IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1309-2011;**
	:	**CR-1545-2011;**
	:	**CR-118-2012;**
vs.	**:**	**CR-816-2012;**
	:	**CR-2156-2012**
	:	
DONDRE T. McMILLAN,	**:**	**Notice of Intent to Dismiss PCRA &**
Defendant	**:**	**Order Permitting Counsel to Withdraw**

OPINION AND ORDER

This matter came before the court on Dondre McMillan's Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Under Information 1309-2011 McMillan was charged with multiple counts of robbery, one count of theft, one count of simple assault and conspiracy to commit each of these offenses arising out an incident where a pizza delivery person was jumped by at least three males at 460 George Street in South Williamsport on July 24, 2011.

Under Information 1545-2011, McMillan was charged with robbery, kidnapping, conspiracy to commit robbery, possession of a weapon, unlawful restraint and false imprisonment as a result of an incident on August 9, 2011 where a pizza delivery person was robbed, tied up and forced into the rear of his vehicle at 686 Mark Avenue in Williamsport.

Under Information 118-2012, McMillan was charged with aggravated harassment by a prisoner, criminal mischief and harassment for throwing urine on another inmate.

As a result of an incident on April 13, 2012 at the Lycoming County Prison during which McMillan threated to shoot a correctional officer's brother in the face if he saw

him on the street, McMillan was charged with terroristic threats and harassment under Information 816-2012.

McMillan was charged with conspiracy to commit aggravated assault, aggravated assault, assault by a prisoner, simple assault and harassment under Information 2156-2012 as a result of an incident at the Lycoming County Prison where another inmate was punched and kicked in his head and body and then thrown or dragged down a flight of stairs by McMillan and three other inmates.

On January 13, 2013, McMillan pleaded guilty to Count 1, robbery, a felony of the first degree under 1309-2011; Count 1, robbery, a felony of the first degree under 1545-2011; Count 1, aggravated harassment by a prisoner, a felony of the third degree under 118-2012; Count 1, terroristic threats, a misdemeanor of the first degree, under 816-2012, and Count 2, aggravated assault, a felony of the first degree under 2156-2012. In accordance with the negotiated plea agreement, the court imposed an aggregate sentence of four and one-half to nine years of incarceration in a state correctional institution followed by seven years of consecutive probation.[1]

McMillan filed a timely pro se PCRA petition alleging ineffective assistance of counsel in that: (1) he was coerced into taking the plea by the statements of counsel which scared him; (2) he suffers from bi-polar disorder for which he was not receiving medication while he was incarcerated; and (3) some of the charges occurred in the borough of South Williamsport where his attorney was a member of borough council which, according to

[1] The individual sentences were as follows: two to four years of incarceration for robbery under 1309-2011; a concurrent two to four years of incarceration for robbery under 1545-2011; a consecutive two and one-half to five years of incarceration for aggravated assault under 2156-2012; a consecutive four year period of probation for aggravated harassment by a prisoner under 118-2012 and a consecutive three year period of probation for

McMillan, may have resulted in his attorney wanting to see him get time instead of being found not guilty. The court appointed counsel to represent McMillan and gave counsel an opportunity to file either an amended PCRA petition or a no merit letter pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). Counsel filed a Turner/Finley no merit letter, and a motion to withdraw as counsel.

After an independent review of the record, the court finds that McMillan is not entitled to relief on his claims.

To prevail on a claim of ineffective assistance of counsel, a petitioner must plead and prove that the underlying claim is of arguable merit; counsel's actions had no reasonable basis designed to effectuate petitioner's interests; and prejudice, i.e., but for counsel's deficient performance there is a reasonable probability that the results of the proceedings would have been different. Commonwealth v. Baumhammers, 92 A.3d 708, 719 (Pa. 2014). Counsel is presumed effective and the petitioner has the burden of proving otherwise. Commonwealth v. Busanet, 54 A.3d 35, 45 (Pa. 2012). If the petitioner fails to satisfy any of the three prongs, the claim will be denied. Id.

A petitioner must also establish that his claims have not been waived. 42 Pa.C.S.A. §9543(a)(3). For purposes of the PCRA, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post conviction proceeding." 42 Pa.C.S.A. §9544(b).

McMillan's avenues of relief are limited by the fact that he entered a guilty

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terroristic threats under 816-2012.

plea. When a defendant pleads guilty, he waives all claims and defenses other than those sounding in the jurisdiction of the court, the validity of the plea and the legality of his sentence. Commonwealth v. Eisenberg, 98 A.3d 1268, 1275 (Pa. 2014); Commonwealth v. Jones, 929 A.2d 205, 212 (Pa. 2007). A defendant who pleads guilty has a duty to answer questions truthfully. Commonwealth v. Pollard, 832 A.2d 517, 524 (Pa. Super. 2003); Commonwealth v. Cortino, 563 A.2d 1259, 1262 (Pa. Super. 1989). "[W]here the record clearly demonstrates that a guilty plea colloquy is conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established." Commonwealth v. Moser, 921 A.2d 526, 529 (Pa. Super. 2007), quoting Commonwealth v. McCauley, 797 A.2d 920, 922 (Pa. Super. 2001). Furthermore, the "desire of an accused to benefit from a plea bargain is a strong indicator of the voluntariness of his plea." Pollard, 832 A.2d at 524.

McMillan first asserts that he was coerced into pleading guilty because he was scared by counsel's statements that he could get 400 months in jail if he did not plead guilty. In the written guilty plea colloquy, McMillan was specifically asked:

> 34. Has anybody made any promises to you (other than those in the plea agreement), threatened you in any manner, or done or said anything that would force you or put pressure on you to plead guilty?

McMillan's response was "No." McMillan then was asked if his plea of guilty was being given freely and voluntarily without any force, threats, pressure or intimidation and he answered yes. Written Guilty Plea Colloquy, p. 6, question 35. He also was asked if he thoroughly discussed with his attorney all the facts and circumstances surrounding the charges against him and whether he was satisfied with the representation and advice of his

attorney. He answered both of these questions in the affirmative. Written Guilty Plea Colloquy, p.5, questions 24 and 25. Furthermore, during the oral colloquy at his guilty plea hearing, McMillan indicated that he had sufficient time to discuss his plea with his attorney, and he was satisfied with the representation that he provided to him.

Even if McMillan's attorney told him that he could get over 400 months in jail, such would not render his guilty plea coerced or involuntary. The aggregate maximum sentence for the charges to which McMillan pleaded guilty was 72 years or 864 months. Therefore, if he was found guilty of all of these offenses and the court imposed the maximum possible sentence, McMillan could have received a sentence of 432 months to 864 months. This did not include additional charges which were dismissed as a result of the plea agreement and two cab robberies which the Commonwealth elected to not to charge McMillan with due to the plea agreement.

McMillan's plea was knowingly, intelligently and voluntarily entered. The written guilty plea colloquy and the oral colloquy during his plea hearing establish that: (1) McMillan understood the nature of the charges to which he was pleading guilty; (2) there was a factual basis for the guilty plea; (3) he understood he had a right to a jury trial; (4) he understood he was presumed innocent; (5) he was aware of the permissible range of sentences for the crimes charged; and (6) he was aware that the judge was not bound by the terms of the plea agreement unless the judge accepted the agreement.

The court also notes that McMillan received a very favorable plea agreement. The sentences imposed on each charge were either in the mitigated range or at the bottom of the standard sentencing guideline ranges. If these cases had gone to trial, the court could

have imposed a sentence of four and one half to nine years just on the aggravated assault conviction.

McMillan next claims that his counsel was ineffective because McMillan suffered from bi-polar disorder and he was not receiving medication for that condition at the time he entered his guilty plea. This situation was discussed at the guilty plea hearing. Once the court became aware of these facts, it specifically inquired about McMillan's mental condition. In response to inquiries from the court, McMillan indicated that his thinking was okay, he was not in a manic state, he was not hearing voices or anything along those lines and he knew what was going on. McMillan's response to these and other questions showed that he understood his rights and knew what he was doing when he entered his guilty plea. Therefore, McMillan is not entitled to relief on this claim.

McMillan's final claim is that his attorney, as a member of South Williamsport Borough Council, may have had an interest in seeing him go to jail on these charges. McMillan was not prejudiced in any way by his attorney's position on Borough Council. The only charges that occurred in South Williamsport were the charges filed under Information 1309-2011. A pizza delivery person from Old School Pizza in Williamsport was the victim of these crimes, not the South Williamsport Borough. Moreover, even if the sentence for robbery in 1309-2011 was removed from his sentence, McMillan's sentence would not change. The two to four year sentence for robbery under Information 1545-2011 would take its place and his aggregate sentence still would be four and one-half to nine years of incarceration in a state correctional institution.

For the foregoing reasons, the court concludes that McMillan is not entitled

to relief on his claims and an evidentiary hearing is not necessary. Accordingly, the following order is entered.

O R D E R

AND NOW, this ___ day of December 2014, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this court's intention to deny McMillan's PCRA petition without holding an evidentiary hearing. McMillan 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.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
John Gummo, Esquire
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191 Fyock Rd, Indiana PA 15701
Gary Weber, Esquire (Lycoming Reporter)
Work file