

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 :
 v. : **No. 1237-CR-2009**
 : **CRIMINAL DIVISION**
 :
 JESSE EARL AUL, :
 Defendant : **PCRA**

OPINION AND ORDER

On January 7, 2013, Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Motion to Dismiss pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 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 has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

Background

Jesse Aul (Defendant) was charged with various crimes that include Aggravated Indecent Assault of a Child, Indecent Assault (under 13 years of age), and Corruption of Minors. On August 17, 2009, the Defendant pled guilty to Aggravated Indecent Assault,¹ a felony of the first degree; a consolidated count of Indecent Assault,² a felony of the third degree; a consolidated count of Indecent Assault,³ a misdemeanor of the first degree, and Corruption of Minors,⁴ a misdemeanor of the first degree. The Defendant pled guilty in exchange for a plea agreement, in which he would be sentenced in the low end of the standard range.⁵ On November 9, 2010, this Court sentenced the Defendant to an aggregate sentence of sixty-two (62) months to 172 months in a State Correctional Institution with a consecutive five (5) years probation. On January 6,

¹ 18 Pa.C.S.A. § 3125(b). Aggravated Indecent Assault had an OGS of twelve (12).

² 18 Pa.C.S.A. § 3126(A)(7). Indecent Assault, a felony of the third degree, has an OGS of six (6).

³ 18 Pa.C.S.A. § 3126(a)(2). Indecent Assault, a misdemeanor of the first degree, has an OGS of five (5).

⁴ 18 Pa.C.S.A. § 6301(a)(1). Corruption of Minors has an OGS of five (5).

⁵ The Defendant had a Prior Record Score of zero (0).

2011, following a hearing on a Motion to Modify Sentence, the Court reduced the sentence to sixty-two (62) months to 124 months in a State Correctional Institution.

On February 2, 2011, the Defendant filed a Notice of Appeal to the Superior Court of Pennsylvania. The Defendant alleged in the concise statement of matters complained of on appeal that the sentence was unduly harsh and excessive. On February 14, 2012, the Superior Court affirmed this Court's sentence and found that it did not abuse its discretion. No subsequent appeal was taken following the Superior Court's decision.

The Defendant filed a timely *pro-se* PCRA Petition on October 25, 2012. Defendant's Petition stated that trial counsel failed to advise him of the right to an expert of his choosing at the Sexual Violent Predator (SVP) hearing and that the guilty plea was unlawfully induced. Amy Boring, Esquire was appointed to represent the Defendant on the PCRA Petition. On January 7, 2013, Attorney Boring filed a Petition for Permission to Withdraw as Counsel and a Memorandum pursuant to Turner/Finley. After an independent review of the record and an additional PCRA conference, the Court agrees with Attorney Boring that Defendant failed to raise any meritorious issues in his PCRA Petition.

Whether trial counsel was ineffective for improperly advising the Defendant on the Sexually Violent Predator determination process

The Defendant alleges that trial counsel was ineffective in the process of his Sexually Violent Predator (SVP) designation, including failing to advise him of his right to an expert of his choosing. To make a claim for ineffective assistance of counsel, a defendant must prove the following: (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 (Pa. 2007) (citing 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, 941 A.2d at 664 (citing Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)). Further, Counsel is presumed to have been effective. Id.

Pennsylvania case law, however, has found that classifications of SVP is not a cognizable claim under the PCRA. In Price, the Pennsylvania Superior Court stated that “[t]he PCRA ‘is not intended to . . . provide relief from collateral consequences of a criminal conviction.’ The registration, notification, and counseling requirements for offenders under Megan’s Law II are not criminal punishment, but represent non-punitive, regulatory measures designed to safeguard the public.” Commonwealth v. Price, 876 A.2d 988, 992 (Pa. Super. 2005) (citations omitted). The Superior Court stated that the following claims are eligible for relief under the PCRA: 1) constitutional violation; 2) ineffectiveness of counsel; 3) unduly induced guilty plea; 4) improper obstruction of the right to appeal; 5) the existence of after-discovered exculpatory evidence; 6) imposition of a sentence greater than the lawful maximum; or 7) a proceeding in a tribunal without jurisdiction. Id.

Further, the scope of the decision in Price has been expanded. In Masker, the defendant filed a PCRA Petition alleging, in part, that his counsel did not advise him of his right to petition the court to appoint an independent expert for the sexual offender evaluation. Commonwealth v. Masker, 34 A.3d 841 (Pa. Super. 2011). The Superior Court stated that there is “no meaningful distinction between a challenge to designation as a SVP and a challenge to the process by which SVP designation is arrived.” Id. at 842. The Superior Court found that a challenge to the process of a SVP designation is not cognizable under the PCRA.

Here, the Defendant is challenging the process that resulted in his SVP designation, as in Masker. The Defendant alleges in his PCRA Petition that his trial counsel was ineffective for not telling him he could have an expert appointed. Further, Attorney Boring addressed

additional issues in her Turner/Finley letter raised by the Defendant to her, which alleged that trial counsel told him he could not call more witnesses to the stand at the SVP determination, that he never spoke to the evaluator during the SVP determination, that SVP evaluators were paid more to conclude that he was SVP, and that his trial counsel told him he would not be classified SVP. All of these issues alleged by the Defendant challenge the process of the SVP designation and therefore are not cognizable under the PCRA.

Whether the guilty plea was coerced

The Defendant contends that his guilty plea was unlawfully induced. Manifest injustice is required to withdraw guilty pleas which are requested after sentence has been imposed.

Commonwealth v. Flick, 802 A.2d 620, 623 (Pa. Super. 2002). Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly.

Commonwealth v. Persinger, 615 A.2d 1305 (Pa. 1992). It does not matter if the Defendant is pleased with the outcome of his decision to plead guilty as long as he did so knowingly,

voluntarily, and intelligently. Commonwealth v. Yager, 685 A.2d 1000, 1004 (Pa. Super. 1996).

The minimum inquiry required of a trial court must include the following six areas: (1) Does the defendant understand the nature of the charges to which he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the defendant understand that he has a right to trial by jury? (4) Does the defendant understand that he is presumed innocent until he is found guilty? (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged? (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Young, 695 A.2d 414, 417 (Pa. Super. 1997). In Yeomans, the Superior

Court further summarized:

In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. Thus, even though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not be deemed invalid if the

circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

Commonwealth v. Yoemans, 24 A.3d 1044 (Pa. Super. 2011) (citing Commonwealth v. Fluharty, 632 A.2d 312, 314 (Pa. Super. 1993); see also Commonwealth v. Scott, No. 1732 MDA 2011 (Pa. Super. Filed July 24, 2012).

A review of the transcripts of the guilty plea hearing in this case confirms that the Defendant did in fact enter into his plea knowingly, voluntarily, and intelligently. The Court informed the Defendant of the elements of the crimes and that the Commonwealth would have to prove them beyond a reasonable doubt. N.T., 8/17/2009, p. 3-5. The Court also stated the maximum sentence and fine for each crime. Id. The Defendant gave the Court a factual basis for his guilty plea. Id. at 9-14. In addition, the Defendant filled out a written guilty plea colloquy highlighting many of these factors in greater detail, to which he stated he understood. In the Court's Order it found he knowingly, voluntarily and intelligently entered his guilty plea. Therefore, according to Pennsylvania law, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently.

In Defendant's PCRA Petition he does not specifically state why his guilty plea was coerced. The Petition, however, states that his "original plea agreement called for min. sentence 22-36 mo. minimum." At the time of the guilty plea, the Defendant and Commonwealth believed that the offense gravity score for Aggravated Indecent Assault was ten (10). At sentencing the Commonwealth informed the Court and the Defendant that the offensive gravity score was actually twelve (12) and the standard range was 48-66 months. After conferring with his attorney, the Defendant decided to go forward with the guilty plea and sentencing:

MR. OSOKOW: Charge was 3125(b).

COURT: Right. When you look at the guidelines, the offense listing of the Crimes Code offenses, 3125(b) only list where it lists felony one it only lists an offense gravity score of 12. There is no other, you know, how sometimes it says an aggravated assault they have the most serious one then they have a couple that are lesser. It just has the one.

MS. BUZAS: Your Honor, can I have a minute to talk with Mr. Aul about this?

COURT: Sure.

(Whereupon, a discussion was held off the record.)

COURT: All right. So when we were last together there was a discussion about the offense gravity score and the standard range for that offense. Based upon your interpretation it should be an offense gravity score of 12 with 48 to 66. Was there a change?

MS. BUZAS: Your Honor, I spoke with Mr. Aul and he's willing to go forward with the guilty plea and sentencing with the guidelines.

N.T., 7/28/2011, p.40. Following this discussion, the Court told the Defendant that he had the right to proceed to trial, that he was not being forced to continue on with sentencing, and that he would be able to withdraw his guilty plea. *Id.* at 41-42. There is no indication that the Defendant was coerced into pleading guilty or to continue with sentencing. He was afforded additional time by the Court to review the change in guideline information. The record reflects that the Defendant's plea was intelligent, voluntary, and knowing and therefore his guilty plea will not be withdrawn.

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 _____ day of February, 2013, 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 7, 2013, is hereby GRANTED and Amy Boring, Esq. may withdraw her appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

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