

IN THE COURT OF COMMON PLEAS LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
v.	:	No.: 683-2003
	:	CRIMINAL DIVISION
LAWRENCE COOK,	:	
Defendant	:	PCRA

OPINION AND ORDER

On October 31, 2008, Defendant filed a *Pro Se* Petition for Relief under the Post Conviction Relief Act (PCRA). Conflicts Counsel, Edward J. Rymysza, Esq. was appointed on November 7, 2008 to represent the Defendant. On January 13, 2009, this Court granted Defense Counsel sixty days to file an amended PCRA petition or a Turner-Finley letter indicating no meritorious issues were raised in Defendant's Petition. On April 13, 2009, after an extension, Attorney Rymysza submitted a "no merit" letter to the Court in compliance with the requirements of Commonwealth v. Turner, 544 A.2d 927 (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.

Background

On November 13, 2003, Defendant pled guilty to two counts of Delivery of a Controlled Substance, two counts of Possession with the Intent to Deliver, two counts of Possession of Drug Paraphernalia, and two counts of Possession of a Controlled Substance. The guilty plea provided for no specific agreement, and therefore, was open. Furthermore, at the time of the plea, the Commonwealth also provided notice of its intent to seek the two year school zone enhancement. Defendant's sentencing was scheduled for January 27, 2004 at which time he failed to appear. A

bench warrant was issued for Defendant's arrest on or about December 30, 2003 and was not vacated until May 14, 2007.

On June 12, 2007, Defendant was sentenced to two (2) to ten (10) years of incarceration in a State Correctional Institution and ten (10) years of consecutive probation with the Pennsylvania Board of Probation and Parole.

A timely direct appeal was filed. On May 29, 2008, the Pennsylvania Superior Court affirmed the judgment of sentence. The Defendant's sentence then became final thirty days later on June 28, 2008. Therefore, Defendant's PCRA Petition was timely filed on October 31, 2008.

Discussion

Defendant alleges in his PCRA Petition that his guilty plea counsel and sentencing counsel rendered ineffective assistance of counsel; specifically, that his guilty plea was unlawfully induced and that his attorneys misled him which resulted in an excessive sentence above the sentencing guidelines.

In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate:

1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Counsel is presumed to have been effective. A failure to satisfy any prong of this test is fatal to the ineffectiveness claim.

Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007) (and cases cited therein).

Defendant's Guilty Plea was Unlawfully Induced

First, Defendant alleges in his PCRA Petition that his guilty plea was unlawfully induced.

The Court finds the Defendant's claim that his guilty plea was unlawfully induced without merit. Prior to entering into his guilty plea, the Defendant was made aware that the plea was open. The Commonwealth also represented to the Court its intent to seek the two year school zone enhancement. The Defendant also completed the seven page written guilty plea colloquy which consists of forty questions. Although, the Defendant answered questions 6, 14a, 18, 19, 24, 25, 33, 35, and 36 incorrectly, basically, that his plea was not being given freely and voluntarily and that his attorney did not explain the full meaning of the terms of the document, he stated that he was satisfied with the representation and advice of his counsel. While, these errors could be the basis of PCRA relief, the Court believes as PCRA counsel stated in his "no-merit" letter, that the errors were cured by this Court's oral colloquy with the Defendant. At the guilty plea hearing, the Defendant was examined extensively under oath. Some of the testimony referred to occurred as follows:

Q: There's no agreement as to time or location for your sentence, do you understand that?

A: Yes.

Q: How do you wish to plead to two counts of delivery of a controlled substance and possession of drug paraphernalia?

A: Open.

Q: Guilty or not guilty?

A: Guilty, I'm pleading guilty.

...

Q: Did you feel if you had any questions you were able to ask him about them?

A: Yes.

Q: Now that you're in court, now that you've had time to think about it since you filled out the form, whenever that was, did you have any questions of me about this form?

A: No, I don't.

Q: Do you understand generally that this form is explaining the rights you're giving up by pleading guilty today?

A: Yes.

...

Q: Whose decision is it to plead guilty?

A: My decision.

N.T. 11/13/08, pgs. 5-8.

The Court finds that based on the Defendant's replies at the guilty plea hearing, Defendant understood the nature of the charges against him, the significance of pleading guilty, the rights he was giving up, and the range of the sentence, including any mandatory time, which the Court could impose. Commonwealth v. Williams, 275 A.2d 103, 104-05 (Pa. 1971). As Defendant's guilty plea was not unlawfully induced and the guilty plea was fully explained to him, Defendant's argument is without merit.

Defendant's Sentence was Excessive

Next, Defendant alleges in his PCRA Petition that his attorneys misled him which resulted in an excessive sentence above the sentencing guidelines.

When a Defendant is challenging the discretionary aspects of his sentence, there is no absolute right to appeal the sentence imposed. 42 Pa.C.S.A. § 9781(b). The Defendant is required to show there is a substantial question that the sentence imposed is not appropriate under the

sentencing code. Id. “A bald claim of excessiveness of sentence does not raise substantial question so as to permit review where the sentence is within the statutory limits.” Commonwealth v. Petaccio, 764 A.2d 582, 587 (Pa. Super. Ct. 2000). See also Commonwealth v. Jones, 613 A.2d 587, 593 (Pa. Super. 1992) (en banc). “In order to establish a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.” Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa. Super. Ct. 2005). The trial court's sentence will stand unless there is a manifest abuse of discretion. To demonstrate an abuse of discretion, “the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias, or ill will, or arrived at a manifestly unreasonable decision.” Commonwealth v. Perry, 883 A.2d 599, 602 (Pa. Super. Ct. 2005).

Further, according to the Pennsylvania Superior Court, when the plea contains a negotiated term of confinement, the Court cannot unilaterally alter the length of the Defendant’s incarceration. Commonwealth v. Townsend, 693 A.2d 980, 983 (Pa. Super. Ct. 1997). However, “a distinction must be made between agreements in which the parties have agreed upon a specific sentence and those in which the length of the sentence is left to the sound discretion of the court.” Id.

In the instant case, the Court finds that the Defendant’s attorneys did not mislead him and his sentence was not excessive. First of all, there is nothing in the record to suggest that Counsel did anything in relation to Defendant’s sentence that would constitute ineffective assistance of counsel. Next, the Defendant pled guilty on November 13, 2003, to two counts of Possession with the Intent to Deliver, two counts of Possession of Drug Paraphernalia, and two counts of

Possession of a Controlled Substance. The plea agreement was open, which left the length of sentence within the discretion of the Court. Additionally, the statutory maximum for each of the offenses is as follows: (1) ten (10) years for each of the Delivery of a Controlled Substance offenses; (2) ten (10) years for each of the Possession With the Intent to Deliver offenses; (3) one (1) year for each of the Possession of a Controlled Substance offenses; and (4) one (1) year for each of the Possession of Drug Paraphernalia offenses. In fact, the Defendant received an aggregate sentence of two (2) to ten (10) of incarceration in a State Correctional Institution and ten (10) years of consecutive probation with the Pennsylvania Board of Probation and Parole, which does not exceed twenty-two (22) years, which would be the Defendant's maximum exposure.¹ Further, the Defendant had a prior record. Finally, the Defendant had absconded for over three years and was involuntarily brought back to be sentenced. As the Defendant sets forth no specific claim as to how the Court has abused its discretion or how Defense Counsel was ineffective, his claim has no 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. None 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 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.

¹ This is the maximum for all the charges that would not merge at the time of sentencing.

ORDER

AND NOW, this _____ day of May 2009, 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 April 13, 2009, is hereby GRANTED and Edward J. Rymsza, Esq. may withdraw his appearance in the above captioned matter.

By The Court,

Nancy L. Butts, Judge

xc: DA (KO)
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