

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**HEATHER HERSH,
Defendant**

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CR-383-2016

PCRA

OPINION AND ORDER

On April 17, 2017, Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Motion to Dismiss 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 her PCRA Petition, and her petition should be dismissed.

Background

On March 21, 2016, Heather Hersh (Defendant) pled guilty and was sentenced, pursuant to a negotiated plea agreement, to Possession of a Controlled Substance, marijuana, an ungraded felony.¹ The plea agreement was that the Defendant was to be placed under the supervision of the Adult Probation Office of Lycoming County for a period of time to be determined by the Court. The Defendant did not file any subsequent appeals. Therefore, her sentence became final on April 21, 2016.

¹ 35 P.S. § 780-113 (a)(30).

On February 6, 2017, the Defendant filed a timely *pro se* PCRA petition. The Defendant alleges that her trial counsel was ineffective for multiple reasons including: 1) failing to request a dismissal of charges pursuant to Pa.R.Crim.P. 600 because of the delays; 2) failing to challenge the illegal sentence imposed by the Court of 36 months of probation and 50 hours of community service and discretionary aspects of the sentence; 3) failing to set a defense for the small amount of marijuana due to the amount of marijuana recovered; 4) failing to challenge the discretionary aspects of sentencing; and, 5) the inducement of an unlawful guilty plea. Trisha Hoover Jasper, Esquire was appointed to represent the Defendant for the PCRA Petition. On April 17, 2017, Attorney Jasper filed a Petition to Withdraw from Representation of PCRA and a Memorandum Pursuant to Turner/Finley. After an independent review of the record and a PCRA conference, the Court agrees with Attorney Jasper that Defendant failed to raise any meritorious issues in her PCRA Petition.

Whether trial counsel was ineffective for failing to file a Pa.R.Crim.P. 600 motion

The Defendant contends that her counsel should have filed a Rule 600 motion dismissing the charges because more than 180 days had elapsed between the criminal complaint being filed and her guilty plea. Specifically, Defendant claims that since the crime occurred on October 18, 2014, and she was not sentenced until March 21, 2016, her attorney was ineffective.

Rule 600 states that “trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.” Pa.R.Crim.P.

600(A)(3). “[A] Trial court must grant a Rule 600(G) motion to dismiss unless it finds that the Commonwealth has exercised due diligence and that the circumstances occasioning the postponement were beyond its control.” Commonwealth v. Meadius, 870 A.2d 802, 805 (Pa. 2005) (citing Pa.R.Crim.P. 600(G)). The exercise of “due diligence” requires the Commonwealth to do everything reasonable within its power to guarantee that a trial begins on time. See id. at 807-08. “In determining when the trial should commence, the unavailability of the defendant’s attorney or any continuances granted at the request of the defendant’s attorney are excluded. Pa.R.Crim.P. 600(C)(3).

Here, the Criminal Complaint was dated September 8, 2015, and the Defendant pled guilty on March 21, 2016; Defendant’s sentencing was slightly more than 180 days from the date that the complaint was filed. In addition, the entry of a plea of guilty “usually constitutes a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of plea.” Commonwealth v. Coles, 530 A.2d 453, 457 (Pa.Super.1987). Irregularities in proceedings prior to a guilty plea are reviewed only for the extent they effected voluntariness of the plea. Commonwealth v. Riviera, 385 A.2d 976 (Pa. Super. 1978) (explaining that a statutory right to a speedy trial did not influence the voluntariness of a defendant’s guilty plea). The Court finds that there is no indication in the record or the Defendant’s PCRA Petition to show that the Defendant’s voluntariness of her plea was affected by a Rule 600 motion not being filed. Therefore, the Court finds that the guilty plea was valid and the Defendant’s Rule 600 issue is without merit.

Whether the Defendant waived her right to raise defenses and defects not concerning jurisdiction of the court, legality of sentence, and validity of plea

The Defendant contends that her trial counsel was ineffective for multiple reasons. The entry of a plea of guilty, however, “usually constitutes a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of plea.” Commonwealth v. Moyer, 444 A.2d 101 (1982); Commonwealth v. Casner, 461 A.2d 324 (1983). Thus, this Court will assess whether the Defendant entered a valid guilty plea to determine if she has waived many of the issues raised in her PCRA Petition.

Manifest injustice is required to withdraw guilty pleas which are requested after sentence has been imposed. Commonwealth v. Flick, 802 A.2d 620, 623 (Pa. Super. 2002). Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly. Commonwealth v. Persinger, 615 A.2d 1305 (Pa. 1992). It does not matter if the Defendant is pleased with the outcome of her decision to plead guilty as long as [s]he did so knowingly, voluntarily, and intelligently. Commonwealth v. Yager, 685 A.2d 1000, 1004 (Pa. Super. 1996).

The minimum inquiry required of a trial court must include the following six areas: (1) Does the defendant understand the nature of the charges to which he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the defendant understand that he has a right to trial by jury? (4) Does the defendant understand that he is presumed innocent until he is found guilty? (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged? (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Young, 695 A.2d 414, 417 (Pa. Super. 1997). In Yeomans, the Superior Court further summarized:

In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. Thus, even though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

Commonwealth v. Yeomans, 24 A.3d 1044 (Pa. Super. 2011) (citing Commonwealth v. Fluharty, 632 A.2d 312, 314 (Pa. Super. 1993); see also Commonwealth v. Scott, No. 1732 MDA 2011 (Pa. Super. Filed July 24, 2012).

A review of the transcript of the guilty plea hearing in this case confirms that the Defendant did in fact enter into her plea knowingly, voluntarily, and intelligently. This Court informed the Defendant of the maximum sentence/fine for the charges and that the Court did not have to accept the terms of the plea agreement. N.T., 3/21/2016, p. 6. The Defendant was made aware of the elements of the crime and that the Commonwealth must prove the elements of the crime beyond a reasonable doubt. Id. at 4-5. The Defendant gave the Court an extensive factual basis for the guilty plea and was informed that she had the right to go to trial. Id. at 4, 7-9, 13. In addition, the Defendant filled out a written guilty plea colloquy highlighting many of these factors in greater detail, to which she stated she understood.² According to Pennsylvania law, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently.

COURT: Whose decision is it to plead guilty to these charges today?

² The Court's Order dated March 21, 2016, found that she knowingly, voluntarily and intelligently entered her guilty plea.

DEFENDANT: Mine.

Id. at 14.

As the Defendant entered a valid guilty plea, she cannot now raise defects and defenses that her trial attorney failed to bring. Therefore, the Court finds that the Defendant has waived the issues of whether trial counsel ineffectively failed to have “set a defense for a small amount of marijuana.” “Where the plea agreement contains a negotiated sentence which is accepted and imposed by the sentencing court, there is no authority to permit a challenge to the discretionary aspects of that sentence.” Commonwealth v. Dalberto, 648 A.2d 16, 19 (Pa. Super. 1994). In addition, the Defendant was not prejudiced in anyway, as the Court accepted the plea agreement and sentenced her accordingly. Therefore, the Court finds that this issue is without merit.

Whether trial counsel was ineffective for failing to object to the Defendant’s illegal sentence

The Defendant contends that her sentence, which was based upon her plea agreement, was an illegal sentence. The maximum sentence for Possession with the Intent to Deliver marijuana is 5 years in jail and has an Offense Gravity Score (OGS) of three (3). With a Prior Record Score (PRS) of a zero (0), the standard guideline range for the charge, at that time, was Restorative Sanctions (RS) or non-confinement to less than 12 months in jail. The Defendant’s sentence for Possession with the Intent to Deliver Marijuana was thirty-six (36) months probation, was within the guideline range and not illegal. Where the plea agreement contains a negotiated sentence which is accepted and imposed by the sentencing court, there is no

authority to permit a challenge to the discretionary aspects of that sentence.” Commonwealth v. Dalberto, 648 A.2d 16, 19 (Pa. Super. 1994). Therefore, the Court finds that the sentence was not illegal and the claim that her trial counsel was ineffective for not objecting to it is without merit.

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 Pennsylvania Rule of Criminal Procedure 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 29th day of August, 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 her PCRA petition unless she files an objection to that dismissal within twenty (20) days of today's date.
2. The **application for leave to withdraw appearance** filed **April 17, 2017**, is hereby **GRANTED** and Trisha Hoover Jasper, Esq. may withdraw her appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA (KO)
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S. Roinick, file