IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-2198-2016**
	:	
	:	
CLINTON ALLEN GEIST,	:	
Appellant	:	
	:	**1925(a) Opinion**

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

Appellant was charged by Information filed on December 23, 2016 with possession of a controlled substance (heroin) and possession of drug paraphernalia. On July 14, 2017, the court accepted as knowing, voluntary and intelligent, Appellant's plea of guilty to both counts. Following Appellant's plea, the court revoked Appellant's bail, concerned that he had not satisfactorily addressed his substance abuse problem, but made him eligible to be placed on the jail to treatment program. The court requested that he be assessed to determine whether he could be placed in an appropriate treatment facility.

Appellant filed a motion to modify bail on July 27, 2017. Appellant indicated that his bail was revoked "due to being intoxicated" and that he still had "treatment needs" that should be addressed outside of the prison setting.

On September 23, 2017, Appellant was sentenced to an aggregate term of twenty-two (22) months to four (4) years' incarceration in a state correctional institution, consisting of sixteen (16) months to three (3) years for possession of a controlled substance and six (6) months to one (1) year for possession of drug paraphernalia. Appellant filed a timely motion for sentence reconsideration asserting that his sentence was excessive and

unduly harsh. Appellant argued that there were treatment options readily available to him that were not argued or considered at the time of the sentencing and that he would "much greater benefit" from rehabilitation options such as medically assisted treatment instead of a state sentence. The court summarily denied Appellant's motion for sentence reconsideration.

Appellant filed a notice of appeal on October 12, 2017. The court ordered that Appellant file a concise statement of matters complained of on appeal. On November 2, 2017, Appellant filed his concise statement in which he asserted that the court "erred in accepting his [g]uilty [p]lea of July 14, 201[7], in that it was not voluntarily and understandingly tendered." Appellant contended that his "level of intoxication, which he believes was plainly visible, should have precluded the [c]ourt from accepting his plea of guilty."

Appellant did not raise before the court either during his guilty plea, during his sentencing or in his motion to reconsider, any issue related to the voluntary or understanding nature of his guilty plea.

In ***Commonwealth v. Lincoln***, 72 A.3d 606 (Pa. Super. 2013), the Superior Court held that a "defendant wishing to challenge the voluntariness of a guilty plea on direct appeal must either object during the plea colloquy or file a motion to withdraw the plea within ten days of sentencing. Failure to employ either measure results in waiver." ***Id.*** at 609-610 (citation omitted). As the court explained, the failure to present a ground for withdrawing a guilty plea before the lower court results in waiver since it is the role of the court which accepted the plea to consider and correct, in the first instance, any error which may have been committed. ***Id.*** at 610.

Accordingly, Appellant's sole issue on appeal regarding the voluntary and understanding nature of his plea is waived. See also Pa. R. App. P. 302 (a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.")

Even if Appellant's claim has not been waived, it is without merit. To determine whether a guilty plea was entered knowingly and intelligently, a reviewing court must review all of the circumstances surrounding the entry of the plea. ***Commonwealth v. Mitchell***, 105 A.3d 1257, 1272 (Pa. 2014). "The law does not require that an appellant be pleased with the results of the decision to enter a plea of guilty; rather '[a]ll that is required is that appellant's decision to plead guilty be knowingly, voluntarily and intelligently made.'" ***Commonwealth v. Brown***, 48 A.3d 1275, 1277 (Pa. Super. 2012)(quoting ***Commonwealth v. Moser***, 921 A.2d 526, 528-29 (Pa. Super. 2007)). "Where the record clearly demonstrates that a guilty plea colloquy was 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. Lewis, 634 A.2d 633, 635 (Pa. Super. 1993).

Prior to entering his guilty plea on July 14, 2017, Appellant completed a written guilty plea colloquy form. The cover sheet of the guilty plea colloquy form clearly sets forth the charges to which Appellant was to plead guilty, and notes that it is an open plea.[1] In the body of the guilty plea colloquy, Appellant noted that he was pleading guilty to "take responsibility." (Written Guilty Plea Colloquy ("Colloquy"), Question 22). Appellant

[1] The guilty plea colloquy incorrectly lists the maximum penalty and fine for Count 1 as one year and $5,000. It should have been three years and $25,000 as Appellant had prior convictions for possession of a controlled substance. 35 P.S. §780-113(b). However, Appellant is only challenging his guilty plea due to his alleged intoxication.

also stated that he had thoroughly discussed his case with his attorney, that he was satisfied with the representation of his attorney, and that his guilty plea was "given freely and voluntarily without any force, threats, pressure or intimidation." (Colloquy, questions 24, 25 and 35).

During his guilty plea hearing, Appellant understood that a likely scenario was somewhere within the standard range of 6 to 16 months. Guilty Plea Hearing Transcript ("Plea Transcript"), July 14, 2017, at 4. He indicated that all of his answers on the guilty plea colloquy form were true and correct, that he understood all of the rights he was giving up in pleading guilty, that it was his individual decision to plead guilty, that he was not forced or pressured into pleading guilty, that he had sufficient time to talk about his case in general, his decision to plead guilty and the consequences of pleading guilty with his attorney, that his attorney had done nothing wrong or failed to do anything which in anyway caused him to plead guilty, that he was satisfied with the representation of his attorney and that he had no questions of the court. (Plea Transcript, at 5-7). Importantly, he specifically noted that he was not taking any substance and did not suffer from any mental, emotional or physical condition that would cause him not to understand what was going on. (Plea Transcript, at 2).

Once the court indicated that it may proceed to sentencing, however, the matters became more muddled. Appellant indicated in detail what steps he was taking to address his prior substance abuse. These steps included counseling, inpatient rehabilitation, aftercare, and 12-step meetings. (Plea Transcript, at 10-11).

In deciding whether Appellant would be released on bail, however, the court indicated that it would need to have Appellant's urine tested. As the court noted:

> "If you're clean, we're done. If you're not clean, we're going to have to deal with it a different way, okay?" (Plea Transcript, at 12).

After Appellant provided a urine specimen, he returned to the courtroom and indicated that he "had a slip up" after his ex-girlfriend died "on Sunday." (Plea Transcript, at 15). He indicated that he used "hemp oil to try to alleviate some of the pain." (Plea Transcript, at 15). He also indicated that he took a morphine pill. (Plea Transcript, at 15). After some back and forth, Appellant admitted taking a morphine pill two days earlier. (Plea Transcript, at 18).

The court asked if Appellant had taken anything recently because Appellant "certainly appear[ed] to [the court] to be under the influence [then]." (Plea Transcript, at 18). Appellant claimed he took his medication in the morning before he came to court and that it wasn't his intention to make anyone think he was under the influence or "anything like that." (Plea Transcript, at 18). When the court indicated to Appellant that his bail would be revoked, Appellant continued to insist that it was "one slip up." (Plea Transcript, at 20, 22).

Manifest injustice is required to withdraw a guilty plea which is requested after a sentence has been imposed. ***Commonwealth v. Flick***, 802 A.2d 620, 623 (Pa. Super. 2002). Such a manifest injustice occurs when a plea is entered unknowingly, unintelligently, or involuntarily. ***Commonwealth v. Pantalion***, 957 A.2d 1267, 1271 (Pa. Super. 2008). At a minimum, trial court must inquire into 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 ***Commonwealth v. Yellmans***, 24 A.3d 1044 (Pa. Super. 2011), 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." ***Yellmans,*** at 1046 (quoting ***Commonwealth v. Fluharty***, 632 A.2d 312, 314 (Pa. Super. 1993)).

In reviewing the totality of the circumstances, the court cannot conclude that Appellant's plea was involuntary or not intelligent because of his appearance of intoxication. At no time during the colloquy did Appellant claim he could not understand what was going on or what he was doing. He satisfactorily completed the Written Guilty Plea Colloquy form and answered all of the questions posed to him by the court. While his urine test was positive, it is not determinative. The positive urine test only showed that he used substances in the past. Appellant admitted taking a morphine pill two days prior to the date of his guilty plea, but he denied being under the influence or being intoxicated. (Transcript, p. 18). Morphine can be detected in a urine test for several days, but loses its effects during the first 24 hours after use. In sum, the appearance of intoxication does not constitute intoxication. While the court's opinion that Appellant appeared to be under the influence is a factor, it as well is not determinative. Any apparent intoxication did not interfere with his ability to

understand and react to the proceedings. Moreover, there was no expert proffer to substantiate any of Appellant's allegations.

Accordingly, Appellant's claims are without merit.

Date: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Matthew Welickovitch, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work File