IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**CR-1160-2014**
	:	
v.	**:**	
	:	**CRIMINAL DIVISION**
GARREN ROSS BIGELOW,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

On August 14, 2015, the Defendant filed a counseled and timely petition under the Post Conviction Relief Act (PCRA).[1] A court conference for argument on the petition was held on October 23, 2015.

I. Background

A. Convictions and Plea Colloquy

On July 28, 2014, the Defendant pled guilty to Burglary,[2] Endangering Welfare of Children,[3] and Criminal Mischief.[4] The following are the facts established during the oral plea colloquy:

> **Court**: Back on July 3rd of this year, what did you do?
>
> **Defendant**: I went to [the house of the mother of the Defendant's child], and she opened the door for me. And I went in there. And I went in there to ask her to use her phone. We began to fight, and I went outside. She locked me out. I went through the window and took my kid, put her in the car seat, put her in the car and drove off in a storm and went to my house. And that's where I was detained.
>
> **Court**: Okay. Any why do you think that although the child may have been in the car seat the car seat wasn't secured in the car?
>
> **Defendant**: That's what [the testimony of the mother of the Defendant's child] was.

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[1] 42 Pa.C.S. § 9541 et seq.
[2] 18 Pa.C.S. § 3502(a)(1).
[3] 18 Pa.C.S. § 4304(a)(1).
[4] 18 Pa.C.S. § 3304.

Court: Okay.

Defendant: Yeah.

Court: But that's what your [*sic*] pleading guilty to?

Defendant: Yeah.

Court: And you are agreeing that when you went back into the house through the window that you didn't have permission to go in?

Defendant: Correct.

Court: That you intended to commit a crime which would be taking your child without permission?

Defendant: Yeah.

Court: Did you damage property? Did you damage the window in order to be able to go in there?

Defendant: No. It was the air conditioner.

Court: So what property did you damage?

Defendant: None that I know of.

Court: Okay. Well, there's a criminal mischief charge.

Defendant: Or it was a phone. That was a while back.

Court: This would have been the same incident.

Defendant: What was it?

Court: Observed the air conditioner lying on the floor in front of the window, and the curtains were pushed in. There were objects strewn. She had physical injuries on her body. Why was the air conditioner pushed out?

Defendant: Because I went in through the air conditioner.

Court: Okay. So maybe it damaged the window frame or something like that.

Defendant: Did they specifically say what it was for?

Court: No, it doesn't.

Defendant: All right.

Court: I wasn't there, so I don't know. I am going to have to surmise that that's what it was.

Defendant: Okay.

Court: Is that alright with you?

Defendant: Yep.

N.T., 7/28/14, at 4-6.

B. Arguments

The Defendant argues that he is entitled to withdraw his plea because his plea counsel was ineffective. The Defendant argues that his plea counsel was ineffective "in failing to properly advise the Defendant as to the elements of the charge of Burglary and in failing to object to the Court accepting the plea because there was no factual basis for the charge of Burglary." The Defendant contends that he did not commit a crime by taking custody of his natural child because "there was no court order regarding custody and/or visitation of the child." In addition, the Defendant argues that his plea counsel was ineffective "in failing to properly advise him as to the elements of the offense of Endangering the Welfare of a Child" and "in failing to object to the Court accepting the plea to that charge since there was no factual basis for said plea." In support of his argument, the Defendant cites 75 Pa.C.S. § 4581(f), which provides, "The requirements of [the restraint systems subchapter] or evidence of a violation of [the restraint systems subchapter] are not admissible as evidence in a criminal proceeding except in a proceeding for a violation of [the restraint systems subchapter]." During the court conference, the Commonwealth did not present any argument in opposition of the Defendant's petition.

II. Discussion

In Commonwealth v. Roney,[5] the Supreme Court of Pennsylvania discussed ineffective assistance of counsel claims under the PCRA:

> Counsel is presumed effective, and the petitioner bears the burden of proving otherwise. To prevail on an ineffectiveness claim, the petitioner must plead and prove, by a preponderance of the evidence, the following three elements: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice as a result of counsel's action or inaction.

79 A.3d at 604 (citations omitted). "[C]laims of counsel's ineffectiveness in connection with a guilty plea will provide a basis for relief only if the ineffectiveness caused an involuntary or unknowing plea." Commonwealth v. Yager, 685 A.2d 1000, 1004 (Pa. Super. 1996) (citation omitted). "Determining whether a defendant understood the connotations of his plea and its consequences requires an examination of the totality of the circumstances surrounding the plea." Id. (citation omitted).

"A valid plea colloquy must delve into six areas: 1) the nature of the charges, 2) the factual basis for the plea, 3) the right to a jury trial, 4) the presumption of innocence, 5) the sentencing ranges, and 6) the plea court's power to deviate from any recommended sentence." Commonwealth v. Morrison, 878 A.2d 102, 107 (Pa. Super. 2005). "[W]hile the [Pennsylvania Supreme] Court has admonished that a complete failure to inquire into any one of the six, mandatory subjects generally requires reversal . . . in determining the availability of a remedy in the event of a deficient colloquy, it has in more recent cases moved to a more general assessment of the knowing, voluntary, and intelligent character of the plea, considered on the totality of the circumstances." Commonwealth v. Flanagan, 854 A.2d 489, 500 (Pa. 2004) (citations omitted). "[E]ven though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not

[5] 79 A.3d 595 (Pa. 2013).

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. Yeomans, 24 A.3d 1044, 1047 (Pa. Super. 2011) (quoting Commonwealth v. Fluharty, 632 A.2d 312, 313 (Pa. Super. 1993)). "A person who elects to plead guilty is bound by the statements he makes in open court while under oath and he may not later assert grounds for withdrawing the plea which contradict the statements he made at his plea colloquy." Commonwealth v. Turetsky, 925 A.2d 876, 881 (Pa. Super. 2007) (citations omitted).

A. The Burglary Plea is not Invalid Because, During the Plea Colloquy, the Defendant Stated that he Understood the Intent Element Before he Stated that he Wished to Plead Guilty to Burglary.

"Under Pennsylvania law the crime of burglary is defined as an unauthorized entry with the intent to commit a crime after entry." Commonwealth v. Alston, 651 A.2d 1092, 1094 (Pa. 1994) (citing 18 Pa.C.S. § 3502). Here, the oral colloquy did not establish a factual basis for Burglary because it did not establish that the Defendant entered the house with intent to commit a crime. However, the lack of an establishment of a factual basis during the colloquy does not make the Burglary plea invalid because the circumstances surrounding 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. During the plea colloquy, the Court stated the following as elements of Burglary: "that you went into a building or occupied structure or separately secured or occupied structure with the intent to commit a crime inside." N.T., 7/28/14, at 2-3. After the Court stated the elements, the following exchange occurred:

> **Court**: Sir, do you understand the elements of these offenses and what their individual maximums are?
>
> **Defendant**: Yes, Your Honor.

Id. at 3. Later in the colloquy, the Court asked the Defendant, "[H]ow do you wish to plead to the burglary . . . ?" The Defendant responded, "Guilty, Your Honor." Id. at 4. The Defendant's statements show that he understood the intent element of Burglary before he pled guilty. Therefore, his Burglary plea is not invalid.

B. Whether the Defendant Knew and Understood the Content of 75 Pa.C.S. § 4581(f) is a Material Issue of Fact.

For Endangering the Welfare of Children, "the Commonwealth must prove that: 1) the accused is aware of his or her duty to protect the child; 2) the accused is aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and 3) the accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare." Commonwealth v. Martir, 712 A.2d 327, 328-29 (Pa. Super. 1998). "The requirements of [the restraint systems subchapter] or evidence of a violation of [the restraint systems subchapter] are not admissible as evidence in a criminal proceeding except in a proceeding for a violation of [the restraint systems subchapter]." 75 Pa.C.S. § 4581(f). "[E]vidence of the use or misuse of a child safety seat for a child under four years of age is inadmissible in a criminal proceeding." Commonwealth v. Engle, 847 A.2d 88, 92 (Pa. Super. 2004).

Here, the oral colloquy established that the Defendant drove in a storm with his child, who was in a car seat that was not properly secured. Under 75 Pa.C.S. § 4581(f), the improper use of the car seat cannot be used as evidence of Endangering the Welfare of Children. Driving

in a storm with a child in the vehicle is not sufficient to establish Endangering the Welfare of Children. Neither facts about the storm nor facts about the Defendant's manner of driving were established during the oral colloquy.

The content of 75 Pa.C.S. § 4581(f) was not mentioned during the oral colloquy, so there is no record of whether the Defendant knew and understood the content. Whether the Defendant knew and understood the content of 75 Pa.C.S. § 4581(f) is a material issue of fact since it was not mentioned during the colloquy, and a factual basis distinct from the misuse of the car seat was not established. Therefore, the Court will hold a hearing on the issue. See Pa. R. Crim. P. 908(A)(2) (providing that "the judge shall order a hearing . . . when the petition for post-conviction relief . . . raises material issues of fact").

III. Conclusion

Whether the Defendant knew and understood the content of 75 Pa.C.S. § 4581(f) is a material issue of fact. Therefore, the Court will hold a hearing to determine whether the Defendant knew and understood the content.

ORDER

AND NOW, this _____ day of December, 2015, based upon the foregoing opinion, it is ORDERED and DIRECTED that a PCRA hearing is hereby scheduled for **February 4, 2016 at 1:30 p.m.** in Courtroom #1 of the Lycoming County Courthouse.

By the Court,

Nancy L. Butts, President Judge