

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CP-41-CR-0001050-2014
	:	CP-41-CR-0001387-2014
vs.	:	CP-41-CR-0002061-2014
	:	
	:	
CARL MOYER, JR.,	:	
Appellant	:	1925(a) Opinion

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

This opinion is written in support of this court's Order entered on December 20, 2018. The relevant facts follow.

Moyer committed three DUI offenses within a six-month period. Specifically, the offenses occurred on March 15, 2014, May 3, 2014 and August 30, 2014. Moyer pled guilty to all three DUIs. Each DUI was graded as a misdemeanor of the first degree and each had similar blood alcohol levels of approximately .21%. On March 10, 2015, following Moyer's guilty plea at 2061- 2014, the court proceeded to a sentencing hearing on all three DUI convictions. The court received and reviewed the pre-sentence report, as well as Moyer's CRN and assessment. The court also received and reviewed a risk needs assessment. Despite Moyer's prior record score of RFEL, the court initially imposed an aggregate sentence of 15 years of Intermediate Punishment with the first 17 months to be served at the county work release facility. This sentence was substantially below the standard guideline ranges, which called for a minimum sentence of 24 to 36 months' incarceration on each offense. The primary basis for the court sentencing below the standard guideline ranges was information presented by Moyer regarding the extraordinary steps he had taken to address his

alcohol abuse. Following the imposition of sentence, however, the court overheard discussions between Moyer and his significant other as well as Moyer and a representative of the Adult Probation Office. It appeared to the court that the information provided by Moyer during his sentencing hearing may not have been accurate. Accordingly, the court stopped Moyer, directed him to return to the courtroom and re-opened the record. The court immediately vacated the initial sentence and proceeded with taking additional testimony.

In questioning Moyer and his significant other, it became evident to the court that much if not all of the information provided by Moyer, and upon which the court based the initial sentence, was incorrect, if not outright lies. Specifically, Moyer admitted that he only attended one AA meeting, he went to church only once, and he drank as recently as “last Friday.”

Moyer’s significant other indicated that Moyer was still drinking. She looked at Moyer and stated: “You can only go so long, because when you get fidgety, I know when you are going to want to drink. And I know the signs. I’ve been around you long enough, Carl, I can’t...you can’t hide it from me. You can’t even hide a can of beer unless I find it.”

The court then entered an aggregate sentence of six to fifteen years’ incarceration in a state correctional facility. Moyer did not file a timely appeal.

Through the filing of a PCRA petition, the court reinstated Moyer’s appeal rights *nunc pro tunc*. In the appeal, Moyer claimed the sentence imposed by the court was unduly harsh and excessive. The Superior Court affirmed Moyer’s judgment of sentence on November 15, 2017.

Moyer then filed a timely Post Conviction Relief Act (PCRA) petition, in which he asserted that the court erred and engaged in misconduct, the prosecution engaged in

misconduct and counsel was ineffective for failing to litigate various issues relating to the court vacating his original sentence and re-sentencing him. Specifically, Moyer asserted that: (1) the trial court illegally sentenced him *ex post facto*; (2) the trial court engaged in misconduct and a violation of due process in accepting *ex post facto* testimony from Cathy Embick in violation of Pa. R. Crim. P. 573(d) and 602 and Pa. R. E. 614; (3) the trial court engaged in misconduct and a violation of due process in violation of Pa. R. Crim. P. 721; (4) the trial court erred and violated due process in ignoring a conflict of interest through the Public Defender's Office; (5) the trial court engaged in misconduct in violation of the Code of Judicial Conduct; (6) the prosecution engaged in similar acts of misconduct and/or violations of due process related to *ex parte* communication and *ex post facto* evidence; and (7) counsel was ineffective for advising Moyer to enter an open plea, failing to object to the "ambush" at re-sentencing, failing to advise Moyer to withdraw his plea, and failing to preserve and appeal the obvious misconduct of the court and the prosecution.

The court appointed counsel to represent Moyer and directed counsel to file either an amended PCRA petition or a no merit letter pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)(en banc). Counsel filed a *Turner/Finley* no merit letter and a motion to withdraw as counsel.

After an independent review of the record, the court found that Moyer's claims lacked merit. The court granted counsel's motion to withdraw, gave Moyer the required notice of the court's intent to dismiss his PCRA petition without holding an evidentiary hearing and then dismissed Moyer's PCRA petition.

Moyer filed an appeal. Moyer raises the following issues on appeal:

1. Did the trial court abuse its discretion in engaging in *Ex parte* communications with the prosecution and an *Ex-post-facto* witness for the

purposes of sentencing?

2. Did the trial court abuse its discretion in resentencing the defendant without allowing defendant to withdraw his prior plea of guilt[y]?

3. Did the prosecution engage in misconduct in presenting *Ex parte* and *Ex-post-facto* evidence to the trial court in order to ambush and violate due process?

4. Was trial council (sic) ineffective in failing to move for immediate withdrawal of the defendant's guilty plea based upon the above errors?

Moyer first asserts that the court abused its discretion in engaging in *ex parte* communications with the prosecution and an "*ex post facto*" witness for the purposes of sentencing.

In order to be eligible for relief under the PCRA, a petitioner must show that the issue has not been waived. 42 Pa. C.S. §9543(a)(3). "[A]n issue is waived if it the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. §9544(b). Any and all claims that the trial court erred or abused its discretion in resentencing Moyer are waived. Moyer could have raised these claims in a timely post sentence motion or in his appeal. He did not. Therefore, this issue is waived.

Furthermore, the court did not engage in *ex parte* communications with the prosecution. After the court sentenced Moyer, the court took a mid-morning break. The court overheard statements between Moyer and his significant other as well as Moyer and a representative of the Adult Probation Office. Based on those statements, it became apparent to the court that the information provided by Moyer in the pre-sentence investigation report and in the sentencing hearing was not accurate. The court *sua sponte* (on its own) brought the parties back into the courtroom, vacated its original sentence, took additional testimony, and re-sentenced Moyer.

Apparently, Moyer believes that throwing around Latin phrases makes his arguments have merit. It does not. Moyer obviously does not understand the term “*ex post facto*” or what such a claim is. The court tried to explain this concept to Moyer when it gave him notice of its intent to dismiss his PCRA petition, but to no avail. The *ex post facto* clause precludes the legislature from passing a law that retroactively makes innocent conduct a crime or increases the punishment for a crime after the conduct was committed. *See Commonwealth v. Muniz*, 164 A.3d 1189, 1195 (Pa. 2017). It does not preclude a court from vacating a sentence or re-opening the record and taking additional testimony. The court did not pass any law when it resentenced Moyer; it merely prevented Moyer from committing a fraud on the court. Therefore, there was no *ex post facto* violation or “*ex post facto* witness” in this case.

Moyer next asserts that the trial court abused its discretion in resentencing him without allowing him to withdraw his guilty plea. Not only is this claim waived for failing to assert it during Moyer’s appeal, it is also waived because it was never raised in Moyer’s PCRA petition. Issues not raised in the trial court are waived and cannot be asserted for the first time on appeal. Pa. R.A.P. 302(a). A claim that the trial court abused its discretion in resentencing him without allowing him to withdraw his guilty plea is a separate and distinct claim from Moyer’s claim that counsel was ineffective for failing to advise him to withdraw his guilty plea or failing to move to withdraw his guilty plea. Therefore, this claim is waived.

Furthermore, this claim is frivolous. Moyer never filed a motion or any other request to withdraw his guilty plea. Even if he had, it would not be an abuse of discretion to deny such a motion. A showing of manifest injustice is required to allow a defendant to

withdraw his guilty plea after sentencing. *Commonwealth v. Muhammad*, 794 A.2d 378, 383 (Pa. Super. 2002). “A plea rises to the level of manifest injustice when it was entered into involuntarily, unknowingly, or unintelligently.” *Id.* (quoting *Commonwealth v. Stork*, 737 A.2d 789, 790 (Pa. Super. 1999)(citation omitted)).

Moyer has not stated any valid basis to withdraw his plea. Moyer entered an open plea, which meant that the sentence to be imposed was entirely within the court’s discretion. All of Moyer’s complaints relate to his sentence, not his guilty plea. Dissatisfaction with the sentence imposed does not represent manifest injustice. *Muhammad, id.*

Moyer next contends the prosecution engaged in misconduct in presenting *ex parte* and *ex post facto* evidence to the trial court in order to ambush and violate due process. Moyer obviously does not understand the terms *ex parte* and *ex post facto*. Moyer was present at the resentencing hearing. Therefore, Ms. Embick’s testimony was not presented “*ex parte*.” The resentencing hearing was not initiated by the prosecution. It was initiated by the court based on statements the court overheard. The prosecution did not call Ms. Embick as a witness. The court questioned Ms. Embick due to the statements it overheard between Moyer and Embick immediately after the original sentencing hearing.

Moyer’s last issue is that trial counsel was ineffective for failing to move for the immediate withdrawal of Moyer’s guilty plea based upon the above errors. There was no basis for trial counsel to withdraw Moyer’s guilty plea. The “above errors” related solely to sentencing. They did not in any way affect whether Moyer knowingly, voluntarily and intelligently entered his guilty plea. Additionally, Moyer was not “ambushed” at the resentencing hearing. Moyer was well aware of Ms. Embick and what she was going to say.

The resentencing occurred due the discussions or argument in the hallway between Ms. Embick and Moyer regarding Moyer's drinking and his misrepresentations regarding his recovery efforts.

Moreover, Moyer was not prejudiced by counsel's alleged ineffectiveness, because even if defense counsel had filed a motion to withdraw Moyer's guilty plea, the court would not have granted it. As previously noted, dissatisfaction with one's sentence does not represent manifest injustice to withdraw a guilty plea after sentencing. The resentencing was not manifestly unjust; the original sentence based on Moyer's misrepresentations of his recovery efforts was. Quite simply, Moyer was not entitled to his original sentence, which he procured by misrepresenting his recovery efforts to the court.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Carl Moyer, Jr., #LX-9469
1100 Pike Street, Huntingdon PA 16654
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)
File 1050-2014
File 1387-2014