

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 1181-CR-2011
	:	CRIMINAL DIVISION
NAZEER BURKS,	:	
Defendant	:	PCRA

OPINION AND ORDER

On February 5, 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 January 9, 2012, Nazeer Burks (Defendant) pled guilty to three counts of Delivery of a Controlled Substance, an ungraded felony.¹ The Defendant pled guilty in exchange for a negotiated plea agreement of three (3) to six (6) years in a State Correctional Institution. On January 19, 2012, the Defendant was sentenced by this Court to one (1) to two (2) years on each Delivery of a Controlled Substance count, each to be consecutive to one another. The aggregate sentence by the Court was three (3) to six (6) years in a State Correctional Institution.

On July 20, 2012, the Defendant filed a *pro se* Post Conviction Relief Act (PCRA) Petition. The Defendant alleged three issues: 1) Defendant was denied the right to view any evidence against him; 2) Defendant was unaware that his plea was to run consecutive with any other sentence; 3) Defendant was told that his case could not be won and that he would get seven

¹ 35 P.S. § 780-113(A)(30).

(7) to fourteen (14) years. Julian Allatt, Esquire was appointed to represent the Defendant for the PCRA Petition. On February 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 was denied to view any weight of evidence against him

The Defendant contends that he was denied his right to view the evidence against him and that he did not prior to pleading guilty. 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.” 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 this argument.

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 charge and that the Court did not have to accept the terms of the plea agreement. N.T., 1/9/2012, p. 2-3. 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 2-3. The Defendant gave the Court a factual basis for the guilty plea. Id. at 3-4. 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. The Court's Order found he knowingly, voluntarily and intelligently entered his guilty plea. According to Pennsylvania law, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently.

As the Defendant entered a valid guilty plea, he cannot now allege that he did not see any evidence or that the Commonwealth did not have the weight of the evidence to obtain a conviction. A guilty plea waived all defenses besides jurisdiction of the court, legality of sentence, and validity of plea. This Court finds that the Defendant's allegation that he did not see any evidence against him has been waived.

Whether the Defendant was unaware that his sentence was to run consecutive to any other sentence

The Defendant alleges that he did not know that his sentence was going to run consecutive to any other sentence. This allegation, however, is contrary to the record:

COURT: Thank you. Is there restitution, please?

MR. LINHARDT: There is restitution to the Pennsylvania State Police in the amount of \$600. The plea agreement of three to six years also calls that this sentence run consecutive to the sentence that the Defendant is presently serving. I believe he was recently sentenced to state incarceration on a gun case in front of Judge Lovecchio.

COURT: Which means he would not be eligible for RRRI?

MR. LINHARDT: Correct.

COURT: Is that your understanding of all that information that you just heard us talk about?

DEFENDANT: Yes.

N.T., 1/9/2012, p. 4-5. The Court specifically asked the Defendant, prior to pleading guilty, if he understood that his new plea agreement was going to run consecutive to his previously sentenced state time. Therefore, the Court finds the issue of whether the Defendant was aware that his sentence would run consecutive to others sentences is without merit.

Whether the Defendant was coerced into pleading guilty because his attorney stated that he would receive a sentence of seven (7) to fourteen (14) if he did not plead guilty and because they stated that the case could not be won

The Defendant contends that he was coerced by his attorney to plead guilty. 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.

As stated above, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently. The Court stated on the record the maximum punishment he could face:

COURT: Okay, I can do that and then it would be all heroin, so it would be 15 years, \$250,000 and the Commonwealth would have to prove beyond a reasonable doubt that between July 26th and August 8th of this - - of 2011 he would have delivered or possessed with the intent to deliver a quantity of heroin on those three different occasions. Sir, do

you understand that the Commonwealth would have to prove and what the maximum punishment is?

DEFENDANT: Yes.

COURT: You hesitate.

DEFENDANT: Yeah.

COURT: Why? What is it that you don't understand?

DEFENDANT: No, I understand.

N.T., 1/9/2012, p. 2-3. The Defendant stated on the record that he understood the maximum punishment he could face.

In addition, the Defendant was charged with seventeen (17) separate criminal counts and it was not incompetent for his trial attorney to inform him that he could receive a sentence of seven (7) to fourteen (14) years if he did not take the plea agreement and continued to trial. The Defendant was charged with three counts of Delivery of a Controlled Substance, ungraded felonies;² three counts of Criminal Use of a Communication Facility, two counts were felonies of the third degree and one was an ungraded felony;³ three counts of Possession of a Controlled Substance, ungraded misdemeanors;⁴ three counts of Possession of Drug Paraphernalia, ungraded misdemeanors;⁵ two counts of Possession with Intent to Deliver, ungraded felonies;⁶ two counts of Corruption of Minors, misdemeanors of the first degree;⁷ and one count of Criminal Mischief, a misdemeanor of the second degree.⁸ As the Defendant has a Prior Record Score of one (1), the trial attorney was not incompetent to inform the Defendant that he could

² 35 P.S. § 780-113(A)(30). Offense gravity scores ranging from six (6) to thirteen (13) depending on the amount of cocaine. One of the charges was for thirty-two (32) grams of cocaine, which is an OGS of eight (8).

³ 18 Pa.C.S.A. § 7512. An Offense Gravity Score of five (5).

⁴ 35 P.S. § 780-113(A)(16). An Offense Gravity Score of three (3).

⁵ 35 P.S. § 780-113(A)(32). An Offense Gravity Score of one (1).

⁶ 35 P.S. § 780-113(A)(30). Offense gravity scores ranging from six to thirteen (13) depending on the amount of cocaine.

⁷ 18 Pa.C.S.A. § 6301(a)(1). An Offense Gravity Score of four (4).

⁸ 18 Pa.C.S.A. § 3304(a)(5). An Offense Gravity Score of two (2).

receive seven (7) to fourteen (14) years. Trial counsel was also not incompetent for discussing trial strategy or the lack of one with their client.

Finally, the Defendant stated on the record that he was not coerced into pleading guilty and that it was his decision to do so:

COURT: 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 freewill?

DEFENDANT: Yes.

COURT: Have you had enough time to speak with the Public Defender's Office about your case?

DEFENDANT: Yes.

COURT: And whose decision is it to plead guilty here today?

DEFENDANT: Mine.

N.T., 1/9/2012, p.9. Based upon the record and the facts of the case, the Court finds that the Defendant's issue of whether he was coerced into pleading guilty 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 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 February 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

xc: DA (KO)
Julian Allatt, Esq.
Nazeer Burks #KL-5796
SCI Pine Grove
191 Fyock Rd.
Indiana, PA 15701