

**Franklin County Legal Journal**  
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Commonwealth v. Williams

**Commonwealth of Pennsylvania v. Corey Williams, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Law No.  
511-2002

HEADNOTES

*Post Conviction Relief; Previously Litigated; Failure to Raise a Claim; Waiver*

1. To be eligible for post-conviction relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated errors or defects in 42 Pa.C.S.A. § 9543(a)(2), and that the issues he raises have not been previously litigated.
2. An issue has been “previously litigated” if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or if the issue has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa.C.S.A. § 9544(a)(2), (3).
3. An issue will be deemed waived under the PCRA “if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding.” 42 Pa.C.S.A. § 9544(b).

Appearances:

Zachary Mills, Esq., *Attorney for Commonwealth*

Elizabeth Clark, Esq., *Attorney for Defendants*

Opinion

Before Herman, P.J.

**Procedural History**

On October 23, 2003 a jury found Corey Williams, Petitioner, guilty of multiple charges stemming from a robbery. On December 3, 2003, Petitioner was sentenced to an aggregate sentence of 72 months to 132 months to run concurrent to a previously imposed sentence of 102 to 420 months. For purposes of trial and sentencing, Petitioner was represented by Attorney James K. Reed. Upon Petitioner’s request, a new attorney, Thomas J. Trgovac, was appointed following sentencing. Mr. Trgovac filed an Amendment to Defendant’s Post-Sentence Motion on February 20, 2004, amending a previous post-sentence motion filed by Petitioner, pro se. The motion raised the issues of ineffective assistance of counsel and sufficiency of the evidence at trial. A hearing on the matter was held, and the Court entered an Order and Opinion denying the post-sentence relief on May 17, 2004. Attorney Trgovac withdrew his representation, and Attorney Michael J. Whare represented Petitioner on appeal. The Petitioner raised the issues of effectiveness of counsel and sufficiency of the evidence. The Superior Court affirmed the judgment of sentence on January 19, 2005.

On May 2, 2005, Petitioner filed his first petition for relief under the Post Conviction Relief Act (PCRA) for reinstatement of right to petition the Pennsylvania Supreme Court for review. On May 31, 2007, the petition was granted, however counsel failed to file a petition seeking allowance of appeal. Petitioner filed a second PCRA petition seeking the same relief he sought in his first petition. On August 28, 2008, the court granted the requested relief. The Supreme Court of Pennsylvania denied the petition for allowance of appeal on December 23, 2009.

On December 20, 2010, Petitioner filed his third PCRA petition, but first following direct review. The court erroneously dismissed the petition and denied counsel due to it being the third PCRA petition for relief. Petitioner appealed and upon closer review while drafting an Opinion pursuant to Pa. R. App. P. 1925(a), the court discovered

that the two previous PCRA petitions were merely requests for reinstatement of appellate rights. The court requested that the Superior Court remand the matter, which it did on March 8, 2012. On June 4, 2012, the current PCRA counsel was appointed.

The instant Amended Petition for Post-Conviction Relief was filed on August 27, 2012. The Commonwealth responded on September 26, 2012. A hearing was held on December 6, 2012. The parties have submitted briefs and the matter is ready for decision.

### **Discussion**

The Petitioner raises the six issues we set forth below. Before we may address the merits of each issue, we must address the Commonwealth's position that these matters have been previously litigated or waived for failure to raise the issue when it could have been raised.

To be eligible for post-conviction relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated errors or defects in 42 Pa.C.S.A. section 9543(a)(2), and that the issues he raises have not been previously litigated. Commonwealth v. Carpenter, 725 A.2d 154, 160 (Pa. 1999). An issue has been "previously litigated" if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or if the issue has been raised and decided in a proceeding collaterally attacking the conviction or sentence. Carpenter, 725 A.2d at 160; 42 Pa.C.S.A. § 9544(a)(2), (3). If a claim has not been previously litigated, the petitioner must then prove that the issue was not waived. Carpenter, 725 A.2d at 160. An issue will be deemed waived under the PCRA "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding." 42 Pa.C.S.A. § 9544(b).

The Commonwealth argues that all issues raised by Petitioner have been previously waived or litigated. First, we address the claims of ineffective assistance of trial counsel. Following trial, with the assistance of new counsel, Petitioner filed a post-sentence motion. The motion raised the ineffective assistance of counsel on grounds other than the grounds raised in the instant PCRA petition. Additionally, a hearing on the post-sentence motion was held and trial counsel was examined on issues of ineffective assistance. There is no indication as to why these claims were not raised in the post-sentence motion which raised the issue of ineffective assistance for failure to develop an alibi defense or to seek suppression of evidence. All claims raised in the instant PCRA petition would have been fully available at the time of the post-sentence motion. Therefore, these matters are waived because they could have been raised at the time of the post-sentence motion but were not.<sup>1</sup>

#### I. Ineffective Assistance of Counsel: Failure to Object to the Reading of the Stipulation to the Jury

Waived as discussed above.

#### II. Ineffective Assistance of Counsel: Failure to Object to "Subsequent Robbery"

Waived as discussed above.

#### III. Ineffective Assistance of Counsel: Reference to Waynesboro Robbery by Trial Counsel

Waived as discussed above.

#### IV. Ineffective Assistance of Counsel: Cumulative Error

Waived as discussed above.

#### V. Violation of State and Federal Constitutional Rights

<sup>1</sup> We would be remiss to not address the procedural aspect of raising ineffective assistance of counsel on direct review. Commonwealth v. Grant, 813 A.2d 276 (Pa. 2002) held that generally, claims of ineffective assistance should not be raised on direct review, and should be reserved for collateral review. Commonwealth v. Bomar, 826 A.2d 831 (2003) created an exception to Grant, in that it is proper to raise such claims on direct review if raised by new counsel, a hearing is held, previous counsel testifies, and the trial court then determines the merits of the claims. This procedure is what occurred in Petitioner's case. While the Superior Court later created a requirement that to proceed under the Bomar exception, a petitioner must give a knowing, intelligent, and express waiver to raise such claims on collateral review, the matter currently before us preceded such a requirement by a span of several years. See Commonwealth v. Barnett, 25 A.2d 371 (Pa. Super. 2011). This matter also preceded the cases relied upon by the Barnett court which evidenced the growing trend of requiring a waiver of collateral review rights in order to raise claims of ineffective assistance on direct review. See Commonwealth v. Wright, 961 A.2d 119 (Pa.2008); Commonwealth v. Liston, 977 A.2d 1089 (2009).

Petitioner asserts that his right to counsel under the Federal and State Constitutions has been violated. Further, his procedural and substantive due process rights have been similarly violated due to the high number of attorneys that were appointed and then withdrew from representation in this matter. Petitioner contends that this created an environment which thwarted his abilities to preserve his rights and set forth certain arguments.

This appears to merely be a reiteration of the claims of ineffective assistance of counsel. To the extent that any part of this claim relates to trial counsel, we find that the argument is waived for reasons discussed above.

#### VI. Ineffective Assistance of Appellate Counsel

Due to the aforementioned waiver of issues related to the effectiveness of trial counsel, we will address the effectiveness of post-sentence and appellate counsel separately. Specifically, Petitioner challenges counsel's failure to challenge the discretionary aspects of the sentence rendered by the trial court.

Before we apply the test for ineffective assistance of counsel, we will address a threshold issue raised by the Commonwealth. The Commonwealth argues that the issue of sentencing has been waived because it was not raised when it could have been. Specifically, the Commonwealth is referencing the Petitioner's first PCRA petition wherein he sought to reestablish his appellate rights. A challenge to the discretionary aspect of a sentence must be raised in a post sentence motion within 10 days of the imposition of the sentence. Pa. R. Crim. P. 720. Petitioner's first PCRA petition did not seek to regain his right to file a post sentence motion but, rather, sought to proceed with direct appellate review. For that reason, we agree that the issue of sentencing was waived because it was not raised when it could have been. However, even if this issue were not waived, the Petitioner would still not prevail on this claim.

"Counsel is presumed to be effective and petitioner has the burden of proving otherwise." Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999). In determining whether counsel was ineffective, we are guided by the standard set forth in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987). First, the underlying claim must be of arguable merit. Second, there was no reasonable basis that existed for counsel's act or failure to act. Third, the prejudice prong, but for the act or omission, it is reasonably probable that the outcome would have been different. Commonwealth v. Abu Jamal, 720 A.2d 79, 88 (Pa. 1998). Failure to satisfy one prong is a failure of the entire claim of ineffective assistance of counsel.

Petitioner testified at the hearing on this petition held on December 6, 2012. Petitioner was the only person to offer testimony. None of the attorneys who Petitioner contends were ineffective testified, particularly not Attorney Trgovac.

In Commonwealth v. Ervin, 766 A.2d 859 (Pa. Super. 2000), a PCRA petitioner raised a claim of ineffectiveness of his trial counsel due to his failure to object to a prosecutors statement at trial. The Superior Court held that failure to call trial counsel to testify at the PCRA hearing resulted in a failure to satisfy Petitioner's burden of proof. "It is the defendant's burden to establish each element of the ineffectiveness standard and we will not speculate as to counsel's rationale." Id. at 863. While it appears that Petitioner made a pro se request to raise this issue with his sentence while he was still represented by Attorney Reed as trial and sentencing counsel, we do not know what happened once Attorney Trgovac was appointed. He may have had a reason for not raising the discretionary aspect of sentencing when he filed the Amended Post Sentence motion. We simply do not know.

Petitioner has not met his burden of establishing that counsel did not have a reasonable basis for his omission. Therefore, the entire claim of ineffective assistance of counsel must fail.

#### **Conclusion**

In light of the foregoing discussion, the Petition for Relief filed pursuant to the PCRA will be denied.

#### ORDER OF COURT

**NOW THIS** 17th day of December, 2013, upon review of the Petitioner, Corey Williams' Petition for Relief pursuant to the Post Conviction Relief Act, the hearing held on the matter, and the briefs submitted by both parties,

**THE COURT HEREBY** dismisses the defendant's Post Conviction Relief Act Petition pursuant to the attached opinion.

**YOU ARE HEREBY ADVISED THAT** Pursuant to Rule 907(4) of the Pennsylvania Rules of Criminal Procedure:

1. You have a right to appeal from the Court's decision disposing of your petition [Pa. R. Crim. P. 907(4)];
2. If you choose to exercise that right, you must do so within thirty (30) days of the date of this order. [Pa. R. Crim. P. 907(4); Pa. R. App. P. 903(a)];
2. If counsel has been appointed to represent you, that appointment shall be effective throughout the post-conviction collateral proceedings, including an appeal from this order. [Pa. R. Crim. P. 904(F)(2)];
3. If your appointed counsel has determined your claims to be meritless and the Court has permitted withdrawal from representation, you may proceed pro se or through privately retained counsel. Commonwealth v. Maple, 559 A.2d 953 (Pa. Super. 1989).

*Pursuant to Pa.R.Crim.P. 114, the clerk of courts shall immediately docket this Order and record in the docket the date it was made. The clerk shall forthwith furnish a copy of the Order, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.*