IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	
v.	**:**	**No. 1825-2010**
	:	**CRIMINAL DIVISION**
BRIAN HORN,	**:**	
Defendant	**:**	**PCRA**

Date: March 13, 2013

OPINION IN SUPPORT OF THE ORDER OF DECEMBER 20, 2012, IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Brian Horn has appealed this Court's December 20, 2012 Order which dismissed his Post Conviction Relief Act (PCRA) Petition that was filed on June 15, 2012. Defendant filed his appeal on January 16, 2012 and the appeal is docketed to 144 MDA 2013.

In his Concise Statement of Matters Complained of on Appeal, filed February 12, 2013, Defendant raised the following issues:

1. The PCRA Court abused its discretion or erred, in finding that Appellant's objections to the Court's Notice of Intention to Dismiss Appellant's PCRA petition did not set forth any grounds for which relief could be afforded the Appellant and dismissing his PCRA petition.

2. Appellant avers that he was denied Direct Appeal rights in connection with ineffective assistance of counsel, in that, Attorney Travis failed to file a direct appeal, after Appellant had shown Attorney Travis his interest in said appeal, and Attorney Travis disregarded that interest.

3. Attorney Travis was ineffective in reviewing the plea colloquy, and failing to include the Megan's Law Supplement to the Appellant's guilty plea.

4. The appellant contends that his guilty plea was not voluntarily, knowingly, intelligently or understandingly made, due to the fact that the guilty plea colloquy was defective and incomplete as per Rule 590 of Pa. R. Crim. P.

5. The PCRA Court abused its discretion in failing to appoint new PCRA counsel, disregarding Appellant's specific request for said appointment, in his written objections to the Court's notice of intentions to dismiss Appellant's pro se PCRA petition.

6. The sentencing court abused its discretion or erred in finding Appellant a sexually violent predator and imposing a lifetime registration upon the Appellant.

7. Appellant seeks re-instatement of his Direct Appeal rights to challenge Megan's law on appeal.

8. Appellant contends that his sentence should be vacated and the Appellant be resentenced accordingly.

9. Appellant's due process rights were violated and deprived in that the Appellant did not receive notice of PCRA counsel being appointed.

Defendant's appeal should be denied and the Court Order of December 20, 2012 affirmed.

Discussion

Prior to dismissing Defendant's PCRA petition the Court reviewed the *Turner/Finley* letter submitted by defense counsel; conducted an independent review of the entire record; and applied the applicable law. The Court then produced a detailed Opinion explaining the reasoning behind the dismissal. This Court did not abuse its discretion or err in its decision. Many of Defendant's matters complained of on appeal have already been addressed by the Court Order of November 13, 2012, file stamped November 16, 2012 (hereinafter November 13). The Court will kindly direct the Appellate Court to the Order of November 13, 2012 or briefly discuss the issue in turn.

The PCRA Court abused its discretion or erred, in finding that Appellant's objections to the Court's Notice of Intention to Dismiss Appellant's PCRA petition did not set forth any grounds for which relief could be afforded the Appellant and dismissing his PCRA petition.

There was no abuse of discretion committed. In the November 13, 2012 Order the Court analyzed Defendant's assertions, the available transcripts, and the applicable case law in reaching its decision. The Court kindly directs the Appellate Court to the Opinion/Order of November 13, 2012. Defendant did not raise any new or meritorious grounds in his Objections to the Court's Notice of Intention to Dismiss filed on November 30, 2012.

Appellant avers that he was denied Direct Appeal rights in connection with ineffective assistance of counsel, in that, Attorney Travis failed to file a direct appeal, after Appellant had shown Attorney Travis his interest in said appeal, and Attorney Travis disregarded that interest.

> In Pennsylvania, counsel is presumed effective, and a defendant bears the burden of proving otherwise. In order to be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel's action or inaction.

Commonwealth v. Steele, 961 A.2d 786, 796 (Pa. 2008) (citations omitted). Failure to satisfy any prong of this test is fatal to the ineffectiveness of counsel claim. ***Commonwealth v.*** Cooper, 941 A.2d 655, 664 (2007). "It is well established that counsel is presumed effective and the defendant bears the burden of proving ineffectiveness." ***Id.*** As the Court stated in the Order of November 13, 2012, after thorough review of the documentation provided by Defendant the record illustrates that Defendant's counsel at the time did in communicate with Defendant the possibility of taking an appeal. Counsel did advise Defendant that the odds of winning an appeal were not in his favor. Defendant did not produce evidence that affirmatively directed counsel to file an appeal nor was evidence presented where counsel refused to file an appeal. Defendant did not meet his burden of proving ineffectiveness.

Attorney Travis was ineffective in reviewing the plea colloquy, and failing to include the Megan's Law Supplement to the Appellant's guilty plea.

The standard and burden for proving ineffective assistance of counsel is detailed above. Defendant has failed to meet his burden of proving ineffectiveness. After being placed under oath Defendant testified that Attorney Travis was available to him when he was filling out his guilty plea colloquy; he had no difficulty understanding the document; and he was satisfied with Attorney Travis's representation. N.T., 1/21/11, p. 3, 4, 5. On January 21, 2011 the Court also completed an oral guilty plea colloquy with Defendant. "A criminal defendant who decides to

plead guilty has a du ty to answe r questions truthfully." ***Commonwealth v. Cortino***, 387 Pa. Super. 210, 563 A.2d 1259 (Pa. Super. 1989). "W here the record clearly dem onstrates that a guilty plea colloquy is conducted, d uring which it became obvious the defendant understood the nature of the charges against him, the voluntariness of the plea is established." ***Commonwealth v. Lewis***, 430 Pa. Super. 336, 634 A.2d 633 (pa. Super. 1993). Defendant failed to overcome the presumption of effective counsel.

The appellant contends that his guilty plea was not voluntarily, knowingly, intelligently or understandingly made, due to the fact that the guilty plea colloquy was defective and incomplete as per Rule 590 of Pa. R. Crim. P.

Defendant's guilty plea was voluntarily, know ingly, intelligently and understand ingly made. This Court kindly directs the Appellate Court to the Order of N ovember 13, 2012 for the detailed analysis.

The PCRA Court abused its discretion in failing to appoint new PCRA counsel, disregarding Appellant's specific request for said appointment, in his written objections to the Court's notice of intentions to dismiss Appellant's pro se PCRA petition.

There was no abuse in discre tion committed by the Court when Def endant's Motion for Appointment of Counsel was denied via Court Order dated February 28, 2013. The Defendant was not entitled to the appointment of additional counsel; "… the appointment of second counsel after original PCHA counsel has been permitted to withdraw b y *Finley* Disposition is unnecessary and improper." ***Commonwealth v. Maple***, 385 Pa. Super. 14, 559 A.2d 953, 954 (Pa. Super. 1989).

The sentencing court abused its discretion or erred in finding Appellant a sexually violent predator and imposing a lifetime registration upon the Appellant.

This matter is not properly before the Court. Defendant's time for a direct appeal has lapsed making this issue untimely. Additionally Defendant did not address this issue in his PCRA petition.

Appellant seeks re-instatement of his Direct Appeal rights to challenge Megan's law on appeal.

Defendant knowingly, voluntarily, intelligently and understandingly entered a guilty plea on January 21, 2011 due to a plea agreement that defense counsel and the Commonwealth had negotiated. Defendant has not proven ineffective assistance of counsel nor a breakdown in the system that would entitle him to a re-instatement of his Direct Appeal rights or a nun pro tunc appeal.

Appellant contends that his sentence should be vacated and the Appellant be resentenced accordingly.

There is no basis to vacate Defendant's sentence. Defendant's opportunity to appeal the sentence of July 13, 2011 has lapsed. The Order of November 13, 2012 illustrates that Defendant entered into the guilty plea knowingly, voluntarily, intelligently and understandingly. Defendant's sentence was within standard range. The Court kindly directs the Appellate Court to the Court Order of November 13, 2012 for further explanation.

Appellant's due process rights were violated and deprived in that the Appellant did not receive notice of PCRA counsel being appointed.

Defendant received notice as required and pursuant to due process. PCRA counsel was appointed by order dated June 21, 2012 and filestamped June 22, 2012. The Court appointed counsel, the public defender's office; the District Attorney's office; and Defendant were all copied on the order of June 21, 2012. There was no due process violation.

Conclusion

The Court did not err or commit an abuse of discretion when reaching the ultimate determination to dismiss Defendant's PCRA petition. It is understandable that Defendant is presumably unhappy confined to a state correctional institution however that does not equate to Court error. Under the guidance and direction of competent and effective counsel Defendant voluntarily, knowingly, intelligently and understandingly entered into a guilty plea on January 21, 2011. Defendant's appeal should be dismissed and the Court Order of December 20, 2012 should be affirmed.

By the Court,

Joy Reynolds McCoy, Judge

JRM/frs

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