

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CR-129-2018
	:	CR-135-2018
	:	
v.	:	
	:	CRIMINAL DIVISION
JEREMIAH BEY,	:	
Petitioner	:	PCRA

OPINION AND ORDER

On May 17, 2018, Jeremiah Bey (Petitioner) pled guilty to Persons Not to Possess a Firearm¹ and Escape,² and pled no contest to Possession of a Controlled Substance with the Intent to Deliver (PWID).³ Petitioner was sentenced the same day to fifty-four months to one hundred eight months for Persons Not to Possess a Firearm and one year to two years on both counts of Escape and PWID. The sentences for Escape and PWID were ordered to run concurrent to Petitioner’s sentence for Persons Not to Possess a Firearm. No subsequent post-sentence motions or appeals were filed. Therefore, Petitioner’s sentence became final on June 17, 2018. On April 26, 2019, Petitioner filed a timely *pro se* Post-Conviction Relief Act (PCRA) petition. Helen Stolinas, Esq. was appointed to represent Petitioner on May 1, 2019. Petitioner, through counsel, filed an amended PCRA petition on September 16, 2019 and a conference was held on September 24, 2019. An evidentiary hearing was held on January 10, 2020.

Petitioner advances two issues in his petition. First, he seeks to have his appellate rights reinstated *nunc pro tunc* alleging that plea counsel was ineffective for failing to preserve his post-sentence motions and appellate rights despite Petitioner’s indication to counsel that he

¹ 18 Pa. C.S. § 6105(a)(1).

² 18 Pa. C.S. § 5121(a).

³ 35 P.S. § 780-113(a)(30).

wished to have them filed. Second, Petitioner requests his guilty plea be withdrawn claiming plea counsel was ineffective in allowing him to enter the plea.

Evidentiary Hearing

Petitioner was the only individual to testify at the evidentiary hearing. Additionally, Petitioner submitted a letter he claims was sent to his attorney, Dance Drier, Esq. (Drier), as an exhibit. The Commonwealth submitted copies of Petitioner's guilty plea recommendation from his preliminary hearing, a case scheduling form indicating he will plea at arraignment, two orders scheduling his guilty plea, his guilty plea colloquy, and the transcript from his guilty plea/sentencing hearing as exhibits. His testimony and the evidence submitted was the following. Drier was Petitioner's assigned attorney in the Public Defender's office, but other members of the office were assisting in representing him at the time of his guilty plea. N.T. 1/10/20, at 3. Petitioner had previously asked Drier to file a Motion to Suppress or a Motion to Dismiss on his behalf. *Id.* at 4. Petitioner believed such a motion would have been of merit because his charges were conspiracy based and his co-defendant's case was dismissed. *Id.* From the beginning of his case, Petitioner claims there were issues with his representation. *Id.* at 5. Examples were that he always had to contact Drier and Drier never contacted him, and that he never received discovery for his charges. *Id.* at 5-6. Petitioner was brought to Lycoming County the day before his guilty plea and did not see Drier prior to the time of his guilty plea. *Id.* at 6-7. In regards to his actual guilty plea, the recommendation was offered at the time of the preliminary hearing on January 24, 2018 and signed by Petitioner and Drier. *Id.* at 14; *see also* Commonwealth's Exhibit #1. Petitioner and Drier then signed a case scheduling form indicating that Petitioner planned to plead guilty at arraignment. *Id.* at 17; *see also* Commonwealth's Exhibit #2. On May 17, 2018, Petitioner was hesitant to take the plea,

specifically to the PWID charge. N.T. 1/10/20, at 3-4. During that time, Petitioner refused to plead guilty to PWID and was taken back to his holding cell to allow him more time to discuss any issues with his attorneys. *Id.* at 29. Petitioner was informed that if he did not plead guilty to PWID, no plea agreement would happen. *Id.* at 30. Petitioner felt as if he did not take the no contest plea, he would not get a plea agreement. *Id.* at 30-32. Petitioner eventually took the plea, but still did not understand the concept of a “no contest” plea. *Id.* at 8. Drier and another attorney at the Public Defender’s office went through the guilty plea colloquy with Petitioner. *Id.* at 21-23. The guilty plea colloquy outlined the terms of the plea agreement, which called for an aggregate sentence of fifty-four to one hundred eight months in a state correctional institution. Commonwealth’s Exhibit #5, at 1. The day after the plea Petitioner spoke with Drier and asked him to file an appeal. *Id.* at 8. Three days after his guilty plea and sentence, Petitioner wrote a letter to Drier memorializing that Drier had told Petitioner in the courtroom, following the plea, that he would file an appeal on his behalf, indicating Petitioner did not want to plead to his PWID charge, and that Petitioner wished to have an appeal filed before the deadline. *Id.* at 8; *see also* Petitioner’s Exhibit #1. Petitioner claims to have asked Drier to file his appeal on several occasions. *Id.* at 11-12. No such appeal or post-sentence motions were ever filed.

Discussion

An individual seeking relief under the PCRA “*must plead and prove* by a preponderance of the evidence” all requirements under the statute. 42 Pa. C.S. § 9543(a) (emphasis added). Therefore a petitioner must plead and prove:

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of

the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

42 Pa. C.S. § 9543 (a)(2).

To establish a claim for ineffective assistance of counsel, a petitioner must show 1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. *Commonwealth v. Cooper*, 941 A.2d 655, 664 (Pa. 2007); *see Commonwealth v. Carpenter*, 725 A.2d 154, 161 (Pa. 1999). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. *Cooper*, 941 A.2d at 664; *see Commonwealth v. Sneed*, 899 A.2d 1067, 1076 (Pa. 2006). Finally, “counsel is presumed to be effective and a [petitioner] has the burden of proving otherwise.” *Commonwealth v. Williams*, 570 A.2d 75, 81 (Pa. 1990).

Whether Trial Counsel Was Ineffective for Failing to File an Appeal

The Pennsylvania Supreme Court has held that “an unjustified failure to file a requested direct appeal . . . falls beneath the range of competence demanded of attorneys in criminal cases, . . . and constitutes prejudice for purposes of Section 9543(a)(2)(ii).” *Commonwealth v. Lantzy*, 736 A.2d 564, 572 (Pa. 1999). If a petitioner fails to show he/she requested an appeal then counsel will not be found *per se* ineffective. *Commonwealth v. Knighten*, 742 A.2d 679, 682 (Pa. Super. 1999); *Commonwealth v. Bath*, 907 A.2d 619, 622 (Pa. Super. 2006) (when a

petitioner fails to request an appeal, “counsel cannot be faulted for failing to perform an action that [the petitioner] never requested”). However, this finding does not end a PCRA court’s analysis,

where there is no indication that the defendant asked counsel to petition for allowance of appeal, the petitioner still may establish that counsel was ineffective if he failed to adequately consult with the defendant regarding such an appeal. In this situation, however, the defendant must show that a duty to consult arose and that any of his issues rose “above frivolity.”

Commonwealth v. Rigg, 84 A.3d 1080, 1088 (Pa. Super. 2014) (citing *Bath*, 907 A.2d at 624).

Petitioner’s allegations in regards to his appeal have changed throughout the PCRA process. In Petitioner’s original PCRA petition he stated “counsel advised me to go through the counsler [sic] at the jail which was false & ultimately made me untimely for filing [sic] my direct appeal.” Petitioner’s Motion for Post Conviction Collateral Relief 3/26/19, at 3. Further in the petition, Petitioner reiterates:

Counsel was ineffective due to before the deadline of [Petitioner’s] direct appeal – [Petitioner] spoke with counsel & asked counsel what did he have too do to file an appeal of his sentence. Counsel advised [Petitioner] that he had to go through the consler, at the jail where [Petitioner] was incarcerated at! Which was false & in face a lie [Petitioner] had to have counsel file the appeal & that ultimately made [Petitioner] untimely for his direct appeal.

Id. at 18.

In Petitioner’s Amended Petitioner, he similarly argued that “[i]mmmediately following sentencing, Petitioner informed his attorney [Drier] that he wanted to appeal his sentence, and that he wanted to argue for a lesser sentence. Rather than meeting with Petitioner, his attorney advised him to inform his counselor at the jail regarding the request.” Petitioner’s Amended Post Conviction Relief Petition 9/16/19, at 3. Then abruptly at the time of the evidentiary hearing the factual circumstances changed. Petitioner testified the day after his sentence he told

Drier he wanted to file an appeal and three days later he wrote Drier a letter stating: “you told me in the courtroom after I was sentenced that you were going, to file a direct appeal immediate [sic];” “I’m sending you this letter as a reminder to file it before the deadline;” and “please make sure you file my paperwork before the deadline!” Petitioner’s Exhibit #1.

This Court finds Petitioner’s testimony was not credible. As shown above, Petitioner’s averments made in his original PCRA petition and Amended Petition do not match his testimony. Additionally, Petitioner’s Exhibit #1 does not match either his petitions or Petitioner’s own testimony. The letter admitted as Petitioner’s Exhibit #1 cannot be verified of when it was actually created or if it was actually sent. There is no timestamp, no proof of postage accompanying it, and no testimony to verify it, other than Petitioner’s self-serving testimony. Petitioner expects this Court to simply rely on the first line of the letter which states: “This is Jeremiah Bey & today is May 20, 2018 – I was sentenced on May 17, 2018.” Petitioner’s Exhibit #1. Yet, Petitioner ignores the glaring red flag that the letter states Drier told him in the courtroom after the plea/sentencing that he would file an appeal on Petitioner’s behalf. Drier was not in the courtroom and did not handle Petitioner’s plea and sentencing, another attorney in Drier’s office did. The combination of an unverified letter and Petitioner’s self-serving and inconsistent averments throughout the process does not satisfy Petitioner’s burden to demonstrate by a preponderance of the evidence that Drier unjustly failed Petitioner by not filing a requested direct appeal.⁴

The Court’s analysis does not end at this point, and it must further determine whether a duty to consult arose and whether the issues Petitioner would have raised are not frivolous. *Rigg*, 84 A.3d at 1088. Petitioner wishes to address on appeal the following issues: (1) Whether

⁴ Drier was not called to testify by Petitioner and, as the burden rests with Petitioner, this Court could only consider Petitioner’s filings, exhibits, and his own inconsistent testimony.

trial counsel was ineffective for not pursuing suppression or dismissal of evidence; and (2) Whether Petitioner should be allowed to withdraw his no contest plea to PWID. N.T. 1/10/20, at 11-12. Both of Petitioner's claims are frivolous. As for Petitioner's first claim, "a plea of guilty constitutes a waiver of all nonjurisdictional defects and defenses and waives the right to challenge anything but the legality of the sentence and the validity of the plea." *Commonwealth v. Singleton*, 169 A.3d 79, 81 (Pa. Super. 2017). Unless Petitioner's guilty plea was invalid he is not entitled to argue the issue of suppression or dismissal of evidence. As addressed below Petitioner's guilty plea and no contest plea were entered knowingly, intelligently, and voluntarily, and therefore withdrawal would be inappropriate.

Whether Petitioner is Entitled to Withdrawal of His Guilty Plea

In a PCRA claim where a guilty plea was entered and honored by the sentencing judge, the Court is directed to look to whether the plea was knowingly, intelligently, and voluntarily entered into. *Commonwealth v. Moury*, 992 A.2d 162, 175 (Pa. Super. 2010). Manifest injustice is required to withdraw guilty plea which is requested after a sentence has been imposed. *Commonwealth v. Flick*, 802 A.2d 620, 623 (Pa. Super. 2002). Such a manifest injustice occurs only 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 hearing in this case confirms that Petitioner did in fact enter into his plea knowingly, voluntarily, and intelligently. The plea agreement was the same as the one agreed upon at the time of the preliminary hearing. N.T. 5/17/18, at 8. This Court informed Petitioner of the nature of the charges to which he was pleading. *Id.* at 8-9. The Commonwealth outlined the facts it would have presented at trial for the PWID charge to which Petitioner pled no contest. *Id.* at 18. Petitioner was asked questions to establish the factual basis for the underlying charges of Persons Not to Possess a Firearm and Escape and he readily admitted to the elements of the charges to which he was pleading guilty. *Id.* at 18-20. The Court informed Petitioner of his absolute right to a jury trial and the maximum sentences and fines that accompanied those charges. *Id.* at 8-10, 21. Petitioner indicated that he went through the guilty plea colloquy with the assistance of an attorney, he had adequate time to consult with his attorney, it was his decision to plead guilty and no

contest, and that he was not threatened, coerced, or forced into making his decision. *Id.* at 20-23. Petitioner contends that he did not understand the no contest plea and that he felt coerced to plead no contest because he would not receive a deal. This contention is meritless based upon Petitioner admitting on the record to the factual underpinnings of the charge. *Id.* at 18-20. Lastly, it is clear that Petitioner only was “coerced” by the fact that he wanted the benefit of a four and half year to nine year sentence and he would only get that sentence if he pled no contest to PWID. N.T. 1/10/20, at 31-32. Petitioner cannot reap the benefit of his negotiated guilty plea, understanding the plea he is entering and the time he is receiving for that plea, and then pick and choose which pieces he did not understand after the fact because he does not like the charges. According to Pennsylvania law, Petitioner’s guilty and no contest pleas were entered knowingly, voluntarily, and intelligently.

ORDER

AND NOW, this 4th day of March 2020, upon review of the record and after an evidentiary hearing, Petitioner's Amended PCRA Petition is hereby **DENIED**. Petitioner 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 county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as 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.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Petitioner may lose forever his right to raise these issues.

By The Court,

Nancy L. Butts, President Judge

CC: DA (DW)
Helen Stolinis, Esq.

NLB/kp