

IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

COMMONWEALTH OF	:	
PENNSYLVANIA	:	
	:	NO: 15 -2010
	:	191-2010
vs.	:	CRIMINAL DIVISION
	:	
	:	
	:	
MONTANA DUNKLEBERGER	:	
Defendant	:	

OPINION AND ORDER

On November 1, 2010 the Defendant filed a Petition for Relief under the Post Conviction Relief Act (PCRA). 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

On March 15, 2010, after negotiating a plea agreement, Defendant entered a guilty plea to one count of Person not to Possess a Firearm (F2), and one consolidated count of Theft by Unlawful Taking (M1) in case number 15-CR-2010, and one count of Access Device Fraud (M1) in case number 191-CR-2010. The plea agreement provided, *inter alia*, that Defendant would plead to the three counts and in case 15-CR-2010 he would receive a 2 year minimum sentence, which was a mitigated range sentence, and consecutive probation for a consolidated count of Theft. In case 191-CR-2010, he was to receive a sentence in the low end of the standard range to run concurrent with the sentence in case 15-CR-2010.

On that same date, consistent with the plea agreement, on case number 15-CR-2010 the Court imposed a minimum of 2 years to a maximum of 4 years on the Firearm count, 4 years consecutive probation on the Theft count. On case number 191-CR-2010 the court imposed a 3 month minimum to 24 month maximum on the Access Device count, entirely concurrent to case 15-CR-2010.

No post-sentence motion or direct appeal was filed. Defendant was represented in the trial by Robin Buzas, Esquire of the Lycoming County Public Defender's Office.

On November 1, 2010, Defendant filed a pro-se motion for Post Conviction Collateral Relief, alleging that Ms. Buzas was ineffective for ostensibly denying him a "fair trial" by not providing "meaningful representation" and advising the Defendant to enter a plea.

Conflicts Counsel, E.J. Rymsza, was appointed on November 5, 2010 to represent the Defendant. On December 28, 2010 following a court conference, Defense Counsel was granted thirty (30) days in which to file an amended PCRA petition or a Turner-Finley letter indicating no meritorious issues were raised in the Defendant's Petition.

On January 27, 2011 a Motion to Withdraw as Counsel was filed with the Court by Mr. Rymsza in compliance with the requirements of Commonwealth v. Turner, 544 A.2d 927 (1988). A copy of Mr. Rymsza's detailed Turner-Finley letter accompanied his Motion to Withdraw as Counsel.

Discussion

Defense counsel's Turner-Finley letter to the Defendant set forth the issue raised in the Defendant's PCRA Petition: trial counsel was ineffective for ostensibly denying him a "fair trial" by not providing "meaningful representation" and advising Defendant to enter a plea.¹

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)). "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).

"Where an allegation of ineffective assistance of counsel is made in connection with the entry of a plea of guilty, such allegation "will serve as a basis for relief only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea."

¹ Although the Defendant's PCRA Petition also raises the issue of whether the Defendant's speedy trial rights were violated, it appears there is no merit whatsoever to this argument as the Defendant was charged on December 8, 2009 in case number 15-CR-2010 and charged on December 28, 2009 in case number 191-CR-2010 for crimes committed between October and November, 2009, and pled guilty and was sentenced for those charges on March 15, 2010.

Commonwealth v. Fluharty, 632 A.2d 312 (Pa.Super.1993). (Citing Commonwealth v. Chumley, 394 A.2d 497, 504 (1978)).

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, *supra*, at 313.

In this case, prior to entering his plea, the Defendant completed a seven page written plea colloquy consisting of 40 questions. The face sheet of that form stated the precise terms of the plea agreement. Certain questions contained in the written colloquy specifically advised the Defendant that by pleading guilty he was, *inter alia*, (i) waiving his right to present any defenses, (ii) waiving his right to file any pre-trial motions, (iii) waiving his right to confrontation of witnesses, (iv) waiving his right to call witnesses, and (v) his right to challenge anything that was improper or illegal in his arrest or in the investigation. See Guilty Plea Colloquy 3/15/10 ¶¶ 15-19. The Defendant signed the colloquy acknowledging that he understood the rights he was giving up in exchange for his plea. In the colloquy he indicated he was pleading guilty because in his words, "I am [guilty]," and signed and acknowledged that he thoroughly discussed all of the facts and circumstances surrounding the charges

against him with Ms. Buzas, and that he was satisfied with her representation. Id. at ¶¶ 22, 24, 25.

This Court also conducted a thorough oral colloquy with the Defendant and reviewed with him his written colloquy, including the precise terms of the plea agreement. (N.T. 3/15/10, p. 5-6). The nature of the charges was reviewed with the Defendant. Id. at 2-4. The facts of the incident to which the Defendant pled guilty were discussed. Id. at 3-5. The Defendant was informed by both the written colloquy in questions seven (7) and nine (9) and by this court that he had the right to a jury trial and that he was presumed innocent until proven guilty. Id. at 3. The permissible range of sentences for the offenses of person not to possess a firearm, theft by unlawful taking and access device fraud were discussed. Id. at 2-3. The Defendant answered “yes” on the written colloquy to question five (5) stating that he understood the permissible range of sentences that could be imposed against him. The written guilty plea colloquy informed the Defendant that the Judge was not bound by the plea agreement; however, this Court agreed to comply with the terms of the plea agreement and sentenced the Defendant accordingly. Id. at 7-8. The Defendant stated that he understood everything in the written colloquy, and signed the colloquy, indicating in response to question twenty-one (21) that the decision to do so was his. Id. at 6. The Court then made a finding that the plea was entered knowingly and intelligently. Id. at 7.

As it appears that the Defendant’s guilty plea was entered knowingly, voluntarily, and intelligently, the Defendant’s claim fails the first prong needed to

prove ineffective assistance of counsel. Therefore, the Defendant's PCRA petition 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 9th 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 January 27, 2011, is hereby GRANTED and Edward J. Rymsza, Esq. may withdraw his appearance in the above captioned matter.

By The Court,

Richard A. Gray, J.

cc: DA
Edward J. Rymza, Esquire
Gary Weber, Esquire