

Defendant's entire aggregate sentence was twenty (20) to fifty (50) years.⁵ The Defendant did not file any subsequent appeals.

On July 12, 2011 the Defendant filed a *pro se* Post Conviction Relief Act (PCRA) Petition. The Defendant alleges that his trial counsel was ineffective for multiple reasons including: 1) failing to request a dismissal of charges pursuant to Pa.R.Crim.P. 600 because more than 180 days expired between the filing of the complaint and the Defendant's guilty plea; 2) failing to have the Third Degree Murder charge downgraded to a justifiable homicide or use of force in self-protection; 3) forcing the Defendant to take the plea agreement; 4) failing to investigate and present mitigating factors during sentencing; 5) failing to object to an unlawful search conducted by Williamsport Bureau of Police; and 6) failing to object to the Defendant's illegal sentence. Julian Allatt, Esquire was appointed to represent the Defendant for the PCRA Petition. On January 30, 2013, the Defendant filed a Letter/Request to Amend PCRA Petition, which additionally argued that this Court failed to properly explain the element of "malice" to the Defendant. On March 5, 2013, Attorney Allatt filed a Petition to Withdraw from Representation of PCRA and a Memorandum Pursuant to Turner/Finley. After an independent review of the record and an additional PCRA conference, the Court agrees with Attorney Allatt that Defendant failed to raise any meritorious issues in his PCRA Petition.

Whether the Defendant waived his right to raise defenses and defects not concerning jurisdiction of the court, legality of sentence, and validity of plea

The Defendant contends that his trial counsel was ineffective for multiple reasons. The entry of a plea of guilty, however, "usually constitutes a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of plea."

⁵ For the Possession with Intent to Deliver a Controlled Substance, the Defendant was sentenced to a concurrent period of incarceration of five (5) to ten (10) years.

Commonwealth v. Coles, 530 A.2d 453, 457 (Pa.Super.1987); Commonwealth v. Moyer, 444 A.2d 101 (1982); Commonwealth v. Casner, 461 A.2d 324 (1983). Thus, this Court will assess whether the Defendant entered a valid guilty plea to determine if he has waived many of the issue raised in his PCRA Petition.

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. This Court informed the Defendant of the maximum sentence/fine for the charges and that the Court did not have to accept the terms of the plea agreement. N.T., 9/8/2010, p. 5. The Defendant was made aware of the elements of the crime and that the Commonwealth must prove the elements of the crime beyond a reasonable doubt. Id. at 2-4. The Defendant gave the Court an extensive factual basis for the guilty plea and was informed that he had the right to go to trial. Id. at 6-9, 10-11. 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.⁶ According to Pennsylvania law, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently.

Further, the Defendant contends that he was coerced by his attorney to plead guilty. The Defendant, however, stated on the record during his guilty plea that he was not coerced into pleading guilty and that it was his decision to do so:

COURT: Have you received any communication from anyone either within the prison or outside the prison that's forcing you or threatening you in any way to have you enter a plea of guilty here today?

DEFENDANT: No, Your Honor.

COURT: Are you doing this of your own choice, of your own free will to enter the plea to these charges today?

DEFENDANT: Yes.

⁶ The Court's Order dated September 8, 2010 found that he knowingly, voluntarily and intelligently entered his guilty plea.

COURT: And again were you satisfied with the ability to communicate with the Public Defender's Office and the information that they provided to you in helping you decide how to proceed here today?

DEFENDANT: Yes.

COURT: Whose decision is it to plead guilty to these charges today?

DEFENDANT: Mine.

Id. at 12-13.

As the Defendant entered a valid guilty plea, he cannot now raise defects and defenses that his trial attorney failed to bring. Therefore, the Court finds that the Defendant has waived the issues of whether trial counsel ineffectively failed to have the Third Degree Murder charge downgraded to a justifiable homicide or use of force in self-protection, forced the Defendant to plead guilty, and failed to object to an unlawful search conducted by Williamsport Bureau of Police.

Whether this Court did not properly advise the Defendant on the meaning of "malice"

The Defendant alleges that the Court did not advise him of the elements of third degree murder and specifically "malice." As stated above, the Court finds that the Defendant's guilty plea was valid. In addition, the record reflects that the Defendant's allegation is without merit:

COURT: Then for third degree murder the Commonwealth would have to prove beyond a reasonable doubt that you would have – that you would have killed another individual with malice and you need to understand that malice has a special definition under the law, that a killing is with malice if the perpetrator, meaning yourself, your actions, show your wanton and willful disregard for an unjustified and extremely high risk that your conduct would result in death or serious bodily injury to another person. In this form of malice the Commonwealth does not need to prove that you specifically intended to kill another person; the Commonwealth must prove that you took action while consciously, that is, knowingly disregarded the most serious risk that you were creating and that by your disregard of the risk you demonstrated your extreme indifference to the value of human life. Keep in mind that for murder of the third degree a killing is with malice if the perpetrator acts with the wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty indicating an

unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life. This offense is graded a felony of the first degree and the maximum punishment is up to 40 years in jail, up to 50,000-dollar fine or both. So sir, with respect to the element of those charges do you understand what the Commonwealth would have to prove and what the maximum punishment is as set by the law?

DEFENDANT: Yes, Your Honor.

Id. at 3-4.

MIELE: Did you hear the Judge's definition of malice when she read it? She just told you what that was.

DEFENDANT: Yes.

COURT: That your actions, which have to show a willful or wanton disregard of an unjustified and extremely high risk that your conduct would result in death or serious bodily injury to another person.

DEFENDANT: Yes.

MIELE: And again, you pointed the gun in the direction of the Miss Alford, did you not?

DEFENDANT: Yes.

MIELE: And you understood the definition of malice?

DEFENDANT: Yes.

MIELE: Okay. Based on that definition and your actions did you act with malice?

DEFENDANT: Yes.

Id. at 8-9. Based upon the record, the Court finds that the Defendant's issue is without merit.

Whether trial counsel was ineffective for failing to investigate and present mitigating factors during sentencing

The Defendant contends that trial counsel was ineffective because they did not investigate and present mitigating factors during sentencing. 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.

During sentencing, trial counsel had the Defendant speak and also argued for the Court to accept the plea agreement:

MIELE: Mr. Barker would like to say something, Your Honor.

DEFENDANT: Your Honor, I just wanted to say to the family and the friends that I do apologize for this situation. This is a situation that I wish that never would have occurred. I knew the person. I really -- I'm just -- I apologize. The only thing I could do is just ask my God for forgiveness and ask them for their forgiveness one day before they leave to try to forgive me for this.

COURT: Okay. Thank you. Mr. Miele.

MIELE: Your Honor, we just argue to the Court that the plea agreement is appropriate under the circumstances and ask the Court to accept it.

COURT: Okay.

MIELE: Nothing else. Thank you.

Id. at 18. As the Defendant had agreed to a plea agreement, the Court is unable to find a reasonable basis for trial counsel to argue mitigating factors or anything else besides the Court accepting the agreement. "Where the plea agreement contains a negotiated sentence which is accepted and imposed by the sentencing court, there is no authority to permit a challenge to the discretionary aspects of that sentence." Commonwealth v. Dalberto, 648 A.2d 16, 19 (Pa. Super. 1994). In addition, the Defendant was not prejudiced in anyway, as the Court accepted the plea

agreement and sentenced him accordingly. Therefore, the Court finds that this issue is without merit.

Whether trial counsel was ineffective for failing to file a Pa.R.Crim.P. 600 motion

The Defendant contends that his counsel should have filed a Rule 600 motion dismissing the charges because more than 180 days had elapsed between the criminal complaint being filed and his guilty plea. Rule 600 states that “trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.” Pa.R.Crim.P. 600(A)(3). “[A] Trial court must grant a Rule 600(G) motion to dismiss unless it finds that the Commonwealth has exercised due diligence and that the circumstances occasioning the postponement were beyond its control.” Commonwealth v. Meadius, 870 A.2 802, 805 (Pa. 2005) (citing Pa.R.Crim.P. 600(G)). The exercise of “due diligence” requires the Commonwealth to do everything reasonable within its power to guarantee that a trial begins on time. See id. at 807-08.

Where the defendant is incarcerated, the trial “shall commence no later than 180 days from the date on which the complaint is filed.” Pa.R.Crim.P. 600(A)(2). “Any defendant held in excess of 180 days is entitled upon petition to immediate release on nominal bail.” Pa.R.Crim.P. 600(E). In determining when the trial should commence, the unavailability of the defendant’s attorney or any continuances granted at the request of the defendant’s attorney are excluded. Pa.R.Crim.P. 600(C)(3).

Here, the Criminal Complaint was dated July 13, 2009 and the Defendant pled guilty on September 8, 2010. The Defendant filed numerous continuance requests.⁷ Even if it is true that

⁷ On February 2, 2010 and March 18, 2010, the Defendant received thirty and forty-five additional days to file an omnibus pre-trial motion. On May 13, 2010, the Defendant continued pre-trials to July 27, 2010. On July 27, 2010,

180 days had elapsed, it would have only given the Defendant the right to nominal bail and not the right to have his case dismissed. In addition, 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.” Coles, 530 A.2d at 457. Irregularities in proceedings prior to a guilty plea are reviewed only for the extent they effected voluntariness of the plea.

Commonwealth v. Riviera, 385 A.2d 976 (Pa. Super. 1978) (explaining that a statutory right to a speedy trial did not influence the voluntariness of a defendant’s guilty plea). The Court finds that there is no indication in the record or the Defendant’s PCRA Petition to show that the Defendant’s voluntariness of his plea was affected by a Rule 600 motion not being filed. Therefore, the Court finds that the guilty plea was valid and the Defendant’s Rule 600 issue is without merit.

Whether trial counsel was ineffective for failing to object to the Defendant’s illegal sentence

The Defendant contends that his sentence, which was based upon his plea agreement, was an illegal sentence. The maximum sentence for Third Degree Murder is forty (40) years and has an Offense Gravity Score of a fourteen (14). With a Prior Record Score of a two (2), the standard guideline range for the charge, at that time, was ninety-six (96) months to statutory limit. The Defendant’s sentence for Third Degree Murder, which was fifteen (15) to forty (40) years, was within the guideline range and not illegal.

The maximum sentence for Persons Not to Possess a Firearm is ten (10) years and has an Offense Gravity score of ten (10). With a Prior Record Score of two (2), the standard guideline range for the charge was thirty-six (36) to forty-eight (48) months. While the sentences of five (5) to ten (10) years, which the Possession with Intent to Deliver charge ran concurrent with, was

the Defendant continued pre-trials to September 8, 2010. On July 27, 2010, unopposed by the Defendant, the Commonwealth continued to trial term from August to September.

beyond the guideline range, it was within the statutory limit and in accordance with the plea agreement. The Court was told by the parties to fashion the sentence in any way and that there was no preference on how the plea agreement was implemented as long as it was aggregated to a twenty (20) to fifty (50) year sentence. *Id.* at 14-15; *Dalberto*, 648 A.2d at 19 (stating that discretionary aspects of sentence may not be challenged if based on a negotiated plea). Therefore, the Court finds that the sentence was not illegal and the claim that his trial counsel was ineffective for not objecting to it 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 _____ day of April, 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 March 5, 2013, is hereby GRANTED and Julian Allatt, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

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