

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CR-1923-2014  
:   
v. :   
:   
MICHAEL ALLEN BROWN, :   
Defendant : PCRA

**OPINION AND ORDER**

On August 31, 2016, PCRA Counsel for the Defendant filed a Motion to Withdraw as Counsel pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

***Background***

On December 22, 2015, Defendant entered a plea of guilty to one (1) count of Recklessly Endangering Another Person<sup>1</sup>, a misdemeanor of the second degree; and one (1) count of Endangering the Welfare of a Child<sup>2</sup>, a felony of the third degree. This Court sentenced Defendant on December 22, 2015, in accordance with a plea agreement. Defendant received a sentence of one (1) to two (2) years on the charge of Recklessly Endangering and a sentence of two (2) to four (4) years on the charge of Endangering Welfare for an aggregate state sentence of three (3) to six (6) years. In accordance with the plea agreement, the Defendant was determined to be not eligible for RRRI and the sentence was to run consecutive to any probation violation. On that same date, Defendant was found to have violated the conditions of his probation (by

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<sup>1</sup> 18 Pa.C.S. § 2705.

<sup>2</sup> 18 Pa.C.S. § 4304(a)(1).

being charged with new crimes) and by Order of that date his sentence of probation was revoked and he was instead sentenced to state incarceration of one to two years, to run consecutive to the sentence on the new charges. The aggregate sentence was to three (3) to six (6) for the above captioned matter. The probation violation sentence was to run consecutive to the sentence imposed under 1923-2014. N.T., 12/22/2015, at 17.

On June 20, 2016, Defendant filed a Motion for Post Conviction Collateral Relief, claiming that a Judge who had heard his pretrial motions did not hear his guilty plea and sentence him, that his public defender did not adequately represent him, and that he was “pushed into taking a plea”. On June 29, 2016, this Court issued an Order appointing counsel in accordance with Pa.R.Crim.P. 904(C),<sup>3</sup> and scheduled a court conference for November 14, 2016. Appointed counsel filed a Motion to Withdraw as Counsel and a *Turner-Finley* letter on August 31, 2016, prior to the conference. Following the conference, and after thorough review, this Court finds that there are no genuine issues of material fact and that Defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings.

***Defendant’s PCRA Petition is timely pursuant to 42 Pa.C.S. § 9545(b)***

Defendant’s PCRA Petition is timely. 42 Pa.C.S. 9545(b) requires that a PCRA petition be filed within one (1) year of the date the judgment in a case becomes final, or else meet one of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1). Here, Defendant was sentenced on December 22, 2015, and took no appeal to the Superior

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<sup>3</sup> “when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant’s first petition for post-conviction collateral relief.” Pa.R.Crim.P. 904.

Court of Pennsylvania. Thus, his judgment of sentence became final thirty (30) days later on January 20, 2016. 42 Pa.C.S. § 9545(b)(3). Defendant filed his PCRA Petition on June 20, 2016, which is within one (1) year of the date the judgment became final and thus the Petition is timely and the Court has jurisdiction to consider whether it has merit.

***I. Whether Trial Counsel was ineffective***

On December 12, 2014, Defendant was charged with Aggravated Assault<sup>4</sup>, (a felony of the first degree); Simple Assault<sup>5</sup>, (a misdemeanor of the first degree), Recklessly Endangering Another Person<sup>6</sup>, (a misdemeanor of the second degree); and Endangering the Welfare of Children<sup>7</sup>, (a felony of the third degree), for his mistreatment of a two-year old male individual between the dates of 3/20/2014 and 5/15/2014. He was represented by Jeffery Frankenburger of the Public Defender's office. He then was represented by Marc Decker, private counsel, who filed pre-trial motions on his behalf. The pretrial motion was a request for the Children and Youth Services records of in this case and Judge Lovecchio ultimately granted the Defense Attorney's pretrial motion in an Order dated May 20, 2015.

Where counsel's effectiveness is at issue, the Superior Court applies the standard adopted by Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (Pa. 1987), which recast the two-factor inquiry regarding the effectiveness of counsel set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as the following three-factor inquiry:

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<sup>4</sup> 18 Pa.C.S.S. § 2702(a)(1).

<sup>5</sup> 18 Pa.C.S. § 2701(a)(1).

<sup>6</sup> See Footnote 1.

<sup>7</sup> See Footnote 2.

[I]n order to obtain relief based on [an ineffective assistance of counsel] claim, a petitioner must establish: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

COMMONWEALTH V. RIVERA, No. 1423 EDA 2015, 2017 PA. SUPER. LEXIS 39, AT \*31 (SUPER. CT. JAN. 18, 2017) (J. BOWES DISSENT CITING COMMONWEALTH V. LIPPERT, 2014 PA SUPER 25, 85 A.3D 1095, 1100 (PA. 2014)).

Defendant's request for Post Conviction Relief does not present an underlying claim with arguable merit. Defendant stated that he believed "my Public Defender was not doing his job. I believe he was against me, he did not once try to help me, and it seemed like he always had an attitude when he would talk to me." Though the Court may be able to sympathize with Defendant's feelings, the record establishes that his case was fully litigated with the advice of not one, not two, but three attorneys. Pretrial motions were successfully argued on his behalf, the Court would not accept his willingness to plea on the most serious offense charged, and he ended up pleading to only two counts having to do with a specific point in time i.e. the date of the fall down the staircase, 4/5/2014. The original criminal information alleged events taking place during the two month period between 3/20/2014 and 5/15/2014. The Court, when recapping the factual predicate for the guilty plea stated

It looks like an individual, two years old was presented to the emergency department at Williamsport Hospital just after midnight on April the 5<sup>th</sup> and they found that – there were numerous bruises in various stages of healing on the child's rear end and posterior thighs bilaterally."

N.T., 12/22/2015, at 4.

At this point, Defense Counsel interrupted and stated

Again, Judge, if I may interrupt. I think if we're going to concentrate on the April 5<sup>th</sup> I think what it is is the allegation is that Mr. Brown had the child upstairs in a second

floor bedroom, that he had been drinking, maybe intoxicated, that he took – tried to walk down the stairs with the child, they fell down the stairs together, a result of which the child had a broken arm and perhaps a broken clavicle; but certainly a broken arm.

Id. at 5.

Defense Counsel narrowed the issue to what the Defendant was indeed pleading guilty to. It was again much less than the Commonwealth had charged. Defendant would have to establish that plea counsel provided ineffective assistance of counsel in advising him to plead guilty on December 22, 2015. COMMONWEALTH V. PATTERSON, 2016 PA SUPER 140, 143 A.3D 394, 398 (PA. SUPER. 2016). Given the long history of the case and the negotiations that took place among all parties involved, it appears to the Court that Defendant's plea and sentence was appropriate and Defense Counsel was effective in advising Defendant to accept the plea offer.

***II. Whether having a different Judge accept Defendant's plea and sentence Defendant merits relief under the PCRA***

Defendant was represented by Chief Public Defender, William Miele, Esq., on the date of his guilty plea and sentence. The sentence of the Court was to the exact terms of the plea agreement. Guilty Plea Colloquy, 12/22/15, at 1. The Defendant has presented no evidence other than the statement that "Judge Lovecchio told the DA that I didn't deserve the time they were offering" that Judge Lovecchio would not have accepted the plea agreement.

In its review of the record of this case, the Court finds that Defendant did receive the benefit of Judge Lovecchio's thinking on this case. On November 20, 2015, Judge Lovecchio entered an Order stating that

the Court will not accept the Defendant's guilty plea to Aggravated Assault, a felony one offense. Defendant is charged with attempting to cause, or intentionally,

knowingly, or recklessly causing serious bodily injury to a minor child under circumstances manifesting an extreme indifference to the value of human life. Defendant has admitted that on occasions, he may have smacked the child on the butt, but never intentionally hurt the child, and he admitted that on one (1) occasion he was intoxicated carrying the child down the stairs and then fell. The Court does not believe that these circumstances to which he admitted constitute the offense of aggravated assault as charged.

Accordingly, this matter shall stay on the pretrial [sic]. The pretrial is December 8, 2015. Jury selection is scheduled in early January, and it shall remain on the trial term.

Order of Court, CR-1923-2014, 11/23/2015.

The matter did not go to trial nor did Defendant end up pleading guilty to a felony one offense. Rather the Commonwealth and the Public Defender negotiated a plea agreement, which included a term of sentence, which the Court accepted and followed. It is unlikely that Judge Lovecchio would not have also agreed to the terms of the plea agreement as it reflected Judge Lovecchio's beliefs about the case, detailed in his order above. Additionally, there is no way to prove that Judge Lovecchio would have not gone along with the terms of the plea agreement.

### ***III. Whether Defendant was coerced into pleading guilty***

Under the PCRA, a petitioner may be eligible for relief if he can prove, inter alia, that his plea of guilty was unlawfully induced, and that the error asserted is not finally litigated or waived. Waiver occurs where a petitioner knowingly and understandingly fails to raise the issue at a time when he could have done so. The existence of extraordinary circumstances justifying the failure to raise the issue at the appropriate time counteracts the waiver. It is settled law that ineffectiveness of counsel constitutes extraordinary circumstances and thus precludes a finding of waiver under the PCRA. COMMONWEALTH V. BELLEMAN, 300 PA. SUPER. 209, 213, 446 A.2D 304, 306 (1982) (STATUTORY CITATIONS OMITTED). Because Defendant's claim that he was under duress

from his attorney to plead guilty, the Court will consider the voluntariness of the plea issue even though Petitioner may have waived it by not requesting the Court to allow him to withdraw his guilty plea in the form of a post sentence motion. But, Defendant has an affirmative duty to plead and prove by the preponderance of the evidence that his guilty plea was unlawfully induced where circumstances made it likely that inducement caused him to plead guilty, or that infective assistance of counsel cause an involuntary or unknowing plea. COMMONWEALTH V. MENDOZA, 730 A.2D 503 (PA. SUPER. 1999).

Here the guilty plea colloquy shows that Defendant made a knowing, voluntary and intelligent plea. He had been working closely with lawyers since charges were filed so he was well apprised of the evidence against him and what the Commonwealth would need to prove in trial against him. The Court went over with the Defendant the elements of the crimes to which he was pleading guilty, N.T., 12/22/2015, at 2, and what his maximum exposure would be if he chose to plead guilty on that date. Id. at 3.

In order to merit relief under the PCRA, the Defendant would have needed to show that his plea was not knowing, voluntary or intelligent. On the date of his guilty plea, the Court asked Defendant, after reviewing the specific terms of the plea agreement, how do you wish to plead to the recklessly and endangering the welfare of the child charge? N.T., 12/22/2015, at 3. Defendant responded “guilty”. Id. After reviewing the factual basis for the criminal charges, the Court reviewed with the Defendant the Commonwealth’s allegation that “you had responsibility for the child, you weren’t in condition to take proper care of the child and as a result the child received very serious injuries in your care. Is that what you’re agreeing to? Is that what you’re

pleading guilty to here today?” Id. at 5. To which the Defendant responded “Yes.” Id. Defendant stated “I take full responsibility”. Id. at 6.

The Court went on to review the entire Written Guilty Plea Colloquy with Defendant, making sure that he had time to review it with his attorney and that he understood the rights he might be giving up. Id. 6-9. The Court specifically questioned Defendant regarding his circling of “emotional” on the form, which led to a conversation with Defendant where he was concerned that Adult Probation could change their agreement to the Court sentencing him to one (1) to two (2) years on the probation violation as well as the voluntariness of his plea. Id. at 9. Such a thorough review indicates to the Court that the Defendant knew what he was pleading guilty to and the consequence of such a plea, and that any “buyer’s remorse” now does not rise to the level of questioning the voluntariness of such plea.

### ***Conclusion***

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant’s PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pa.R.Crim.P. 907(1), the parties are hereby notified of this Court’s intention to deny the Defendant’s PCRA Petition. The Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the Petition.



**ORDER**

**AND NOW**, this 31st day of January, 2017, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed August 31, 2016, is hereby GRANTED and Donald Martino, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA  
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