IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	**No. 516-2009**
	:	**CRIMINAL DIVISION**
RENARD SCOTT,	:	
Defendant	:	**PCRA**

OPINION AND ORDER

Following a Court conference on the Defendant's Post Conviction Relief Act (PCRA) Petition, the Court granted an evidentiary hearing on three (3) of the issues raised in the Petition. This Opinion is written following the hearing held over several days in March and May, 2011 and following the opportunity for counsel to submit briefs.

Factual background

The basic facts of the case are as follows. On March 17, 2009, at approximately 7:00 p.m., Trooper Tyson Havens (Havens) and Corporal Michael Simpler (Simpler) of the Pennsylvania State Police (PSP) approached a black male operating a silver Dodge Durango in the 1400 block of West 4th Street in Williamsport as they had received information from a source that a black male was dealing large amounts of drugs out of a silver Dodge Durango in Williamsport. Upon making contact with the driver of the Durango, identified as Renard Scott (Defendant), Havens observed a blue vial containing what appeared to be vegetable matter soaked in liquid on the passenger seat of the vehicle. Havens and Simpler were familiar with the substance as "wet," a street name referring to marijuana and/or vegetable matter that is soaked in PCP and then smoked. The Defendant was placed under arrest for Possession of a Controlled

Substance and a search incident to arrest revealed a small amount of a green leafy substance, approximately $400.00, and a cell phone. The green leafy substsance field tested positive for marijuana. The troopers obtained consent to search the vehicle the Defendant was driving from the registered owner of the vehicle, Teresa Mattison (Mattison), who also provided consent to search the residence she shared with the Defendant at 1154 Park Ave in Williamsport. The search of the vehicle revealed additional PCP and additional marijuana, and a search of the residence revealed a Taurus 9mm handgun under the Defendant's bedroom mattress, ammunition, additional amounts of PCP, marijuana, and various items of drug paraphernalia.

Procedural background

On April 27, 2009, the Defendant pled guilty before the Honorable Kenneth D. Brown[1] to one count of Possession with intent to deliver (PWID) (PCP), one count of PWID marijuana, and one count of Person not to possess a firearm. The Defendant was sentenced on PWID (PCP) to a period of incarceration for a minimum of five (5) years and a maximum of ten (10) years, to PWID (marijuana) for two (2) to five (5) years incarceration to run concurrent to the sentence for PWID (PCP), and to Person not to Possess a Firearm for five (5) to ten (10) years incarceration, also to run concurrent to the sentence for PWID (PCP). The aggregate sentence imposed against the Defendant was for five (5) to ten (10) years state incarceration.

On February 22, 2010, the Defendant filed a pro-se Post Conviction Relief Act (PCRA) Petition. On April 20, 2010, Edward J. Rymsza, Esq., entered his appearance to represent the Defendant, and filed an Amended PCRA Petition on August 12, 2010, and a Supplemental Amended PCRA Petition on October 29, 2010. In his Amended PCRA Petition, the Defendant

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[1] Judge Brown retired as an active Court of Common Pleas judge on December 31, 2009.

alleges several grounds of ineffective assistance of trial counsel: 1) failure to object to deficiencies in the plea allocution where there was no factual basis established to support the charge of Person not to Possess a Firearm; 2) failure to challenge the five year mandatory for the gun enhancement; 3) advising the Defendant to enter into a plea without obtaining any discovery or otherwise adequately investigating possible defenses; 4) failure to file a motion to suppress physical evidence; and 5) failure to object to the improper calculation of the sentencing guidelines where the Defendant's prior record score of five (5) was erroneous. The Court notes that Nicole Spring, Esquire, of the Lycoming County Public Defender's Office, represented the Defendant at the preliminary hearing prior to the guilty plea/sentencing hearing. Stephanie Lombardo, Esquire, also of the Public Defender's Office, appeared for Ms. Spring on behalf of the Defendant at his guilty plea/sentencing hearing.

Following a Court Conference on the Petition, the Court determined that an evidentiary hearing was needed to examine three (3) of the issues raised: 1) ineffective assistance of counsel for failing to challenge the 5 year mandatory gun enhancement sentence imposed by the court; 2) ineffective assistance of counsel for advising the Defendant to enter a plea agreement without obtaining any discovery; and 3) ineffective assistance of counsel for failing to file a motion to suppress physical evidence. Following the hearing, which was held over several days in March and May of 2011, the Court granted both parties the opportunity to submit briefs; the Court received the Defendant's brief on July 6, 2011, but failed to receive a brief from the Commonwealth in a timely manner. Although the evidentiary hearing focused on three (3) of the issues raised, the Court will address in this Opinion all five (5) issues raised by the Defendant in his Petition.

In order to establish a claim for ineffective assistance of counsel, a petitioner must establish:

> (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (2009). See Commonwealth v. Pierce, 527 A.2d 973 (1987).

Discussion

Failure to object to deficiencies in the plea allocution where there was no factual basis established to support the charge of Person not to Possess a Firearm

The Defendant contends that trial counsel was ineffective for failing to object to the deficiencies in the plea allocution where there was no factual basis established to support the charge of Person not to Possess a Firearm. Whether there is a factual basis for the plea requires that the court determine "[w]hether the facts acknowledged by the defendant constitute a prohibited offense." Commonwealth v. Anthony, 475 A.2d 1303, 1307 (Pa. 1984). This requirement for a factual basis is to "[p]revent a plea where in fact the legal requirements have not been met; and, to name and define the offense, supported by the acts, so the defendant will know the legal nature of the guilt to which he wishes to plead." Id.

18 Pa.C.S. §6105 Person not to Possess a Firearm prohibits a person convicted of certain offenses from possessing, using, controlling, selling, transferring or manufacturing a firearm. A review of the transcripts from guilty plea/sentencing hearing in this case reveals that a factual basis was in fact established to support the charge of Person not to Possess a Firearm. Judge Brown named and defined the offense, and the Defendant admitted that he found a firearm,

possessed it, and put said firearm in his mattress to store. N.T., 4/27/09, p. 5, 10-11. The Commonwealth also stated at the hearing that the Defendant's prior record consisted of felony convictions in 1999 and 2000 in Lycoming County, which would qualify the Defendant as a prior felon not to possess a firearm under 18 Pa.C.S. §6105(c)(2).[2] For these reasons, the Court finds that a factual basis to establish the offense of Person not to Possess a Firearm was in fact established and the Defendant's argument otherwise is without merit.

Failure to challenge the five year mandatory for the gun enhancement

The Defendant contends that trial counsel was ineffective for failure to challenge the five (5) year mandatory for the gun enhancement. The Defendant first argues that the Commonwealth failed to provide notice of its intention to seek the mandatory prior to the Defendant's sentencing hearing. The Defendant argues he was not advised he was entering a plea to a mandatory minimum sentence of five (5) years as both the written plea agreement as listed on the court scheduling form at the preliminary hearing and the written guilty plea colloquy are devoid of any reference to the mandatory.

The Court finds that the Defendant was in fact notified that he was entering a plea to a mandatory minimum of five (5) years before the time he was sentenced. At 42 Pa.C.S. §9712.1(c) the mandatory requires that "notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing." The Defendant's guilty plea and sentencing hearing were both held on April 27, 2009 before Judge Brown. The Defendant

[2] The Defendant pled guilty and was sentenced on June 19, 2000 to Delivery of a Controlled Substance (cocaine) under CR: 570-2000 and the Defendant pled nolo contendere and was sentenced also on June 19, 2000 to Delivery of a Controlled Substance (cocaine) and Conspiracy to Deliver a Controlled Substance (cocaine) under CR: 800-2000.

entered his plea of guilty after reviewing the facts of the case with Judge Brown. The Commonwealth then notified the Court of the following:

> COMMONWEALTH: [T]he plea agreement in the case calls for a sentence of five to ten years. The Defendant is facing a mandatory of five years on Count 2 as the PCP was found in the residence along with the firearm….

N.T., 4/27/09, p. 11. Following this disclosure from the Commonwealth, Judge Brown then asked both Defense Counsel and the Defendant himself if they wished to proceed with sentencing at that time; the Defendant responded that he did want to proceed with sentencing. N.T., 4/27/09, p. 12. The Court finds that the Defendant **did** have reasonable notice of the Commonwealth's intention to proceed with the mandatory; if the Defendant wanted to postpone the time for his sentence after learning of the Commonwealth's intention to seek the mandatory, he could have easily done so.

The Defendant also contends there was no evidence that the Defendant was ever in actual physical possession of the firearm or that it was within his reach. The Defendant further contends that there was no nexus established between the controlled substances and the firearm as the firearm was not found in close proximity to the controlled substances. The Court disagrees with the Defendant's contention. The Defendant's actual physical possession of the firearm was established by his own testimony during his guilty plea hearing as he stated specifically that he had in fact possessed the firearm. N.T., 4/27/09, p. 10-11. Furthermore, the Court finds the fact that the firearm was found in the same residence as the controlled substances is enough to establish "close proximity" pursuant to 42 Pa.C.S. §9712.1(a) as the term was given an expansive meaning in Commonwealth v. Sanes, 955 A.2d 369 (Pa. Super. 2008). See Commonwealth v. Zortman, 985 A.2d 238 (Pa. Super. 2008) where a firearm found in a room separate from drugs within the same residence was found to be within "close proximity" to said

controlled substances. Accordingly, the Defendant fails to raise a claim of merit, failing the first prong needed to prove ineffective assistance of counsel.

Advising the Defendant to enter into a plea without obtaining any discovery or otherwise adequately investigating possible defenses

The Defendant contends that trial counsel was ineffective for advising the Defendant to enter into a plea without obtaining any discovery or otherwise adequately investigating possible defenses. "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.'" Commonwealth v. Fluharty, 632 A.2d 312 (Pa. Super. 1993). (Citing Commonwealth v. Chumley, 394 A.2d 497, 504 (Pa. 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 at 313.

Judge Brown conducted an on the record oral colloquy with the Defendant on April 27, 2009 and the Defendant completed a written colloquy that he signed on April 23, 2009. Judge Brown informed the Defendant that he had a right to a jury trial and that he was presumed innocent until proven guilty. N.T., 4/27/09, p. 2-3. Questions (7) and (9) of the written colloquy

also informed the Defendant of these facts. Judge Brown reviewed with the Defendant the nature of the charges to which the Defendant was pleading, and informed the Defendant of the permissible range of sentences for the offenses charged. N.T., 4/27/09, p. 2-5. The Defendant also answered "yes" in response to question (2) on the written colloquy asking if his attorney had explained the elements of the crimes to which he was pleading, and "yes" to question (5) asking if he understood the permissible range of sentences and/or fines for the crimes to which he was pleading. Judge Brown also established a factual basis for the offenses charged, and the Defendant responded "yes" to question (24) on the written colloquy asking if he had discussed with his attorney the facts and circumstances surrounding the charges against him. N.T., 4/27/09, p. 5-11. While it does not appear that Judge Brown informed the Defendant that he was not bound by the terms of the plea agreement, Judge Brown did in fact sentence the Defendant pursuant to the agreement, so failure to the inform the Defendant as to this matter is not significant. Furthermore, the Defendant did acknowledge in question (3) of the written guilty plea colloquy that he was in fact aware that the judge was not bound by the terms of the plea arrangement. As it appears that the Defendant entered his plea knowingly, voluntarily, and intelligently, the Defendant's claim fails on the first prong needed to prove ineffective assistance of counsel.

Additionally, the testimony of Attorney Spring at the PCRA Hearing was that she spoke with numerous individuals involved in the case, including Havens and Simpler, regarding the facts of the case. Attorney Spring's testimony revealed that the troopers cooperated with her and seemed to be willing to answer any questions she had concerning the case on a continuing basis, not just at the preliminary hearing where the plea agreement was offered. Thus, the Court finds

that the facts of the case were properly investigated prior to the Defendant's plea and finds the Defendant's claim otherwise to be without merit.

Failure to file a motion to suppress physical evidence

The Defendant also claims that trial counsel was ineffective for failure to file a motion to suppress physical evidence. Since the Defendant entered a plea of guilty, he waived the right to challenge "[a]nything but the legality of his sentence and the validity of his plea." See Commonwealth v. Thomas, 506 A.2d 420 (Pa. Super. 1986) (quoting Commonwealth v. Montgomery, 401 A.2d 318, 319 (Pa. 1979). The only non-waivable issues are jurisdictional in nature, those issues concerning the court's subject matter jurisdiction. Thomas at 422. (see Commonwealth v. Little, 314 A.2d 270 (Pa. 1974). As the Defendant's allegation of ineffective assistance of counsel concerns trial counsel's failure to file a pre-trial motion, an issue unrelated to either the legality of the Defendant's sentence or the validity of his plea, the Court finds that the Defendant waived his right to raise this issue upon the entrance of his plea of guilty. Additionally, the Defendant acknowledged in question (16) of his written guilty plea colloquy that he waived the filing of any pre-trial motions by entering his plea of guilty.

Notwithstanding the fact that the Court believes the Defendant waived his right to raise the issue, Attorney Spring testified at the PCRA hearing that she in fact had a reasonable basis for not filing a suppression motion. Attorney Spring testified that the Defendant was charged with multiple offenses, the conviction for which could result in the Defendant being sentenced to a significantly longer period of time than five (5) years. Attorney Spring also knew that if she were to file a motion to suppress, the plea agreement deal would be taken off the table by the Commonwealth. Therefore, Attorney Spring thought it was in the Defendant's best interest to

accept the plea agreement. Additionally, Attorney Spring was also able to speak with Mattison concerning her involvement in the case, and while she did not recall speaking with Mattison about her consent to search, she found no evidence indicating that the consent to search was not voluntary. Mattison also testified at the PCRA Hearing and admitted that she had in fact given her consent to the police for the search of both the vehicle and the residence. Therefore, Attorney Spring did not even believe that she had a winning suppression issue to argue.[3] In light of these facts, the Court finds that the Defendant's argument fails to meet the first and second prongs of the test needed to prove ineffective assistance of counsel, in that the claim of ineffectiveness for failure to file a suppression motion is without merit, and as trial counsel had a reasonable basis for failing to file said motion.

Failure to object to the improper calculation of the sentencing guidelines where the Defendant's prior record score of 5 was erroneous

The Defendant also alleges ineffective assistance of counsel for failure to object to the improper calculation of the sentencing guidelines where the Defendant's prior record score of five (5) was erroneous. In a footnote in his Brief in support of his PCRA Petition, PCRA Counsel alleges that if the Defendant's prior record score had been calculated correctly, the guidelines for the Person not to Possess charge would have been 48 to 60 months. The Defendant was sentenced on the Person not to Possess charge to incarceration for a minimum of 5 years to a maximum of 10 years. However, this sentence was to run **concurrent** to the **mandatory** minimum sentence of five (5) years incarceration imposed for Possession with Intent

[3] The Court did preserve the testimony of both Havens and Simpler and did not develop any issues of arguable merit which could have been raised in a suppression motion.

to Deliver PCP. Therefore, whether or not the sentence on the Person not to Possess charge was improper appears to be irrelevant, as the Defendant would still serve the same sentence of incarceration regardless of whether his prior record score was calculated as lower than a five (5). Furthermore, the Defendant fails to provide the Court with any evidence as to his allegedly correct prior record score. For these reasons, the Court finds that the Defendant's argument that trial counsel was ineffective for failing to object to the sentencing guidelines where the Defendant's prior record score of five (5) was erroneous is without merit as it fails both the first and third prongs needed to prove ineffective assistance of counsel.

ORDER

AND NOW, this 7th day of September, 2011, upon consideration of the Defendant's Petition for Post Conviction Collateral Relief, it is ORDERED and DIRECTED that the Defendant's PCRA Petition is DENIED and the Defendant and his attorney are hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907 (1), that it is the intention of the Court to dismiss the remainder of the PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Edward J. Rymsza, Esq.