

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. 140-2009
	:	CRIMINAL DIVISION
ALLEN SMITH	:	
a/k/a AQUIL THORNTON,	:	
Defendant	:	PCRA

OPINION AND ORDER

Following a Court Conference with both parties on the Defendant's Post Conviction Relief Act (PCRA) Petition, the Court conducted a review of the Petition and this Opinion addresses the issues raised in that Petition.

Factual Background

On January 10, 2010, the Defendant pled guilty before this Court to three counts of Possession of Controlled Substance, Contraband by Inmate Prohibited, each a felony of the second degree, and to Tampering or Fabricating Physical Evidence, a misdemeanor of the second degree. The terms of the agreement were for a period of 3 to 6 years incarceration. At his guilty plea hearing, the Defendant testified that while in the Lycoming County Prison, he had on his person marijuana, Xanax, and Oxycodone. While at the prison, the Defendant attempted to flush the contraband down the toilet so that he would not get caught with it.

Following entry of the plea, the Court sentenced the Defendant on Counts 1, 2, and 3 Possession of a Controlled Substance Contraband by Inmate Prohibited to state incarceration for two (2) years to four (4) years on each count to run concurrent to one another, the standard range for the charges, with an offense gravity score of 7 and a prior record score of 5, was 24 to 30 months. On Count 4 Tampering With or Fabricating Physical Evidence the Defendant was

sentenced to one (1) year to two (2) years state incarceration, where the maximum term of imprisonment allowable was two (2) years, and the standard range, with an offense gravity score of 2 and a prior record score of 5, was 1 to 9 months. The aggregate sentence imposed against the Defendant was therefore three (3) to six (6) years state incarceration, consistent with the plea agreement.¹

Procedural Background

On January 7, 2011, the Defendant filed a pro-se Post Conviction Relief Act (PCRA) Petition, and thereafter E.J. Rymysza, Esquire, was appointed to represent the Defendant in this matter. After several extensions of time to file an amended petition, Attorney Rymysza filed an Amended PCRA Petition with the Court on September 29, 2011. The Defendant, through his attorney, raises four issues in this Petition: 1) the guilty plea entered in this case was unlawfully induced where the plea was not knowing, voluntary and intelligent where the trial court failed to conduct a sufficient on the record colloquy; 2) trial counsel was ineffective for advising the Defendant to plead guilty to all 3 counts of Inmate Contraband charges; 3) trial counsel was ineffective for failing to familiarize himself with the facts and law in the case and to make an informed recommendation regarding the plea bargaining/agreement; and 4) trial counsel was ineffective for failing to object to his sentencing on the application of an erroneous prior record score of 5.

¹ As the Defendant is currently serving a sentence of imprisonment, probation or parole for the crime, the Court finds it has jurisdiction to hear this case pursuant to 42 Pa.C.S. §9544(a)(1)(i). See Commonwealth v. Ahlborn, 683 A.2d (Pa. Super. 1996) where the Superior Court determined that the “currently serving” requirement of Pa.C.S. §9544(a)(1)(i) is determined at the time the petition is filed, and that even where a petition is filed prior to the petitioner’s release from custody, the petition is rendered moot by the defendant’s subsequent unconditional release.

Discussion

The trial court failed to conduct a sufficient on the record colloquy as to guilt

The Defendant opines that the guilty plea in this case was unlawfully induced where the plea was not knowing, voluntary and intelligent as the trial court failed to conduct a sufficient on the record guilty plea colloquy. The Defendant contends that the trial court failed to advise him of, among other things, his presumption of innocence, the unanimous verdict requirement, and the possibility of a consecutive sentence with his other case. The Defendant also now asserts his innocence.

In all post-sentence attempts to withdraw a guilty plea, the defendant must demonstrate a manifest injustice by showing that his plea was involuntary or was entered without knowledge of the charges. Commonwealth v. Hollbrook, 629 A.2d 154 (Pa. Super. 1993). 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. Commonwealth v. Fluharty, 632 A.2d 312 (Pa. Super. 1993).

In this case, the Court reviewed with the Defendant the nature of the charges to which he was pleading and established a factual basis for the plea. N.T., 1/10/10, p. 3-8. The Court also informed the Defendant of his right to a jury trial, reviewed with the Defendant the permissible range of sentences for the offenses charged, and informed the Defendant that she, as the Judge, was not bound by the terms of the plea agreement. N.T., 1/10/10, p. 3-11. While the Court

agrees with the Defendant that it did not specifically state that the Defendant was “innocent until proven guilty,” the Court did inform the Defendant what the Commonwealth would have to prove if he in fact were to go to trial:

THE COURT: All right. Thank you. Okay. Mr. Smith, you're here for three counts of possession of controlled substance, contraband by inmate prohibited. Each of those is a felony of the second degree. So if the Commonwealth were to go to trial on that charge the Commonwealth would have to prove beyond a reasonable doubt that on January 12th....[t]hat you were in possession of a controlled substance while you were a prisoner or inmate....[t]hen tampering or fabricating physical evidence the Commonwealth would have to prove beyond a reasonable doubt that believing that the police or corrections officers or law enforcement suspected that you had something illegal in your possession and they were doing an investigation and in an attempt to avoid that you would have altered, destroyed, concealed, or removed it says record, document, or thing with the intent to impair its availability in the investigation.

N.T., 1/10/10, p. 3-4. The Court finds that these facts establish that the Court discussed with the Defendant all the elements required for the Defendant to enter into a knowing, intelligent and voluntary plea, as the Defendant was aware of the nature and elements of the charges against him and of the consequences for those charges. See Commonwealth v. Broadwater, 479 A.2d 526 (Pa. Super. 1984).

As to the Defendant's argument that the Court failed to inform him of the unanimous verdict requirement, the Court finds that the Defendant was informed of the unanimous verdict requirement in his written guilty plea colloquy, which the Defendant signed on January 11, 2010, swearing and affirming that he understood its full meaning, and of which he acknowledged during his on the record colloquy that he understood its full meaning. N.T., 1/10/10, p. 8-10. The Court notes that the Rules of Criminal Procedure state that the combination of an oral and written colloquy is sufficient to ensure a defendant enters into a knowing, intelligent and voluntary plea. See Pa.R.Crim.P. 590. Furthermore, in Commonwealth v. Payne, 475 A.2d 137 (Pa. Super. 1984), the Superior Court affirmed the trial court's denial of a Post Conviction Hearing Act (PCHA) petition, and determined that the fact that the defendant was not informed specifically as

to the jury's unanimous verdict requirement during his on the record colloquy, but that the colloquy was otherwise proper, did not affect the defendant's knowing, voluntary and intelligent plea, as the Payne Court employed the "totality of the circumstances' approach to assess the validity of a colloquy in the context of a jury trial waiver." In making this determination, the Payne Court relied on the reasoning in Commonwealth v. Carson, 469 A.2d 599 (Pa. 1993) "[t]he focus.....was, and it remains, whether the waiver was knowing and intelligent, not whether certain talismanic questions were asked and answered." In this case, the Court finds that it does not even need to employ the "totality of the circumstances" approach to assess the validity of the Defendant's plea, as the Defendant was specifically informed as to the jury's unanimous verdict requirement in his written colloquy. See Commonwealth v. Smith, 450 A.2d 973 (Pa. 1982) where the Pennsylvania Supreme Court determined that counsel was not ineffective for failing to object to defects in a colloquy where the defendant signed a written waiver form which stated that the defendant was aware of the unanimity and defendant-participation requirements of a jury trial.

As to the Defendant's contention that the trial court failed to advise him of the possibility of a consecutive sentence with his other case, the Court finds that this information is required if the sentence imposed could be made to run consecutively to a sentence which the defendant was already serving, as a valid plea requires that a defendant have a "proper and full understanding" of the consequences of the plea. See Commonwealth v. Guyton, 480 A.2d 330 (Pa. 1984) (See also Commonwealth v. Zuber, 353 A.2d 441, 444 (Pa. 1976). However, the Defendant has failed to inform the Court as to which case he refers, which the Court notes is in violation of Pa.R.Crim.P. 902 (11) and (12), requiring that a PCRA Petition include the grounds for the relief requested and the facts supporting each such ground. Notwithstanding this deficiency, the Court finds that the Defendant was in fact informed that the sentence imposed against him was to run

consecutive to the Attorney General case on which he was previously sentenced. N.T., 1/10/10, p. 4-5. Therefore, if this is the case to which the Defendant refers, the Court finds his contention to be without merit. Otherwise, the Court finds that the Defendant's claim shall be dismissed for failure to comply with Pa.R.Crim.P. 902.

Additionally, the Court finds that the Defendant's decision to now assert his innocence does not afford him relief under the PCRA. 42 Pa.C.S. 9543 (a)(2)(iii) provides relief when a plea of guilty is unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent. This Court finds that the plea of guilty was not unlawfully induced as the Court has already determined that the Defendant's plea was entered knowingly, voluntarily and intelligently. Furthermore, the Court notes that the Defendant clearly admitted his guilt on the record and the Court established a sufficient factual basis for the charges. See Commonwealth v. Ryan, 575 A.2d 949 (Pa. Super. 1990). Therefore, the Court finds the Defendant's argument to be without merit. N.T., 1/10/10, p. 6-7.

Trial counsel was ineffective for advising the Defendant to plead guilty to all 3 counts of Inmate Contraband charges

The Defendant claims that trial counsel was ineffective for advising the Defendant to plead guilty to all 3 counts of Inmate Contraband charges, where if counsel had adequately investigated and researched the issue, counsel could have challenged the number of charges where the possession of contraband constituted a single offense and/or merged.

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).

The Court finds that this claim is not of arguable merit for several reasons. Firstly, the Defendant has provided no assurance that either the Commonwealth or the Court would have agreed to a plea agreement where the three separate Inmate Contraband constituted a single offense and/or merged. Furthermore, the Defendant received a concurrent sentence on all three of the Inmate Contraband charges; therefore, a plea for a single and/or merged offense would not likely have resulted in a sentence different than the one he actually received, as a single charge of Inmate Contraband could be punishable by imprisonment of up to ten (10) years. Additionally, if the Defendant faced charges that did in fact merge, the Court could not have modified the merger, as doing so would be illegal. For these reasons, the Court finds that the Defendant's argument fails to establish ineffective assistance of counsel.

Trial counsel was ineffective for failing to familiarize himself with the facts and law in the case and to make an informed recommendation regarding the plea bargaining/agreement

The Defendant contends that trial counsel was ineffective for failing to familiarize himself with the facts and the law in the case and to make an informed recommendation regarding the plea bargaining/agreement, thereby making the Defendant's plea not knowingly, voluntarily and intelligently made.

The Court finds that this claim is not in compliance with Pa.R.Crim.P. 902, which provides that petitions for Post-Conviction Collateral Relief shall include, among other things:

- (11) the grounds for the relief requested;
- (12) the facts supporting each such ground that:
 - (a) appear in the record, and the place in the record where they appear; and
 - (b) do not appear in the record, and an identification of any affidavits, documents, and other evidence showing such facts....

As the Defendant has failed to comply with the rules, in that he has failed to provide the Court with any facts to support his allegation, the Court is unable to make a determination as to the merit of this claim. Not only does this claim not comply with Pa.R.Crim.P. 902, the Defendant's claim is too vague to establish any of the elements needed to prove ineffective assistance of counsel, which are enumerated above. Such an imprecise argument, which fails to demonstrate the defendant's entitlement to relief, is considered to be waived. See Commonwealth v. Bracey, 795 A.2d 935, 940 n.4 (Pa. 2001). Furthermore, the Court has already found that the Defendant did in fact enter into a knowing, intelligent and voluntary plea, at least as to the issues discussed above.

Trial Counsel was ineffective in failing to properly calculate Defendant's prior record score which in turn directly influenced his decision to accept the offered plea agreement

Defendant alleges that Trial counsel was ineffective for failing to object to the Defendant's sentencing on the application of an erroneous prior record score of 5. The Defendant contends his prior record score should have actually been a 3. Since a preliminary review of the disparity in the sentencing guideline ranges reveals to the Court that if the Defendant's prior record score is in fact only a 3, the sentence imposed by the Court would have been in the aggravated range. Had the Defendant's prior record score been properly calculated there is a reasonable probability that the Defendant would not have accepted the plea agreement for 3-6 years. The Court believes that the Defendant should have the opportunity through hearing to develop the facts on this issue.

ORDER

AND NOW, this ____ day of December, 2011, based on the above discussion, a PCRA Hearing to determine whether trial counsel was ineffective for failing to object the Defendant's sentencing on the application of an erroneous prior record score of 5, as the Defendant contends that his prior record score was actually a 3, is hereby scheduled for **January 24, 2012 at 9:00 a.m. in Courtroom No. 1 of the Lycoming County Courthouse, Williamsport, PA**. One hour has been allotted for the hearing.

At the hearing on this issue, the Defendant must provide evidence that his prior record score should have in fact been a 3 at the time of sentencing on this case, and that but for counsel's ineffectiveness, it is reasonably probable that he would not have entered into the plea of guilty. See Commonwealth v. Hickman, 799 A.2d 136 (Pa. Super. 2002).

Defense Counsel is responsible for arranging the transport of his client for the upcoming hearing. Should the Defendant wish to give up his right to be physically present at the hearing, he should notify his counsel as soon as possible so that arrangements for his participation by video conference can be made.

By the Court,

Nancy L. Butts, President Judge

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