

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	<b>CR: 630-2008; 1863-2008;</b>
	:	<b>1882-2008; 2096-2008;</b>
	:	<b>430-2009; 829-2009</b>
<b>v.</b>	:	
	:	
	:	<b>CRIMINAL DIVISION</b>
<b>COLIN J. BEST,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

On December 20, 2010, current Court Appointed Counsel for the Defendant filed a Motion to Withdraw in accordance with Commonwealth v. Turner, 544 A.2d 927 (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 fails to raise any meritorious issues in his PCRA Petition.

***Background***

Current court appointed counsel, Donald F. Martino, Esq., set forth the facts of the Defendant's numerous cases in a precise manner; therefore, the Court reiterates the relevant facts as stated by Mr. Martino as follows:

On April 16, 2009, the Defendant entered a plea guilty/nolo contendere plea on docketed cases numbers 742-2008; 630-2008; 1863-2008; 1882-2008; 2096-2008, to (1) count of Burglary, a felony of the first degree, one (1) count of Theft by Deception, a felony of the third degree, one (1) count of Corruption of Minors, a misdemeanor of the first degree, a second count of Burglary, also graded a felony of the first degree, and one (1) count of Loitering and Prowling, a misdemeanor of the third degree. On June 2, 2009, the Defendant was sentenced on the 2008 docketed cases by Judge Kenneth D. Brown to an aggregate period of incarceration of forty-three (43) to eighty-six (86) months followed by a ten (10) year period of consecutive probation.

On June 29, 2009 the Defendant pled guilty to case numbers 430-2009 and 829-2009 to one (1) count of Receiving Stolen Property, a felony of the third degree, and one (1) count of Burglary, felony of the second degree, and was sentenced by the Honorable Dudley N. Anderson to a period of incarceration of one (1) year to four (4) years concurrent to the above sentence for forty-three (43) to eighty-six (86) months. On September 28, 2009, the Defendant filed a *pro se* Petition for Post Conviction Relief. In this Petition and subsequent Amended Petitions and correspondence, the Defendant alleged that trial counsel, Kyle Rude, Esquire, provided ineffective assistance of counsel. On October 2, 2009, Robin Buzas, Esquire, from the Lycoming County Public Defender's Office, was appointed to represent the Defendant. However, following a fourth PCRA conference on October 15, 2010, it was determined the Public Defender's Office had a conflict with handling the Defendant's cases. Current counsel, Donald F. Martino, Esquire, was then appointed on October 26, 2010. Mr. Martino sent a letter to the Defendant on November 1, 2010, requesting more information. The Defendant responded on November 16, 2010 raising several additional issues and providing counsel with information concerning his claims. On November 28, 2010, Mr. Martino sent the Defendant a letter pursuant to Turner-Finley, explaining why each issue raised in the Defendant's Petition lacks merit. The November 28, 2010 letter gave the Defendant twenty (20) days to respond to counsel and provide further information regarding the claims set forth in his PCRA Petition which might assist counsel. Mr. Martino filed a Motion to Withdraw as Counsel on December 20, 2010, as he had not received a response from the Defendant.

The Court notes that several amended PCRA Petitions have been filed on behalf of the Defendant; however, the Court addresses the issues as they are outlined by current counsel in his Motion to Withdraw.

## *Discussion*

Defense Counsel's Motion to Withdraw sets forth with specificity the issues raised in the Defendant's PCRA Petition. The Defendant alleges that trial counsel, Kyle Rude, Esquire, provided ineffective assistance of counsel by: (1) failing to request a Preliminary Hearing on several of the above captioned cases; (2) allowing illegal evidence in the Burglary cases; (3) failing to file a Motion to Suppress; (4) failing to file a Petition for Habeas Corpus; (5) failing to obtain discovery relating to the above charges; (6) forcing the Defendant to plead guilty by threatening that if he went to trial and was found guilty, he might be found to be a Sexually Violent Offender and lose custody of his child, and forcing the Defendant to plead guilty by use of emotional and physical duress; (7) failing to request to withdraw the Defendant's guilty plea; (8) failing to object to the Defendant's sentences being in the aggravated range and outside the guidelines without justification; (9) failing to raise an objection to the Defendant's sentence because it was different than that contained in the plea agreements reached between the Defendant and the Commonwealth; (10) failing to object to the restitution ordered; and (11) failing to file a direct appeal with the Superior Court of Pennsylvania on the Defendant's behalf.

As to the first four (4) issues listed above: (1) failing to request a Preliminary Hearing on several of the above captioned cases; (2) allowing illegal evidence in the Burglary cases; (3) failing to file a Motion to Suppress; and (4) failing to file a Petition for Habeas Corpus, the Court finds that these issues were waived upon the Defendant's entry of a plea of guilty. As the court stated in Commonwealth v. Coles, 530 A.2d 453, 457 (Pa.Super.1987), 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."

The majority of the Defendant's remaining claims allege ineffective assistance of counsel. To make a claim for ineffective assistance of counsel, a defendant must show 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. Commonwealth v. Cooper, 941 A.2d 655, 664 (2007). (See Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper at 664. (See Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)).

***Whether trial counsel was ineffective by failing to obtain discovery relating to the Defendant's charges***

The Defendant alleges that trial counsel was ineffective for failing to obtain discovery relating to the Defendant's charges. To merit relief under this claim, the Defendant must show that "[c]ounsel inexcusably failed to raise issues which, had they been raised, would have afforded Appellant relief." Commonwealth v. Porter, 728 A.2d 890 (Pa.1999). In this case, the Defendant failed to allege any issues that counsel should have raised, or any useful information that counsel would have found had further investigation been made. Therefore, the Defendant's claim that trial counsel was ineffective for failing to conduct a pretrial investigation lacks merit and fails the first prong needed to prove ineffective assistance of counsel.

***Trial counsel forced the Defendant to plead guilty and trial counsel failed to request a withdrawal of the Defendant's guilty plea***

The Defendant alleges that trial counsel forced him to plead guilty by threatening that if he went to trial and was found guilty, he might be found a Sexually Violent Offender and lose custody of his child. The Defendant alleges that trial counsel forced him to plead guilty by use

of physical and emotional duress.<sup>1</sup> As Mr. Martino correctly points out in his Turner-Finley letter to Defendant, where an allegation of ineffective assistance of counsel is made in connection to the entry of a plea agreement, such allegation will only serve as a basis for relief if the ineffectiveness caused the accused to enter an unknowing or involuntary plea. See Commonwealth v. Fluharty, 632 A.2d 312 (Pa.Super.1993).

The Defendant also alleges that trial counsel was ineffective for failing to request a withdrawal of the Defendant's guilty plea. "Manifest injustice is required to withdraw guilty pleas which are requested after sentence has been imposed." Commonwealth v. Broaden, Pa.D. & C. Dec. LEXIS 331 (Pa.D. & C. 2009). A manifest injustice occurs if a guilty plea is not knowingly, voluntarily, and intelligently made. Broaden at 5. (See Commonwealth v. Yager, 685 A.2d 1000, 1004 (Pa.Super.1996).

Therefore, it appears that both of these claims hinge on whether the Defendant's guilty plea was knowingly, voluntarily, and intelligently entered. In determining whether a plea is entered knowingly, voluntarily, and intelligently, the court must at a minimum address the following six (6) areas: 1) whether the Defendant understands the nature of the charges to which he is pleading; 2) whether there is a factual basis for the plea; 3) whether the defendant understands that he has a right to a jury trial; 4) whether the defendant is aware that he is presumed innocent until proven guilty; 5) whether the defendant is aware of the permissible range of sentences for the offenses charged; and 6) whether the defendant understands that the judge is not bound by the terms of the plea agreement unless he or she accepts the agreement. Fluharty at 313.

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<sup>1</sup> In the Defendant's original PCRA Petition, he states that the police violated his rights by forcing him to incriminate himself for promises of release from custody. Aside from this statement, the Court cannot find other evidence offered to sustain the Defendant's allegation. Furthermore, as the Court addresses in this Opinion, it appears as though the Defendant's plea was entered knowingly, voluntarily, and intelligently.

On April 16, 2009, Judge Brown conducted an on the record colloquy on cases 742-2008; 630-2008; 1863-2008; 1882-2008; 2096-2008. Judge Brown went over the nature of the charges to which the Defendant was pleading. N.T. 7-12. The Defendant stated facts surrounding the crimes to the Court, and the Commonwealth provided the Court with facts to which the Defendant agreed. N.T. 16-21. Judge Brown informed the Defendant of his right to a jury trial and the fact that he would be innocent until proven guilty. N.T. 4-6. Judge Brown also stated the permissible range of sentences for the crimes. N.T. 6-7. Finally, Judge Brown went over the plea agreement with the Defendant and told him that the Court would probably not have a problem following the agreement. N.T. 27. On June 29, 2009, Judge Anderson conducted an on the record colloquy with the Defendant. Judge Anderson informed the Defendant of his right to a jury trial and that he would be presumed innocent until proven guilty. N.T. 4. While it appears that Judge Anderson did not go over the permissible range of sentence for the charges, the Defendant was not prejudiced by this as the sentence imposed was to run concurrent with the Defendant's existing sentence under his 2008 cases. Also, while Judge Anderson did not inform the Defendant that the Court was not bound by the plea agreement, the Court did ultimately abide by the agreement. Judge Anderson also went over in detail the nature of the charges to which the Defendant was pleading guilty, as well as the facts surrounding the crimes. N.T. 6-16. Furthermore, during both guilty plea hearings the Judges supplemented the on the record colloquies with the two (2) written colloquies that the Defendant stated he completed and understood.

As it appears that the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently, the Defendant's claims fail the first prong needed to prove ineffective assistance of counsel. Therefore, the Defendant's claims that trial counsel forced the Defendant to enter a plea

of guilty, and that trial counsel was ineffective for failing to file a motion to withdraw his guilty plea are both without merit.

***Trial counsel failed to object to a sentence in the aggravated range and not in conformity with the plea agreements***

The Defendant contends that trial counsel was ineffective for failing to object to his sentences being in the aggravated range and outside of the guidelines. The Defendant also contends that trial counsel was ineffective for failing to object to his sentences as they were not in conformity with the plea agreements. Neither of these allegations have any merit.

The Defendant's prior record score was calculated as a one (1). The Defendant received a sentence of incarceration of eighteen (18) months to thirty-six (36) months on both Burglary charges; the Court imposing a split sentence and a consecutive two (2) year period of probation. The Court finds this sentence is consistent with the guideline range of eighteen (18) to thirty (30) months and within the statutory limit of ten (10) years. The Defendant received a sentence of six (6) to twelve (12) months on the Corruption of Minors charge, consistent with the guideline range of R.S. to nine (9) months. The Defendant received a sentence of one (1) month on the Loitering and Prowling charge, consistent with the guideline range of R.S. to one (1) month. The Defendant received a sentence within the guideline range of each of his charges, and his sentence on the 2009 cases ran completely concurrent to his aggregate sentence of forty-three (43) to eighty-six (86) months<sup>2</sup>. Therefore, it does not appear that the Defendant's sentence was in the aggravated range.

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<sup>2</sup> The Court notes that the Defendant's aggregate sentence includes the sentence imposed under case number 742-2008 for Theft by Deception. Whether or not the Defendant intended to include this case number in his PCRA Petition, the Court is unsure. Case number 742-2008 was absent from the Defendant's initial PCRA Petition and current counsel's Motion to Withdraw, but the case number was present on other court filings regarding the PCRA. That being said, the Defendant received a sentence of a five (5) year period of probation for Theft by Deception (M1), which is the statutory maximum for the offense.

The Defendant contends that his sentence failed to comply with the plea agreement because he was required to attend sex offender education while in the custody of the Department of Corrections. The Court notes that the Defendant's plea agreements do not address whether or not the Defendant will be required to attend sex offender education. Furthermore, the Defendant informed Judge Brown at the time of his sentencing on June 2, 2009, that he thought there was something mentally wrong with him that needed to be addressed. N.T. 17. The Defendant also contends that trial counsel told him he would not have to be registered under Pennsylvania's Megan's Law: the Defendant is correct and is not required to register under Megan's Law. The Court notes that the plea agreement set forth at the bottom of the colloquy cover sheet on the 2008 cases states that the agreement is that the sentence on these charges shall be an aggregate sentence of forty-three (43) to eighty-six (86) months with a consecutive ten (10) year period of probation. The plea agreement on the 2009 cases is for bottom end standard range sentences concurrent to each other and concurrent to the sentence on the 2008 cases. The Court finds that the sentence imposed on the Defendant is consistent with the terms of the plea agreement as set forth on the colloquies. The Court can find no merit to the Defendant's allegation that his sentences failed to comply with the plea agreements.

***Trial counsel failure to object to the amount of restitution ordered***

The Defendant contends that trial counsel was ineffective for failing to object to the amount of restitution ordered. The restitution assessed was discussed in the Defendant's presence in Court. On June 29, 2009, the Defendant admitted to receiving the property assessed at \$31,047.95 and \$3,770.00, which makes up the majority of the amount of restitution assessed. Furthermore, the Defendant provides no evidence as to how he was prejudiced by the amount of restitution assessed. The Court reiterates that in order to prove ineffective assistance of counsel,



the Defendant must establish: 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. See Cooper at 664. As it does not appear that the Defendant can meet any of the elements of ineffective assistance of counsel, it appears that this claim also lacks merit.

***Trial counsel was ineffective in failing to file a direct appeal***

The Defendant alleges that trial counsel was ineffective in failing to file a direct appeal. The Court reviewed trial counsel's Witness Certification and letter of August 5, 2010, which state unequivocally that the Defendant never requested that trial counsel file an appeal. Moreover, the Defendant has failed to present any evidence showing that he did in fact request that trial counsel file a direct appeal.<sup>3</sup> See Commonwealth v. Collins, 687 A.2d 1112 (Pa.1996), in which the PCRA court's dismissal of a PCRA petition was affirmed when the defendant failed to present facts supporting his assertion that trial counsel failed to file an appeal from judgment of sentence upon defendant's request.

***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

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<sup>3</sup> The Defendant attached two separate hand written letters, one to his Amended Petition for Relief Under the PCRA filed December 28, 2010 and one to his Memorandum of Law/Brief in Support of Defense Counsel's Amended PCRA filed on January 25, 2010. The letters, which appear to be originals, were dated June 4, 2009, and request that counsel file an appeal. The hand written notes do not appear to have been sent to trial counsel, as evidenced by the fact that the Defendant remained in possession of them and attached them to his court filings.

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 4<sup>th</sup> day of March, 2011, 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 December 20, 2010, is hereby GRANTED and Donald F. Martino, Esq. may withdraw his appearance in the above captioned matter.

By The Court,

Nancy L. Butts, President Judge

xc: DA  
Donald F. Martino, Esq.  
Amanda Browning, Esq. (Law Clerk)