

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

vs.

**FRANK NIXON,
Defendant**

**:
:
: No. CR-1186-2017; CR-257-2018
:
: Notice of Intent to Dismiss PCRA
: without Holding an Evidentiary Hearing**

OPINION AND ORDER

On October 12, 2018, under 1186-2017, Defendant pled guilty to Count 1, driving under the influence, incapable of safely driving, first offense within ten (10) years, an ungraded misdemeanor, and under 257-2018 to Count 2, delivery of a controlled substance, an ungraded felony. It was an open plea.

At Defendant's plea hearing on October 12, 2018, he indicated that he could read, write and understand English. He indicated that he was not suffering from any condition that would cause him not to understand what was going on that day. He understood that it was an open plea. More specifically, he understood that it was up to the court to decide what an appropriate sentence would be and that the worst case scenario could be a minimum of seven and a half (7 ½) years plus three (3) months to a maximum of fifteen (15) years plus six (6) months.

He indicated that he reviewed the first page of his written guilty plea colloquy form which listed the charges he was pleading guilty to, his standard guideline range and his prior record score. He indicated that with respect to his answers on his written guilty plea colloquy form, he wrote them down and that all of his answers were true and correct.

He indicated that it was his decision to plead guilty and that no one was

forcing him or pressuring him into pleading guilty. He acknowledged as well that he was not given any promises that would cause him to plead guilty.

With respect to his counsel, he indicated that he had enough time to discuss with his counsel his case in general, his decision to plead guilty and the consequences of pleading guilty. He noted that his attorney did not do anything wrong or fail to do anything which in any way was causing him to plead guilty. He stated that he was satisfied with the representation of his attorney and did not need any more time to discuss any further matters with his attorney.

Finally, he acknowledged that his guilty plea was knowing, intelligent and voluntary. He acknowledged that he knew what he was doing, that he understood what the Commonwealth would need to prove to find him guilty, that he understood the grading of his offenses, that he understood the maximum penalties, that he understood that the plea was open, that he understood what rights he was giving up in pleading guilty and that it was his choice and no one else's.

Defendant's written guilty plea colloquy form was read, reviewed, initialed and signed by the defendant on October 12, 2018. Among other things, he acknowledged that: it was an open plea; no one told him, promised to him or suggested to him in any manner what the actual sentence of the judge would be; he was giving up his right to present any defenses that either he or his attorney thought he may have to the crimes charged; he understood that by pleading guilty he was waiving, or giving up any right to file any pretrial motions and waiving any such motions that may have already been filed; he was giving up

his right to appeal any adverse decisions on any motions already heard by the court; he was waiving his right to object to anything that he thought was improper or illegal in his apprehension and arrest or in the investigation or prosecution of the charges against him; he thoroughly discussed with his attorney all of the facts and circumstances surrounding the charges against him; and he was satisfied with the representation and advice of his attorney. Finally, he acknowledged that no one made any promises to him, threatened him in any manner or did or said anything that would put pressure on him to plead guilty and that his plea of guilty was being given freely, voluntarily, and without any force, threats, pressure or intimidation.

Defendant's sentencing was held on December 11, 2018. Among other things, the court reviewed a Pre-Sentence Investigation Report, heard from counsel and heard from Defendant. Following the sentencing hearing, the court sentenced Defendant on the delivery count to a minimum of forty (40) months and a maximum of fifteen (15) years, and on the DUI count, the court sentenced Defendant to a concurrent three (3) to six (6) months.

Defendant filed a timely motion for reconsideration of sentence which was denied by the court on January 3, 2019. On November 7, 2019, Defendant filed a pro se Post Conviction Relief Act (PCRA) petition. By Order dated November 15, 2019, the court appointed counsel to represent Defendant and directed counsel to file either an amended petition or a *Turner/Finley*¹ no merit letter on or before January 15, 2020.

PCRA counsel reviewed Defendant's Petition, original court files, docket

¹ *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988); *Commonwealth v. Finley*, 379 Pa. Super. 390,

sheets, and transcripts of the guilty plea and sentencing hearings. On December 23, 2019, counsel sent Nixon a no merit letter, detailing the extent of counsel's review of Nixon's case, setting forth each issue raised in Defendant's petition and any other applicable issue, and explaining why in counsel's opinion the issues raised, lacked merit.

On January 27, 2020, appointed counsel filed a motion to withdraw, which included a copy of his *Turner/Finley* letter.

This court conducted its own review of the record and based on such, it will grant counsel's motion to withdraw and will notify Defendant of its intent to dismiss the PCRA petition without holding an evidentiary hearing but giving Nixon at least twenty (20) days to respond to the court's Order. Pa. R. Crim. P. 907 (1).

Defendant requests collateral relief on the basis that his guilty plea was not entered in a knowing, intelligent and voluntary manner. He contends that his trial counsel did not secure a plea agreement for a sentence of county incarceration; his trial counsel did not file pretrial motions on his behalf; and his trial counsel failed to secure his release through the filing of a motion for nominal bail pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure.

While a concession of guilt does not, per se, foreclose PCRA relief,² 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 defendant to enter an involuntary or unknowing plea. *Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super 2012).

550 A.2d 213 (1988).

Moreover, counsel is presumed to be effective. *Commonwealth v. Diaz*, J-57-2019, 2020 WL 1479846, *10 (Pa., March 26, 2020)(citing *Commonwealth v. Brown*, 196 A.3d 130, 150 (Pa. 2018)). To be granted relief on an ineffectiveness claim or to overcome this presumption, a petitioner must establish by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel lacked any reasonable basis for the action or inaction; and (3) the petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there was a reasonable probability that the result of the proceeding would have been different had counsel not erred. *Id.* (citing *Brown*, 196 A.3d at 150-151).

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. Housman*, J-58AB-2019 2020 WL 147862, *13 (Pa., March 26, 2020)(citing *Commonwealth v. Ali*, 10 A.3d 282, 291 (Pa. 2010)). In other words, a failure to satisfy any prong of the ineffectiveness test requires a rejection of the claim. *Id.*; *Commonwealth v. Daniels*, 104 A.3d 267, 281 (Pa. 2014).

Finally, a PCRA petitioner is not automatically entitled to a hearing on the issues that are raised. *Commonwealth v. Clark*, 961 A.2d 80, 85 (Pa. 2008). The court may decline to hold a hearing if a 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).

² *Commonwealth v. Haun*, 32 A.3d 697, 705 (Pa. 2011).

Defendant is not entitled to relief on any of his ineffective assistance claims. While he baldly suggests that his plea was not knowing, intelligent or voluntary, the record belies such a suggestion. Furthermore, Defendant fails to set forth or plead any facts that would support defenses that might secure a period of county incarceration or prevail in defending against the charges or would have secured his release pursuant to Rule 600. Finally and perhaps determinatively, Defendant made statements under oath at both the guilty plea hearing and his sentencing that not only was he guilty of the charges but that he fully understood all of the rights that he was waiving in pleading guilty.

In order to be valid, a guilty plea must be knowing, voluntary and intelligent. *Commonwealth v. Rush*, 909 A.2d 805, 808 (Pa. Super. 2006). A plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea. *Id.* Where the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became obvious that the defendant understood the nature of the charges against him, the voluntariness of the plea is established. *Id.*

Defendant is bound by all of the statements he made during his prior hearings and he may not now assert grounds for withdrawing the plea which contradict those statements. *Commonwealth v. Pier*, 182 A.3d 476, 480 (Pa. Super. 2018); *Commonwealth v. Turetsky*, 925 A.2d 876, 881 (Pa. Super 2007).

On an additional note as to Defendant's Rule 600 claim, he specifically

acknowledged in pleading guilty that he was waiving any and all defenses. Moreover and as specifically related to Rule 600, the court has held that “an irregularity in proceedings prior to a plea of guilty, including an alleged violation of [Rule 600] would be reviewable to the extent it affected the voluntariness of the guilty plea itself”, and that “said violation may not be challenged where it does not affect the voluntariness of the plea.” *Commonwealth Riviera*, 254 Pa. Super 196, 385 A.2d 976 (1978); see also *Commonwealth v. Sisneros*, 692 A.2d 1105, 1107 (Pa. Super. 1997). Again a review of the record supports the finding that this issue is without merit.

ORDER

AND NOW, this ___ day of April 2020, Defendant Frank Nixon is advised of this Court’s intent to dismiss his PCRA Petition without holding an evidentiary hearing. If Defendant wishes to respond to this notice, he may do so by submitting a written response no later than twenty (20) days from today’s date. After reviewing the response, the court will proceed accordingly.

The court grants counsel’s motion to withdraw. Defendant is advised that he has the right to represent himself or hire a private attorney but the court will not appoint counsel to represent him further in this matter unless his response sets forth facts to support all three prongs of an ineffective assistance of counsel claim.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney

Donald Martino, Esquire

Frank Nixon, NS2364

SCI Rockview, 1 Rockview Place, Box A, Bellefonte PA 16823

Gary Weber, Esquire (Lycoming Reporter)

Work File