted to prosecutorial misconduct. Nor has he shown that even if there had been misconduct, that he was denied a fair trial as a result. It follows that the underlying claim is meritless. It is well settled that an attorney will never be found to have been ineffective for failing to raise a meritless claim. *Commonwealth v. Craig*, 345 Pa.Super. 542, 498 A.2d 957 (1985). Therefore, we need not examine the remaining two factors in the *Maroney* test. For the reasons set forth above, we find that the defendant's claim of ineffective assistance of counsel against his trial attorney, Mr. Toms, is entirely without merit. We also note that the defendant has not elucidated any other claims against Mr. Toms.

Next, we will address the defendant's claim of ineffectiveness against his appellate counsel, Mr. Jokelson. First, the defendant contends that Mr. Jokelson was ineffective for failing to raise Mr. Toms' ineffectiveness as an issue and to preserve it for appeal. However, having found that defendant's ineffectiveness claim against Mr. Toms is without merit, Mr. Jokelson cannot be found ineffective for failing to raise this issue, as the underlying claim is meritless. Therefore, the defendant cannot prevail on this claim.

The next allegation of ineffectiveness against Mr. Jokelson concerns his failure to appeal the discretionary aspects of defendant's sentence. The Commonwealth agrees with the defendant that he should be allowed to file an appeal *nunc pro tunc*, limited, however, to the discretionary aspects of his sentence. This issue was addressed by the Superior Court in *Commonwealth v. Hickman*, 434 Pa.Super. 633, 644 A.2d 787 (1994). In that case, the Court overturned the lower court's ruling that since the petitioner was seeking review of the

discretionary aspects of his sentence, and issues related to the discretionary aspects of a sentence are not cognizable under the PCRA, the petitioner was not entitled to relief. *Id.* at 634-635, 644 A.2d at 788. The Superior Court held that the issue before the PCRA court was not the propriety of the sentence, but rather, whether his constitutional right to a direct appeal was violated by his counsel's ineffectiveness. *Id.* if counsel's ineffectiveness caused a deprivation of petitioner's direct appeal rights, then he should be granted the right to appeal *nunc pro tunc*. *Id.*

In the present case, pursuant to 42 Pa.C.S.A. §9781, the defendant has the right to file a petition for allowance of a direct appeal of his sentence with the appellate court. This issue was not included in the defendant's Pa.R.A.P. 1925 statement of matters complained of on appeal, although it could have been since it was properly preserved by Mr. Toms in a motion to modify the defendant's sentence. The 1925 statement was limited to allegations of prosecutorial misconduct and the qualification of an expert witness, both issues that had been previously waived. This was clearly an omission by Mr. Jokelson that has prejudiced the defendant in that he was denied his opportunity for appellate review of the discretionary aspects of his sentence.

Likewise, the defendant would also be able to petition for review of the discretionary aspects of his sentence relating to the charges to which he pleaded *nolo contendere*. See *Commonwealth v. Becker*, 383 Pa.Super. 553, 557, 557 A.2d 390 (1989) ["The entry of a guilty plea does not preclude a petition for allowance of appeal of discretionary aspects of sentence subsequently imposed."] In this respect, the defendant was denied effective representation by Mr. Jokelson. Accordingly, we find that the defendant should be allowed to file a petition for allowance of appeal *nunc pro tunc*, strictly limited to the discretionary aspects of the sentences imposed.

Lastly, the defendant asserts that Mr. Jokelson was ineffective for failing to include a challenge to his plea of *nolo contendere* in the 1925 statement. Although this issue was preserved by Mr. Toms, the defendant has not stated a basis for any challenge to the plea at this time. We have already granted the defendant the right to review of the discretionary aspects of his sentence in

connection with this plea. However, the defendant has failed to meet his burden of showing that any challenge to the validity of the plea, such as lack of voluntariness, would have had any merit if it had been properly included in the statement of matters complained of on appeal. Therefore, we cannot find that the appellate counsel was ineffective for not raising this issue in the defendant's 1925 statement. Accordingly, we will deny the defendant relief on this claim.

ORDER OF COURT

NOW, March 26, 1997, upon consideration of the Petition for Post Conviction Relief filed by defendant, and of the evidence presented, for the reasons set forth in the opinion attached hereto, defendant is hereby GRANTED leave to file an appeal *nunc pro tunc* to the Superior Court on the issue of the judgments of sentence imposed herein provided that a notice of appeal is filed within thirty (30) days of the date hereof. All other relief sought by defendant is DENIED.

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