IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-1293-2013; CR-293-2014**
	:	
DA'RAN SEARS,	**:**	
Petitioner	**:**	**PCRA**

OPINION AND ORDER

Before the court is Petitioner's Amended Petition for Post-Conviction Relief pursuant to Pennsylvania's Post-Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9501 et. seq.

Petitioner was charged under Docket No. 1293-2013 on June 13, 2013 with one count of involuntary manslaughter, a misdemeanor of the first degree; one count of receiving stolen property, a felony of the second degree; one count of simple assault, a misdemeanor of the second degree; and one count of recklessly endangering another person, a misdemeanor of the second degree.

Petitioner applied for representation from the Lycoming County Public Defender's office and Attorney Nicole Spring met with Petitioner for the first time one day after the above charges were filed and continued to represent Petitioner through trial and direct appeal.

A preliminary hearing on the above charges was held on July 25, 2013 and all charges were held for court. Petitioner entered a plea of not guilty during his formal arraignment held on August 26, 2013.

Between August 26, 2013 and February 7, 2014, trial counsel failed to file any pretrial motions on Petitioner's behalf. On February 7, 2017, Petitioner was charged under

Docket No. 293-2014 with one count of murder in the third degree, a felony of the first degree. This charge related to the same facts which led to the charge of involuntary manslaughter and related charges previously filed on June 13, 2013.

A preliminary hearing on the additional charge of third degree murder was held on February 18, 2014 and the charge was held for court. On March 6, 2014, Petitioner entered a plea of not guilty during his formal arraignment and the Commonwealth filed a notice of joinder requesting that the cases be joined.

Attorney Spring filed a motion to suppress statements on November 20, 2014 and an amended motion to suppress statements on December 21, 2014. Following a hearing held on January 16, 2015, the court denied these motions in an Opinion and Order filed on February 9, 2015.

Petitioner proceeded to a non-jury trial which was held on March 2, 2015 and March 3, 2015 before this court. Following the presentation of the evidence and closing arguments, this court found Petitioner guilty of all charges under both Informations and an Order entering the guilty verdict was filed on May 14, 2015.

On August 17, 2015, this court sentenced Petitioner to an aggregate sentence of state incarceration, the minimum of which was 21 years and the maximum of which was 50 years. The sentence included a sentence of incarceration of 20 to 40 years on the charge of third degree murder.

Petitioner through Attorney Spring filed post-sentence motions on August 27, 2015 which were denied by Opinion and Order filed October 2, 2015. Petitioner through his

attorney filed a notice of appeal to the Superior Court on October 7, 2015, challenging the sufficiency of the evidence to sustain the third degree murder conviction, the court's denial of Petitioner's motion to suppress statements, and the discretionary aspects of sentence. The Superior Court issued an order on February 14, 2017, denying Petitioner's appeal.

Petitioner subsequently filed a pro se PCRA Petition on November 27, 2017, and this court entered an order on December 5, 2017 appointing current counsel and directing counsel to file an amended PCRA Petition on or before January 26, 2018. An amended PCRA Petition was filed on January 24, 2018.

In his amended PCRA petition, Petitioner submitted that his trial counsel, Attorney Spring, was ineffective in not discussing with Petitioner the potential for a far greater charge being filed against Petitioner if he did not accept the Commonwealth's plea offer and by stating her desire to pursue dismissal of the lessor charge. More specifically, Petitioner asserted that Attorney Spring: failed to discuss the evidence against him; failed to discuss the elements of third degree murder; failed to advise him that said evidence, particularly his own statements, made a third degree murder conviction possible or overwhelmingly likely; failed to discuss a significantly greater sentencing exposure for Petitioner if he faced a third degree murder charge; advised Petitioner to wait to plead guilty so that she could challenge a receiving stolen property charge; failed to actually present such a challenge; and, in essence, caused Petitioner to put off entering a guilty plea which, in this case, resulted in the filing of the third degree murder charge, the withdrawal of a plea offer, and a far less favorable outcome.

The court held evidentiary hearings on April 17, 2018 and June 19, 2018. The parties requested transcripts of the hearings and the opportunity to file briefs. Petitioner's brief was filed on August 15, 2018, and the Commonwealth's brief was filed on September 17, 2018.

Petitioner testified on his own behalf. Prior to his preliminary hearing while he did meet with Attorney Spring, they did not talk about "other evidence that the police had" against him. They had no discussion about a witness named James Boring.

At his preliminary hearing, he and Attorney Spring discussed his statement to the police. Following his preliminary hearing, he discussed with Attorney Spring pleading open to all of the charges. According to Petitioner, it was "definitely" his desire to "do that." He knew he had broken the law. He "just really wanted to get it over with."

At his arraignment, however, he did not plead open because Attorney Spring advised him not to. She told him that she wanted to fight the felony receiving stolen property charge to avoid state incarceration. He "obviously followed her advice."

At no time, however, before, during or even after trial did Attorney Spring challenge the receiving stolen property charge.

With respect to discovery, Petitioner received it from Attorney Spring and discussed it with her. Prior to being charged with third degree murder on February 7, 2014, approximately five months, he spoke with Attorney Spring at least two or three times.

During these discussions, she never discussed with him the statement made by potential witness James Boring. He could not recall if she discussed his prior statement to the

police. That statement included him admitting that he had a gun, that he pointed it at the decedent, it fired, and it fired because "it's pretty likely" that he pulled the trigger.

At no time prior to him actually getting charged with third degree murder did Attorney Spring advise him that it was possible or likely that he faced a more serious charge of third degree murder. Although they discussed the sentencing guidelines for the offenses for which he was charged in the first Information, they never discussed the sentencing guidelines for third degree murder.

As to the potential risks of not pleading guilty, she advised him that he could get the same time if he went to trial or lost. He could get the same time if he pled open. Nonetheless, she persisted with her advice that she wanted to challenge the receiving stolen property charge.

Because Attorney Spring advised him that she wanted to challenge the receiving stolen property charge and that she could try to beat that charge and he may not need to go to state prison, he chose not to plead open.

He noted that if someone would have told him that he could be charged with third degree murder, he would have pled open.

In June of 2014, he was provided with a plea offer for a six year minimum and a 12 year maximum. This was after he was charged with third degree murder. At the time the plea was discussed with Attorney Spring, they discussed a statement by Gage Wood and Attorney Spring thought the Gage Wood statement would likely get him convicted. They also discussed the James Boring statement. According to Attorney Spring, both statements

"would likely" get Petitioner convicted of third degree murder.

Petitioner decided to accept the six-year minimum offer. He told her that if she could get him 12 years on the max, he would take the deal. Three days later, she returned and told him that she got the 12 years. He was informed that he would "sign a deal" in 10 to 12 days.

However, the day before he was supposed to sign the deal, Attorney Spring informed him that there was "no such thing as the deal." He certainly was willing to accept the 6 to 12 years because of the vast difference between 6 to 12 and 20 to 40.

On cross-examination with respect to the receiving stolen property charge, Petitioner testified that Attorney Spring indicated that he could "win the receiving stolen property charge" or "get it reduced." He was a first-offender, he was young, and he was never in trouble before. He understood that if she did not get it dropped or didn't "beat it", he would likely go to state prison. According to Petitioner "she was very adamant about beating the charge."

According to Petitioner, Attorney Spring essentially said "all you got to do is sit in the county for a little bit, I am going to get the charge reduced, if not dropped, time served, county sentence, you are going to get out."

On cross-examination and with respect to the differing statements, Attorney Spring wasn't concerned with Mr. Boring's statement alone. Following the statement by Mr. Wood in combination with the statement by Mr. Boring and Petitioner, she was concerned with a third degree murder conviction.

The victim was a very good friend of Petitioner. Despite what was going on legally and despite what was being told to him, he was always willing to plead open but also wanted to avoid further incarceration. Based upon what he was told by Attorney Spring, he believed that he could get out of jail sooner if he just waited. Unfortunately, he and Attorney Spring never had any discussion prior to him being charged with third degree murder that his statement along with Mr. Boring's statement made it possible, let alone likely, that he could be charged with third degree murder.

Nicole Spring testified before the court on April 17, 2018. She is currently employed as the First Assistant Public Defender in the Lycoming County Public Defender's office.

Under Docket No. 1293-2013, she represented Petitioner. She first met with him the day after the killing on June 14, 2013 and then again prior to the preliminary hearing which was held on July 25, 2013.

Prior to the preliminary hearing, she had reviewed the criminal complaint, the affidavit and a transcript of the interview with Petitioner. She was aware that Petitioner's "statement" admitted that he pointed a loaded gun at the victim, the gun was a Ruger .22, the gun went off with a bullet striking the victim in the chest and for the gun to go off, he "obviously did…he had to have pulled the trigger."

Subsequent to the preliminary hearing, on or about August 28, 2013, she received the initial discovery from the Commonwealth. It included a statement from James Boring. Mr. Boring had been downstairs and shortly before he heard a shot, he heard

"something to the effect of, I'm going to fucking kill you."

On February 7, 2014, Petitioner was charged with third degree murder. Prior to being charged, Attorney Spring never had a conversation with Petitioner about the evidence that was made available to her being sufficient to convict him of third degree. She never discussed Petitioner's statement or Mr. Boring's statement with respect to a potential third degree charge.

While she remembered thinking about it, "they didn't charge third degree", it didn't concern her and "I wouldn't even worry about it at this point."

She never explained to Petitioner that if he did not plead guilty but was charged with third degree murder, his exposure would have been significantly greater. She did not have any strategic reason for not discussing a potential third degree charge with him. "It just never…I just never thought about it. I never foresaw it coming. I just didn't think about it."

In fact, Petitioner was always willing to plead guilty to all of the charges set forth in the first complaint and Information. Prior to the preliminary hearing, he wanted to plead guilty but he acquiesced in Attorney Spring's advice that he not plead guilty. Attorney Spring's "objection at that point" was the receiving stolen property charge. She wanted to challenge the receiving stolen property charge by filing a motion to dismiss. She was hoping that if the receiving stolen property was dismissed, Petitioner would get a county sentence instead of a state sentence. Despite Petitioner wanting to plead open to all of the charges, her "only issue" was the "gun receiving stolen property." She wanted to fight the receiving

stolen property and as indicated, he "acquiesced because [she] wanted to do it."

Attorney Spring's responsibility for not having Petitioner plead open is documented in a series of emails between her and the deputy court administrator. On January 24, 2014, the court administrator asked Attorney Spring if a scheduling conference was necessary. Attorney Spring emailed her back noting that "if it's a trial, it's only on the RSP charge and won't take more than two days." The deputy court administrator responded inquiring as to what happened with the manslaughter charge. Attorney Spring responded: "My only issue is the gun, RSP." She readily admitted that it was her issue and not Petitioner's issue. She conceded that she did not have a "hint or inkling" that the Commonwealth was considering filing a third degree murder charge.

On cross-examination, Attorney Spring stated that she didn't even consider Mr. Boring's statement at the time, because Petitioner was "only charged with involuntary manslaughter and he admitted it." She wasn't worried about Boring's statement at that point "until the third degree murder charges got filed." While another person may have made the statement, Attorney Spring "never thought about anybody other than Da'Ran having made the statement."

She specifically stated that she should have been aware of the potential at the beginning for third degree murder based upon Mr. Boring's statement. Because Petitioner admitted to the shooting but wasn't charged with third degree, she "wasn't concerned about it." In fact, she indicated that Petitioner's statement alone would have legally allowed the Commonwealth to charge him with third degree murder. Specifically, Petitioner used a

deadly weapon on a vital part of the victim's body.

At the time that she advised Petitioner not to enter a plea to the charges she "didn't see" the third degree murder charge "coming." While she assumed that the reason the third degree charge was filed was because of the additional statement of Gage Wood, her discussions with the District Attorney prior to the third degree charges being filed centered on the receiving stolen property charge and the fact that the Commonwealth wanted Petitioner to plead guilty to both charges for a state sentence. The District Attorney never mentioned that if Petitioner did not plead guilty to all the charges, the Commonwealth would charge him with third degree murder.

She restated that she just never thought about third degree murder charges being filed although she was aware of the potential. She believed, based upon the lack of evidence, that the receiving stolen property charge could be dismissed or that Petitioner could be found not guilty on that.

She conceded, rather sincerely, that because she personally liked Petitioner that it "colored why [she] had blinders on when it came to [the receiving stolen property charge]." She described her failure to anticipate the third degree murder charges as one of her "worst failures." "It's an error [she] never again will make." Further, based upon her long experience as an attorney, she never was involved in a case where the Commonwealth came back and filed a more serious charge without any notice or warning whatsoever. She again agreed that there was no reasonably strategic reason not to talk to her client about the potential for a greater charge.

While she could not state that she would have advised him to plead guilty, she would have discussed with him the potential for more serious charges being filed.

Attorney Spring also rendered testimony with respect to Petitioner's second issue. In July of 2014 following the filing of the third degree murder charges, Attorney Spring had discussions with Assistant District Attorney Melissa Kalaus who was assigned to the case, regarding a plea.

According to Attorney Spring, an agreement was reached wherein Petitioner would plead for a recommended plea agreement of a minimum of six years and a maximum of 12 years. The plea would include pleading guilty to third degree murder. In a July 15, 2014 email, Attorney Kalaus confirmed the offer of 6 to 12 years with 12 being the agreed upon maximum. Having a "solid plea agreement", Attorney Spring called court scheduling to schedule a plea hearing.

The plea was scheduled for August 1, 2014 during arraignments. Between July 15, 2014 and August 1, 2014, there were two Mondays in which the plea could have been scheduled. Attorney Spring did not have a strategic basis for not scheduling the plea prior to August 1, 2014.

To her astonishment, on August 1, 2014, Attorney Spring received an email from Attorney Kalaus questioning the plea and any agreement. Attorney Kalaus eventually sent an email contending that Attorney Spring may have misunderstood the communication as an offer. Attorney Kalaus indicated that the District Attorney required that Petitioner "plead open to everything."

Given the fact that she had the plea agreement verified through emails and had Petitioner actually complete a written colloquy, she never "even contemplated" that the plea would be revoked, or more specifically, that Attorney Kalaus would disavow all knowledge that there had been any discussions or any plea offer made.

Petitioner makes two claims of ineffectiveness. First, Petitioner claims that trial counsel was ineffective in failing to advise Petitioner that the evidence against him and in the possession of the Commonwealth, supported a third degree murder conviction, instead advising Petitioner to wait to plead (despite his expressed desire to do so) to permit counsel to challenge a lesser charge which provided no specific benefit, particularly when no challenge was made and Petitioner was convicted of the offense at trial. Petitioner's second claim of ineffectiveness concerns trial counsel failing to schedule Petitioner for a prompt guilty plea hearing to accept the plea offer made by the District Attorney's office on or about July 15, 2014.

As recently as December 19, 2018, the Superior Court set forth the basis for one to prevail on an ineffectiveness claim.

> To prevail on a claim alleging counsel's ineffectiveness, [Petitioner] must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interests; and (3) that he was prejudiced by counsel's ineffectiveness. In order to meet the prejudice prong of the ineffectiveness standard, a [petitioner] must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome.

Commonwealth v. Stahley, 2018 PA Super 346, 2018 WL 6658013, *7 (December 19, 2018)

(internal citations and quotation marks omitted) (quoting *Commonwealth v. Jones*, 811 A.2d 1057, 1060 (Pa. Super. 2002)).

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). Further, "[c]ounsel cannot be found ineffective for failing to pursue a baseless or meritless claim." *Stahley, id. at *8* (quoting *Commonwealth v. Poplawski*, 852 A.2d 323, 327 (Pa. Super. 2004)(citations omitted)).

Despite the recitation of facts set forth above through the testimony, the determinative facts are clear and undisputed.

On July 13, 2013, Petitioner was charged with involuntary manslaughter and receiving stolen property. The evidence against the petitioner, including the petitioner's statements and the statement of a witness, supported the filing of a third degree murder charge. From the inception of the case, the petitioner wanted to plead open to the charges.

Petitioner, however, acquiesced to the advice of his counsel not to plead guilty but to attempt to obtain a county sentence by attempting to have the receiving stolen property charge dismissed. Defense counsel, however, neither filed any motion to dismiss the receiving stolen property charge nor challenged that charge in court in any manner whatsoever.

On February 7, 2014, Petitioner was charged with third degree murder. At no time prior to this date did defense counsel have any discussion with Petitioner that the evidence was sufficient to charge him with third degree murder; that he could face third

degree murder charges; that if he was convicted of third degree murder, he would face far more time in state prison; or that he should plead open as he desired. At no time did defense counsel advise the petitioner that if he pled open as Petitioner desired, he could avoid potentially more serious charges. Petitioner's counsel had no strategic basis whatsoever for not advising Petitioner as to the above.

Once Petitioner was charged with third degree murder, he became immediately exposed to a much greater sentence. Had he pled open to the original charges, which Petitioner wanted to do for a period of approximately seven months, the theoretical worst case scenario he could face, assuming none of the charges merged and all were imposed consecutively, was an aggregate sentence of 9 ½ to 19 years.[1] Instead, the petitioner was eventually found guilty at trial of third degree murder and sentenced to an aggregate of 21 to 50 years of which a 20 to 40 year sentence was imposed on the third degree murder conviction.

There is no doubt in this court's opinion that petitioner is entitled to the relief that he seeks. Petitioner's claim is of great merit, counsel's conduct was without a reasonable basis designed to effectuate her client's interests and Petitioner was clearly prejudiced. But for counsel's errors, the result would have been vastly different.

As PCRA counsel cogently argues, this decision is supported by both the Supreme Court's decision in *Lafler v. Cooper,* 566 U.S. 156, 132 S. Ct. 1376 (U.S. 2012) and

[1] The court found that the charges of simple assault and recklessly endangering another person merged for sentencing purposes. Therefore, as a practical matter, the worst case scenario on the original charges was a sentence of 7 ½ to 15 years, which represents consecutive statutory maximum sentences for involuntary manslaughter and receiving stolen property.

the Pennsylvania Superior Court's decision in *Commonwealth v. Steckley,* 128 A.3d 826 (Pa. Super. 2015).

The Commonwealth argues that "merely because something is possible does not require that counsel advise [her] client of all possibilities no matter how remote." The Commonwealth submits that counsel does not have a duty to advise a client of all conceivable possible outcomes and that in this case "but for Gage Wood coming forward, third degree [murder] would not have been charged."

The Commonwealth argues that counsel's actions are not to be viewed in hindsight. The Commonwealth asserts that there was no reason for defense counsel to advise Petitioner of the possibility of a third degree murder charge, because there was no reason to believe that the charges would be upgraded.

The essential issue before the court is what information must be supplied or provided to a criminal defendant in order for that individual to make knowing, intelligent and voluntary decisions. While certainly one cannot expect counsel to predict all possible outcomes, there is a level that counsel is expected to meet in order to provide effective assistance of counsel.

In *Commonwealth v. Steckley*, 128 A.3d 826 (Pa. Super. 2015), the defendant was charged with child pornography. The Commonwealth offered a three (3) to six (6) year plea agreement. The defendant rejected the offer because "it didn't make sense to him in light of the sentencing guideline worksheets that were previously provided to him by the Commonwealth." The Commonwealth then offered a reduced two (2) to six (6) year plea

agreement which the defendant rejected for the same reason.

The defendant proceeded to trial and was convicted. Prior to his sentencing hearing, the Commonwealth provided notice of its intent to seek the twenty-five (25) year mandatory minimum. Defendant's counsel was unaware of the "potential twenty-five (25) year minimum" and therefore, never discussed such with the defendant. Counsel's failure to recognize the extent of defendant's exposure and to discuss such with the defendant caused the defendant to reject the plea agreement.

In the context of a defendant's claim seeking relief on the basis of ineffective counsel causing him to reject the guilty plea, the defendant must demonstrate that but for the ineffective advice, there is a reasonable probability that the plea would have been presented to the court, that the court would have accepted it, and that the terms would have been less severe than under the sentence that was in fact imposed. *Id.* at 832 (citing *Lafler v. Cooper,* 132 S. Ct. 1376, 1385 (2012)).

The ineffective advice in *Steckley,* was in fact the lack of effective advice. The court chose "not to discuss at length the unreasonableness of [counsel's] failure to inform her client that he might be sentenced to a lengthy mandatory term of imprisonment if he opted to go to trial and did not prevail." *Id.* The court noted that it is the duty of defense counsel to inform [her] client of those things defendant needs to know to make a knowing, voluntary and intelligent decision whether to seek a negotiated plea or go to trial. *Id.* at 832 n. 2.

Contrary to what the Commonwealth argues, *Steckley* is persuasive— if not determinative. In *Steckley,* prior to defendant rejecting a plea, it was ineffective for counsel

not to advise the defendant that he "might face the possibility" of the Commonwealth seeking a mandatory minimum. Like this case in which the Commonwealth failed to give defense counsel any reason whatsoever to suspect let alone know that it was going to file third degree murder charges, in *Steckley* the Commonwealth failed to let defense counsel know that it would be seeking a mandatory minimum. In this case, the filing of third degree murder charges was a possibility within the discretion of the Commonwealth. In *Steckley,* the filing of the notice seeking a mandatory was a possibility, within the discretion of the Commonwealth.

In this case, prior to persuading Petitioner to reject the open plea which he wanted to enter, counsel should have advised Petitioner that he might face the possibility of the Commonwealth adding additional charges, including third degree murder, especially because the evidence in counsel's possession clearly supported the filing of said charges. This is exactly what Petitioner needed to know in making a knowing, voluntary and intelligent decision with respect to accepting or rejecting any plea, including an open plea.

The Commonwealth argues that it would be improper to impose a duty upon defense counsel to speculate or guess. The Commonwealth fails to support this argument with any legal authority whatsoever. Indeed, the Commonwealth cites no legal authority to support its position. In each and every criminal case an attorney is duty bound to examine the evidence, to defend not only against the pending charges, but potential further adverse consequences.

Despite the Commonwealth's argument to the contrary, every criminal

defendant, in order to make a knowing voluntary and intelligent decision whether to accept or reject the plea agreement is entitled to know whether he or she may be exposed to additional more serious charges based upon the evidence as evaluated by his or her attorney. The failure to so advise a client is ineffective.

A lawyer's ability to predict a particular outcome is pivotal in client decision making. One of a lawyer's most valued and important tasks is to advise a client as to the likely outcome of a proceeding. "Outcome prediction is basically the legal equivalent of prognosis in medicine: An attempt to forecast the consequences of various causes of action so that the lawyer can help the client make an informed decision about matters of significant consequence to the client." Lawyer as Soothsayer: Exploring the Role of Outcome Prediction in the Practice of Law, Mark Osbeck, University of Michigan of Law School Scholarship Repository, March 12, 2018. While this is an imprecise endeavor, it is a required endeavor.

Defense counsel must advise his or her client of those things he or she needs to know to make an appropriate decision. The American Bar Association has published criminal justice standards for the defense function. The standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. Standard 4-1.1 (a). Defense counsel has a specific duty to keep a client informed of potential options and outcomes. Standard 4-1.3 (d). Defense counsel has a duty to evaluate the impact that each decision may have at later stages. 4-1.3 (f). As early as practicable, an attorney should discuss with his or her client the range of potential outcomes. 4-3.3 (c) (vi), 4-5.1 (b).

The Pennsylvania Rules of Professional Conduct, which first became effective in 1988 but most recently were revised in 2018, also address this issue. A lawyer shall explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions. Rules of Prof. Conduct, Rule 1.4 (b). The term "reasonably" denotes that a lawyer of reasonable competence and prudence would ascertain the matter. The lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests. Rules of Prof. Conduct, Rule 1.4 comment [5]. This theme is also echoed in the inferred consent portions of the rules. See Rules of Prof. Conduct, 1.0(e) and 1.7 comment [18].

This duty of an attorney was set forth in *Commonwealth v. Bradley,* 715 A.2d 1211 (Pa. 1998). Counsel's duty is to discuss the decision to accept or withdraw a plea, explain its risks and ramifications and to give advice. The withdrawal of a guilty plea to third degree murder in a case which "might involve the death penalty" is a momentous event. "To say that the advice of counsel should be available before a criminal defendant undertakes the withdrawal of his plea is an understatement." *Id*. at 1124

Indeed, a strong analogy can be made with the doctrine of informed consent in medical treatment. The doctrine recognizes that a patient has the right to be informed by his or her physicians of the risks and benefits attending a proposed course of treatment in order to enable the patient to make an informed decision about the treatment. *Shinal v. Toms,* 163 A.3d 429, 452 (Pa. 2017). To ensure informed consent, the physician has a duty to inform the patient about the risks, benefits, likelihood of success and alternatives. *Id.* Doctors must

provide patients with sufficient information to give the patient "a true understanding of the nature of the operation to be performed, the seriousness of it, the organs of the body involved, the disease or incapacity sought to be cured and the possible results." *Valles v. Albert Einstein Medical Center*, 805 A.2d 1232, 1237 (Pa. 2002)(citations omitted).

To accept the Commonwealth's argument in this case would be to accept the conclusion that a criminal defendant's right to information with respect to future consequences is less than that of an individual undergoing a medical procedure. Such a distinction is not warranted nor shall it be applied.

Furthermore, the Pennsylvania Rules of Criminal Procedure generally permit the Commonwealth to amend the information to add additional charges when those charges arise from the same set of events, even up to the day of trial. See Pa. R. Crim. P. 564; *Commonwealth v. Picchianti*, 600 A.2d 597 (Pa. Super. 1991). Specifically, the Superior Court in *Picchianti* stated:

> Where the crimes specified in the original information involve the same basic elements and arose out of the same factual situation as the crimes specified in the amended information, the defendant is deemed to have been placed on notice regarding his alleged criminal conduct and no prejudice to defendant results. Further, if there is no showing of prejudice, amendment of an information to add an additional charge is proper even on the day of trial. Finally, the mere possibility amendment of an information may result in a more severe penalty due to the addition of charges is not, of itself, prejudice.

600 A.2d at 599 (citations omitted).

If a defendant is deemed to have been placed on notice, certainly his attorney who is trained in the law would also be deemed to have been placed on notice. Therefore, a

defense attorney has an obligation not only to consider the charges filed in the information but to also be aware of the possibility of the addition of similar charges arising from the same factual situation.

Petitioner's claim is meritorious. The undisputed evidence shows that Petitioner wished to enter an open plea to the original charges of involuntary manslaughter, receiving stolen property, simple assault, and recklessly endangering another person filed under 1293-2013 at his arraignment on August 26, 2013. Attorney Spring advised and persuaded Petitioner not to enter such a plea so that she could challenge the receiving stolen property charge. Attorney Spring, however, never challenged that charge. She also never advised Petitioner that the evidence was sufficient for the Commonwealth to file an additional charge of third degree murder. Clearly, Attorney Spring's failures were without a reasonable basis designed to effectuate her client's interests. Lastly, Petitioner was prejudiced. But for Attorney Spring's ineffectiveness, Petitioner would have pled open and, in the absolute worst case scenario, would have been exposed to an aggregate sentence of 9 ½ to 19 years' incarceration. If Petitioner had tendered an open guilty plea at his arraignment as he desired, the Commonwealth would not have been able to file the third degree murder charge. See 18 Pa. C.S.A. §110. Because of the ineffective failure to provide appropriate advice, resolution of the charges was delayed for no reason, the Commonwealth added the third degree murder charge, Petitioner proceeded to trial and was found guilty of all of the charges, and Petitioner was sentenced to twenty-one (21) to fifty (50) years' incarceration.

Having established ineffectiveness, the question now turns to the appropriate remedy.

As the court in *Steckley* noted, Sixth Amendment remedies should be tailored to the injuries suffered from the constitutional violation and should not unnecessarily infringe on competing interests. *Steckley,* 128 A.3d at 836 (citing *Lafler,* 132 S.Ct. at 1388). Petitioner suffered a sentence substantially longer than the one he would have faced if he had pled guilty to the original charges at arraignment. The Commonwealth cannot be given another opportunity to charge and litigate third degree murder. Accordingly, the appropriate remedy in this court's opinion is to give the Petitioner an opportunity to plead open to the original charges of involuntary manslaughter, receiving stolen property, simple assault and recklessly endangering another person. This is the plea that Petitioner wished to enter but was dissuaded from doing so due to his attorney's deficient performance.

Having awarded the petitioner the relief requested on his first claim of ineffectiveness, the court need not address the second claim.

ORDER

AND NOW, this ___ day of January 2019 following a hearing, argument and the submission of briefs, the court GRANTS Petitioner's PCRA Petition. The Verdict Order and the Sentencing Order previously entered in this matter are VACATED. Petitioner shall be returned to the custody of the Lycoming County Prison for a guilty plea and sentencing hearing to be held on the **1st day of March 2019 at 9:00 a.m. in Courtroom #4 of the Lycoming County Courthouse**. Petitioner will be permitted to plead open to all counts

under Information 1293-2013. The plea of guilty and the sentence on said counts shall preclude the Commonwealth from proceeding with prosecution underc Information No. 293-2014.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: CA
Kenneth Osokow, Esquire (ADA)
Don Martino, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file