

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH | : No. CR-1229-2015 |
| | : |
| vs. | : CRIMINAL DIVISION |
| | : |
| DERRICK BOONE, | : Notice of Intent to Dismiss PCRA |
| Defendant | : Without Holding An Evidentiary Hearing |
| | : and Granting PCRA Counsel's Motion to |
| | : Withdraw |

OPINION AND ORDER

This matter came before the court on a Post Conviction Relief Act (PCRA) petition filed by Derrick Boone (“Boone”).

By way of background, on or about April 25, 2015, Boone was charged with one count of homicide, two counts of aggravated assault with a deadly weapon, one count of persons not to possess a firearm, one count of firearms not to be carried without a license, one count of possession of a weapon, two counts of simple assault, one count of voluntary manslaughter, two counts of aggravated assault, and one count of discharging a firearm into an occupied structure.

On November 28, 2017, Boone pled guilty to two counts of aggravated assault with a deadly weapon, felonies of the second degree; one count of persons not to possess firearms, a felony of the second degree; and voluntary manslaughter, a felony of the first degree. On that same date and in accordance with the negotiated plea agreement, the court sentenced Boone to 12 to 30 years’ incarceration in a state correctional institution.

Boone filed a timely PCRA petition in which he asserted that his plea was not knowingly, voluntarily and intelligently entered and his counsel was ineffective because: (1) he was not given enough time to accept or process the plea agreement; (2) he felt pressured

and felt obligated to sign the plea agreement due to the presence of the victim's family; (3) the sentence was excessive for the situation; and (4) he was coerced in that his counsel told him that if he did not accept the plea he would "get fried."

The court appointed counsel to represent Boone and directed counsel to file either an amended PCRA petition or a *Turner/Finley*¹ "no merit" letter. PCRA counsel filed a motion to withdraw as counsel which included a no merit letter.

After an independent review of the record, the court finds that Boone's plea was knowingly, voluntarily, and intelligently entered; therefore, he is not entitled to PCRA relief.

Counsel is presumed to be effective and the burden rests on the petitioner to prove that counsel was ineffective. *Commonwealth v. Crispell*, 193 A.3d 919, 928 (Pa. 2018). To show counsel was ineffective, a petitioner must plead and prove that: (1) the underlying claim has arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) counsel's deficient performance prejudiced the petitioner. *Id.*; *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001). In this context, prejudice means that but for counsel's errors or omissions there is a reasonable probability that the outcome of the proceedings would have been different. *Pierce, id.*

When a defendant pleads guilty, he waives any claims or defenses other than the jurisdiction of the court, the legality of the sentence and the validity of the plea.

¹ *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)(en banc).

Commonwealth v. Harvey, 595 A.2d 1280, 1282 (Pa. Super. 1991); *Commonwealth v. Johnson*, 466 A.2d 636, 642 (Pa. Super. 1983). A defendant cannot challenge his guilty plea by saying he lied under oath, even if he asserts that counsel induced the lies. *Commonwealth v. Pier*, 182 A.3d 476, 480 (Pa. Super. 2018); *Commonwealth v. Pollard*, 832 A.2d 517, 523 (Pa. Super. 2003).

“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. Willis*, 68 A.3d 997, 1001-02 (Pa. Super. 2013). “The law does not require that the defendant be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that his decision to plead guilty be knowingly, voluntarily and intelligently made.” *Id.* at 1002. “After a defendant enters a guilty plea, it is presumed that he was aware of what he was doing, and the burden of proving involuntariness is upon him.” *Id.*

Boone first asserts that his plea was invalid because he was not given enough time to accept or process the plea agreement. Boone’s case had been pending for more than two years. Although Boone asked counsel to negotiate a plea for a minimum sentence of 8 or 8 ½ years, the Commonwealth was not willing to make such an offer in this case. After a jury was selected and a few days before trial was to commence, the Commonwealth offered Boone a plea agreement for 12 to 30 years’ incarceration. Plea counsel discussed the offer with Boone and he accepted it. Transcript, 11/18/17, at 11. The written guilty plea colloquy was completed and about an hour later the court accepted the plea agreement and sentenced Boone. *Id.* Boone stated during the guilty plea hearing that he had sufficient time to consult

with counsel, he did not need more time to discuss any aspect of his case with counsel, he was satisfied with counsel's representation, and counsel did not do anything or fail to do anything that was causing him to plead guilty. *Id.* at 13. The mere fact that Boone did not have a substantial period of time to consult with counsel and complete the written guilty plea colloquy prior to the guilty plea and sentencing hearing does not render his plea unknowing, unintelligent or involuntary. *See Commonwealth v. Sisco*, 393 A.2d 1197, 1198 (Pa. 1978)(“the time actually spent by counsel with the accused during his case is not necessarily related to, and affords no basis for inferring , the extent of total preparation”); *Commonwealth v. Nero*, 378 A.2d 430, 434 (Pa. Super. 1977)(“It is well settled that counsel is not deemed ineffective simply because he spent only a short amount of time conferring with his client.”).

Boone next avers that the victim's family was brought up from Philadelphia, which put more pressure on him to take the plea. Boone has not alleged that the victim's family did anything other than appear for the guilty plea and sentencing hearing which they had a right to be present for and participate in. Moreover, Boone stated both in the written guilty plea colloquy and under oath on the record that nobody was forcing him, pressuring him or giving him any inducements or promises to plead guilty. Transcript, 11/28/17, at 12-13. As previously noted, a defendant cannot challenge his guilty plea by saying he lied under oath. *Commonwealth v. Pier*, 182 A.3d 476, 480 (Pa. Super. 2018); *Commonwealth v. Pollard*, 832 A.2d 517, 523 (Pa. Super. 2003).

To ensure that a plea is knowingly, intelligently and voluntarily entered, the court must conduct an inquiry to elicit information regarding: (1) the nature of the charges to

which the defendant is pleading guilty; (2) the factual basis for the plea; (3) the defendant's understanding of his right to a jury trial; (4) the defendant's understanding of the presumption of innocence; (5) the permissible range of sentences and/or fines for the offenses charged; and (6) the defendant's awareness that the court is not bound by the terms of any plea agreement unless the court accepts such agreement. Pa. R. Crim. P. 590, cmt.; *Commonwealth v. Rush*, 909 A.2d 805, 808-809 (Pa. Super. 2006).

Boone was aware of the nature of the charges and the permissible range of sentence and/or fines for the offenses to which he pled guilty. Transcript, 11/28/17, at 4-7. Boone was aware of the terms of the plea agreement and that the court was not bound by the terms of the plea agreement unless they were accepted by the court. *Id.* at 8-10. He understood that he had rights to a jury trial, a presumption of innocence, and to have his guilt proven beyond a reasonable doubt and he was giving up those rights by pleading guilty. *Id.* at 13-14. There also was a factual basis for the plea. *Id.* at 16-20. Therefore, the written guilty plea colloquy and the transcript of the guilty plea hearing establish that Boone's plea was knowingly, voluntarily and intelligently entered.

Boone next avers he was not comfortable with a 12-30 year sentence. He told his attorney that he would accept an 8-20 year sentence for voluntary manslaughter and a concurrent sentence on the other charges. He feels that his sentence was excessive for the situation. Boone also alleges that he was coerced because his attorney told him that if he didn't accept the plea he would "get fried." Boone does not explain what he believed "get fried" meant. Based on his related claims about the length of his sentence, the court believes "get fried" meant Boone was told he could face a significantly greater sentence if he

proceeded to trial and lost.

The Commonwealth was not willing to make an offer for an 8-20 year sentence in this case, and it was under no obligation to do so. *Commonwealth v. McElroy*, 665 A.2d 813, 816 (Pa. Super. 1995)(quoting *Commonwealth v. Stafford*, 416 A.2d 570, 573 (Pa. Super. 1979)). Boone was fully aware that the plea agreement he was accepting was for a sentence of 12 to 30 years' incarceration. Not only was the sentence noted on the coversheet of the written guilty plea colloquy, the court explained the sentence to Boone during the guilty plea hearing and he indicated that he understood. Transcript, 11/28/17, at 7, 8-9. If Boone was not comfortable with the 12 to 30 year sentence, he could have rejected the plea agreement and taken his chances at trial. If he proceeded to trial, however, the jury could have rejected his self-defense/justification claim and been found guilty of murder, which could have resulted in a much higher sentence.

Plea counsel was required to advise Boone of the risks he faced if he went to trial. Boone fired four shots in a crowded bar. The victim was struck in the back and killed. However, two of the shots missed the victim and struck innocent bystanders. Boone was charged with an open count of homicide for the victim's death and aggravated assault for the injuries to the two bystanders. If the jury rejected his self-defense/justification claim, he could have been found guilty of murder. If he was found guilty of first degree murder, the court would have been required to impose a sentence of life imprisonment and he would never have been eligible for parole. See *Commonwealth v. Yount*, 615 A.2d 1316, 1320 (Pa. Super. 1992)(the statute unequivocally bars parole for all first degree murderers). If he was found guilty of third degree murder, the court could impose a maximum sentence of 40

years' incarceration for that offense (see 18 Pa. C.S. §1102(d)) and still imposed consecutive sentences for other convictions including, but not limited to, the aggravated assaults of the two innocent bystanders who suffered gunshot wounds as a result of Boone's actions.

Boone contends he was forced to protect himself from a very violent and dangerous person. Boone, however, was not entitled to stand his ground and use deadly force. Furthermore, he waived any claim of self-defense or justification when he entered his guilty plea.

Pennsylvania's "stand your ground" law states:

An actor who is not engaged in a criminal activity, **who is not in illegal possession of a firearm** and who is attacked in any place where the actor would have a duty to retreat under paragraph (2)(ii) has no duty to retreat and has the right to stand his ground and use force, including deadly force, if:

(i) the actor has a right to be in the place where he was attacked;
(ii) the actor believes it is immediately necessary to do so to protect himself against death, serious bodily injury, kidnapping or sexual intercourse by force or threat; **and**

(iii) the person against whom the force is used displays or otherwise uses:

(A) a firearm or replica of a firearm as defined in 42 Pa.C.S. § 9712 (relating to sentences for offenses committed with firearms); or
(B) any other weapon readily or apparently capable of lethal use.

18 Pa.C.S. §505(b)(2.3)(emphasis added).

While the victim punched Boone and threw at bar stool at him, the victim did not display a firearm or other weapon capable of lethal use. Moreover, Boone was in illegal possession of a firearm, as he had previously been convicted of a felony offense under the Controlled Substance, Drug, Device and Cosmetic Act, which precluded him from possessing any firearm. 18 Pa. C.S. §6105(c)(2). Therefore, Boone was not entitled to stand

his ground and use deadly force in this case.

ORDER

AND NOW, this ____ day of December 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, no purpose would be served by conducting an evidentiary hearing in this case and none will be scheduled. The parties are hereby notified of the court's intention to dismiss Boone's PCRA Petition. Boone 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 also grants PCRA counsel's motion to withdraw. Boone may represent himself or hire private counsel to represent him, but the court will not appoint counsel to represent him further in this matter unless Boone's response shows a meritorious issue that would require an evidentiary hearing.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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Work file