

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 96-11,140

VS :

NORMAN CARL WADE :

OPINION IN SUPPORT OF ORDER
IN COMPLIANCE WITH RULE 1925(A)
OF THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order dated January 26, 1999 in which the Court denied the Defendant's *pro se* Motion to Vacate Order and Appoint Counsel. In his motion the Defendant appealed the denial of his Petition for Post Conviction Collateral Relief (PCCR), and argues that he was not afforded a full and fair opportunity to present his claim. This Opinion is written in support of this Court's Order dated January 26, 1999, and this Court's Order dated September 22, 1998 which denied the Defendant's Petition for PCCR.

The procedural facts pertaining to this matter are as follows: On June 6, 1996, Defendant was arrested and charged with two counts of possession of a controlled substance, two counts of possession with the intent to deliver, and two counts of possession of drug paraphernalia as a result of an incident which occurred that date at 729 2 Cherry Street in Williamsport. Defendant filed a Motion to Suppress on August 8, 1996, alleging that the search warrant was not supported by probable cause. The Defendant's Motion to Suppress was denied on October 24, 1996. On December 5, 1996, the Defendant filed a waiver of jury trial. The non-jury trial was held February 3, 1997, after

which this Court found the Defendant guilty of all charges. The Defendant was sentenced on March 25, 1997 to undergo incarceration for an aggregate minimum of four years and an aggregate maximum of eight years. Defendant appealed to the Superior Court on April 8, 1997 raising only the suppression issue. The Superior Court affirmed the judgment of the sentence by Opinion dated March 5, 1998. On April 22, 1998, the Defendant was notified that his attorney did not file a Petition of Allocatur to the Supreme Court

In his PCCR Petition filed May 14, 1998, Defendant alleges that his counsel was ineffective for failing to timely file an allowance of appeal to the Supreme Court. A conference on the matter was held September 22, 1998. After hearing the arguments of the parties, the Court determined that the Defendant had not provided a basis for relief under the Post Conviction Relief Act, and denied the Defendant's Petition by Order dated September 22, 1998. The Defendant was notified that he had 20 days in which to respond to the Petition.¹ On January 22, 1999, Defendant filed an appeal to the denial of his Petition alleging that he was not appropriately represented at the PCCR conference. The Defendant's motion was denied by Order dated January 26, 1999, wherein the Court noted that the Defendant was represented by counsel at the conference. Defendant filed a Notice of Appeal to the Superior Court from the January 26, 1999 Order on February 10, 1999.

The Defendant first argues that he was not adequately represented by counsel at the PCCR conference. Instantly, as this was the Defendant's first Petition for Post

¹It was discovered after the Defendant's appeal was filed that the Court had inadvertantly neglected to enter a final Order dismissing the Defendant's PCRA Petition. The Court has since filed the final Order.

Conviction Collateral Relief, the Court appointed counsel to represent him in accordance with Pa.R.Crim.P.1504(a), see *a/so Commonwealth v. Hampton* 718 A.2d 1250 (1998). As the Defendant alleged ineffective assistance of counsel against his attorney from the Public Defender's Office, a member of conflicts counsel was appointed to represent him, see *Commonwealth v. Willis*, 492 Pa 310, 424 A.2d 876, (1981). James R. Protasio, Esquire, was present at the conference on the Petition, and presented the Defendant's claim of ineffective assistance of counsel for failing to file a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Mr. Protasio highlighted the fact that the Defendant was not informed of his right to seek discretionary review by the Supreme Court until the time for appeal had run. Despite Mr. Protasio's argument, however, the court found that the Defendant was not eligible for relief under the Act.

The Defendant next argues that his PCCR Petition was wrongfully denied. 42 PA.C.S.A. ' 9543 lists the four requirements to be eligible for relief under the Post Conviction Relief Act. It provides in relevant part:

(a) To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime:

...

(2) That the conviction or sentence resulted from one or more of the following:

...

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

...

Instantly, the Court found that the Defendant's claim that his counsel failed to inform him of his right to seek discretionary review by the Supreme Court is not cognizable under Section 9543(a)(2), see also Commonwealth v Tanner, 410 Pa.Super.398, 600 A.2d 201 (1991). In Tanner, the Defendant was convicted of seven counts of involuntary deviate sexual intercourse. The Defendant filed a direct appeal which was denied. A new attorney was then appointed to the case, and a post-conviction petition was filed and denied by the court without a hearing. The defendant appealed, alleging in part that his appellate counsel was ineffective for failing to advise him of his right to take an appeal to the Supreme Court. The Court found that Appellant's allegation that his appellate counsel was ineffective for failing to inform him of his right to appeal to our Supreme Court does not raise an issue bearing upon his ultimate guilt or innocence, @ Tanner, at 205.

The Court reasoned that the only PCRA category under which this claim could arguably be brought is Section 9543(a)(2)(ii). The Court added that it has interpreted Section 9543(a)(2)(ii) to mean that an ineffectiveness claim brought under the PCRA must raise a question of whether an innocent individual has been convicted. As the Defendant had not explained how the truth-determining process was undermined, nor alleged that his appellate counsel's actions prevented a reliable determination of guilt or innocence, his claim was not cognizable, Ibid. The Defendant's allegations in this case, like the

allegations in Tanner, did not explain how the truth-determining process had been undermined, nor that his counsel's actions prevented a reliable determination of guilt or innocence. The Court therefore finds that his claim is not cognizable under the act.

Dated: June 14, 1999

BY THE COURT,

Nancy L. Butts, Judge

xc: James Protasio, Esquire,
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges