

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 :
 v. : **No. 1772-CR-2011**
 : **CRIMINAL DIVISION**
 :
 MARK A. BIRD, :
 Defendant : **PCRA**

OPINION AND ORDER

On August 28, 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

On August 11, 2011, Mark Bird (Defendant) was pulled over by police for rapidly accelerating his vehicle at an intersection, which caused his tires to squeal and the vehicle to fishtail. During the vehicle stop the officer noticed the odor of an alcoholic beverage emanating from the Defendant and an almost empty case of beer in the back seat. As a result of the vehicle stop, the Defendant was charged with Driving Under the Influence of alcohol (3rd),¹ Driving Under the Influence With High Rate of Alcohol (3rd),² and Driving While Operating Privilege is Suspended or Revoked with BAC .02% or Greater.³

On December 16, 2011, the Defendant waived his preliminary hearing in exchange for a “Guilty Plea Recommendation” by the Commonwealth. The Guilty Plea Recommendation

¹ 75 Pa.C.S. §3802(a)(1).

² 75 Pa.C.S. § 3802(b).

³ 75 Pa.C.S. § 1543(b)(1.1)(ii).

stated that “The Defendant will plead guilty to: Count 1 and Count 3 for bottom end standard range, to be served in county prison so that Defendant can work and pay fines; Count 1: \$1,500, Count 2: \$2,500.” Importantly, the Guilty Plea Recommendation form states that:

The Defendant, by signing this plea recommendation, understands and agrees that it is subject to final approval of the District Attorney, and may be subject to being withdrawn by the Commonwealth at any time prior to the entry of the guilty plea.

Subsequently, the District Attorney of Lycoming County withdrew the guilty plea recommendation.

On August 2, 2012, the Defendant pled guilty pursuant to a plea agreement to all three (3) counts charged against him. The plea agreement was for an aggregate sentence of eighteen (18) months to five (5) years to be served in a State Correctional Institution. On January 17, 2013, the Court sentenced the Defendant pursuant to his plea agreement. In addition, the Defendant had two (2) summary appeal sentences which were for a total of ninety (90) days, which were aggregated with the DUI sentences. The Defendant did not appeal his sentence to the Superior Court of Pennsylvania.

On July 2, 2013, the Defendant filed a *pro se* Post Conviction Relief Act (PCRA) Petition. The Defendant alleges that trial counsel was ineffective because they did not raise the guilty plea recommendation that was withdrawn by the District Attorney at the time of sentencing. Donald Martino, Esquire was appointed to represent the Defendant for the PCRA Petition. On August 28, 2013, Attorney Martino filed a Petition 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 Martino that Defendant failed to raise any meritorious issues in his PCRA Petition.

Whether the Defendant guilty plea was made knowingly, voluntarily, and intelligently

The Defendant contends that his counsel was ineffective because they failed to disclose to this Court at the time of sentencing a previous guilty plea recommendation. 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.

When a defendant alleges that his guilty plea was induced by ineffective counsel they must prove that their attorney was not competent and that it caused them to enter an involuntary or unknowing plea. “Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea.” Commonwealth v. Anderson, 995 A.2d 1184, 1192 (Pa. Super. 2010). “Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id.

This Court cannot find that trial counsel was ineffective for two reasons: 1) the Defendant made a voluntary and knowing plea to this Court; and 2) trial counsel was within the range of competence demanded of attorneys in criminal cases. In support of the Courts first determination that the Defendant’s PCRA Petition is without merit, a showing of manifest

injustice is required to justify the withdrawal of a guilty plea which are requested after sentence has been imposed. Commonwealth v. Flick, 802 A.2d 620, 623 (Pa. Super. 2002). Manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly. Commonwealth v. Persinger, 615 A.2d 1305 (Pa. 1992). Whether the Defendant is pleased with the outcome of his decision to plead guilty is not relevant 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 charges and the elements of those charges. N.T., August 2, 2012, p. 2-3. Along with the elements, the Court informed the Defendant of the statutory maximum fine and sentence for each charge. Id. at 3-4. The Court reviewed the plea agreement and informed the Defendant that the Court is not bound by the agreement at sentencing. Id. at 4. The Defendant gave the Court a factual basis for the guilty plea and was informed that he had the right to go to trial and to select a jury. Id. at 4-6, 7-8. In addition, the Defendant completed a written guilty plea colloquy explaining many of these factors in greater detail, to which he stated he understood.⁴ According to Pennsylvania law, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently.

In addition, the record establishes that the Defendant was not coerced or threatened to plead guilty:

COURT: Is anybody forcing you or threatening you in any way to get you to plead guilty here today?

DEFENDANT: No.

COURT: Are you doing this of your own free will?

DEFENDANT: Yes.

.....

COURT: Have you had sufficient time to speak with the Public Defender's Office about how you wanted to proceed with your case?

DEFENDANT: Yes.

Id. at 7. Therefore, this Court does not find merit that the Defendant involuntarily and unknowingly pled guilty.

⁴ The Court's Order dated August 2, 2012 found that the Defendant knowingly, voluntarily and intelligently entered his guilty plea.

Finally, this Court finds that the Defendant's PCRA Petition is without merit because trial counsel was performing within the range of competence demanded of attorneys in criminal cases. At the time of sentencing, the Defendant had already knowingly, intelligently, and voluntarily pled guilty pursuant to a plea agreement. The Defendant was aware of the nature and terms of the plea agreement he entered into with the Commonwealth. Trial counsel was not incompetent for failing to argue a plea recommendation that had been pulled by the District Attorney well before the guilty plea/sentencing with the sentencing judge.

Whether the guilty plea recommendation should be enforced

The Defendant argues that the plea recommendation that was denied by the District Attorney should have influenced his sentence. Besides the fact that the plea recommendation was clearly not a plea offer, the recommendation would also not be enforceable even if it was considered a plea agreement. The fact that a plea agreement is required to be presented to a court before the terms are binding has been previously established by Pennsylvania Courts. "Our Supreme Court has . . . held that 'where a plea agreement has been entered of record and has been accepted by the trial court, the [Commonwealth] is required to abide by the terms of the plea agreement.'" Commonwealth v. McElroy, 665 A.2d 813, 816 (Pa. Super. 1995) (citations omitted). "However, prior to the entry of a guilty plea, the defendant has no right to specific performance of an executory agreement." Id. (citations omitted). Here, the Defendant's plea recommendation was never entered of record and therefore not enforceable.

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 November, 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 August 28, 2013, is hereby **GRANTED** and Donald Martino, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

xc: DA (KO)
Donald Martino, Esq.
Mark Bird #KX-1855
SCI Waymart
P.O. Box 256, Route #6
Waymart, PA 18472