

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-315-2019  
: CR-316-2019  
: CR-1644-2018  
vs. : CR-52-2018  
: CR-2046-2017  
NICHOLAS BROWN, : CR-1855-2017  
Defendant : CR-970-2017  
: Amended Petition for Post-Conviction Relief

**OPINION AND ORDER**

On June 20, 2019, Petitioner Nicholas Brown (Brown) pled guilty and was sentenced on six different counts of home improvement fraud, 73 P.S. § 517.8, all of which except for one count were graded as felonies of the third degree.

By letter dated August 23, 2019, Brown requested collateral relief. The court-appointed counsel who filed an Amended Petition for Post-Conviction Relief on March 4, 2020. A conference was held on March 18, 2020, and the Commonwealth was directed to file an Answer no later than May 18, 2020. On May 14, 2020, the Commonwealth filed its Response (Answer).

The court has reviewed the pleadings as well as the record of Brown’s guilty plea and sentencing hearings. Brown claims that under Case No. 1644-2018, his counsel was ineffective “which resulted in the entry of a guilty plea that was involuntary, unintelligent and unknowing.” (Amended Petition, Paragraph 27). More specifically, Brown contends that he “did not give an adequate, if any, factual basis for his guilty plea...in violation of 73 Pa. C.S. § 517.8 (a) (2) under Docket No. 1644-CR-2018.” (Amended Petition, paragraph 36) and that counsel was ineffective for failing to object to the court’s acceptance of the plea

without any factual basis thus rendering it involuntary, unknowing and unintelligent.

(Amended Petition, paragraphs 48-49).

Counsel is presumed to be effective. *Commonwealth v. Rivera*, 199 A.3d 365, 374 (Pa. 2018), citing *Commonwealth v. Robinson*, 82 A.3d 998, 1005 (Pa. 2013). To be granted relief on an ineffectiveness claim, a petitioner must establish by a preponderance of the evidence the following elements: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's 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 had counsel not erred. *Riviera, id.*, citing *Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987).

Counsel's assistance is deemed constitutionally effective if the court determines that the petitioner has not established any one of the prongs of the ineffectiveness test. *Commonwealth v. Charleston*, 94 A.2d 1012, 1020 (Pa. Super. 2014), citing *Commonwealth v. Rolan*, 964 A.2d 398, 406 (Pa. Super. 2008). In other words, a failure to satisfy any prong of the ineffectiveness test requires a rejection of the claim. *Commonwealth v. Daniels*, 104 A.3d 267, 281 (Pa. 2014).

Brown is correct that a concession of guilt does not, per se, foreclose PCRA relief. *Commonwealth v. Haun*, 32 A.3d 697, 705 (Pa. 2011). 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 petitioner to enter an involuntary or unknowing plea. *Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super 2012).

Further, a PCRA petitioner is not entitled to a hearing on every issue raised. *Commonwealth v. Clark*, 961 A.2d 80, 85 (Pa. 2008). The court may decline to hold a hearing if petitioner's claim is patently frivolous and without a trace of support in either the record or from other evidence. *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super 2001).

As to Brown's claim under 1644-2018, the Criminal Complaint filed on October 31, 2018 noted that Brown entered into a contract with the victim, the victim gave Brown \$8,313.34, Brown completed some of the contracted services, Brown gave the impression that he was going to complete all of the work, Brown refused to "go back and complete the work" but never refunded the victim's monies from the projects that were not completed.

During his guilty plea hearing on June 20, 2019, Brown admitted that he contracted with the victim to remove a concrete pad, pour and replace the pad, remove the wood privacy fence, replace it with an aluminum fence, install a walk gate and retaining wall and also remove a solar panel. (Transcript, p. 19).

He performed some of the work but with agreement of the victim, "due to the weather, they decided to stop the project until the following spring." (Transcript, p. 20). Brown returned in the spring and performed additional work. (Transcript, p. 20). The victim, however, cancelled his contract and through his attorney tried to negotiate "an amount to be returned." (Transcript, p. 20). They could not agree and the criminal charges were subsequently filed. (Transcript, p. 20). Brown admitted that when he failed to return the

monies, he was injuring the victim. (Transcript. pp. 20-21).

While it is a “close call” this court cannot conclude at this point, that Brown’s claim is patently frivolous. It involves a legal interpretation of the statute and a thorough examination of Petitioner’s admissions. On the one hand, it appears that Petitioner’s admissions fit within the elements of the offense. Specifically, with knowledge that he was injuring the victim, he received advanced payment for performing home improvement services, failed to perform such services, and failed to return the payment received for such services which were not provided. 73 P.S. § 517.8 (b) (2). On the other hand, the extension of the agreement by the victim may provide a defense.

A hearing shall be held to address Brown’s claims. As he is aware, his allegations of ineffectiveness in connection with the entry of his guilty plea will serve as a basis for relief only if the ineffectiveness caused him to enter an involuntary or unknowing plea. Because Brown entered his plea on the advice of the counsel, the voluntariness of the plea depends on whether his counsel’s advice was within the range of compliance demanded of attorneys in criminal cases. *Wah*, 42 A.3d at 338. Moreover, Brown must demonstrate that it is reasonably probable that but for counsel’s errors, he would not have pled guilty and would have gone to trial. *Commonwealth v. Rothfor*, 899 A.2d 365, 370 (Pa. Super 2006). Finally, Brown is bound by the statements he made under oath at his guilty plea hearing and may not assert grounds for withdrawing his plea which contradict such guilty plea statements made on the record. *Commonwealth v. Turetsky*, 925 A.2d 876, 881 (Pa. Super 2007).

**ORDER**

**AND NOW**, this \_\_\_ day of June 2020, following a consideration of the Petition, Answer and Transcript, a hearing is scheduled for **July 21, 2020 at 9:00 a.m. in Courtroom No. 4 of the Lycoming County Courthouse**. One hour is allocated for this hearing. Following the hearing, the court will set a briefing schedule. The briefs will need to address not only whether Brown is entitled to relief but also whether Brown is entitled to the specific relief requested in light of the plea agreement.

By The Court,

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Marc F. Lovecchio, Judge

cc: Ryan Gardner, Esquire (DA)  
Kirsten Gardner, Esquire (ADA)  
Donald Martino, Esquire  
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Work File  
Gary Weber, Esquire (Lycoming Reporter)