

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

AARON CHRISTOPHER WHEELER

v.

PATRICIA DUGAN, ESQUIRE;
DUGAN & KOSINSKI, ATTYS. AT LAW

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MARCH TERM, 2001

NO. 00438

Myrna Field, A.J.

April 2, 2002

OPINION OF THE COURT

Plaintiff, Aaron Christopher Wheeler appeals from this court's order dated January 24, 2002, sustaining defendants' preliminary objections to his complaint. For the reasons which follow, plaintiff's complaint in this legal malpractice action was properly dismissed and this court's order should be affirmed.

Plaintiff brought this suit alleging professional negligence by defendant, Patricia Dugan, Esquire, and her firm Dugan & Kosinski, who were appointed to represent him in his action brought pursuant to the Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 (PCRA). The background on this case is as follows: A bench trial in the underlying matter was held before the Honorable Arthur Kafrissen on June 10, 1993, following the hearing of pre-trial motions by the Honorable Arnold New on June 9, 1993. Plaintiff was found guilty of aggravated assault, robbery, criminal conspiracy and possession of an instrument of crime. On June 6, 1994, after his motions for post trial relief were denied, he was sentenced to a term of twenty-seven and one-half to fifty-five years imprisonment to be served consecutive to two life sentences to which he

had been previously sentenced. A direct appeal was taken to the Superior Court which affirmed the judgment and sentence of the trial court. Commonwealth v. Wheeler , 677 A.2d 1268 (Pa. Super. 1996). Plaintiff's subsequent petition for allowance of appeal was denied by the Supreme Court on February 22, 1996. Commonwealth v. Wheeler, 548 Pa. 635, 694 A.2d 621(1997).

On October 17, 1997, plaintiff filed a pro se PCRA petition, which alleged that the trial court should have recused himself because he was prejudiced against the plaintiff, and that trial counsel was ineffective on several grounds. Defendant herein, Ms. Dugan, was appointed to represent plaintiff in his PCRA action.

On December 18, 1998, Ms. Dugan filed a no-merit letter, pursuant to the standards set forth in Commonwealth v. Finley , 397 Pa. 390, 550 A.2d 213 (1988). In her letter, Ms. Dugan stated that she had reviewed Mr. Wheeler's claims and the PCRA and concluded that he had no cognizable claim for relief pursuant to that act, and she asked to be allowed to withdraw from representation in the case. Subsequently, after notice to Mr. Wheeler, his petition was dismissed by the Honorable Barbara Joseph on February 9, 1999. Mr. Wheeler appealed to the Superior Court. His appeal was denied by memorandum opinion dated January 31, 2000. Commonwealth v. Wheeler, No. 621 EDA 1999. The Superior Court opinion addressed each of Mr. Wheeler's arguments and concluded that the PCRA petition had been properly dismissed.

On March 7, 2001, Mr. Wheeler commenced this action against Ms. Dugan and her law firm alleging professional negligence in her representation of him. In response to the complaint, Ms. Dugan filed preliminary objections in the form of a demurrer, asserting that Mr. Wheeler failed to state a claim upon which relief could be granted. This court agreed and, by order dated

January 24, 2002, sustained Ms. Dugan's preliminary objections and dismissed Mr. Wheeler's complaint.

The criteria for a legal malpractice action have been specifically set forth by the Pennsylvania Supreme Court in Bailey v. Tucker, et al, 533 Pa. 237, 621 A.2d 108 (1993). Under Bailey, in order to sustain a malpractice action against a criminal defense attorney, the plaintiff must establish five elements: 1) the employment of the attorney; 2) reckless or wanton disregard of the criminal defendant's interest by the attorney; 3) that "but for" the attorney's conduct the plaintiff (criminal defendant) would have obtained an acquittal or complete dismissal of the charges; 4) the existence of damages; and that 5) the plaintiff (criminal defendant) has pursued post trial remedies and obtained relief which was dependent on attorney error. 533 Pa., at 250-51, 621 A.d., at 115. The court explained that the burden on a plaintiff in a criminal malpractice action is higher than in the civil context because, among other reasons, a criminal defendant has many opportunities to allege ineffective assistance of counsel or to otherwise attack his conviction.

In the instant matter, Mr. Wheeler appealed the denial of his PCRA petition, and the appellate court, after addressing in detail each of his allegations, found the petition to be without merit. Moreover, the court found that many of the issues had been previously litigated in his direct appeal, and that those which were not were not within the purview of the PCRA. Consequently, he has not met the Bailey standards. Thus, Ms. Dugan's demurrer was properly sustained.

For all of the above reasons, this court's order of January 24, 2002, sustaining defendants' preliminary objections and dismissing plaintiff's complaint, was proper and should be affirmed.

By the Court:

Myrna Field, A.J.