

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :  
 : CP-41-CR-0001589-2014  
 v. :  
 :  
 :  
 ROBERT DAVID NEIDIGH, :  
 Defendant : PCRA

**OPINION AND ORDER**

On September 19, 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 his PCRA Petition, and his petition should be dismissed.

***Background***

On December 15, 2015, Robert David Neidigh (Defendant) pled guilty pursuant to a negotiated plea agreement to Possession with Intent to Deliver<sup>1</sup>, marijuana, greater than 50 pounds, an ungraded felony; Conspiracy to Deliver a Controlled Substance<sup>2</sup>, marijuana, an ungraded felony; Corrupt Organizations<sup>3</sup>, a felony of the first degree; and Dealing in the Proceeds of Unlawful Activity<sup>4</sup>, a felony of the first degree. The charges arise out of the presentment of the Thirty-Sixth Statewide Investigating Grand Jury filed April 25, 2014.

In exact accordance with a negotiated plea agreement to both Defendant's minimum and maximum term of confinement, sentence of the Court was to undergo

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<sup>1</sup> 35 P.S. § 780-113(a)(30).

<sup>2</sup> 18 Pa.C.S. § 903 (c).

<sup>3</sup> 18 Pa.C.S. § 911.

<sup>4</sup> 18 Pa.C.S. § 5111(a)(1).

incarceration in a State Correctional Institution for an indeterminate period of time, the minimum of which shall be one (1) year and the maximum of shall be two (2) years on each offense. Each of these four (4) sentences shall run consecutive to one another. Sentencing, 3/8/2016.

The aggregate sentence was to 48 months (4 years) to 96 months (8 years) as agreed to by the Commonwealth and Defense Counsel and signed by the Defendant on the front page of the Guilty Plea Colloquy. Guilty Plea Colloquy, 12/15/2015, at Page 1 of 6. In accordance with the negotiated plea agreement, the Defendant was made Recidivism Risk Reduction Incentive (RRRI) eligible such that his minimum sentence was effectively 40 months.

No post sentence motion or direct appeal was filed and Defendant's Judgment of Sentence became final on April 7, 2016.

On May 18, 2016, Defendant sent a letter to the Court requesting that the Court make Defendant eligible for the State Intermediate Punishment program. The Court treated the letter as a Petition for Post Conviction Relief in accordance with Commonwealth v. Johnson, 803 A.2d 1291, 1293 (Pa. Super. 2002) ("We have repeatedly held that the PCRA provides the sole means for obtaining collateral review, and that any petition filed after the judgment of sentence becomes final will be treated as a PCRA petition).

The Court issued an Order appointing counsel in accordance with Pa.R.Crim.P. 904(C), and scheduled a court conference for December 2, 2016. At the time of the Court Conference, PCRA Counsel was granted a thirty-day extension to file a Petition to Withdraw as Counsel and a Turner/Finley Letter. PCRA Counsel

did so on February 15, 2017. The Court mistakenly scheduled the Petition for Motions Court having not realized that the Petition to Withdraw as Counsel was related to a claim for post-conviction relief. Prior to the rescheduled court conference, the Court received a Motion for Post-Conviction Relief filed *pro se* alleging ineffective assistance of trial counsel in that his plea of guilty was unlawfully induced. As Defendant raised new issues, the Court issued an order directing that the transcripts of the guilty plea and sentencing hearings be prepared and that PCRA Counsel address all issues raised by the Defendant. A court conference was scheduled for August 29, 2017, where PCRA Counsel was granted a forty-five day extension to file an Amended Petition or a Turner/Finley Letter. On September 19, 2017, PCRA Counsel filed a Petition to Withdraw as Counsel and a court conference was held on November 16, 2017. 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.

## **Discussion**

Incarcerated defendants, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by a preponderance of the evidence the following four components:

- 1) Defendant has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.
- 2) Conviction or sentence resulted from one or more of the following
  - i. A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-

determining process that no reliable adjudication of guilt or innocence could have taken place.

- ii. Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
  - iii. A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
  - iv. The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
  - v. Deleted.
  - vi. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
  - vii. The imposition of a sentence greater than the lawful maximum.
  - viii. A proceeding in a tribunal without jurisdiction.
- 3) Allegation of the error has not been previously litigated or waived; and
- 4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel.

42 Pa.C.S. § 9543 (eligibility for relief).

Defendant is currently incarcerated in SCI Mercer in the above captioned docket number so he is potentially eligible for relief. The Defendant alleges that his plea was unlawfully induced by the ineffective assistance of counsel.

In order to succeed on a claim of ineffective assistance of counsel, Defendant must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Defendant's underlying claim has arguable merit, (2) trial counsel had no reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Defendant. Commonwealth v. Pierce, 527 A.2d 973, 975-76 (Pa. 1987). See also, Strickland v. Washington, 466 U.S. 668, 687-91, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984); Commonwealth v. Sampson, 900 A.2d 887, 890 (Pa. Super. 2006), appeal denied, 907 A.2d 1102 (Pa. 2006) (citing Commonwealth v. Lynch, 820 A.2d 728, 733 (Pa. Super. 2003)).

A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs. Commonwealth v. Busanet, 54 A.3d 35, 45 (Pa. 2012).

***Was plea of guilty unlawfully induced?***

In the context of a guilty plea, a claim of ineffectiveness must show that plea counsel's ineffectiveness induced the plea and there is a causal nexus between counsel's ineffectiveness and an unknowing or involuntary plea. Commonwealth v. Flood, 627 A.2d 1193, 1199 (Pa. Super. 1993) (citations omitted); see also, Commonwealth v. Johnson, 875 A.2d 328, 331 (Pa. Super. 2005). The focus is the guilty plea hearing and whether the accused was misled or misinformed or acted under misguided influence. Flood, supra, citing, Commonwealth v. Broadwater, 479 A.2d 526, 531 (1984). A defendant who pleads guilty has a duty to answer questions truthfully. Commonwealth v. Pollard, 832 A.2d 517, 523-24 (Pa. Super. 2003) (citations omitted).

The Defendant contends that his trial counsel was ineffective for allowing Defendant to accept the negotiated sentence of 48 months to 96 months rather than go to trial. 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. Coles, 530 A.2d 453, 457 (Pa. Super. 1987); Commonwealth v. Moyer, 444 A.2d 101 (Pa. 1982); Commonwealth v.

Casner, 461 A.2d 324 (Pa. Super. 1983). Thus, this Court will assess whether the Defendant entered a valid guilty plea. It does not matter if the Defendant is pleased with the outcome of his decision to plead guilty as long as 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 when accepting a plea of guilty 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, 55 A.3d 146 (Pa. Super. 2012).

A review of the transcript of the guilty plea hearing in this case confirms that the Defendant did in fact enter into his plea knowingly, voluntarily, and intelligently. Guilty Plea Transcript, 12/15/2015. The Defendant had ample opportunity to consult with counsel throughout the plea process as well..

The Court informed the Defendant of the maximum sentence/fine for the charges. Id. at 3-5. 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. The Defendant gave the Court a factual basis for the guilty plea. Id. at 6. The Court reviewed the guilty plea colloquy form with Defendant and explained that he had a right to go to trial on the charges. Id. at 5 and 8/7-10. The Court also confirmed that the Defendant was not on probation or parole when the offenses to which he pled guilty were committed. Id.

In addition, the Defendant filled out a written guilty plea colloquy highlighting many of these factors in greater detail, to which he stated he understood.<sup>5</sup> According to Pennsylvania law, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently.

***Was it ineffective assistance of counsel to not suggest to the Court and the Attorney General that the Defendant be sentenced to the State Intermediate Punishment program?***

A challenge to the Defendant not being referred to the State Intermediate Punishment (SIP) program is a challenge to the discretionary aspect of a sentence. "A claim regarding the discretionary aspects of a sentence raised in the context of an ineffectiveness claim is cognizable under the PCRA." Commonwealth v. Watson, 835 A.2d 786, 801 (Pa. Super. 2003). Therefore, the Court must consider the three prongs *supra*. In the context of a challenge to the discretionary aspects of one's sentence, prejudice may be established only by pleading and proving that the

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<sup>5</sup> The Court's Order dated December 15, 2015, found that Defendant knowingly, voluntarily and intelligently entered his guilty plea.

challenge would have resulted in "a reduction in the sentence." Commonwealth v. Reaves, 923 A.2d 1119, 1132 (2007) (internal quotations and citations omitted).

The State Intermediate Punishment Program is designed to treat individuals with drug-related offenses that have addiction to drug and alcohol, 61 Pa.C.S. § 4101 – 4108. The facts underlying Defendant's charges and negotiated plea agreement and sentence would make Defendant ineligible for the State Intermediate Punishment program. 18 Pa.C.S. § 7508 (relating to drug trafficking sentencing and penalties). Though the Commonwealth is able to waive eligibility requirements and request referral for evaluation for the SIP program, prior to sentencing, 61 Pa.C.S. § 4014, it was confirmed at the time of the PCRA Court Conference that the Commonwealth would not waive Defendant's ineligibility.

Each of the charges to which Defendant pled guilty had an Offense Gravity Score of "8". Defendant's Prior Record Score was "0". Sentencing Guidelines suggest 9 months -16 months as a minimum sentence for each conviction. The one year (12 month) minimum sentence for each conviction was within the standard guideline range, not an aggravated range as Defendant appears to believe. The maximum of eight years which was agreed to by the Commonwealth and Defendant prior to sentencing is well below the 60 years available to the Court for the distribution of marijuana, conspiracy to distribute, and two felony of the first degree convictions.

The negotiated plea agreement set the terms of both the minimum and maximum sentence. The guilty plea colloquy and record show that the Defendant was aware of the exact sentence that he would receive and should the Court not

sentence in accordance with the plea agreement he could withdraw his guilty plea and go to proceed to trial. Guilty Plea, 12/15/2015, at 5. The Court sentenced to the exact terms of the plea agreement.

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 him accordingly. Therefore, the Court finds that this issue 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 1st day of February, 2018, it hereby ORDERED and DIRECTED as follows:

1. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1) and for the reasons discussed in the foregoing opinion, the Defendant is hereby notified that this Court intends to dismiss his PCRA petition, which was filed on May 11, 2017. The Defendant may respond to the proposed dismissal within 20 days of the date of the notice.
2. The **Petition to Withdraw from Representation**, filed on September 19, 2017, is hereby **GRANTED**, and **William J. Miele, Esq.** may withdraw from the above-captioned case.

By the Court,

Nancy L. Butts, President Judge

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