

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 98-11,245

VS :

KENNETH HILL :

ORDER

AND NOW, this ____ day of April 2000, upon review of the record and pursuant to Pa. Crim. P. Rule 1507(a), it is the finding of this Court that the Defendant's Petition for Post Conviction Relief filed in the above captioned matter raises no genuine issue of fact and the Defendant is not entitled to post conviction collateral relief. The Court finds that the Act does not provide a basis for relief for the issues raised in the Defendant's Petition.

42 Pa.C.S. § 9543(a) requires that to be eligible for relief, the Defendant must plead and prove by a preponderance of the evidence *all* of the following:

...

(2) That the conviction or sentence resulted from one or more of the following:

...

(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.

(3) That the allegation of error has not been previously litigated or waived.

(4) That the 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.

Instantly, the Defendant alleges that his counsel was ineffective for failing to file a modification of the sentence, a motion to withdraw his guilty plea, and in the event of an

adverse ruling, an appeal. The Defendant cites Commonwealth v. Lantzy, 558 Pa. 214, 736 A.2d 564 (1999) in support of his position that his right to appeal should be restored. The Lantzy Court, held that “where there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal cases” Lantzy, 736 A.2d at 573. The Court explained that “in such circumstances *and where the remaining requirements of the PCRA are satisfied*, the petitioner is not required to establish his innocence or demonstrate the merits of the issue or issues which would have been raised on appeal.” Lantzy, *supra*, emphasis added. Therefore, although the Defendant need not establish his innocence, under Section 9543(a)(2)(ii), he must still satisfy the remaining requirements under the PCRA. The Court finds that the Defendant has not satisfied the remaining requirements, specifically, Section 9543(a)(4).

The Court finds in the instant case that the Defendant has failed to establish by a preponderance of the evidence that the failure to litigate the issue prior to or during trial, could not have been the result of any rational, strategic or tactical decision by counsel. The Court finds that a rational reason existed for not filing a motion to modify the Defendant’s sentence and to withdraw his guilty plea. In a motion to withdraw a plea of guilty after sentencing, a petitioner must prove to the trial court that withdrawal is necessary to correct a manifest injustice. Commonwealth v. Glaze, 366 Pa.Super. 517, 531 A.2d 796, 798 (1987) *citing* Commonwealth v. Schultz, 505 Pa. 188, 191, 477 A.2d 1328, 1329-30 (1984); Commonwealth v. Starr, 450 Pa. 485, 490, 301 A.2d 592, 595 (1973); Commonwealth v. Nelson, 319 Pa. Superior Ct. 66, 70, 465 A.2d 1056, 1058 (1983). Under this standard, one seeking to withdraw a guilty plea after sentencing must demonstrate that the plea was not voluntary or was entered without knowledge of the charge. Commonwealth v. Shaffer, 498 Pa. 342, 346, 446 A.2d 591, 593 (1982); Commonwealth v. Campbell, 309 Pa. Superior Ct. 214, 219, 455 A.2d 126, 128 (1983), allocatur denied.

In the instant case, the Court is satisfied that the plea entered was voluntary and with knowledge of the charges. The Defendant was sentenced pursuant to a detailed plea agreement. In exchange for his plea to three counts and total sentence of 4 – 8 years, the Commonwealth agreed to dismiss the remaining counts in file numbers 98-11,244¹ and 98-11,245², agreed not to pursue any enhancements or mandatories, and agreed to dismiss Informations 97-11,242³; 97-11,726⁴; 98-10,734⁵; and 98-11,243⁶. At the time that the plea was entered, the Defendant completed a guilty plea colloquy in which he writes that it is his decision to plead guilty, that his plea is given freely, voluntarily, and without any force, threats, pressure or intimidation. He also indicates that he understood the elements and permissible range of sentences of the crimes to which he pled guilty. The face sheet of the colloquy has a list of the charges in which a plea was entered, along with the accompanying maximums, the aggregate maximums, and guideline ranges. Additionally, the Court questioned the Defendant with regard to his charges and his understanding of the guilty plea colloquy.

Not only would a motion to withdraw this *very favorable* plea have been without merit, it would have been against the Defendant's interests. Since the dismissal of the remainder of the charges and the additional informations was contingent on the Defendant's plea, the charges would have been reinstated, See Commonwealth v. El, 273 Pa.Super. 1, 416 A.2d 1058, (1979). (The defendant successfully petitioned the lower court for permission to

¹ Included charges of possession with the intent to deliver, delivery, possession, and two counts of conspiracy. The Defendant pled guilty to one of the conspiracy charges.

² Included three charges of delivery, three charges of possession, three charges of possession with the intent to deliver and three charges of possession of paraphernalia. The Defendant pled guilty to two charges of delivery.

³ Included charges of possession with the intent to deliver, delivery, possession of paraphernalia, and criminal conspiracy.

⁴ Included charges of possession with the intent to deliver, delivery, possession, and possession of paraphernalia.

⁵ Included charges of possession with the intent to deliver, delivery, possession, possession of a small amount, and possession of paraphernalia.

⁶ Included charges of possession with the intent to deliver, delivery, two charges of conspiracy, and a charge of possession.

withdraw his guilty plea. The Court found that the defendant could not then complain that a subsequent prosecution placed him in double jeopardy. The Court explained that “the defendant should not be permitted to benefit from his withdrawal of his guilty plea. If he is successful in withdrawing his guilty plea, there is no reason why he should not then face trial on the original charges as was done on this case.” EI, 416 A.2d at 1063)

Additionally the Court finds that the Defendant has not demonstrated the merits of the issue or issues he would have raised on appeal. Although the Defendant did not set forth any areas he would have appealed, the Court assumes that the Defendant is solely challenging his sentence. 42 Pa.C.S.A. § 9721(b) sets forth the general standards for the imposition of sentences. It provides that

. . . the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing and taking effect pursuant to section 2155 (relating to publication of guidelines for sentencing). In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed.

(emphasis added)

Instantly, in addition to the agreement between the parties, the Court considered the Sentencing Guidelines in determining the time of incarceration for the Defendant’s offenses. The Defendant was found to have, and the Defendant does not dispute that he has a prior record score of two (2). The two charges of delivery of a controlled substance have an offense gravity score of six (6). According to the sentencing guidelines, sixteen months is within the standard range of minimums for those offenses. The charge of conspiracy to deliver also has an offense gravity score of six (6). Therefore, a minimum of sixteen months on this charge is in the standard range. The Court therefore finds that imposing an aggregate

sentence of four to eight years was not only pursuant to the agreement, but was within the guidelines for these offenses, and was clearly not an abuse of discretion.

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Petition. 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.

By The Court,

Nancy L. Butts, Judge

cc: DA
Mark Shea, Esquire