

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 95-11,409
	: 95-10,935
VICKIE ZERBY,	: CRIMINAL ACTION - LAW
	:
Defendant	: PCRA Petition

OPINION AND ORDER

This matter is before the Court on Defendant's PCRA Petition filed October 15, 1998, which contended that her trial counsel and post-trial counsel were ineffective. Hearings were held February 9 and March 29, 1999. By Order dated and filed June 29, 1999, this Court agreed with Defendant's contentions relating to one of two sentences imposed June 1, 1996, for Delivery of Controlled Substances and vacated the Defendant's guilty plea and sentence for that charge. Thereafter, on July 7, 1999, the Commonwealth filed a Motion to reconsider the grant for post conviction relief. This Court granted the Request for Reconsideration by Order filed July 14, 1999; by subsequent Order dated July 26, 1999, we vacated the prior PCRA Order of June 29, 1999.

The Commonwealth's basis for seeking reconsideration of the June 29, 1999, Order rests upon its contention that the issue of Defendant's ineffective assistance of guilty plea counsel has been finally litigated on direct appeal to the Superior Court. Hence, Defendant is not entitled to relief under the Post Conviction Relief Act, 42 Pa.C.S. §9541-46, as §9543(a)(3) denies relief to a petitioner unless the petitioner pleads and proves the issue has not been finally litigated. The Commonwealth further asserts that under §9544, the issue of the guilty plea counsel's ineffectiveness has been finally litigated since the

Pennsylvania Superior Court ruled on the merits of the issue of guilty plea counsel's ineffectiveness. The Commonwealth further relied upon *Commonwealth v. Baker*, 371 Pa.Super. 588, 538 A.2d 892 (1988) and *Commonwealth v. Carpenter*, ____ Pa. ____, 725 A.2d 154 (1999) for the proposition that once finally litigated, an issue cannot be re-litigated in a PCRA proceeding by alleging ineffective assistance of counsel or by raising new theories of relief to support the previously litigated claims.

Defendant continues to assert she is entitled to PCRA relief because her post-trial counsel, by such counsel's own admission, was ineffective in pursuing her direct appeal. Further, even though the direct appeal raised trial counsel's ineffectiveness, since this PCRA proceeding is the first opportunity Defendant has had to raise the issue of *post* trial counsel's ineffectiveness; the issue is properly litigated in this form.

This Court agrees with the contentions of Defendant that the present PCRA proceeding is an appropriate procedure by which to challenge the effectiveness of her post-trial counsel and that she is entitled to the PCRA relief of having her guilty plea set aside. Defendant has demonstrated her guilty plea counsel was clearly ineffective in failing to pursue whether Defendant had an available defense of entrapment.

This Court's first Opinion and Order under Defendant's PCRA petition, dated and filed June 29, 1999, fully sets forth the factual background and reasons why this Court has made a determination that Defendant's plea of guilty to one of the two charges to which she entered pleas of guilty for delivery of

heroin on June 1, 1996, was an improper plea. That Opinion and Order are incorporated herein by reference.

The Commonwealth contends that when Defendant filed a direct appeal from her sentencing which raised the ineffectiveness of her guilty plea counsel because he failed to pursue a defense of entrapment; the question was finally determined by the Pennsylvania Superior Court decision entered August 13, 1999, which found that on remand Defendant had failed to introduce evidence to establish facts that supported her appeal claim of ineffectiveness of guilty plea counsel. Upon the entry of that decision by the Pennsylvania Superior Court, Defendant promptly filed the present PCRA petition which alleges her counsel on appeal was ineffective for failing to take advantage of appropriate evidence by which at the remand hearing it could have been demonstrated that trial counsel was ineffective. As discussed in our Opinion of June 29, 1999, at the PCRA evidentiary hearing post-trial appellate counsel readily acknowledged being ineffective in failing to introduce available testimony that was obviously necessary in order to establish Defendant's claim of guilty plea counsel's ineffectiveness. Consequently, the Superior Court was never provided the information sought on remand that would have allowed that Court to determine the merits of Defendant's appeal.

Moreover, the Superior Court has never actually considered whether Defendant's post-trial appellate counsel was ineffective. This matter has not been finally litigated. It has long been the law of this Commonwealth (as well as the United States) that ineffective representation of appellate counsel gives rise to an independent basis for relief under Post Conviction Hearing Act (or Post Conviction Relief Act), even

where assessment of an ineffectiveness claim may trigger review of facts examined earlier. *See Commonwealth v. Harer*, 46 Pa. 123, 404 A.2d 388 (1979). In *Harer*, the only issue that had been raised by the appellant on direct appeal was the ineffective assistance of trial counsel. The appellant then filed a PCHA petition, raising the ineffectiveness of appellate counsel. The *Harer* court recognized that representation by ineffective appellate counsel gives rise to an independent basis for relief. The *Harer* court further recognized that appellate counsel could not raise his/her own effectiveness on direct appeal and that appellant's first opportunity to raise such ineffectiveness of appellate counsel was in the PCHA proceeding. Accordingly, *Harer* reached the merits of appellant's PCHA claim. This is exactly what this Court has done in reaching the merits and holding a hearing on the merits of this Defendant's PCRA claim that her guilty plea counsel was ineffective. As noted in our Order of June 29, 1999, Defendant clearly met her burden in proving this.

Furthermore, this Court finds the reliance of the Commonwealth upon the *Carpenter* and *Baker* decisions to be misplaced. In both, the issues being examined by the appellate court (which held that the ineffectiveness of counsel could not be raised in a PCRA proceeding) was the ineffectiveness of *trial* counsel. In *Baker*, the issue was whether trial counsel was ineffective for failing to object to certain portions of the prosecutor's summation on direct appeal. In the PCHA petition, the focus was again on the ineffectiveness of counsel at trial, albeit focusing on different portions of the prosecutor's summation (which, in the PCHA proceeding, defendant contended appellate counsel should have concentrated upon). Similarly, in *Carpenter* the legal principle asserted by the Commonwealth here was enunciated by the

Supreme Court when it considered whether trial counsel was ineffective for failing to present mitigating evidence. *See, Carpenter supra*, at Section B2, “Mitigating Evidence” (discussing whether trial counsel’s ineffectiveness in this regard could be a basis for relief under the PCRA petition). The *Carpenter* court recognized the principle that to be eligible for PCRA relief the petition must establish that the issue has not been previously litigated. The Court and stated that the appellant had the issue of trial counsel’s failure to present mitigating evidence raised on direct appeal and in a first PCRA petition. *Carpenter, supra* at ____, 725 A.2d at 162. In this regard, the *Carpenter* court did state: “Finally, case law provides that a petitioner ‘cannot obtain post-conviction review of claims previously litigated on appeal by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims.’ *Commonwealth v. Beasley*, 544 Pa. at 565, 678 A.2d at 778.” *Ibid*. The *Beasley* court upon which *Carpenter* relied was also dealing with the issue of ineffective trial counsel. In fact, the *Carpenter* court recognized that the PCRA proceeding was an appropriate time to deal with appellant’s claim that his direct appeal attorney was ineffective. *Carpenter* at ____, 725 A.2d at 167.

This Court is further persuaded that it is appropriate at this time to allow Defendant relief under the Post Conviction Relief Act, based upon the interpretation of that Act most recently given to it by the decision of our Supreme Court of *Commonwealth v. Lantzy*, ____ Pa. ____, ____ A.2d ____, J-38-99, No. 66 W.D.App.Dkt. 1998, in a decision issued July 7, 1999. *Lantzy* clearly recognizes that a PCRA is the sole basis by which the defendant can obtain post conviction relief. If this Court were not to review the issue as to whether appeal counsel was ineffective, then there would be no framework where

such could be reviewed. That result is not tolerable simply because, as noted in *Lantzy*, the appeal to the Superior Court by Defendant represents an integral part of the adjudication of the Defendant's guilt or innocence. Where counsel's ineffectiveness on appeal operates to deprive Defendant of her Constitutional rights, the finding of guilt is thereby rendered inherently unreliable and thus gives rise to a claim for post conviction relief under the express terms of §9543(a)(2)(ii). In *Lantzy*, the issue was whether appellate counsel was ineffective for improvidently withdrawing an appeal. *Lantzy* states that an accused who is effectively denied the assistance of counsel when counsel does not file a direct appeal is prejudiced; a further showing of innocence or merits of the issue/issues that could be raised on appeal is not required.

At the hearing on the PCRA petition of Defendant, this Court found Defendant did make a valid showing that guilty plea counsel was ineffective, because there was no reasonable basis for defense counsel not to pursue the entrapment defense. This Court also took testimony and found Defendant had met her burden as set forth previously by the Pennsylvania Superior Court to establish that the nature and frequency of the informant's entreaties to Defendant were of a manner in which the informant acted as a police informant; the information given by Defendant to her counsel were such as to support an entrapment defense. This Court was convinced that Defendant had met her burden (recognized by *Lantzy*), *supra* that the guilty plea counsel's ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place in the guilty plea procedure. The Court also found that the failure of post-trial counsel to proceed with introducing appropriate evidence, which would have been available at the remand hearing, was so ineffective as to have been the functional equivalent of having

no representation at all on direct appeal. It would constitute a manifest injustice to deny Defendant a fair opportunity to assert a meritorious defense simply because trial counsel failed to explore the merits of that defense, a failure compounded by appellate counsel's failure to ensure the Superior Court had the information specifically requested on remand. The fault in this case is clearly and solely that of Defendant's counsel, not of Defendant. Accordingly, the following Order, which is essentially the same order originally entered on June 29, 1999, will be entered.

ORDER

AND NOW, this 9th day of September 1999, the Defendant's guilty plea and sentence for the offense of Delivery of Heroin on the date of June 1, 1996, Count 5, of information 95-11,944, is hereby **VACATED**. That charge shall be scheduled for trial. The sentence of the Court that Defendant pay the costs of prosecution, a fine in the amount of \$1,000 and undergo imprisonment in a State Correctional Institution for a minimum period of 18 months and a maximum period of 10 years is also **VACATED**. For purposes of determining status as well as trial readiness Defendant shall appear for a pre-trial conference to be held on November 4, 1999 in Courtroom No. 4 of the Lycoming County Courthouse, commencing at 9:00 a.m. The Sheriff of Lycoming County is authorized to transport the Defendant from any place she may be incarcerated to the Lycoming County Courthouse for purposes of that proceeding and thereafter see that she is returned to the same. Present conflicts counsel, J. Michael Wiley, Esquire, shall represent the Defendant at trial.

In the event that an appeal from this Order is timely taken, the appearance at the pretrial conference by the Defendant as noted above is canceled; the party filing the appeal shall so notify the Court Scheduling Technician, the Sheriff and the Warden on a timely basis to avoid the unnecessary transportation of Defendant.

BY THE COURT,

WILLIAM S. KIESER, JUDGE

cc: Eileen A. Grimes, CST
District Attorney
J. Michael Wiley, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire, Lycoming Reporter
Honorable Nancy L. Butts

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