IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**: No. CR-1808-2016**
	:
vs.	**: CRIMINAL DIVISION**
	:
	:
KAREN STINE,	**: Notice of Intent to Dismiss PCRA**
	: Without Holding An Evidentiary Hearing

OPINION AND ORDER

Before the court is Petitioner Karen Stine's Post-Conviction Relief Act (PCRA) petition as well as her counsel's motion to withdraw.

Petitioner was charged on August 12, 2016 with one count of driving under the influence, a misdemeanor of the first degree; illegally operating a vehicle not equipped with ignition interlock, an ungraded misdemeanor; and careless driving, a summary traffic offense. She was represented throughout the disposition of her underlying case by the Lycoming County Public Defender's office.

On June 23, 2017, Petitioner pled no contest before the Honorable Nancy L. Butts. On October 11, 2017, the court sentenced Petitioner to five years of supervision on the Intermediate Punishment Program with the first nine months to be served at the Lycoming County Work Release Facility.

On March 2, 2018, the court received a letter from Petitioner, which appears to have been postmarked February 28, 2018 from the Lycoming County Work Release Facility. Petitioner introduced herself, stated that her attorney talked with her about a reconsideration request but indicated to her that "it wouldn't get [her] anywhere." She further indicated that she had "worn an ankle bracelet for two months prior to" her hearing and that

her attorney advised her that "it wouldn't matter in court." She was of the opinion that she was "misrepresented, he didn't talk about [her] side of the story. Even about the ignition appliance for [her] car, no one can make a deal with Penn Dot." She also was concerned about her attorney bringing up an issue that had "been talked about between [us] confidentially."

The court treated Petitioner's letter as a Post-Conviction Relief Act petition and appointed counsel. The court directed PCRA counsel to file either an amended PCRA petition or a "no merit" letter pursuant to pursuant to *Commonwealth v. Turner,* 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley,* 550 A.2d 213 (Pa. Super. 1988)(en banc) (Turner/Finley letter). Counsel filed a Motion to Withdraw which contained a *Turner/Finley* letter.

After conducting an independent review of the record and for the reasons set forth below, the court finds that Petitioner's PCRA petition is without merit and it will grant counsel's motion to withdraw.

Petitioner claims that her counsel failed to request and that this court failed to grant her credit for time served of two months that she was released on bail prior to sentencing on electronic monitoring. Petitioner further raises a claim that her trial counsel was ineffective by failing to "talk about [her] side of the story." Finally, Petitioner claims that her trial counsel violated a confidence by discussing on the record an issue involving another traffic stop which occurred prior to her sentencing.

> In order to qualify for relief under the PCRA, a Petitioner must establish, by a preponderance of the evidence, that [her] conviction or sentence resulted from one or more of the enumerated errors in 42 Pa. C.S. § 9543 (a) (2); that [her] 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. Van Divner, 178 A.3d 108 (Pa. 2018).

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 prejudice 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.* (citing *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001)). 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.* (citing *Commonwealth v. Ali,* 10 A.3d 282, 291 (Pa. 2010)).

In the context of a guilty plea, a claim of ineffectiveness must show that plea counsel's ineffectiveness induced the plea and that there is a causal connection between counsel's ineffectiveness and an unknowing or involuntary plea. *Commonwealth v. Johnson,* 2005 Pa. Super. 159, 875 A.2d 328, 331 (Pa. Super. 2005). "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 [her] 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.*

Clearly, Petitioner's plea was knowing, intelligent and voluntary. "A criminal

defendant who decides to plead guilty has a duty to answer questions truthfully." *Commonwealth v. Yeoman*, 24 A.3d 1044, 1047 (Pa. Super. 2011)(quoting *Commonweatlh v. Pollard*, 832 A.2d 517, 524 (Pa. Super. 2003)). "Where the record clearly demonstrates that a guilty plea colloquy is conducted, during which it became obvious the defendant understood the nature of the charges against [her], the voluntariness of the plea is established." *Commonwealth v. Rush*, 909 A.2d 805, 808 (Pa. Super. 2006).

In this particular case, the defendant pled no contest. The record establishes that Petitioner's no contest plea was sufficient to meet the requirements for a knowing, intelligent and voluntary plea. Although Petitioner's written colloquy form does not specifically address questions to a no contest plea, the information concerning her plea within the written colloquy and the oral colloquy conducted on the record are sufficient. The colloquy coversheet correctly notes that Petitioner entered an open plea with no written plea agreement. It also correctly lists the maximum terms of incarceration and fines except for the careless driving. The de minimis error was later amended on the form and during the plea hearing held June 23, 2017. The written colloquy further acknowledges that Petitioner was aware of the rights that she was waiving by entering a plea and stated that she entered the plea because, she was guilty and that she was doing so voluntarily. Although the written colloquy did not address her rights as they related to a no contest plea, President Judge Butts explained what a no contest plea meant and the rights she was giving up by entering the same. Plea Transcript, June 23, 2017, at 10-11, 15. The record makes clear that she understood what she was doing and the rights that she was giving up by pleading no contest.

The record establishes that Petitioner was aware of the nature of the charges

and the range of sentences and fines. (Plea Transcript at 2-3, 8-9; Written Colloquy Coversheet). She was aware of the presumption of innocence and her right to a jury trial and that by entering her plea she was giving up those rights. (Plea Transcript at 15; Written Colloquy, Questions 7, 9, 12, and 16). She was aware that the judge was not bound by the terms of any plea agreement and that she was entering an open plea. (Plea Transcript at 3; Written Colloquy Question 3). The record also establishes a factual basis for the plea, which Petitioner did not contest. (Plea Transcript at 9-12).

The court conducted an in depth colloquy and inquiry on the record during Petitioner's plea hearing. Specifically, she was asked if anyone was forcing her or threatening her in any manner to get her to plead no contest to which she responded no. She was asked if she was pleading no contest of her own free will and she said yes. The record does not support an assertion that her no contest plea was involuntary, unknowing or unintelligent and as such, any issue averring the same does not have merit pursuant to the requirements of the Post-Conviction Relief Act.

With respect to Petitioner's claim that her trial counsel failed to request, and the sentencing judge failed to grant, credit for two months that Petitioner was placed on electronic monitoring prior to sentencing and that counsel was ineffective for failing to request such and to essentially advocate on behalf of the petitioner, Petitioner's claims are also without merit.

Petitioner was not entitled to receive credit for time served on electronic monitoring or on a TAD unit as a condition of bail. *Commonwealth v. Kyle*, 582 Pa. 624, 874 A.2d 12, 20 (2005)(time spent on bail release subject to electronic monitoring does not qualify for time served.).

Petitioner was subject to a mandatory minimum of one year for her DUI offense. Petitioner's counsel passionately advocated against the state prison sentence that the Commonwealth was seeking and counsel's advocacy kept her from going to state prison. While counsel was not successful in persuading the court to impose a treatment court sentence or a sentence consisting solely or predominantly of electronic monitoring/in-home detention, he zealously argued for such a sentence. The court simply did not feel such a sentence was appropriate in this case, as this was Petitioner's third DUI offense within ten years and her current offense did not arise from a substance abuse issue. Petitioner was taking prescribed medications, but she wasn't abiding by instructions not to drive while taking those medications. Instead, the court made Petitioner eligible for the Intermediate Punishment Program and permitted her to satisfy the year by serving nine months at the county work release center and three months on in-home detention/electronic monitoring.

With respect to Petitioner's claim that her trial counsel violated a confidentiality, and as PCRA counsel noted in his *Turner/Finley* letter: "It is clear from a review of the record that your trial counsel explained to a significant degree your side of the story in an unsuccessful attempt to obtain a sentence solely of electronic monitoring and in a successful attempt to obtain a county sentence. This was not only in your best interest, it appears to have been at your request as counsel's arguments were reiterated by you throughout the sentencing hearing. There is no evidence of ineffective assistance of counsel during your sentencing hearing. In fact, just the opposite is true."

Counsel discussed a conversation he had with Petitioner in an effort to obtain a sentence of electronic monitoring/in-home detention. Counsel explained that there had been an incident a few weeks after this incident where a police officer took Petitioner to the

hospital because she was out of sorts and confused. This incident resulted in a medication correction. Her current DUI did not arise from a situation where Petitioner was consuming alcohol or illegal controlled substances. She had not used those substances in four years. Instead, she was taking prescribed medications and over-the-counter medications, which impacted her ability to drive safely on the night in question, but which no longer would be a problem due to the medication correction and the regular med checks she was now undergoing with her physician, as well as the medical revocation of her driver's license. Sentencing Transcript, Oct. 11, 2017, at 5-9, 11, 12.

Clearly, counsel was acting in Petitioner's best interests when he discussed the conversation he had with Petitioner. Furthermore, Petitioner was not prejudiced by the mention of this uncharged incident. While the Commonwealth attempted to use the incident as a factor to justify a sentence of state incarceration, the court did not impose such a sentence. Instead, counsel's argument persuaded the court to impose a sentence of nine months incarceration at the work release facility and three months of electronic monitoring/in-home detention.

The court finds that there is no merit to her underlying claims of ineffectiveness related to her plea or sentencing. As the court finds that no purpose would be served by conducing any further evidentiary hearing regarding this matter, a hearing will not be scheduled. Pa. R. Crim. P. 909 (B) (2); see *Commonwealth v. Walker,* 36 A.3d 1, 17 (Pa. 2011) (holding that a PCRA Petitioner is not entitled to an evidentiary hearing as a matter of right, but only when the PCRA Petition presents genuine issues of material facts).

ORDER

AND NOW, this 5th day of December 2018, upon review of the

record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting an evidentiary hearing, none will be scheduled and the parties are hereby notified of this court's intention to dismiss the Petition. Petitioner 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. Attorney Martino's Motion to Withdraw is GRANTED. Petitioner may represent himself or hire private counsel to represent her further.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
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