

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP –41-CR-21-2011;
 : CP-41-CR-1011-2012
vs. :
 :
 :
 :
MICHAEL L. SMITH, :
Appellant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's judgment of sentence dated February 1, 2013. The relevant facts follow.

Under Information 21-2011, Appellant was charged with three counts of delivery of a controlled substance, three counts of possession with intent to deliver a controlled substance, and three counts of criminal use of a communication facility as a result of delivering crack cocaine to a confidential informant on September 21, 2010, September 25, 2010, and September 27, 2010 and utilizing a telephone to arrange the transactions.

Under Information 1011-2012, Appellant was charged with three counts of delivery of a controlled substance, three counts of possession with intent to deliver a controlled substance, and three counts of criminal use of a communication facility as a result of delivering crack cocaine to a confidential informant on April 20, 2012, May 11, 2012, and May 18, 2012 and utilizing a cell phone to arrange the transactions.

On February 1, 2013, Appellant pled guilty to one consolidated count of delivery of a controlled substance under Information 21-2011 and two counts of delivery of a

controlled substance under 1011-2012, in exchange for an aggregate sentence of five to ten years of incarceration in a state correctional institution, consisting of two to four years of incarceration for the consolidated count of delivery under Information 21-2011 and eighteen months to three years of incarceration for each delivery conviction under Information 1011-2012. The court then proceeded to sentence Appellant in accordance with the plea agreement.

On February 28, 2013, Appellant filed a notice of appeal. The court directed Appellant to file a concise statement of errors on appeal. Appellant complied and asserted the following issues on appeal: (1) his sentence was excessive; (2) his plea was not knowing, voluntary and intelligent; (3) plea counsel was ineffective because she did not have sufficient time to become familiar with case 21-2011 which was assigned to her on the day of the guilty plea; (4) Appellant is RRRRI eligible and was misinformed by plea counsel regarding the same; and (5) Appellant was coerced into signing the plea agreement and had he taken an open plea, as he initially considered, he would have had more appellate rights.

Appellant first contends that his sentence was excessive. This claim was not properly preserved and, even if it had been, it is frivolous.

A claim that a sentence is excessive challenges its discretionary aspects. Commonwealth v. Rhoads, 8 A.2d 912, 915 (Pa. Super. 2010). “Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings.” Commonwealth v. Lamonda, 52 A.3d 365, 372 (Pa. Super. 2012). Appellant has done neither. Therefore, this claim is waived.

In the alternative, this issue is frivolous. The offense gravity score for each

delivery was a six, and Appellant's prior record score was a five. Therefore, the standard minimum guideline range for each delivery was 21 to 27 months of incarceration. The minimum sentence of two years under Information 21-2011 was in the middle of the standard guideline range, and the minimum sentence of 18 months on each delivery under 1011-2012 was in the mitigated range. Appellant's prior record score of five did not adequately reflect Appellant's significant history of controlled substance and firearm convictions. In fact, if the Pennsylvania sentencing guidelines did not cap the numerical score at five, Appellant's actual prior record score would have been an eight. Moreover, Appellant entered a valid, negotiated plea agreement and the court imposed the agreed upon sentence; therefore, he cannot challenge the discretionary aspects of his sentencing. Commonwealth v. Baney, 860 A.2d 127, 131 (Pa. Super. 2004), appeal denied, 583 Pa. 678, 877 A.2d 359 (2005).

Appellant next asserts that his guilty plea was not knowing, voluntary and intelligent. Again, the court cannot agree.

In order to ensure that a defendant understands the connotations of his plea and its consequences, the court must inquire into the following areas during the plea colloquy: (1) the nature of the charges; (2) the factual basis of the plea; (3) the right to trial by jury; (4) the presumption of innocence; (5) the permissible range of sentences; and (6) the judge's authority to depart from the recommended sentence. Pa.R.Cr.P. 590, comment; Baney, supra.

The record demonstrates that the court covered all six areas. The court advised Appellant that each charge carried a maximum penalty of 10 years of imprisonment and a \$100,000 fine and informed him what the Commonwealth would have to prove to establish those charges. Transcript, at p. 3. Appellant admitted on the record that he sold

crack cocaine to a confidential informant on each of the dates that corresponded to the charges to which he plead guilty, he knew the substance was crack cocaine, and he delivered it to the confidential informant in exchange for money. Transcript, at pp. 8-9. The court also inquired whether Appellant understood all the rights he was giving up by pleading guilty, including the right to proceed to a trial by jury, the right to be presumed innocent, and the right to have the Commonwealth prove his guilt beyond a reasonable doubt. Transcript, at p. 5; Written Guilty Plea, questions 7-9, 12-13, 16. Finally, the court explained to Appellant that the plea agreement was a recommendation that the court was not required to accept, but if it did not Appellant could withdraw his plea of guilty. Transcript at p 4; Written Guilty Plea, questions 3-4

Appellant also asserts that plea counsel was ineffective because she did not have sufficient time to become familiar with case 21-2011, which was assigned to her on the day of the guilty plea. Appellant cannot prevail on this issue for two reasons

First, claims of ineffective assistance of counsel cannot be raised for the first time on appeal, but rather must wait until collateral review under the Post Conviction Relief Act (PCRA). Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002); Commonwealth v. Barnett, 25 A.3d 371, 377 (Pa. Super. 2011).

Second, the court specifically asked Appellant whether he had sufficient time to discuss his case and his decision to plead guilty with his attorney. Although Appellant initially stated that his plea counsel just got the older case that day, he answered the court's question in the affirmative and, in response to further questioning, Appellant indicated that he did not need more time to discuss his charges with his attorney and his attorney answered all of his questions and addressed his concerns. Transcript, at pp. 6-7.

Appellant next avers that he was entitled to a Recidivism Risk Reduction Incentive (RRRI) and he was misinformed by counsel regarding the same.

In his concise statement, Appellant indicates that the District Attorney required him to waive eligibility for RRRI. Such a waiver, however, was not mentioned during the guilty plea colloquy. The Pennsylvania Rules of Criminal Procedure require the parties to state the terms of the plea agreement on the record in open court unless the judge orders, for good cause shown and with the agreement of the parties, that specific conditions in the agreement be placed on the record *in camera* and the record sealed. Pa.R.Cr.P. 590(B)(1). Nowhere in the record is there any mention of Appellant waiving his RRRI eligibility in exchange for his negotiated plea agreement. However, based on Appellant's prior criminal convictions, Appellant would not meet the eligibility requirements for RRRI. See 61 Pa.C.S. §4503 (relating to the definition of an eligible offender).

To be considered an eligible offender, a defendant cannot have any convictions for firearms offenses under Chapter 61 of the Crimes Code. At the sentencing hearing, the prosecutor listed Appellant's prior convictions, which included convictions in 1999 for possession of a firearm without a license and person not to possess a firearm. N.T., at 11-12. Both these offenses are firearms offense under Chapter 61. 18 Pa.C.S. §§6105, 6106. Therefore, Appellant was not eligible for a RRRI minimum sentence.

Appellant asserts that he was coerced into signing the plea agreement and that had he taken an open plea, as he initially considered, he would have had more appellate rights. At the guilty plea hearing Appellant answered several questions in a manner that indicated it was his decision to plead guilty; nobody was forcing him, coercing him or pressuring him into pleading guilty; and nobody had given him any promises or other type of

inducement to make him plead guilty. Transcript, at 5-6; see also Written Guilty Plea, questions 34 and 35. A defendant may not challenge his guilty plea by claiming that he lied while under oath. Commonwealth v. Turetsky, 925 A.2d 876, 881 (Pa. Super. 2007).

Although Appellant's claim that his sentence was excessive would not have been waived if he entered an open plea instead of a negotiated plea, he would not have been in a better position. Instead, he would have been facing the possibility of a much longer sentence. If Appellant had entered an open plea, he would have been required to plead guilty to all the charges; none of the deliveries would have been consolidated into a single count; and the criminal use of a communication facility charges would not have been dismissed. Moreover, in light of Appellant's significant prior criminal history for offenses involving controlled substances and firearms, the court would not have been inclined to impose sentences in the mitigated guideline range.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Aaron Biichle, Esquire (ADA)
Jerry Lynch, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)