

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

**COMMONWEALTH OF PENNSYLVANIA** :  
 :  
 v. : **CR-600-2014**  
 :  
 :  
 **ZAKARY WALLS,** :  
 **Petitioner** : **PCRA/WITHDRAWAL**  
 : **GRANTED**

**OPINION AND ORDER**

On February 27, 2019, Attorney William Miele filed a Petition to Withdraw as Counsel pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) in the above docketed information. After an independent review of the entire record, this Court agrees with Post-Conviction Relief Act (PCRA) Counsel and finds that Zakary Walls (Petitioner) has failed to raise any meritorious issues in his PCRA Petition, and that his Petition should be dismissed.

***Background***

On February 19, 2015, Petitioner was found guilty by a jury of Assault of a Law Enforcement Officer,<sup>1</sup> Simple Assault,<sup>2</sup> Resisting Arrest,<sup>3</sup> and Unlawful Restraint.<sup>4</sup> Prior to trial he pled guilty to five counts of Possession of a Controlled Substance with the Intent to Deliver,<sup>5</sup> two counts of Criminal Use of a Communication Facility,<sup>6</sup> two counts of Possession of Drug Paraphernalia,<sup>7</sup> and one count of Possession of a Controlled Substance.<sup>8</sup> Petitioner was sentenced

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<sup>1</sup> 18 Pa. C.S. § 2702.1(a)(3).

<sup>2</sup> 18 Pa. C.S. § 2701(a)(1).

<sup>3</sup> 18 Pa. C.S. § 5104.

<sup>4</sup> 18 Pa. C.S. § 2902(a)(1).

<sup>5</sup> 35 P.S. § 780-113(a)(30).

<sup>6</sup> 18 Pa. C.S. § 7512(a).

<sup>7</sup> 35 P.S. § 780-113(a)(32).

<sup>8</sup> 35 P.S. § 780-113(a)(16).

by this Court on May 14, 2015, to an aggregate term of two and a half (2 ½) years to ten (10) years of state incarceration followed by a five year term of probation. Petitioner filed a Motion for Modification of Sentence on June 5, 2015, which was denied as untimely. His sentence was then appealed based on discretionary aspects of his sentence. The Pennsylvania Superior Court affirmed the sentence on May 16, 2016. Petitioner then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on June 17, 2016, which was subsequently denied on October 19, 2016. This timely PCRA Petition was filed on December 18, 2017. On December 21, 2017, William Miele, Esq. was appointed as PCRA counsel and a conference was scheduled. That conference was held on April 9, 2018. Counsel was then ordered to file either an Amended Petition or a Motion to Withdraw following a *Turner/Finley* letter. Attorney Miele sent a *Turner/Finley* letter to Petitioner on December 12, 2018 and filed his Petition to Withdraw as Counsel on February 27, 2019. After consideration this Court agrees with Attorney Miele that Petitioner failed to raise any meritorious issues in his PCRA Petition and therefore it is the intention of this Court to dismiss his Petition.<sup>9</sup>

***Whether Criminal Use of a Communication Facility and Possession with the Intent to Deliver Merge for Sentencing Purposes***

Petitioner alleges that trial counsel, James Best, Esq., was ineffective for failing to raise the applicability of the Merger Doctrine at the time of sentencing. “It is well-settled that counsel is presumed to have been effective and that the petitioner bears the burden of proving counsel's alleged ineffectiveness.” *Commonwealth v. Wholaver*, 177 A.3d 136, 144 (Pa. 2018) (citing *Commonwealth v. Cooper*, 941 A.2d 655, 664 (Pa. 2007)). To overcome this claim a petitioner must establish “(1) the underlying substantive claim has arguable merit; (2) counsel did not have

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<sup>9</sup> It should also be noted that Petitioner has failed to respond to any of Attorney Miele’s inquiries to acquire additional information from him regarding his case and his claims.

a reasonable basis for his or her act or omission; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance.” *Id.* Failure to meet any of these three requirements must result in denial of Petitioner’s claim. *Id.*

The Pennsylvania Supreme Court has determined that the Merger Doctrine only applies to those crimes which are “greater and lesser included offenses” of one another. *Commonwealth v. Anderson*, 650 A.2d 20, 22 (Pa. 1994). When determining whether two offenses are greater and lesser offenses of one another the Court must analyze the elements of the separate offenses. *Commonwealth v. Duffy*, 832 A.2d 1132, 1138 (Pa. Super. 2003). “If the elements of the lesser offense are all included within the elements of the greater offense and the greater offense has at least one additional element, which is different, then the sentences merge,” but “[i]f both crimes require proof of at least one element that the other does not, then the sentences do not merge.” *Id.* The two statutes Petitioner contends should merge are Possession with the Intent to Deliver a Controlled Substance and Criminal Use of a Communication Facility. Possession with the Intent to Deliver a Controlled Substance prohibits the “delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act.” 35 P.S. § 780-113(a)(30). Criminal Use of a Communication Facility defines a violation as a “person us[ing] a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under . . . The Controlled Substance, Drug, Device and Cosmetic Act.” 18 Pa. C.S. § 7512(a).

Defendant was found guilty of both Delivery of a Controlled Substance and Criminal Use of a Communication Facility. These two crimes are not lesser and greater included offenses of one another. Petitioner’s violation of 35 P.S. § 780-113(a)(30) did not require the use of a cellphone, instead he violated by delivering the controlled substance. Petitioner’s violation of 18

Pa. C.S. § 7512(a) did not require that he even possessed a controlled substance with the intent to deliver it. *See Commonwealth v. Moss*, 852 A.2d 374, 382-84 (Pa. Super. 2004) (An individual can be found guilty of 18 Pa. C.S. § 7512(a) for facilitating the commission of a crime by texting a known drug dealer to purchase a controlled substance and then doing so). Since both offenses have an element the other does not, the offenses are not lesser and greater included offenses of one another and were properly not merged for sentencing purposes. *Duffy*, 832 A.2d at 1138; *see also Commonwealth v. Brown*, 609 A.2d 1352 (Pa. Super. 1992) (Similarly Possession of an Instrument of a crime is a separate offense that is not subject to Merger Doctrine). Additionally, this Court did take into consideration the Merger Doctrine at the time of sentencing and merged those charges that were appropriate. *See Sentencing Order 5/14/15*, at 2. Since the underlying substantive claim has no merit, counsel was not ineffective for not raising the issue. *Wholaver*, 177 A.3d at 144.

***Whether Trial Counsel was Ineffective for Failing to Hire a Psychiatrist to Show his Involuntary Guilty Plea***

Petitioner claims trial counsel was ineffective for failing to hire a psychiatrist to testify as to his incompetence prior to his plea, which if he had “the outcome of the case would have been drastically different.” Petitioner’s PCRA 12/18/17, at 17. A defendant is presumed to be competent. *Commonwealth v. duPont*, 681 A.2d 1328, 1330-31 (Pa. 1996). A defendant is competent to plead guilty if he/she understands the nature of proceedings, the charges facing him/her as the accused, and he/she has had adequate time to consult with an attorney in making the determination to plead guilty. *Commonwealth v. Frey*, 904 A.2d 866, 872 (Pa. 2006). Manifest injustice is required to withdraw guilty pleas which are requested after a sentence has been imposed. *Commonwealth v. Flick*, 802 A.2d 620, 623 (Pa. Super. 2002). Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and

understandingly. *Commonwealth v. Persinger*, 615 A.2d 1305, 1308 (Pa. 1992). It does not matter if Petitioner is pleased with the outcome of his decision to plead guilty as long as he did so knowingly, voluntarily, and intelligently. *Commonwealth v. Yager*, 685 A.2d 1000, 1004 (Pa. Super. 1996). Petitioner must demonstrate a “miscarriage of justice . . . which no civilized society could tolerate, in order to be entitled to relief.” *Commonwealth v. Allen*, 732 A.2d 582, 588 (Pa. 1999). A trial court must, at a minimum, evaluate the following six areas:

(1) Does the Petitioner understand the nature of the charges to which he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the Petitioner understand that he has a right to trial by jury? (4) Does the Petitioner understand that he is presumed innocent until he is found guilty? (5) Is the Petitioner aware of the permissible ranges of sentences and/or fines for the offenses charged? (6) Is the Petitioner aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

*Commonwealth v. Young*, 695 A.2d 414, 417 (Pa. Super. 1997).

In *Yeomans*, the Superior Court further summarized:

In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the Petitioner understood what the plea connoted and its consequences. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. Thus, even though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the Petitioner had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

*Commonwealth v. Yoemans*, 24 A.3d 1044, 1047 (Pa. Super. 2011) (citing *Commonwealth v. Fluharty*, 632 A.2d 312, 314 (Pa. Super. 1993)).

A review of the transcripts of the guilty plea and sentencing hearings in this case confirms that Petitioner did in fact enter into his plea knowingly, voluntarily, and intelligently. Petitioner was made aware of the nature of the charges, the potential consequences associated with those charges, and the absolute right to a jury trial on those charges. N.T. 2/19/15, at 8-10. The factual basis underlying the charges, which he pled guilty were outlined in detail. *Id.* at 10-

13. Petitioner does state that goes to psychological counseling during his guilty plea, but he is not on any medication as a result of his counseling. *Id.* at 15-16. This Court took Defendant's ongoing mental health counseling into account at the time of sentencing. N.T. 5/14/15, at 5. Defense counsel also noted Defendant had "a great sense of low self worth, low self esteem" and believed he would benefit from mental health counseling. *Id.* at 7. These instances do not go to show that Defendant was unaware incapable of entering a plea. Defendant was receiving counseling starting in August of 2014 six month prior to his guilty plea. The guilty plea colloquy and the record reflect Defendant was aware of his choice to pled guilty and his testimony on the stand further validates the reason why he indicated that he pled guilty, as he was involved in the sales of marijuana, which were alleged.

***Whether Defense Counsel was Ineffective for Failing to Provide Expert Testimony Regarding Petitioner's Mental State and Police Training Techniques***

Petitioner alleges that counsel should have hired expert witnesses to explain police training techniques and Petitioner's mental state at the time of the incident. Again, "[i]t is well-settled that counsel is presumed to have been effective and that the petitioner bears the burden of proving counsel's alleged ineffectiveness." *Wholaver*, 177 A.3d at 144. To overcome this claim a petitioner must establish "(1) the underlying substantive claim has arguable merit; (2) counsel did not have a reasonable basis for his or her act or omission; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance." *Id.* Failure to meet any of these three requirements must result in denial of Petitioner's claim. *Id.*

Petitioner contends that the force used by officers was "above and beyond the force required for the arrest." Petitioner's PCRA 12/18/17, at 18. Petitioner's remedy for excessive force is exclusively civil and Petitioner was only permitted to resist arrest in response to unlawful excessive deadly force. *See Commonwealth v. French*, 611 A.2d 175, 178-79 (Pa.

1992). No expert was required to show police acted excessively because legally the argument was meritless. *Wholaver*, 177 A.3d at 144. Petitioner also argues that a psychiatrist could have shown that “an individual under arrest was belligerent, the element of a diminished capacity should have been factored into the amount of force utilized.” Petitioner’s PCRA 12/18/17, at 19. “[D]iminished capacity defense is available in Pennsylvania only on murder charges.”

*Commonwealth v. Terry*, 521 A.2d 398, 404 (Pa. 1987); *see also Commonwealth v. Garcia*, 479 A.2d 473, 477 (Pa. 1984) (“Proper *psychiatric* testimony is admissible only to negate the specific intent required to establish first degree murder.”). Therefore Petitioner’s two above claims are meritless.

***Whether Counsel was Ineffective for Failing to Present Evidence to Show a Lack of Maturity***

Petitioner alleges defense counsel should have put on evidence to show his lack of maturity at the time of the offenses. At the time of the offenses Petitioner was twenty (20) years old. It would have been meritless for counsel to argue in accordance with *Roper* as Petitioner suggests. *See Commonwealth v. Lesko*, 15 A.3d 345, 408 fn. 31 (Pa. 2011); *see also Commonwealth v. Lee*, -- A.3d --, 2019 WL 986978, at \*2 (Pa. 2019) (“we find it untenable to extend *Miller* to one who is over the age of 18 at the time of his or her offense”). Therefore counsel was not ineffective. *See Wholaver*, 177 A.3d at 144.

***Conclusion***

Based upon the foregoing, the Court finds no basis upon which to grant Petitioner’s PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court’s intention to deny Petitioner’s PCRA 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.

**ORDER**

**AND NOW**, this 1<sup>st</sup> day of May, 2019, it is hereby **ORDERED** and **DIRECTED** as follows:

1. Petitioner is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed February 27, 2019, is hereby **GRANTED** and William Miele, Esq. may withdraw his appearance in the above captioned matter.
3. **Petitioner Zakary Walls will be notified at the address below through means of certified mail.**

By the Court,

Nancy L. Butts, President Judge

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NLB/kp