IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**: No. CR-1010-2015**
	:
vs.	**: CRIMINAL DIVISION**
	:
	:
DAVID GEHR,	**: Notice of Intent to Dismiss PCRA**
	: Without Holding An Evidentiary Hearing

OPINION

On April 20, 2016, the court sentenced David Gehr ("Gehr") to an aggregate term of incarceration in a state correctional institute for a minimum of 6 ½ years and a maximum of 15 years. By Order dated May 27, 2016, the court amended the April 20, 2016 Sentencing Order by running the DUI sentence concurrent with the persons not possess sentence.

Gehr subsequently filed an appeal which ultimately resulted in his judgment of sentence being affirmed.

On September 19, 2017, Gehr filed a *pro se* Post Conviction Relief Act (PCRA) petition. The court appointed counsel to represent Gehr. On December 14, 2017, a conference was held with counsel. The court permitted counsel an additional sixty days within which to file either an amended PCRA petition or a no merit letter in accordance with *Commonwealth v. Turner,* 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley,* 550 A.2d 213 (Pa. Super. 1988) (en banc).

On January 22, 2018, counsel filed a motion to withdraw as well as a *Turner/Finley* no merit letter.

The Pennsylvania Supreme Court very recently reaffirmed the standard under

which a petitioner can obtain PCRA relief. "[I]n order to qualify for relief under the PCRA, a petitioner must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors in 42 Pa. C.S. §9543(a)(2); that his claims have not been previously litigated or waived; and that the failure to litigate the issue prior to or during trial or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel. *Id.* § 9543(a)(3), (a)(4)." *Commonwealth v. VanDivner*, 2018 Pa. LEXIS 668, *12 (February 5, 2018). Furthermore, to obtain relief under the PCRA based on a claim of ineffectiveness of counsel, a petitioner must establish that: "(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) the petitioner suffered prejudiced as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different." *Id.* at *12-13 (citing *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001)). Finally, counsel is presumed to have rendered effective assistance, and, if a claim fails under any required prong of the test, the court may dismiss the claim on that basis. *Id.* at *13 (citing *Commonwealth v. Ali*, 10 A.3d 282, 291 (Pa. 2010)).

After an independent review of the record, the court finds that Gehr's claims lack merit, that counsel is entitled to withdraw and that Gehr is not entitled to relief as a matter of law.

In his petition, Gehr makes claims of ineffective assistance of counsel against Scott Gardner, his counsel during the preliminary hearing; Ravi Marfatia, his counsel during his January 5, 2016 guilty plea; and Josh Bower, his counsel before his re-sentencing hearings and thereafter.

The court will first address the claim against Attorney Gardner. By way of

background, on January 11, 2015, Gehr backed his vehicle into David Lunger's ("Lunger") vehicle. Gehr fled the scene without exchanging any information with Lunger. Lunger called the police and began to follow Gehr. The police eventually stopped Gehr. The police discovered that Gehr was intoxicated and he possessed of a small amount of marijuana, a glass pipe, and a .22 caliber rifle. Gehr told the police that he was drinking vodka at a friend's home, and that he smoked marijuana every day to relax. The police arrested Gehr and transported him to the hospital, where he refused to submit to a blood test. Subsequently, the police determined that Gehr was a convicted felon and was not permitted to possess a firearm.

On March 4, 2015, Trooper Travis Pena of the Pennsylvania State Police filed a criminal complaint against Gehr, charging him with persons not to possess firearms, possession of a small amount of marijuana, possession of drug paraphernalia, driving under the influence of alcohol (DUI) – incapable of safely driving (refusal), and several summary traffic offenses.

Gehr appeared for his preliminary hearing on June 15, 2015, at which time he was represented by Attorney Scott Gardner. Gehr signed a written preliminary hearing waiver, in which he acknowledged his right to be represented by counsel, cross-examine witness, inspect physical evidence offered against him, call witnesses on his own behalf, offer evidence on his own behalf and testify, and make written notes of the proceedings or have his own counsel do so, and make a stenographic, mechanical or electronic recording of the proceeding. He also acknowledged in the waiver that he understood that, by waiving his right to a preliminary hearing, he was precluded from raising challenges to the sufficiency of the prima facie case. Finally, Gehr acknowledged in the waiver that he knowingly,

voluntarily and intelligently made the waiver. No plea agreement was reached, and Gehr's arraignment was scheduled for July 13, 2015. Attorney Gardner entered his appearance on behalf of Gehr and waived the arraignment.

Attorney Gardner continued to represent Gehr until October 28, 2015 when his appearance was withdrawn and Josh Bower, Esquire entered his appearance.

It is somewhat difficult to discern Gehr's argument with respect to Mr. Gardner's alleged ineffectiveness. According to Gehr, he waived his preliminary hearing upon the advice of Mr. Gardner. Gehr appears to assert that the advice was ineffective because he was allegedly told by the Magistrate that he should not have waived the hearing.

The court finds no merit in Gehr's claim. First, everything in the record demonstrates that Gehr was informed of his right to proceed to a preliminary hearing yet knowingly, intelligently and voluntarily waived his right to proceed to such. Second, by pleading guilty, Gehr waived any challenges to the sufficiency of the evidence and waived any defenses he may have thought he had to the charges. See Written Guilty Plea Colloquy, at 3 (Questions 13 and 14). Third, Gehr failed to allege in his petition how he was prejudiced by the waiver. Although he asserts that the Magistrate told him some of the charges could have been dropped, Defendant admitted his guilt to all the charges when he pled guilty on January 5, 2016.

Prior to addressing Gehr's second claim of ineffectiveness, the procedural background of Gehr's guilty plea and various sentencings is necessary.

On January 5, 2016, following a hearing, the court accepted as knowing, voluntary and intelligent Gehr's pleas of guilty to Count 1, persons not to possess a firearm; Count 2, possession of a small amount of marijuana; Count 3, possession of drug

paraphernalia; Count 4, driving under the influence, incapable of safely driving refusal; and Counts 5, 6, 7 and 8, respectively, all traffic summaries.

Sentencing was scheduled for April 20, 2016. The court directed that an abbreviated presentence report be prepared and that Gehr undergo a CRN evaluation and an assessment. Further, since the Commonwealth contended that the DUI constituted Gehr's 6th DUI in his lifetime, Gehr was placed on the supervised bail program and on a SCRAM unit. It was specifically noted that Gehr's plea was "an open plea."

On April 20, 2016, the court sentenced Gehr to five (5) to ten (10) years in prison for the person not to possess a firearm conviction and a consecutive prison term of one and one-half (1 ½) to five (5) years for the DUI – refusal conviction. The court did not impose any further prison sentences on the remaining convictions. Gehr filed post-sentence motions, seeking withdrawal of his guilty plea and reconsideration of his sentence. The court denied Gehr's request to withdraw his plea but granted reconsideration of his sentence. On June 7, 2016, the trial court imposed the same sentences for the person not to possess a firearm and DUI refusal conviction, but imposed them concurrently.

Gehr appealed from the judgment of sentence. Among other arguments, Gehr argued that he did not knowingly plead guilty because he expected a county sentence, not a state sentence.

The Superior Court disagreed, concluding that he knowingly, voluntarily and intelligently tendered his guilty plea. As the Superior Court noted:

> At the plea colloquy, Gehr indicated that he understood the English language, and that he was not under the influence of alcohol or drugs. Gehr understood the charges against him, and admitted to the facts that led to those charges. Gehr also indicated that by pleading guilty, he understood that he was foregoing certain rights, including, *inter alia*, the presumption of innocence,

> the right to a jury trial, and most of his direct appeal rights. Gehr affirmed that he was pleading guilty of his own free will, that no one had forced him to plead guilty, and that he was satisfied with his attorney's representation. Further, Gehr understood that he was entering an open guilty plea, and that the trial court was not bound by the terms of the plea. The trial court also informed Gehr about the permissible range of sentences for each of the convictions.

*Commonwealth v. David Gehr***,** No. 1012 MDA 2016 at 6 (April 13, 2017)(transcript citations omitted).

As the Superior Court further noted:

> In point of fact, Gehr specifically stated that he understood the permissible ranges of sentence and that no specific prison sentence, whether county or state, was promised to him.

Id. at 7.

However, the Superior Court determined that Gehr's sentence for the DUI-refusal conviction violated the United States Supreme Court holding in ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016) and, accordingly, remanded the matter for resentencing.

On August 10, 2017, the court resentenced Gehr in connection with the DUI count to undergo incarceration in a state correctional institution for an indeterminate term, the minimum of which was five (5) days and the maximum of which was six (6) months. This sentenced was to be served concurrently with the sentence previously imposed with respect to the persons not to possess conviction.

In connection with Gehr's ineffectiveness claim regarding Attorney Marfatia, Gehr contends that his "open plea" was the result of an ineffectiveness of counsel. He asserts that he was informed by his attorney that "the judge can give you county time", that he never saw "the front page of the [guilty plea colloquy form]" and that Mr. Marfatia did not go over

the guilty plea colloquy form with him "later" as promised.

When a defendant alleges that his guilty plea was induced by ineffective counsel, he must prove that his attorney was not competent and that it caused him to enter an involuntary or unknowing plea. "Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea." *Commonwealth v. Anderson*, 995 A.2d 1184, 1192 (Pa. Super. 2010). "Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends upon whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Id.*

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 a defendant be pleased with the results of the decision to enter a plea of guilty; rather all that is required is that the defendant's decision to plead guilty be knowingly, voluntarily and intelligently made." *Commonwealth v. Brown*, 48 A.3d 1275, 1277 (Pa. Super. 2012).

There is absolutely no evidence whatsoever that counsel for Gehr was not competent or that counsel's statements or conduct caused Gehr to enter an involuntary or unknowing plea. Not only did the Superior Court come to this conclusion in its Opinion but this Court addressed such in its Opinion in Support of Order filed on October 13, 2016. As the court noted in said Opinion, Gehr's claims continue to be nothing more than buyer's remorse or disappointment in the sentence actually imposed. Moreover, "a defendant may not challenge his guilty plea by asserting that he lied while under oath, even if he avers that counsel induced the lies. 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. Pollard*, 832 A.2d 517, 523 (Pa. Super. 2003)(citations omitted).

Gehr's final claim of ineffectiveness against Attorney Bower is as well confusing. He admits that he was not willing to enter into a plea agreement for either one and a half (1 ½) to five (5) years in state prison or five (5) to ten (10) years in state prison. He specifically notes in both cases he "said no." Gehr claims that after his second sentencing hearing on May 27, 2016, he submitted requests to meet with Mr. Bower "to file an appeal." He claims as well that he asked Mr. Bower for "paperwork form the beginning and never got it." He further claims that Mr. Bower did not go over the open plea with him.

Gehr's claims of ineffectiveness are without merit. His own statements belie his claim of ineffectiveness. Gehr claims he did not want to accept any of the Commonwealth's specific plea offers. Accordingly, he entered a knowing, intelligent and voluntary open guilty plea in an effort to get a lesser sentence from the court. He did so, despite being specifically told that it was up to the court whether he would get a county or a state sentence. In other words, Gehr knew at the time he entered his plea that there was no guarantee he would receive a county sentence.

Following the "second sentencing hearing" on May 27, 2016, an appeal was timely filed on Gehr's behalf. The decision rendered by the Superior Court on April 13, 2017 concluded that Gehr knowing, voluntarily and intelligently tendered his open guilty plea. The case was remanded to address the DUI sentence in light of ***Birchfield.***

Lastly, Gehr appears to claim that his open plea was not knowing, intelligent and voluntary because Mr. Bower did not give the colloquy to him or go over it with him.

This issue has been addressed above. Clearly, the defendant's plea was knowing, intelligent and voluntary.

ORDER

AND NOW, this ____ day of February 2018, upon review of the record and pursuant to Rule 907 (1) of the Pennsylvania Rules of Criminal Procedure, the court finds that Gehr's PCRA petition lacks merit. The parties are hereby notified of this Court's intention to dismiss Gehr's PCRA Petition without holding an evidentiary hearing. Gehr 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.

The court **GRANTS** counsel's motion to withdraw. Gehr may represent himself or hire private counsel to represent him further.

By The Court,

_____
Marc F. Lovecchio, Judge

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