IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-21-2011;**
	:	**CP-41-CR-1011-2012**
vs.	:	
	:	
	:	
MICHAEL LAQUAY SMITH,	:	
Defendant	:	

OPINION AND ORDER

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

Under Information 21-2011, Defendant 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.

Defendant was initially represented by an assistant public defender, but he hired Michael Morrone to represent him in May 2011. Defendant, however, was not meeting his financial obligations to Mr. Morrone, and Mr. Morrone was permitted to withdraw on January 28, 2013.

Under Information 1011-2012, Defendant 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. Defendant committed these offenses while he was released on bail on the other case.[1]

Amy Boring was appointed to represent Defendant in case 1011-2012. After the court granted Mr. Morrone's motion to withdraw, Ms. Boring represented Defendant on case 21-2011 as well.

On February 1, 2013, Defendant pled guilty to a 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

[1] After Defendant committed the first set of charges, he decided to cooperate with the Commonwealth. By agreement of the parties, Defendant's bail was reduced and he was released from incarceration.

months to three years of incarceration for each delivery conviction under 1011-2012. The court sentenced Defendant in accordance with the plea agreement.

Defendant filed an appeal claiming that: his sentence was excessive; his plea was not knowing, voluntary and intelligent; his plea counsel was ineffective because she did not have sufficient time to become familiar with case 21-2011; he was eligible for RRRI but was misinformed by plea counsel; and he was coerced into signing the plea agreement and if he had taken an open plea, as he initially considered, he would have had more appellate rights. The court addressed all these issues in its 1925(a) Opinion. Defendant's appeal, however, was dismissed by the Superior Court on November 8, 2013, and the record was remanded on December 16, 2013.

Defendant filed a timely PCRA petition in which he alleged that Mr. Morrone

was ineffective for advising him that he would not be eligible for boot camp due to his age, and if he had been properly advised of his boot camp eligibility he would not have accepted the global plea precluding him from that possibility and, instead, would have entered an open plea.

The court held a hearing at which Ms. Boring, Mr. Morrone, and Defendant testified.

Ms. Boring testified that she began representing Defendant in case 1011-2012 in July 2012. She was orally appointed to represent Defendant in case 21-2011 at the pretrial conference on February 1, 2013, which would have been the day that Defendant pled guilty. As with any criminal defendant, Ms. Boring discussed all options with Defendant. Ms. Boring also noted that Defendant required more time and attention than any other client she had. She spoke to Ms. Kalaus, an assistant district attorney, about a plea agreement and a global offer on both cases, but boot camp "was not something that was on the table."

In case 1011-2012, she sent Defendant a letter dated January 8, 2013 (which was admitted as Commonwealth Exhibit 1), in which she advised Defendant that the current offer for case 1011-2012 was "for a term of 3-6

years, no RRRI or boot camp eligibility." She informed Defendant that his application for Drug Court had been denied previously on more than one occasion and the DA's office indicated that it did not intend to approve him for the program. She also informed Defendant that the standard guideline range for each count of delivery of controlled substance was 21-27 months and each count of criminal use of a communication facility was 12-18 months. Defendant was charged with three counts of each offense. If he was found guilty of all counts, he would face a minimum sentence in the range of 99-135 months. She indicated that she believed the offer was going to be the best one made on these charges. She also noted that Defendant suggested an open plea and letting the court determine his sentence, but she did not recommend that Defendant make an open plea.

Ms. Boring testified that she would have talked to Defendant about boot camp, but she did not recall what she told him other than what was in the letters she sent to him.

Ms. Boring sent Defendant another letter dated January 31, 2013, which was admitted as part of Defendant's Exhibit 1. In that letter, Ms. Boring noted that Defendant had a pre-trial conference on February 1, 2013 and at

the conference she would need to advise the court whether he would be entering a plea or proceeding with trial. She again noted that the DA's offer was to plead guilty to two of the three delivery counts for a sentence of 3-6 years and no RRRI or boot camp eligibility. She explained that the offer was in the mitigated range due to his cooperation, it was the DA's final offer, and the case would proceed to trial if the offer was not accepted. She believed the DA had a strong case against Defendant. She also noted that delivery in a school zone carried a two year mandatory sentence, and for three delivery offenses, he faced a mandatory minimum sentence of six years with no RRRI and boot camp eligibility.

Mr. Morrone testified that he represented Defendant in case 21-2011, but he withdrew from representing him. He filed three motions to withdraw because he wasn't being paid – one in March 2012, one in August 2012, and one in January 2013. He did not recall when the motion was granted until defense counsel showed him the order dated January 28, 2013. He also testified that he thought an earlier motion had been denied because the court wanted to hear from Defendant but he was not present for the hearing on the motion.

Mr. Morrone testified that he was not aware that the age for eligibility for boot camp changed in September 2012. Mr. Morrone did not believe that he discussed boot camp with Defendant. They discussed Defendant's cooperation and an offer of 1-2 years, but Defendant got the new charges and the DA withdrew the offer.

Mr. Morrone also testified that he would not have told Defendant that he was not eligible for boot camp due to his age. Mr. Morrone did not know the eligibility age. If the DA did not specifically preclude boot camp in the plea agreement, he would argue for it and make the Commonwealth show that the defendant was not eligible or leave it up to the judge to determine that the defendant was not eligible.

On cross-examination, Mr. Morrone was shown and questioned about a series of letters between him and Defendant. He testified that Commonwealth Exhibit 2 was a letter he received from Defendant after Ms. Boring was appointed to represent Defendant in the other case and before he was granted leave to withdraw by Judge Butts. In the letter, among other things, Defendant indicates that he has been trying to work out a global offer with all his cases and he asks Mr. Morrone to contact Ms. Boring about this

matter. Mr. Morrone was then shown a letter he wrote to Defendant dated October 12, 2012, in which he stated "I must advise that since you have new counsel, it would be unethical of me to advise you any further in this matter. Please consult with your new attorney regarding your cases." In a letter postmarked January 9, 2013, Defendant responded that he was told Mr. Morrone was still his lawyer. He noted that a year ago he was supposed to take a plea of 1-2 years and he told Mr. Morrone to get him into court so he could "sign off on that deal." He also asked Mr. Morrone why he couldn't pass the case along to Ms. Boring so Defendant could work on a global plea agreement.

Mr. Morrone also was shown Commonwealth Exhibit 5, which contained a series of emails about Defendant's cases. The email dated July 9, 2012 from Eileen Dgien, the Deputy Court Administrator, indicated that Defendant was supposed to plead in case 21-2011 on Friday but he did not because of new charges and case 21-2011 was being moved from August 31 to July 16 so that it could be tracked with Defendant's new case, which was scheduled for arraignment on July 16, 2012.

Defendant testified that he was represented by Mr. Morrone in

his 2011 case and Ms. Boring in his 2012 case. Defendant said he wanted to get boot camp. He knew it was a good program and he needed as many programs as he could get. Defendant also indicated that he thought boot camp would help him with his drug problems.

Defendant testified that he talked to Mr. Morrone about boot camp and he told him that the age limit was 35. Mr. Morrone told him that the plea offer was 1-2 years when he was out of jail before he got the second set of charges. He was still getting high and he wasn't seeking help. Defendant testified that he was willing to take the deal. He asked Mr. Morrone if he would get boot camp with that. Mr. Morrone came out of a meeting and said that the case was being continued. Defendant asked, "What about boot camp?' According to Defendant, Mr. Morrone replied, "They do not want you to go to boot camp. They want you to waive it." Defendant said he didn't really push for boot camp at that time, because he was still getting high.

Defendant also testified that he talked to Ms. Boring about boot camp, and she also told him that the age limit was 35. He was 34 years old when he was discussing his plea options with Ms. Boring. Defendant testified that he was hesitant and did not want to take the plea agreement, because by

the time he would get his three years in, he would be over 35 and no longer eligible for boot camp. He was going to plead open and go with the judge. Ms. Boring said he would not make it because, when he would finally become eligible, he would be past the age limit. Ms. Boring also told him that if he did not take the plea agreement he was risking getting more time. She advised him if he entered an open plea that the judge could give him more time than what the DA was offering.

Defendant stated that he became aware that the age limit increased when he was at Camp Hill and somebody who was 36 years old got into the program. Defendant testified that if he knew the age limit was 40 he would have taken the risk with the judge and pled open. He thought 5 to 10 years was a lot of time, and if he would have pled open he would have received less time.

Defendant also believed that he could get boot camp if his sentence was 4 to 8 years or 5 to 10 years. He testified when he met with Ms. Boring on the day of the plea, she told him that the global offer was 5-10 years. Defendant asked her about boot camp and she said that by the time he could be placed on it he would be too old. She did not say that a 5-10 year sentence

would make him ineligible. She said he had to have no more than two years left on his minimum sentence.

In order to obtain relief pursuant to the PCRA, a petitioner must establish by a preponderance of the evidence that his conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa. C.S. § 9543 (a) (2). *Commonwealth v. Reid*, 99 A.3d 427, 435 (Pa. 2014). Such enumerated circumstances include ineffectiveness of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa. C.S. § 9543 (a) (2)(ii).

To succeed on an ineffectiveness claim, a petitioner must prove that: (1) the underlying legal claim has arguable merit; (2) that counsel had no reasonable basis for his act or omission; and (3) that the petitioner suffered prejudice as a result. *Commonwealth v. Baumhammers*, 92 A.3d 708, 719 (Pa. 2014) (citing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987)). To establish prejudice in the context of a guilty plea, a defendant must prove that he would not have pleaded guilty and would have achieved a better outcome at trial. *Commonwealth v. Fears*, 86 A.3d 795, 807 (Pa. 2014)(citing *Commonwealth v. Malloy*, 596 Pa. 172, 941 A.2d 686, 703 (Pa. 2008)(emphasis

omitted)); see also *Commonwealth v. Lippert*, 85 A.3d 1095, 1100 (Pa. Super. 2014)(to establish prejudice the defendant must show that there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial).

In his PCRA petition and his certification, Defendant alleged that Mr. Morrone was ineffective for advising him that the age limit for boot camp was 35 years old. The court cannot agree for several reasons.

First, the court is not convinced that Mr. Morrone told Defendant what the age limit was for boot camp. Mr. Morrone credibly testified that he did not know what the age limit for boot camp was. Such an admission in this case lends credence to Mr. Morrone's testimony. Why would an attorney who practices criminal law admit to such a lack of knowledge if it were not true?

Second, by Defendant's own testimony, Mr. Morrone advised him that the age limit was 35 in June or July 2012 before he was incarcerated on the second set of charges.[2] At that time, the age limit was 35. The age limit did not increase to 40 until September 4, 2012, when 61 Pa.C.S. §3903 was

[2] According to docket sheet from the Magisterial District Judge (MDJ) filed of record in this case, Defendant was incarcerated on the charges in case 1011-2012 on May 18, 2012, when he could not post the bail that was set at his preliminary arraignment.

amended by Act 122 of 2012, which was approved by the Governor on July 5, 2012 and became effective in 60 days. Therefore, even if Mr. Morrone advised Defendant that the age limit was 35, he had a reasonable basis for doing so and Defendant's claim that Mr. Morrone gave him incorrect advice lacks merit.

Third, Defendant was not prejudiced. Defendant was not going to take these cases to trial. He repeatedly testified that if he had been told the age limit was 40 he would have entered an open plea. Furthermore, Defendant has not shown that there is a reasonable probability that he would have achieved the outcome that he seeks, i.e., a sentence that would have made him eligible for boot camp. It is readily apparent from the record that the Commonwealth would not give Defendant a plea agreement where he would be eligible for boot camp. Both Ms. Boring and Mr. Morrone advised him of this fact on one or more occasions.

It is equally apparent that Defendant had totally unrealistic expectations for either a plea agreement or the sentence he would receive if he entered an open plea. The Commonwealth offered Defendant a plea agreement of 1-2 years because of his cooperation when he was only facing

the charges in case 21-2011. There were three delivery offenses and three criminal use of a communications facility charges on which, in the worst case scenario, he could have received six consecutive sentences. The offense gravity score for each delivery was 6. Defendant's prior record score was a 5. The standard guideline range for a single delivery was 21-27 months and the mitigated range was 15-21 months. The Commonwealth offered Defendant a plea agreement with a minimum of 1 year (or 12 months) which was below even the mitigated range for a single delivery. Instead of being satisfied with this great plea offer and snatching it up at the first available opportunity, Defendant wanted (and apparently unrealistically expected) to get drug court or boot camp, which the Commonwealth was ***never*** willing to give him.

Even after he was charged with the second set of charges, Defendant persisted in trying to get drug court. In a letter to Mr. Morrone, Defendant stated, "I need a Global [sic] offer; I would take a ten year IP [intermediate punishment] with drug court." Commonwealth Exhibit 2. In her letter dated January 8, 2013, Mr. Boring stated to Defendant: "As we discussed on the above date, the current offer in the above-referenced case is for a term of 3-6 years, no RRRI or boot camp eligibility. Your application to Drug Court

has been denied previously on more than one occasion and the DA's office has indicated that it does not intend to approve you for the program." Commonwealth Exhibit 1. Even if Defendant had entered an open guilty p to all the charges, the court would not have made him boot camp eligible under the facts and circumstances of this case.

An eligible inmate for boot camp is a

> person sentenced to a term of confinement under the jurisdiction of the Department of Corrections who is serving a term of confinement, the minimum of which is not more than two years and the maximum of which is five years or less, or an inmate who is serving a term of confinement, the minimum of which is not more than three years where that inmate is within two years of completing his minimum term, and who has not reached 40 years of age at the time he is approved for participation in the motivational boot camp program.

61 Pa.C.S.A. §3903.

Absent the plea agreement, Defendant was facing six delivery charges and six charges of criminal use of a communication facility. In an open plea, Defendant would have been required to plead guilty to all of those charges.

The substance delivered was cocaine. The typical standard range minimum sentence on each delivery was 21 to 27 months. Furthermore,

according to Ms. Boring's letter dated January 31, 2013, (which was admitted as part of Defendant's Exhibit 1) at least three of the deliveries carried a two year mandatory minimum sentence due to the deliveries occurring within a school zone.[3] Generally, the maximum sentence for delivery of cocaine is 10 years. Where, as here, a defendant has a prior conviction for delivery or possession with intent to deliver,[4] however, the individual may be imprisoned for a term up to twice the term otherwise authorized. 35 P.S. §780-115. Therefore, Defendant had the risk that the court would double the minimum guideline range to 42 to 54 months and the maximum to 20 years on each delivery offense. *Id.*; see also *Commonwealth v. Warren*, 84 A.3d 1092 (Pa. Super. 2014).

In order for Defendant to be eligible for boot camp, the court would have had to impose concurrent sentences on all of the deliveries and not double the

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[3] Defendant entered his guilty plea on February 1, 2013, before the United States Supreme Court issued its decision on June 17, 2013 in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), which held that a defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any facts which trigger the imposition of a mandatory minimum sentence. The issue of whether the mandatory sentence is severable from the portions of the Pennsylvania statutes that provided for the trial judge to determine those facts by a preponderance of the evidence is currently before the Pennsylvania Supreme Court.

[4] In addition to numerous other convictions, Defendant had a 1996 conviction for possession with intent to deliver (PWID), and a 1999 conviction for PWID. N.T., February 1, 2013, at 11.

minimum guideline range. That just was not going to happen in this case. Although the court would not have considered doubling the guideline range prior to reading the *Warren* case, the court was not going to give Defendant a volume discount. Even if the court imposed only two consecutive sentences for delivery at the very bottom of the standard range, Defendant's minimum sentence would be 42 months and he would not have been eligible for boot camp.

Defendant had an extensive prior criminal record. N.T., February 1, 2013, at 11-12. His prior record score was a five only because the sentencing guidelines do not allow a numerical score higher than five. Otherwise, Defendant's prior record score likely would have been a ten.[5] As a result of Defendant's prior contacts with the criminal justice system, Defendant would have had several opportunities in the past to see the error of his ways, rehabilitate, and stop committing crimes, but he did not do so. Defendant also committed the crimes in case 1011-2012 while he was released on bail in case 21-2011. These facts and circumstances are the type of factors that the

[5] The 1996 PWID, 1997 criminal attempt PWID, and 1999 PWID would be two points each, or six points. The 1999 persons not to possess a firearm would probably be a second degree felony based on Defendant's previous felony drug convictions, which would be an additional two points. Defendant's six misdemeanor convictions would be another two points.

Commonwealth argues or the court cites as reasons for an aggravated range sentence.

In light of these facts and circumstances, the court would not have imposed a minimum sentence below the guidelines or in the mitigated range of the sentencing guidelines like Defendant received on each of his three deliveries pursuant to the plea agreement, or imposed concurrent sentences on all of the deliveries. Therefore, Defendant would not have received a sentence that would have made him eligible for boot camp.

Defendant recognized that the court probably would not "go wild" and sentence him to what he believed was the highest possible sentence of 30 to 60 years for the delivery offenses or anything approaching that long of a sentence. What Defendant fails or refuses to acknowledge, however, is that it was equally unlikely that the court would go to the opposite end of the spectrum and impose a minimum sentence of 3 years or less.

The court acknowledges that if Defendant had entered an open plea and the court imposed a sentence the length of which would have precluded him from being eligible for boot camp Defendant would have been able to file a motion for reconsideration or an appeal. The likelihood of

success in pursuing either avenue, though, would be slim.

There is a distinct possibility that neither the Pennsylvania Superior Court nor the Supreme Court would review Defendant's claims on the merits. The imposition of consecutive sentences involves discretionary aspects of sentencing. When the issue presented on appeal involves discretionary aspects of sentencing, the litigant must petition the Superior Court for allowance of appeal and there is no opportunity for further review in the Supreme Court. 42 Pa.C.S.A. §9781; *Commonwealth v. Taylor*, 104 A.3d 479, 488-489 (Pa. 2014). The Superior Court can only grant allowance of appeal in such claim when the litigant presents a substantial question that the sentence imposed is not appropriate under Sentencing Code. 42 Pa.C.S.A. §9781(b). "To demonstrate that a substantial question exists, a party must articulate reasons why a particular sentence raises doubts that the trial court did not properly consider [the] general guidelines provided by the legislature [in 42 Pa.C.S. §9721]." *Commonwealth v. Koehler*, 737 A.2d 225, 244 (Pa. 2000)(citing *Commonwealth v. Siranchak*, 544 Pa. 158, 177, 675 A.2d 268, 277 (1996), cert. denied, 519 U.S. 1061, 136 L.Ed.2d 617, 117 S.Ct. 695 (1997)).

In imposing a sentence, a court shall follow "the general principle

that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S.A. §9721(b). These factors include the nature and circumstances of the offense and the history and characteristics of the defendant. Furthermore, section 9721(a) specifically gives the trial court discretion to impose consecutive sentences of total confinement. 42 Pa.C.S.A. §9721(a); see also *Commonwealth v. Walls*, 926 A.2d 956 (Pa. 2007); *Commonwealth v. Prisk*, 13 A.3d 526, 533 (Pa. Super. 2011)(upholding a sentence of 633 to 1500 years' incarceration for convictions on 314 offenses related to appellant sexually abusing his stepdaughter over the course of six years).

These are precisely the type of factors that the court listed in this opinion when it stated that it was unlikely that Defendant would receive a minimum sentence of three years or less such that he would be eligible for boot camp.

During the hearing Defendant asked to amend his PCRA petition to add a claim that Ms. Boring also was ineffective for advising him that the

age limit for boot camp eligibility was 35. The court would permit Defendant to orally amend his claim, because the court believes the one year time period for filing a PCRA petition had not yet expired when defense counsel made the request and amendments to PCRA petitions are to be liberally allowed. Nevertheless, the court does not believe such an amendment would entitle Defendant to relief.

The court does not believe that Ms. Boring informed Defendant that the age limit was 35. Ms. Boring never mentioned Defendant's age as a prohibiting factor in her letters. Instead, she informed Defendant that the Commonwealth's plea offer did not include RRRI or boot camp eligibility and, if Defendant did not plead guilty, the length of his sentence due to the potential imposition of three consecutive mandatory minimum sentences of two years each would preclude him from being eligible for boot camp.[6]

Defendant also never mentioned in either his PCRA petition or his certification that Ms. Boring improperly advised him of the age limit for boot

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[6] Both Ms. Boring and the Commonwealth's attorney were incorrect to the extent that they indicated or implied that a single school zone mandatory would preclude Defendant from boot camp eligibility. The only drug convictions or penalties that preclude an individual from meeting the definition of an eligible inmate are the highest weight mandatories found in 18 Pa.C.S. §7508(a)(1)(iii), (2)(iii), (3)(iii) or (4)(iii). 61 Pa.C.S.A. §3903.

camp. In his testimony, Defendant explained that a person at the prison was helping him and he did not know when that person was filling the papers out if it got switched up or what. The court did not find this explanation credible.

The phrase "switched up" implies that the person incorrectly wrote Mr. Morrone's name instead of Ms. Boring's. In other portions of his testimony, however, Defendant claimed that both attorneys advised him of the wrong age limit. Furthermore, Defendant heard his attorney ask Mr. Morrone if he was aware that the age of boot camp changed in September 2012. It seemed like Defendant's explanation was made up on the

spur of the moment, as if Defendant realized during his former attorneys' testimony that his recollections of his contacts with Mr. Morrone and the letters that were exchanged between them showed that any plea discussions with Mr. Morrone would have occurred before the age limit was raised to 40 and for him to have any chance of succeeding on his petition he had to claim that Ms. Boring also advised him of the wrong age limit.

As previously noted in this opinion, the court also does not believe Defendant has shown prejudice.

ORDER

AND NOW, this ___ day of May 2015, the court denies Defendant's PCRA petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirements set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the

order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Jerry Lynch, Esquire
Michael L. Smith, KX 5822 (certified mail)
SCI Somerset, 1600 Walters Mill Rd, Somerset PA 15510-0001
Work file