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Commonwealth v. Kerr

COMMONWEALTH OF PENNSYLVANIA
v. MATTHEW J. KERR, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 1739–2000, 1740–2000 (nol prossed)

PCRA; Ineffective assistance of counsel; reasonableness of counsel's act or omission

1. A pro se petition/motion filed by a defendant will be treated as a first PCRA petition by the court if all applicable time limits have passed within which defendant should have filed the petition/motion.

2. A defendant is eligible for post-conviction relief based on counsel's ineffectiveness only where counsel's act or omission so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

3. Counsel is deemed to be effective; the defendant has the burden of establishing ineffective assistance of counsel.

4. A claim of ineffective assistance of counsel asserted in a PCRA petition is evaluated according to the three-prong performance and prejudice test set out in Commonwealth v. Pierce: (a) defendant must establish that the issue underlying the claim of ineffectiveness has arguable merit; (b) defense counsel's act or omission was not reasonably designed to advance the interests of the defendant; and (c) defendant must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different.

5. A mental health diagnosis is not sufficient to support a claim of ineffective assistance of counsel simply because a mental health evaluation was not ordered prior to a defendant entering a guilty plea or being sentenced; this is true particularly when the evidence shows that the defendant was coherent and articulate throughout the time of entering his guilty plea and during his sentencing hearing.

6. Failure of counsel to investigate, discover and present evidence of mental illness does not constitute ineffectiveness of counsel where defendant demonstrated clarity of thought and intelligence and otherwise gave no indication prior to or at the time [he entered his guilty plea] that he suffered from brain damage or serious mental illness.

7. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record, but whether counsel's decision had any reasonable basis to advance the interests for the defendant.

8. To prevail on the second prong of the Pierce test, reasonableness of counsel's act or omission, the defendant must prove that counsel's strategic decision was so unreasonable that no competent lawyer would have chosen it or that the alternatives not chosen offered a potential for success substantially greater than the tactics utilized.

Appearances:

David W. Rahauser, Esq., *First Assistant District Attorney*

Paul T. Schemel, Esq., *Counsel for Defendant*

OPINION

Walsh, J., December 12, 2002

Opinion Sur Pa.R.A.P. §1925(a)

On August 6, 2001, Matthew J. Kerr ("Defendant") filed a *pro se* Motion to Withdraw Guilty Plea with the Franklin County Court of Common Pleas. In his Motion, Defendant raised the claim that he was not competent to enter a guilty plea to the charge of Theft By Deception because of his mental illness and asserted that the Court should have obtained a mental health evaluation of Defendant prior to his pleading guilty.

On August 20, 2001, the Court noted that Defendant entered his guilty plea on January 10, 2001, and was sentenced on April 4, 2001. We further noted that the Motion was not filed within ten (10) days of the imposition of sentence nor did Defendant file a direct appeal from the judgment of sentence within thirty (30) days. Accordingly, we treated Defendant's Motion as a first PCRA Petition pursuant to 42 Pa.C.S.A. §9541 et seq. See Commonwealth v. Guthrie, 749 A.2d 502, 2000 Pa.Super. 77 and Commonwealth v. Kutnyak, 2001 Westlaw 902499, 2001 Pa.Super. 230. The Court appointed Thomas S. Diehl, Esq., to represent Defendant for the PCRA proceedings. PCRA counsel was given time to file an amendment to Defendant's Motion pursuant to 42 Pa.C.S.A. §9541 et seq. and Pa.R.Crim.P. 900 et seq.

Rather than file an amendment to Defendant's Motion, PCRA counsel chose to petition the Court for an evidentiary hearing claiming Defendant's Motion included facts not of record in this case. After some procedural confusion, a Re-Petition for Evidentiary Hearing was filed by PCRA counsel on June 21, 2002. The Re-Petition characterized Defendant's claim as one of ineffective assistance of trial counsel in not seeking a mental health evaluation of Defendant prior to allowing him to enter his guilty plea.

A defendant is eligible for post conviction relief based on counsel's ineffectiveness only where counsel's act or omission "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). Counsel is deemed to be effective; therefore the Defendant has the burden of establishing ineffective assistance of counsel. Commonwealth v. Speight, 544 Pa. 451, 677 A.2d 317 (1996).

When a claim of ineffective assistance of counsel is asserted in a PCRA Petition, the claim is evaluated according to the three-prong performance and prejudice test set out in Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987) as follows: 1) Defendant must establish that the issue underlying the claim of ineffectiveness has arguable merit; 2) defense counsel's act or omission was not reasonably designed to advance the interests of the defendant; and 3) Defendant must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326 (1999). We apply the Pierce test in the context of the record of this case.

The evidentiary hearing on this matter was held over a period of two days, September 19 and 23, 2002. Defendant presented evidence in an effort to establish that he should have had a mental health evaluation prior to entering his guilty plea. Only two witnesses were called by the petitioner. The first was Micky Hall, Defendant's girlfriend. Hall testified as to her perception of Defendant's mental health on the day and the days surrounding the entering of his guilty plea. We note that this witness's opinions as to Defendant's mental state on the day Defendant entered his guilty plea were, in all probability, inadmissible; her opinion testimony was, however, not objected to by the prosecution. Of greater importance than her opinion, however, was her testimony regarding her "observations" of the defendant at the time he entered his plea. They are of importance because they simply are not borne out by the record of the sentencing proceeding.

Hall testified that Defendant could not speak in complete, coherent sentences at the time of entering his guilty plea. According to Hall, at that time Defendant was not capable of making rational decisions. But when she was questioned as to the type of training or background Hall had which allowed her to reach these conclusions, she replied that she had no formal training; she did claim to have been currently enrolled in a two-year degree program. Hall testified that she works as an assistant residential director for an agency that deals with adults with mental health disabilities.

At the evidentiary hearing, the Court questioned Hall as to why she did not express to her boyfriend's defense counsel or the Court at the time Defendant entered his guilty plea her concerns about his mental state and her thinking that he was incapable of entering a plea knowingly. In fact, Hall was a witness for Defendant at his sentencing hearing and had had contact with Defendant's attorney prior to the time that

Defendant entered his plea. Hall had no explanation for her silence on the matter — for her failure to have come forward with her concerns at the time.

Also at the evidentiary hearing, the Court looked to the transcript from Defendant's sentencing hearing and noted that Defendant came across as alert, coherent and articulate when questioned by the Court during that proceeding. He spoke in complete sentences and even owned up to his guilt, stating he had to take responsibility. Further, the Court reviewed the January 10, 2001, transcript of the guilty plea colloquy of the Defendant. Again the Court finds Defendant to have been alert, coherent and articulate when questioned by the Court and throughout his guilty plea hearing.

The only other witness at the evidentiary hearing was Defendant. He testified as to why he was not on medication at the time of entering his guilty plea in January of 2001. But in Defendant's Pre-Sentence Report, where the taking of certain medications are self-reported, Defendant claimed to have been taking the medication Escolith [sic] for a bi-polar disorder. The Pre-Sentence Report has a date of January 16, 2001. When filling out the guilty plea colloquy on January 10, 2001, Defendant answered "no" to the question of "are you under the influence of drugs or alcohol at the present time." At the sentencing hearing on April 4, 2001, Defendant stated he was at that time taking the medications Depakote and Risperdal. He further stated that he was taken off the medication Histalet four months prior. Obviously there is discrepancy about what, if any, drug or drugs Defendant was on at any given time. But the discrepancy is created by the Defendant himself, making far less than credible his testimony about what medications he was actually on and when he was on them.

Defendant also testified to having had conversations with his attorney, Sean Fitzgerald, Esq., about his mental health prior to entering a guilty plea. Defendant testified about irrational thoughts he disclosed to Fitzgerald. Defendant claimed to have asked Fitzgerald at one point to have a psychological evaluation performed because of his long history of mental illness.

Interestingly, Fitzgerald was not called as a witness by the Defendant. The Court, therefore, didn't hear from Defendant's counsel who allegedly was told all these things by the Defendant regarding his mental health. Moreover, the Defendant has a long history of *crimen falsi* offenses, all listed in his pre-sentence report, and all of which were, therefore, known to the sentencing judge. A copy of the pre-sentence report, made part of the record of the sentencing proceeding, will be made part of the record for appeal. Such convictions may be used for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement (*crimen falsi*), and the date of conviction or the last day of confinement is less than ten years old. If a period greater than ten years has expired, the presiding judge must determine whether the value of the evidence substantially outweighs its prejudicial effect. Pa.R.E. 609, Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987). Among the prior convictions of the Defendant, we particularly note these: 1) in November of 1988, one count of Unauthorized Use of Automobiles and two counts of bad checks; 2) in December of 1988 and January of 1989, two counts of Forgery and two counts of Theft by Deception; 3) in January of 1989, one count of Receiving Stolen Property and one count of Unauthorized Use of Automobiles; 4) in December of 1989, one count of Theft by Deception, one count of Theft of Services and one count of Bad Checks; 5) in April of 2000, one count of Bad Checks; and 6) also in April of 2000, one count of Forgery. Considering the discrepancies in Defendant's testimony regarding what medications Defendant was taking and when and Defendant's extensive prior record of *crimen falsi* offenses, serious doubts were raised concerning Defendant's truthfulness. Based on the contradictions in his testimony as to his medications, and based on his extensive record of convictions relating to his dishonesty, we simply did not find Defendant to be a credible witness. As already noted, the only other witness was Defendant's girlfriend: a witness with a bias toward the defendant, a witness who expressed opinions regarding the Defendant's mental health without foundation and who was not qualified to render such opinions, and a witness whose opinion testimony would have been excluded upon proper objection.

The fact that Defendant had a mental health diagnosis is not sufficient to support a claim of ineffective assistance of counsel simply because a mental health evaluation was not ordered prior to Defendant entering his guilty plea or being sentenced. Commonwealth v. Long, 310 Pa.Super. 339, 456 A.2d 641 (1983). This is true particularly when the evidence shows that Defendant was in fact alert, coherent and articulate throughout the time of entering his guilty plea and during his sentencing hearing. Id. Under the three-prong performance test of Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987), Defendant has not shown trial counsel to be ineffective.

The first prong of the test requires the Defendant to establish that the issue underlying the claim of ineffectiveness has arguable merit. We conclude that trial counsel was not ineffective because the Defendant's evidence does not establish that he was in need of a mental health evaluation at the times in question. First, we did not find Defendant to be a credible witness. Second, we did not find credible the Defendant's girlfriend's claim that Defendant was incoherent and inarticulate on the day of entering his guilty plea. Third, the Defendant did not present credible evidence regarding what medication he may or

may not have been taking at the time of entering his guilty plea. In reviewing the matter, had Defendant's counsel sought a mental health evaluation on the evidence which has now been placed before us, it is unlikely that we would have honored the request, as there are no reliable indicia that the Defendant needed one. Failure of counsel to investigate, discover and present evidence of mental illness does not constitute ineffectiveness of counsel where defendant demonstrated clarity of thought and intelligence and otherwise gave no indication prior to or at the time [he entered his guilty plea] that he suffered from brain damage or serious mental illness. Commonwealth v. Lewis, 560 Pa. 240, 743 A.2d 907 (2000). See also Commonwealth v. Jacobs, 556 Pa. 138, 727 A.2d 545 (1999). As to the first prong of the test, the Defendant has failed in his proof.

The second prong of the test requires the Defendant to establish defense counsel's act or omission was not reasonably designed to advance the interests of the defendant. The Court would note that although Fitzgerald was not called as a witness at the evidentiary hearing in this case, the Court has had frequent and regular contact with defense counsel in the courtroom. Fitzgerald is an experienced public defender who has never failed to seek a mental health evaluation when he deemed it was in his client's best interest.

Originally, Defendant was charged with two counts of Theft by Deception, each carrying a maximum of seven (7) years in prison. By pleading guilty to only one count of Theft by Deception in exchange for a *nol prosse* on the other count, Defendant avoided the possibility of a fourteen (14) year maximum which would have been allowed for two counts. With Defendant's extensive prior record, pleading to one count of Theft by Deception as opposed to two counts was certainly in Defendant's best interest. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record, but whether counsel's decision had any reasonable basis to advance the interests for the defendant. See, e.g., Commonwealth v. Fluharty, 429 Pa.Super. 213, 632 A.2d 312 (1993). To satisfy this prong of the test, the defendant must prove that counsel's strategic decision was so unreasonable that "no competent lawyer would have chosen it," Commonwealth v. Albrecht, 510 Pa. 603, 511 A.2d 764 (1986), cert. denied, 480 U.S. 951 (1987), or that the "alternatives not chosen offered a potential for success substantially greater than the tactics utilized." Commonwealth v. Clark, 533 Pa. 579, 626 A.2d 154 (1993). It appears that counsel's tactic of having the Commonwealth jettison one of two first degree misdemeanors was both tactically sound and in the defendant's interest. Moreover, at the hearing, Defendant produced no evidence to suggest otherwise. Defendant has not met his burden under prong two of the test.

The third prong of the test requires the Defendant to establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. Defendant fails to carry the burden on this prong of the test as well. As has been demonstrated by the two witnesses at the evidentiary hearing, Defendant was coherent and articulate on the day he entered his guilty plea. Even if a mental health evaluation had been performed, the fact remains that Defendant exhibited no signs on the day of entering his guilty plea of not being capable of doing so knowingly and intelligently. The mere fact of a mental health diagnosis does not trump a finding that the Defendant, a full participant in the proceedings, voluntarily, knowingly and intelligently pleaded guilty to one count of theft by deception. The record suggests that the Defendant was far more on top of his game than he would have us believe at this juncture; and his proofs at the evidentiary hearing were too meager to support his claim of the necessity for a mental health evaluation. This Court does not believe the outcome of Defendant's case would have been any different had the Defendant had a mental health evaluation.

For all of the foregoing reasons, we suggest that we have committed no error in our handling of this proceeding and respectfully request that the Superior Court affirm our denial of Defendant's Motion to Withdraw Guilty Plea.

ORDER OF COURT

December 12, 2002, the Clerk of Courts is directed to transmit the forgoing Opinion and Order along with the record in this case to the Superior Court.

The following exchange took place as the Court questioned the witness at the Evidentiary Hearing on September 19, 2002, page 16, line 5 through page 19, line 10.

So it is fair to say that as of the time that you were here testifying on the Defendant's behalf in April of 2001, he was still manifesting the same kinds of things that you have described here in the court today as he was at the time of his guilty plea in January of 2001, correct?

Yes.

Q: I'm going to read just a portion of the transcript of the sentencing proceedings from April 4, 2001. And for counsel's benefit, I'm referring to Page 7, beginning at Line 8. This is the sentencing proceeding on April 4 th. Page 7, beginning at Line 8. I said to Mr. Kerr: Mr. Kerr, is there anything you would like to share with the Court. And this was the Defendant's answer. Assume for the sake of the question I'm going to ask that this was the Defendant's answer. Quote, I do have a problem with discernment when it comes to making the right choices, and I understand the circumstances. I wasn't taking my medication. I had convinced myself that I could live without it, and turned out a wrong choice. And I did write a letter and expressed my apologies. I think it was misconstrued what I said to the investigator. I told her that I am sympathetic for what I've done. And I apologize for what I've done, but I am not going to make excuses for it. I have to take responsibility for what I did, and I have to – this is my first child and my only child, and I want a chance to be able to be a father. And I know I'm not exhibiting probably any good behavior by doing things like this. But if I can get the help that I need with the mental health issue and get my medication and realize that I need to stay on them and keep myself focused.

Q: Are you on meds currently? The Defendant answers: Yes. I take 1250 milligrams of Depakote and 20 milligrams of Risperdal. Now the question. Do the answers that show up in the sentencing transcript of April 4 th reflect the kind of incoherence, inability to understand circumstances, inability to finish a sentence, inability to have a cogent thought and express it, do those traits come through in a transcript like this? Do you see the traits that you described in Defendant as having in the answers that he gave?

A: I see him switching subjects three times. I see him talking to you saying I'm doing this, I know I did this, I have a two-year-old daughter, back to I think I could do better if I was on medications. I kind of see him changing his direction, which tells me that he's just not being able to complete a full thought. And he was talking to you initially about being, I don't know, he was talking about medications, being on medications and being sympathetic, and the next thing you know he's talking about his two-year-old, and then he's back to talking about I understand what I did.

Q: That was in response to a question is there anything you'd like to share with the Court. And it's a defendant who's about to be sentenced. Is it fair to assume that there may be more than one item on his agenda that he'd like to address to the Court before sentencing?

A: Yes.

Q: Isn't it fair to say that we have a lot of completed sentences in there?

A: Yes.

Q: Isn't fair to say that on that reading of it, the transitions from one subject to another are not inappropriate?

A: Correct.

Q: And there are complete thoughts.

A: Yes.

Q: Would it be fair to say that when answers are given like that, there wasn't a great need to follow up because they were not understandable or not coherent?

A: Yes.

Evidentiary Hearing trans., Sept. 19, 2002, Page 16, Line 5 to Page 19, Line 10, the Court questioning Hall.

The following exchange occurred at the evidentiary hearing as reflected in the transcript at page 20, line 9 through page 21, line 3:

Q: She had indicated that in January of last year, you were not on your medications at that time, is that correct?

A: Right.

Q: Why was that the case?

A: Because I was having – I was having medical problems with – when you take Eskalith or lithium, you have to take blood work routinely because they check your creatinine count and your kidneys, which I'm not quite clear what the creatinine is. I know it has something to do with your kidneys and liver functioning, filtering out the chemicals in your body.

Q: To your limited understanding, if you are on those medications for prolonged periods of time, it can be toxic to your blood?

A: Yeah. That's more or less what happened with me. That's why I was taken off in December. I think December, I'm not sure what date. In December of 2000, I was taken off of the Eskalith because of that fact. My body had become toxic.

Evidentiary Hearing Trans., Sept. 19, 2002, page 20, line 9 to page 21, line 3.