

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

**COMMONWEALTH**

**: No. CR-0001010-2015**

**:**

**vs.**

**:**

**: Opinion and Order Dismissing**

**DAVID G. GEHR,**

**: Defendant's PCRA petition**

**Defendant**

**:**

**OPINION AND ORDER**

This Opinion addresses Defendant's responses to the court's order giving notice of its intent to dismiss Defendant's Post Conviction Relief Act (PCRA) petition, which consisted of another PCRA petition and an amendment thereto. The responses assert similar issues as Defendant asserted in his initial PCRA petition for which the court already gave notice. The court, however, would add the following comments.

Although Defendant may have been hoping for a county sentence, he was clearly aware that he was entering an open plea; it was up to the court to decide the appropriate sentence; and the highest sentence the court could impose was a minimum of 8 years and 15 days and a maximum of 16 years and 30 days. Guilty Plea Transcript, 1/5/16, at 7-8. Furthermore, Defendant admitted on the record during his re-sentencing hearing on August 10, 2017 that he was not promised a county sentence. Re-sentencing Transcript, 8/10/17, at 11, 14.

Defense counsel ably argued for concurrent, mitigated range sentences on Defendant's convictions. Sentencing Transcript, 4/20/2016, at 14-15. Defendant, however, hurt his chances for a mitigated sentence by making statements in the Pre-Sentence Investigation (PSI) report and at the sentencing hearing that made excuses for his conduct

and denied that he had an alcohol problem, despite his current DUI conviction being his sixth such conviction in his lifetime. In light of Defendant's criminal history, his excuses, and his denial that he had an alcohol problem, the court was not persuaded that a mitigated sentence was appropriate in this case; therefore, it imposed an aggregate sentence of 6 ½ to 15 years' incarceration, which consisted of five to ten years' incarceration for persons not to possess a firearm and a consecutive sentence of 18 months to five years' incarceration for DUI.

Attorney Bower filed a post-sentence motion in which he sought to withdraw Defendant's guilty plea and, in the alternative, requested reconsideration of sentence. The court denied the motion to withdraw the guilty plea, but did reconsider the sentence such that Defendant's sentence for DUI was concurrent with, rather than consecutive to, his sentence for person not to possess a firearm. As a result of Attorney Bower's efforts, the aggregate sentence was lowered to 5 to 10 years' incarceration.

Defendant did not decide that he no longer wished to plead guilty until after he was sentenced. In fact, Defendant admitted on the record at his re-sentencing hearing that he asked Attorney Bower to "pull the plea" because he did not expect to a 6 ½ -15 year sentence. Re-Sentencing Transcript, 8/10/17, at 12. Attorney Bower did his best to do so. Attorney Bower did not provide ineffective assistance of counsel. The motion did not succeed because Defendant did not have a valid reason to withdraw his plea.

"When a defendant seeks to withdraw his plea after sentencing, he 'must establish prejudice on the order of manifest injustice.'" *Commonwealth v. Hart*, 174 A.3d 660, 664, (Pa. Super. 2017)(quoting *Commonwealth v. Yeomans*, 24 A.3d 1044, 1046 (Pa. Super. 2011). "Manifest injustice occurs when the plea is not tendered knowingly,

intelligently, voluntarily, and understandingly.” *Id.* (quoting *Commonwealth v. Kpou*, 153 A.3d 1020, 2013 (Pa. Super. 2016)(citation omitted)).

Both this court and the Pennsylvania Superior Court found that Defendant’s guilty plea was knowing, intelligent, and voluntary. Therefore, Defendant’s claim that Attorney Bower was ineffective for failing to become aware that Defendant no longer wanted to plead guilty as well as his derivative claim that PCRA counsel was ineffective related to the fact that defendant no longer wanted to plead guilty lacks merit.

Furthermore, Defendant appears to be confusing two different plea offers. Defendant may have wanted a county sentence, but the Commonwealth was not willing to make such an offer. The Commonwealth offered him a negotiated plea for five to ten years’ incarceration. Defendant rejected that plea. That rejection, however, does not mean that Defendant did not wish to subsequently enter an open plea.

If Defendant had gone to trial and been found guilty of all of the offenses, he could have received a much greater sentence. Attorney Marfatia’s advice to that effect was accurate. As the court explained at the guilty plea hearing, Defendant’s sentence could have been as high as a minimum of 8 years and 15 days and a maximum of 16 years and 30 days. Defendant wanted to avoid that possibility. Therefore, at the call of the list, Defendant chose not to proceed to trial and instead entered an open plea. By entering the open plea, defense counsel could (and did) argue for a mitigated sentence, including a county sentence, and point to Defendant’s acceptance of responsibility in support of it. The mere fact that Defendant did not receive the county sentence he hoped for, however, was not a valid basis to withdraw his plea. *See Commonwealth v. Muhammad*, 794 A.3d 378, 383 (Pa. Super.

2002)(stating that “disappointment in the sentence actually imposed does not represent manifest injustice.”).

With respect to Attorney Bower’s certification, the court notes that the date on the certification reflects the date that Attorney Bower signed and dated the form; it does not necessarily reflect the date that Attorney Bower spoke to Defendant. Defendant seems to imply in his “Amendment” that his plea could only be voluntary if he initialed the attorney certification form. However, Defendant was not required to initial or sign the attorney certification. Defendant did sign and initial the written guilty plea colloquy. Furthermore, Defendant was not prejudiced in any way by the attorney certification. Regardless of the date on the certification, the record reflects that Defendant’s plea was knowing, voluntary, and intelligent.

With respect to Defendant’s claim that the Commonwealth committed a fraud on the court because the cover sheet was not attached to the written guilty plea colloquy, Defendant was not prejudiced, as the court discussed with Defendant at the time of his guilty plea hearing the information contained on the coversheet. Guilty Plea Transcript, 1/5/16, at 5-8.

In his “Amendment,” Defendant also seems to assert that his sentence was illegal because he received a mandatory minimum pursuant to 42 Pa. C.S. §7508<sup>1</sup> and/or 42 Pa. C.S. §9712, which are unconstitutional statutes in light of *Alleyne*<sup>2</sup> and its Pennsylvania progeny. This claim lacks merit. The court did not impose a mandatory sentence pursuant to either of those statutes in this case. These statutes are clearly inapplicable in this case

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<sup>1</sup>The court believes Defendant is actually referring to 18 Pa. C.S. §7508, as there is no such section in Title 42.

<sup>2</sup> *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151 (2013).

because Defendant was neither charged nor convicted of any violation of 35 P.S. 780-113(a)(30). He was charged and convicted of possession of a small amount of marijuana in violation of section ;780-113(a)(31), not manufacturing, delivering, or possessing with intent to manufacture or deliver any controlled substance. Instead, the court imposed a five year minimum sentence on Defendant's conviction for persons not to possess a firearm because the standard guideline range for that offense was 60-72 months (or 5-6 years).<sup>3</sup>

### **ORDER**

AND NOW, this 19<sup>th</sup> day of December 2018, after review of Defendant's response to the court's order giving notice of its intent to dismiss Defendant's Post Conviction Relief Act (PCRA) petition, which consisted of another PCRA petition and an amendment thereto, the court dismisses all of Defendant's PCRA petitions and amendments.

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 Appellate 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.

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<sup>3</sup> The offense gravity score for this offense was a 10, and Defendant's prior record score was a 5.

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

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
David Gehr, MP3154 (certified mail)  
SCI Dallas, 1000 Follies Road, Dallas PA 18612  
Gary Weber, Esquire (Lycoming Reporter)  
Work file  
Suzanne Fedele, Prothonotary/Clerk of Courts