IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 97-10,193
	:	97-11,301
TYRONE BUTLER,	:	
Defendant	:	1925(a) OPINION

OPINION IN SUPPORT OF THE ORDER OF JUNE 30, 1999, IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

The Defendant appealed this Court's Order of June 30, 1999, which denied his Post Conviction Relief Act request to be allowed to file a direct appeal from his sentence imposed on May 13, 1998.

This subject proceeding now on appeal came before the Court on the Post Conviction Relief Act Petition, (PCRA) 42 Pa.C.S. §§9541-46, filed on November 6, 1998, *pro se*, in which Defendant asserted that trial counsel, Public Defender Jay Stillman, Esquire, was ineffective because of the failure of trial counsel to appeal this Court's May 13, 1998, sentence imposed at an intermediate punishment probation violation hearing, which had sentenced the Defendant to State Prison for drug-related offenses. Counsel was appointed to represent the Defendant in these proceedings and filed a First Amended PCRA Petition on February 17, 1999. On March 23, 1999 an evidentiary hearing was held on the request for PCRA relief and at that time the Defendant also filed a *pro se* amended petition. All three Petitions assert counsel's ineffectiveness because Defendant had requested trial counsel to appeal the Defendant's illegal sentence and counsel failed to so do. The apparent basis for the appeal was that the

sentence imposed on May 13, 1998, was unlawful because the sentence exceeded the aggravated guidelines for the offense which involved conspiracy and delivery of 0.6 grams of cocaine. The Petition filed March 23, 1999, also asserted counsel at the probation violation hearing had failed to object to introduction of testimony concerning the Defendant's failure to attend rehabilitative drug treatment while on probation.[1]

Defendant basically asserts in seeking PCRA relief that his counsel who handled the May 23, 1998 Intermediate Punishment probation violation hearing failed to appeal his sentence imposed as a sanction for violation and was thus ineffective. Defendant asserts the basis for filing such an appeal was that this Court had imposed an improper sentence as a probation violation sanction because that sentence exceeded Defendant's original sentence, and also because the sentence of the Court departed from the Sentencing Guidelines, as Defendant contends that the minimum sentence of 27 months exceeded the aggravated guideline range and that this Court had not stated any reasons on the record for department from the guidelines standards.

The Commonwealth argued the Defendant's various petitions and contentions should be denied because Defendant introduced no testimony to establish any facts which would substantiate that his

[1] On April 22, 1999, Defendant also filed a document *pro se* entitled "Ineffective Assistance of Counsel." This document is dated as being signed by Defendant on 3/22/99. One of the two copies located this date by this Judge in the Court file the document has a routing instruction notice to the Clerk of Courts (commonly completed by the filing person) to "dkt & place in Ct file." This document was not presented to this Court for any action. The document asserts that Defendant's appointed counsel, by Court Order of December 16, 1998, pursuant to the P.C.R.A. petition had not communicated with Defendant and had not learned of other issues Defendant wished to raise under the PCRA petition. The Court deems this document to be inaccurate and moot. On March 23, 1999, Defendant was permitted to file a *pro se* amended PCRA petition. Also, a hearing was held under the PCRA *pro se* petitions filed November 6, 1998, and March 23, 199, and the Amended Petition filed February 17, 1999 by counsel. The Defendant appeared and testified. Defendant did not raise any issues relating to counsel being ineffective. Defendant, over objection of the Commonwealth, was allowed to raise all the issues he deemed pertinent at the time of the P.C.R.A. hearing.

adjudication of guilt was made unreliable through counsel's ineffectiveness of failing to perfect a direct appeal since no evidence of any appealable issue has been presented. The Court believed the record fully supported the Commonwealth's position and therefore denied the request for PCRA relief.

On May 13, 1998 the Defendant appeared before this Court having been charged by the Adult Probation Office of Lycoming County with violating the terms of his previous intermediate punishment sentence. The Defendant made a counseled admission that he had violated the terms of his intermediate punishment program. The Defendant has never asserted this admission was made unknowingly or without an understanding of its consequences, nor that it was a false admission. As a sanction for the violation this Court revoked the prior intermediate punishment sentences that had initially been imposed on February 2, 1998 as to Count 1 of each case and re-sentenced the Defendant.[2] Count 1 of the Information under no. 97-11,301 charged the Defendant with Conspiracy to Deliver a Non-Controlled Substance. Count 1 of Information No. 97-11,193 charged the Defendant with Delivery of a Controlled Substance, Cocaine, less than 2-1/2 grams. This Court's Sentencing Order of May 13, 1998 directed Defendant serve a minimum of 27 months and a maximum 10 years, on each of those Counts and also directed the sentences be served totally concurrently with each other and also concurrently with any parole that he may have been serving

under Information No. 97-10,840. The intent of the Court at the time of imposing the sentence on May

[2] The original sentence to Intermediate Punishment was below the sentence guideline range and had been imposed as part of a new sentencing program which sought to allow drug defendant offenders to take advantage of rehabilitation programs rather than undergoing imprisonment. The Defendant admitted he failed to follow directions to enter a drug rehabilitation program.

13, 1998 was to sentence the Defendant to serve a concurrent term of incarceration in State

Prison which would have as its minimum the bottom of the standard range applicable to the charges and have as its maximum the statutory maximum sentence applicable to each charge.

In July 1998 Defendant, through counsel, filed a *Nunc Pro Tunc* Motion to Reconsider the May 13th sentence because, *inter alia*, the sentence illegally imposed a 10-year maximum sentence as to the conspiracy to deliver a non-controlled substance which has a 5-year statutory maximum. In response to the motion, Conspiracy to Deliver a Non-Controlled Substance was corrected by the Order of the Honorable Kenneth D. Brown on July 28, 1998, who appropriately reduced the maximum sentence under Count 1 of Information No. 97-11,301 to 5 years. Judge Brown otherwise denied all other requests for relief that were raised in the prior reconsideration of sentence motion as being untimely.

The Defendant then filed a second Motion for Modification of Sentence *Nunc Pro Tunc* on October 30, 1996 challenging the legality of the sentence. The Defendant's verified statement in support of the modification states "the Court erred in sentencing the Defendant by failing to consider the sentencing guidelines as required by 42 Pa.C.S.A. & 9721 AND 204 Pa. Code (sic) CH. 303.1, And continue on exhibit A." Exhibit A consisted of a list of statute and case citations. The Defendant further asserted in the body of the petition that the minimum sentence exceeded by more than twice the aggravated range guideline sentence for the Defendant, given his prior record of 5. By and Opinion and Order of Court (dated November 24, 1998) filed November 25, 1998 this Court acknowledged it had imposed an unlawful sentence under the conspiracy charge by imposing a maximum sentence of 10 years instead of 5 years but denied Defendant's request for a further modification of sentence because the illegal

sentence had been corrected by Judge Brown's Order on July 28, 1998. This Court determined through its review of the file that the sentence imposed was one in which the minimum sentence fell within the standard range of the sentencing guidelines applicable to the case and was at the bottom of the standard range of 27-40 months, applicable to the cocaine delivery charge.

At the evidentiary hearing, held in this case on March 23, 1999, for the first time the Defendant has also raised the issue that counsel at the parole violation hearing and re-sentencing proceeding of May 13, 1998, was ineffective because Defendant had advised his probation violation hearing counsel of reasons as to why he had violated probation which were not utilized by counsel when presenting the case to this Court at the violation hearing.[3]

By an Opinion and Order of June 30, 1999 the Court denied the Defendant's request for PCCR relief. In support of that decision this Court reasoned as follows:

> The matter as to the illegal sentence as to the conspiracy offense was remedied long before Defendant filed any PCCR petition. In fact, it was remedied by the motion and request of counsel that represented the Defendant at the parole violation proceeding.
>
> This Court does not find believable the assertion that Defendant had given trial counsel, at the parole violation proceeding, information which would have justified his violation of probation. The testimony proffered by the Defendant in this regard as to the reasons for the excuse

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3 On March 23, 1999, no testimony was actually received. Defendant's counsel instead represented what matters Defendant wanted made of record. The District Attorney objected to admission of the proffered evidence concerning the mitigating reasons not utilized by probation violation counsel because the issue had not been raised previously. Although the transcript of the March 23, 1999 hearing (just prepared on this date 9/9/99) does not reflect a ruling on that objection ever being made, this Court did accept Defendant's offer made through counsel as being the testimony which would be given by the Defendant and through the orders of June 30, 1998 (see following text) discussed the effect of such testimony.

The notes of testimony of March 23, 1999, at pp. 14-16 also review the history of the case and the reasons for the Court's imposition of both its original sentence and its probation violation sentence.

> as given to this Court at the PCCR hearing was not credible. It certainly did not amount to anything close to what this Court would have found justified violation of his intermediate punishment probation conditions, particularly for the length of time that the Defendant was an absconder. Even had trial counsel been advised of these assertions by Defendant, this Court can well conceive that such counsel would have probably recommended against attempting to persuade this Judge with such an excuse. Regardless, this Court also believes that the raising of this reason to assert counsel's ineffectiveness is a last-ditch effort to obtain relief by the Defendant whose is confronted with the fact that all the matters he had set forth seeking PCCR relief in the various petitions would be to no avail.
>
> As noted before, the illegal sentence of this Court was appropriately corrected within six weeks of the time that the Order had been filed. All other post-sentence requests for relief that had been filed had also been reviewed by Judge Brown and had been denied. They were again reviewed and denied by this Court through its Order of November 24, 1998. At that time the Court rejected the Defendant's contentions that the sentence imposed was one in which the minimum sentence fell outside the Sentencing Guidelines. As this Court has previously found, the standard guideline range applicable to the sentence in this case for the minimum is 27-40 months. The sentence imposed by this Court, being a minimum of 27 months is a minimum sentence imposed at the bottom of the standard sentencing range. No evidence has been presented by the Defendant at any proceeding which asserts his prior record score or the sentencing guideline information was miscalculated or inaccurate. Accordingly, there is no basis for any appeal to have been filed by prior counsel who represented the Defendant at the parole violation and sentencing proceeding on May 13, 1998.

Approximately one week after our Opinion and Order of June 30, 1999, which is the subject of this appeal, the Supreme Court of Pennsylvania issued its decision in the case of ***Commonwealth of Pennsylvania v. Jesse D. Lantzy***, J-38-99, No. 66 W.D. Appeal Docket 1998 (Decided July 7, 1999). In ***Lantzy***, *supra*, the Supreme Court has held:

> [W]here there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal cases, denies the accused the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, as well as the right to direct appeal under Article V, Section 9, and constitutes prejudice for purposes of Section 9543(a)(2)(ii). Therefore, in such circumstances, and where the remaining requirements of the PCRA are satisfied, the petitioner is not required to establish his innocence or demonstrate the merits of the issue or issues which would have been raised on appeal.

Id. at J-38-1999-12, 13. Accordingly, we wish to acknowledge that, given this holding, it may well be Defendant's appeal rights should have been reinstated. However, we add that the footnote to this holding indicates it is not to be "construed as affecting the substantial body of case law which concerns the circumstance in which a defendant seeks to pursue frivolous claims on appeal." *Id.* at J-38-1999-12, fn. 8. Counsel will not be deemed to be ineffective for failing to assert or pursue a baseless claim. *See* ***Commonwealth v. Hubbard***, 472 Pa. 259, 372 A.2d 687 (1971); ***Commonwealth v. Peterkin***, 538 Pa. 455, 649 A.2d 121 (1994), *cert. denied*, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995). Here, we believe Defendant's continually asserted basis for the ineffective assistance of counsel claim, the failure to appeal the alleged illegality and/or impropriety of his sentence, is meritless, as set forth in our Opinion of June 30, 1999.

BY THE COURT,

Dated: September 9, 1999

William S. Kieser, Judge

cc: Court Administrator
District Attorney
Kyle W. Rude, Esquire

Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)
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