

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**MARGARET WHITE,
Defendant**

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**No. CR: 1068-2010; 1167-2010
CRIMINAL DIVISION
PCRA**

OPINION AND ORDER

On April 18, 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 her PCRA Petition, and her Petition should be dismissed.

Background

On January 11, 2011, Margaret White (Defendant) pled guilty under docket number 1167-2010 to Retail Theft, a felony of the third degree;¹ and False Identification to Law Enforcement Authorities, a misdemeanor of the third degree.² Under docket number 1068-2010, the Defendant pled guilty to Possession of a Controlled Substance (cocaine)³ and Possession of Drug Paraphernalia,⁴ both ungraded misdemeanors. The Defendant did not have a plea agreement with the Commonwealth regarding these charges. On March 22, 2011, the Defendant received an aggregate sentence of forty-eight (48) months to twelve (12) years in a State Correctional Institution. The sentence was to be consecutive to any sentence that the Defendant would serve as a result of her technical parole violator status.

¹ 18 Pa.C.S. § 3929(a)(1).

² 18 Pa.C.S. § 4914.

³ 35 P.S. § 780-113(A)(16).

⁴ 35 P.S. § 780-113(A)(32).

On April 20, 2011, the Defendant filed a Notice of Appeal with the Superior Court of Pennsylvania. The only issue raised on appeal was whether the Court abused its discretion when imposing the sentence. On July 17, 2012, the Superior Court affirmed the Defendant's sentence stating that "[w]e cannot conclude that Appellant's sentence for retail theft was 'unreasonable,' or that her other sentences were 'clearly unreasonable.'" Commonwealth v. White, No. 712 MDA 2011 (Pa. Super. filed July 17, 2012). Counsel for the Defendant had filed a Petition to Withdraw pursuant to Anders v. California, 386 U.S. 738 (1967). The Superior Court found that based on their independent review there were no other issues of arguable merit and granted the counsel's Petition for Leave to Withdraw as Counsel.

On February 19, 2013, the Defendant filed a *pro se* Post Conviction Relief Act (PCRA) Petition. The Defendant alleged three (3) issues: 1) the guilty plea was made unknowingly, unintelligently, and involuntary; 2) trial counsel was ineffective for failing to raise sentencing guideline issues when the Court sentenced the Defendant outside the maximum guidelines; and 3) trial counsel was ineffective for failing to reserve issues on appeal. Donald Martino, Esquire was appointed to represent the Defendant for the PCRA Petition. On April 18, 2013, Attorney Martino filed a Motion to Withdraw as Counsel and a Memorandum Pursuant to Turner/Finley. Through his correspondence with the Defendant, five (5) additional issues were raised: 1) trial counsel was ineffective for allowing the Defendant to be sentenced as a Repeat Felony Offender; 2) the trial court improperly accepted the Defendant's guilty plea for Possession of Drug Paraphernalia because a napkin was insufficient for this charge; 3) the charge of False Identification to Law Enforcement should be dismissed; 4) the trial court improperly had the Defendant's sentences run concurrent; and 5) the Defendant is entitled to time credit of nine (9) months and twenty-seven (27) days. 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 trial counsel provided ineffective assistance by coercing the Defendant to plead guilty

The Defendant alleges that her guilty plea was not made knowingly, intelligently or voluntarily. 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 her plea knowingly, voluntarily, and intelligently. This Court informed the Defendant of all the charges and elements the Commonwealth would have to prove beyond a reasonable doubt if the case would go to trial. N.T., January 11, 2011, p. 4-6. The Defendant was told the maximum sentences and fines she would face for pleading guilty. Id. at 5-6. The Defendant gave the Court factual basis for the guilty plea. Id. at 18-20. In addition, the Defendant filled out a written guilty plea colloquy highlighting many of these factors in greater detail, to which she stated she understood.⁵ According to Pennsylvania law, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently.

Further, the Defendant stated on the record that she was not coerced into pleading guilty and that it was her decision:

COURT: Within the last year have you been under the treatment or the care of a doctor for any mental or emotional problems that you think might be affecting what you're doing here right now?

DEFENDANT: No.

COURT: Anyone forcing you or threatening you in [anyway] 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 enough time to speak with Mr. Felix about your case?

⁵ The Court's Order dated January 11, 2011 found that she knowingly, voluntarily and intelligently entered her guilty plea.

DEFENDANT: Yes.

...

COURT: Whose decision is it to plead guilty here today?

DEFENDANT: My own.

Id. at 22-23. Based on the record, the Court finds that the Defendant gave a voluntary, intelligent, and knowing guilty plea.

Whether trial counsel was ineffective for failing to raise sentencing guideline issues when the Court sentenced the Defendant outside the maximum guidelines

The Defendant alleges that her trial counsel was ineffective for not raising the issue that the sentence was outside the maximum guidelines. 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.

The Defendant's allegation that she was sentenced outside the maximum guidelines is without merit. The Defendant was not sentenced outside the maximum guidelines but outside the sentencing guidelines for the charge of Retail Theft. The Superior Court has addressed the Defendant's sentence and found that it was "reasonable." Commonwealth v. White, No. 712 MDA 2011 (Pa. Super. filed July 17, 2012). As the Superior Court has already addressed this

issue and found that the sentence was not improper, this Court finds that the issue raised in the PCRA Petition is also without merit.

Whether trial counsel was ineffective for failure to reserve issues on appeal

The Defendant contends that trial counsel was ineffective for failing to reserve issues on appeal. The Defendant must “establish that counsel inexcusably failed to raise issues that, had they been raised, would have entitled him to relief.” Commonwealth v. Porter, 728 A.2d 890 (Pa. 1999). Further, Pa.R.Crim.P. 902(A) states that the PCRA Petition is to contain the relief requested, the grounds for the relief requested, and the facts supporting each ground.

Here, the Defendant has failed to state any issues her attorney failed to reserve for appeal and show that they would have entitled her to relief. The PCRA Petition merely states that counsel “failed to reserve issues on appeal.” Without a specific allegation or any grounds to support it, this Court must find that this issue is without merit.

In addition, the Superior Court has previously conducted a full examination of the proceeding and determined that there were no issues of arguable merit. When the Superior Court granted counsel’s Petition for Leave to Withdraw as Counsel they reviewed the record and found no additional issues that could have been raised by counsel. Trial counsel cannot be found ineffective as there were no issues with arguable merit found on the record.

Whether trial counsel was ineffective for allowing the Defendant to be sentenced as a Repeat Felony Offender

The Defendant argues that her prior record score is not a Repeat Felony Offender. As indicated by Attorney Martino in his Turner/Finley letter, “Section 303.4 of the Pennsylvania Sentencing Guidelines states, ‘Offenders who have previous convictions or adjudications for felony 1 and/or Felony 2 offenses which total 6 or more in the prior record, and who do not fall

within the Repeat Violent Offender Category, shall be classified in the Repeat Felony 1/Felony 2 Offender Category.’”

Based alone on the three (3) felony one burglary convictions, the Defendant has a prior record score of Repeat Felony Offender. N.T., March 22, 2011, p. 19. In total, the Defendant had been previously convicted fourteen (14) times prior to this case. The Defendant had five previous retail theft convictions, which included a felony. *Id.* at 14. In addition, the Defendant had additional convictions relating to narcotics. Based on the criminal history, the Defendant’s prior record score was properly calculated as a Repeat Felony Offender.

Whether the trial court improperly accepted the Defendant’s guilty plea for Possession of Drug Paraphernalia because a napkin was insufficient for this charge

The Defendant argues that a napkin is not sufficient for the charge of Possession of Drug Paraphernalia. Within Pennsylvania it is prohibited to use or possess with intent to use “drug paraphernalia for the purpose of . . . packing, repacking, storing, containing, concealing” 35 P.S. § 780-113(a)(32).

In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, statements by an owner or by anyone in control of the object concerning its use . . . the proximity of the object, in time and space, to a direct violation of this act, the proximity of the object to controlled substances, the existence of any residue of controlled substance on the object, direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to sue the object to facilitate a violation of this act . . . the existence and scope of legitimate uses for the object in the community, and expert testimony concerning its use.

Commonwealth v. Coleman, 984 A.2d 998, 1001 (Pa. Super. 2009) (citing 35 P.S. § 780-113(a)(32)).

Here, there was sufficient information for the Defendant’s guilty verdict of Possession of Drug Paraphernalia. The Defendant stated that she kept the cocaine in a napkin and that she

knew it was there when police searched it. N.T., January 11, 2011, p. 19-20. Further, police had found the cocaine residue on the napkin. Id. The facts indicate that the Defendant used the napkin to store and conceal the cocaine, which is prohibited by 35 P.S. § 780-113(a)(32).

Whether the charge of False Identification to Law Enforcement should be dismissed

The Defendant requests that her conviction of False Identification to Law Enforcement should be dismissed. To have a claim under the PCRA a Defendant must prove by a preponderance of the evidence:

(2) That the conviction or sentence resulted from one or more of the following:

- (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (v) Deleted.
- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction

42 Pa.C.S. § 9543. Here, the Defendant is not making a claim cognizable under PCRA. In addition, the Defendant stated on the record that she committed the charge of False Identification to Law Enforcement:

COURT: Back on June 19th of 2010 did you go to Sears?

DEFENDANT: Yes, I did.

COURT: Did you take something from them?

DEFENDANT: Yes.

COURT: Did you take it from the shelf and leave the store without paying for it?

DEFENDANT: Yes, Your Honor.

COURT: And would you agree that when they stopped you you didn't give them the right name?

DEFENDANT: Yes, Your Honor, I was scared.

N.T., January 11, 2011, p. 19. The Court finds that this issue is without merit.

Whether the trial court improperly ran the Defendant's sentences consecutively

The Defendant argues that the Court improperly imposed consecutive sentences and that they should have been concurrent. The Defendant, however, pled guilty without a plea agreement. It was within the Court's discretion to make the Defendant's sentence consecutive or concurrent. See Commonwealth v. Diaz, 51 A.3d 884 (Pa. Super. 2012); Commonwealth v. Hill, 2013 PA Super 78 (Pa. Super. 2013) (stating that sentencing is a matter vested in the sound discretion of the sentencing judge). Further, the Superior Court has already address whether the Defendant's sentence was an abuse of discretion. The Court finds that the issue of whether the sentences should not have been concurrent is without merit.

Whether the Defendant is entitled to time credit of nine (9) months and twenty-seven (27) days

The Defendant contends that she is entitled to time credit she served at the Lycoming County Prison. This issue was not raised in the Defendant's PCRA Petition and Attorney Martino's Turner/Finley letter did not disclose the exact dates the Defendant is requesting. The Defendant was in the Lycoming County Courthouse from July 4, 2010 to April 1, 2011, which is a total of eight (8) months and twenty-nine (29) days. The Court is uncertain of where the nine (9) months and twenty-seven (27) days the Defendant is requesting is from.

The Court agrees with Attorney Martino that the Defendant's time at Lycoming County Prison was credited towards a state parole violation. After reviewing the Defendants file and contacting SCI Muncy and the Adult Probation Office of Lycoming County, the Court has found that the dates from March 22, 2011 to April 1, 2011 were credited to a sentence out of Clinton County. The remaining portion of the time was credited towards a Pennsylvania Board of Probation and Parole Detainer for the parole violation. As the Defendant is not entitled to double credit, the Court finds that this issue 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 June, 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 April 18, 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

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