

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 96-11,356

VS. :

KENNETH LARUE THORNE, JR. :

OPINION AND ORDER

Defendant, Kenneth L. Thorne, was convicted by a jury on March 14, 1997, inter alia, aggravated assault, indecent assault and endangering the welfare of children. The victim in this case was the Defendant's five (5) week old infant Tatiana Thorne. On June 29, 1999, the Defendant filed a pro se Motion for Post Conviction Relief. On January 4, 2000 Defendant's counsel filed an amended Motion for Post Conviction Collateral Relief. A conference on the motion was held on March 14, 2000. After reviewing the issues presented, the Court must grant Defendant the relief he seeks and allow him to appeal his case to the Superior Court. However, the Court will review the issues presented in the PCCR motion.

Defendant asserts two issues in his motion. First, Defendant argues that his counsel was ineffective for failing to adequately apprise him of his right to testify on his own behalf at trial. Second, Defendant argues that his counsel was ineffective for failing to file a brief in support of his appeal to the Superior Court.

To establish a claim of ineffective assistance of counsel, the Defendant must show that (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable basis for his or her course of

conduct and; (3) that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. Commonwealth v. Carpenter, 511 Pa. 429, 725 A.2d 154 (1999). Counsel cannot be considered ineffective for failing to raise a claim that is without merit. Commonwealth v. Peterkin, 538 Pa. 955, 649 A.2d 121 (1994), cert denied, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995). Additionally, the Post Conviction Relief Act provides relief only when counsel's ineffectiveness "so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S. §9543(a)(32)(ii).

Defendant's first claim that he was deprived of his right to testify on his own behalf, fails to satisfy the first prong (claim of arguable merit). In the transcript of the trial, this Court inquired of the Defendant, under oath, of his decision not to testify on his own behalf. (Notes of Testimony, March 13-14, 1997 at pp. 199-201.) It is clear from the colloquy, that it was the Defendant's choice not to testify. Accordingly, the Court rejects Defendant's claim that his counsel was ineffective on that basis.

Defendant's remaining issue challenges trial counsel's failure to file a brief in his appeal to the Superior Court. It is the duty of counsel to perfect an appeal once requested to do so, even if counsel believes that the appeal would be meritless. Commonwealth v. Gonzales, 415 Pa. Super. 65, 608 A.2d 528 (1992). Here, counsel filed an appeal to the Superior Court. Even if trial counsel believed that the appeal had no merit, failing to file a brief was not the appropriate way to resolve the matter.

The dismissal of post-verdict motions or a criminal appeal on the basis of procedural default" improperly places the entire burden of counsel's errors on the powerless client, rather than the offending counsel." Commonwealth v. Mosteller, 430 Pa. Super. 57, 633 A.2d 615 (1993) "When counsel fails to file a timely appellate brief, resulting in the dismissal of an appeal, counsel has waived

the right of the accused in the absence of an effective waiver by the accused; counsel cannot be said to have been effective.” Id. at 62, 633 A.2d at 618. Therefore, based on Mosteller, the Defendant is entitled to a direct appeal nunc pro tunc. The Court finds that Defendant’s counsel was ineffective for failing to file a timely appellate brief, and would grant his request to appeal nunc pro tunc.

O R D E R

AND NOW, this 14th day of July, 2000, after conference and review of the outstanding issues, it is ORDERED and DIRECTED the Defendant’s PCRA Petition is Granted, as trial counsel was ineffective for failing to file a brief on direct appeal.

It is ORDERED and DIRECTED Defendant has leave nunc pro tunc to perfect a timely appeal to the Superior Court within thirty (30) days of the date of this Order.

BY THE COURT,

Nancy L. Butts, Judge J.

xc: District Attorney
Kyle Rude, Esquire
Honorable Nancy L. Butts
Law Clerk
Judge
Gary Weber, Esquire