IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-973-2018; CR-1053-2018**
	:	
CORY STEPHON WILLIAMS,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

The law presumes counsel has rendered effective assistance. *Commonwealth v. Williams,* 597 Pa. 109, 950 A.2d 294 (2008). To obtain relief on a claim of ineffectiveness, a petitioner must establish that: "(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or 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." *Commonwealth v. Johnson,* 263 A.3d 63, 68 (Pa. Super. 2020), citing *Commonwealth v. Pierce,* 527 A.2d 973, 975-76 (Pa. 1987).

If a claim fails under any of the above required elements, the court may dismiss the claim on that basis. *Johnson, id.,* citing *Commonwealth v. Rivera,* 10 A.3d 1276, 1279 (Pa. Super. 2010). The burden of demonstrating ineffectiveness rests on the appellant. *Johnson, id.* Where a petitioner has failed to meet any of the three, distinct prongs of the ineffectiveness test, the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met. *Commonwealth v. Treiber*, 632 Pa. 449, 121 A.3d 435, 451 (2015), citing *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 701 (1998).

Further, the court need not analyze the elements of an ineffectiveness claim

in any particular order; if as stated above, a claim fails under any prong of the ineffectiveness test, the court may proceed to that element first. *Commonwealth v. Sepulveda,* 55 A.3d 1108, 1117-18 (Pa. 2012).

Under CR-973-2018, on May 24, 2019, Petitioner pled guilty to Count 2, possession of a controlled substance (heroin), an ungraded misdemeanor. Petitioner admitted that on June 10, 2018, he possessed heroin at his residence of 410 Anthony Street.

Petitioner claims that his counsel was ineffective in advising the petitioner to plead guilty when trial counsel should have filed a motion to suppress all items seized from his residence. Petitioner asserts that if the motion to suppress had been filed, the court would have been constrained to grant it and suppress the evidence.

Petitioner alleges that despite there being meritorious grounds for a suppression of the items seized from his apartment, trial counsel failed to file a suppression motion. Petitioner contends that the entry into the apartment was without probable cause, exigent circumstances or a search warrant.

Under CR-1053-2018, on May 1, 2019, Petitioner pled guilty to count 2, delivery of a controlled substance (heroin), an ungraded felony; count 3, criminal use of a communications facility, a felony of the third degree; count 5, delivery of a controlled substance, an ungraded felony; and count 7, criminal use of a communication facility, a felony of the third degree.

Petitioner admitted to delivering and/or selling forty (40) bags of heroin for $300.00 to a confidential informant on two separate occasions, specifically on May 7, 2018 and May 18, 2018. He admitted that both arrangements were facilitated by using a cell phone.

On May 24, 2019, the court sentenced Petitioner under both Informations.

Under CR-1053-2018, he received an aggregate sentence of four (4) to sixteen (16) years, while under CR-973-2018, he received a consecutive sentence of one (1) to three (3) years. The total aggregate sentence on both Informations was a period of state incarceration, the minimum of which was five (5) years and the maximum of which was nineteen (19) years.

Under CR-1053-2018, Petitioner claims that his trial counsel was ineffective in advising Petitioner to plead guilty when trial counsel should have filed a motion for a line-up to determine whether the confidential informant could identify him. Petitioner asserts "challenging the identification testimony would likely have changed the outcome of the trial."

The court granted Petitioner a hearing on both ineffectiveness claims. At the time of the hearing, Petitioner raised a third issue alleging ineffective assistance of counsel with respect to sentencing; specifically, that the parties had agreed that the sentences in Petitioner's cases would run concurrently to each other.

Hearings were held on June 2, 2020 and July 27, 2020.

At the June 2, 2020 hearing, Officer Joshua Bell of the Williamsport Bureau of Police testified, as did Petitioner's guilty plea counsel, Matthew Welickovitch. Officer Bell testified that he was summoned to 412 Anthony Street for a domestic disturbance. The premises consisted of four apartments—two downstairs and two upstairs. The domestic disturbance had occurred at the west downstairs apartment. At the door of that apartment, Officer Bell spoke with the involved female. While speaking with her, Officer Bell noticed an odor of marijuana and asked her about it. The female indicated that the males on the second floor were involved in drug activity. Officer Bell noticed that the second story windows above him were open. Officer Bell decided to investigate.

Officer Bell walked to the rear of the building where there were stairs to the

upstairs apartments. The odor of marijuana was stronger at the rear of the residence and increasingly got stronger as Officer Bell went up the stairs. At or near the top of the stairs, Officer Bell encountered three males—Defendant and two others. The males claimed that they resided in the east upstairs apartment. Officer Bell knocked on the door of that apartment. A female answered the door and Officer Bell asked her if she knew the males outside. One of the males attempted to flee. Another male yelled, "Shut the door, auntie." Officer Bell directed the males to remain where they were. The female told Officer Bell that the males resided in the other upstairs apartment. Officer Bell began running the names the males provided to him. Two of the males, including Defendant, gave false names. Both had outstanding warrants.

Officer Bell went to the door of that apartment and knocked. He smelled a heavy odor of marijuana emanating from that apartment. Someone yelled, "Who is it?" Officer Bell answered, "Williamsport police." He then heard furniture being moved inside the apartment. He knocked again, but received no further response. He believed that evidence was being destroyed.

The police forced entry into the residence to secure it. A refrigerator had been moved against the door. They conducted a safety sweep for occupants. A fourth male was inside. During the sweep, Officer Bell observed marijuana and empty baggies in plain view.

Officer Bell obtained a search warrant for the males' apartment. During the search, the police found heroin, marijuana, wax bags, hundreds of empty plastic baggies, cell phones, currency, digital scales, and some clothing items that included a Yankees baseball cap and a Pirates baseball cap. Officer Bell was aware that Trooper Edward Dammer was

conducting an investigation of heroin and fentanyl sales. The investigation included controlled buys from a black male who was wearing those ball caps and matched Defendant's description.

Matthew Welickovitch testified that he represented Defendant in these cases after the preliminary hearings. He testified that officers from the Pennsylvania State Police (PSP) and the Narcotics Enforcement Unit (NEU) were present for the controlled buy in the Brandon Park area and there were clear photographs of Defendant interacting with the confidential informant (CI). Although the plea negotiations with the Commonwealth were somewhat convoluted, ultimately the Commonwealth would not offer less than five to ten years in the case involving the controlled buys. Mr. Welickovitch discussed pleading open to the deliveries to obtain an agreement for a concurrent sentence for the case arising out of the entry into the apartment. Mr. Welickovitch thought that the best course of action was for Defendant to plead open to the controlled buys so that he would receive a concurrent sentence for the other case. He thought that with an open plea on the delivery case and a concurrent sentence on the other case that he could get a better sentence than five to ten years. Factors that he specifically mentioned were that the Commonwealth agreed to use the heroin guidelines instead of the fentanyl guidelines; the labs came back low; and although Defendant had prior convictions, he had never been to state prison. He anticipated a lower sentence because the offense gravity score would be lower utilizing the heroin guidelines and the low amounts of controlled substances from the lab report. He also testified that he believed the Commonwealth would revoke the offer of concurrent sentences if he filed a suppression motion.

At the July 27, 2020 hearing, Petitioner first testified. Prior to entering his

guilty plea on both cases, he spoke with both Attorney Welickovitch and his paralegal, Elizabeth McCray, and asked them to file a suppression motion in the possession case and a motion for a line-up in the delivery case. As for the motion to suppress, Attorney Welickovitch indicated to Petitioner that he was going to file one but he "never did." As for the motion for a line-up, someone else was named as a suspect and although there were some physical similarities, there were differences as well. As a result, Petitioner asked Attorney Welickovitch for a "line-up plenty of times."

While Petitioner was ready for trial, and while he believed that he had "a very good chance at trial" even if the evidence was not suppressed, he pled guilty. He "felt" that Attorney Welickovitch was not fighting for him. As well, Attorney Welickovitch informed him that the labs "came back low" and that this court would "give a lower sentence." Attorney Welickovitch told Petitioner that this court was "happy" that the labs came back low and that this court was "on his side."

When Petitioner was confronted with the transcript of his guilty plea, he admitted that he had stated the following during his plea: (1) he had enough time to discuss his case in general with Attorney Welickovitch, including his decision to plead guilty and the consequences of pleading guilty; (2) Attorney Welickovitch answered his questions and addressed his concerns; (3) Attorney Welickovitch did not do anything which in anyway caused him to plead guilty; (4) Attorney Welickovitch did not fail to do anything which caused him to plead guilty; (5) Attorney Welickovitch did not do anything wrong which caused him to plead guilty; and (6) when this court asked if he had any concerns that the court could address, he answered "no." (Guilty Plea Transcript, 5/1/19, at 6-7).

With respect to the sentence, he acknowledged that there was no plea

agreement except for the Commonwealth to drop charges. (Guilty Plea Transcript, 5/1/19, at 4). He also admitted knowing and being informed of the maximum penalties for each offense to which he pled guilty and that the worst cases scenario for him could be twenty-seven (27) to fifty-four (54) years. (Guilty Plea Transcript, at 3-5).

Despite these admissions, he was "still thinking" that he would get less than an aggregate five (5) to nineteen (19) year sentence. This was the "only reason" he said "nothing." He placed his trust in Attorney Welickovitch regarding what would likely happen. Yet, he admitted saying during his guilty plea colloquy that no one had promised him anything. In making this admission, he indicated that he thought everything would go through the way Attorney Welickovitch was saying.

Petitioner claimed that he had written to the court during the entire case complaining about Attorney Welickovitch not doing his job. By Order of Court dated January 29, 2019, the court indicated that it would hold a hearing on Petitioner's oral motion for newly appointed counsel. Petitioner claimed that he never authorized his counsel to seek a plea offer, never authorized his counsel to waive his Rule 600 rights, never authorized his counsel to seek a global plea, and informed counsel that he, from the very beginning, wanted to defend the case at trial. He also claimed that he attempted to contact his counsel via letters and the kiosk but he never received any responses. He further claimed that his counsel filed a petition for habeas corpus and did not advise him of such, and that he was not aware of such until the date of the hearing when he transported from the prison. Finally, Petitioner claimed that he did not have any contact and did not speak with his counsel in person since November of 2018.

Petitioner conceded, however, that on March 6, 2019, the date for the hearing on his motion for newly appointed counsel, Petitioner indicated that he was satisfied

with the representation of Attorney Welickovitch and was no longer seeking newly appointed counsel.

Petitioner explained that he informed the court that he was not seeking new counsel because he "thought" that he was eligible for a Rule 600 and that if he obtained new counsel, it would "mess up his chances for a Rule 600."

In reviewing the file, the court takes judicial notice of two letters sent to the court following his sentencing, one on June 5, 2019 and one on June 26, 2019. In connection with both letters, the court entered a No Action Order and directed that the Order along with a copy of the letters be placed in Petitioner's court file.

In the letter received on June 5, 2019, Petitioner requested a reconsideration of his sentence. He referenced how he believed that a lesser sentence would have been imposed and that the aggregate sentence of five (5) to nineteen (19) years was unduly harsh. He referenced nothing regarding pleading guilty because of any failures of counsel.

In his letter received on June 26, 2019, in pertinent part, he references his desire to withdraw his plea not because Attorney Welickovitch failed to do anything but because Attorney Welickovitch allegedly mislead him. According to Petitioner, he thought he was "taking the deal for a three and a half (3 ½) to seven (7) with RRRI." He further indicated that he had a "hard time to comprehend things" and that the medication he was taking made him "feel spaced out."

In none of the letters submitted to the court by Petitioner did he claim that Attorney Welickovitch failed to request a line-up or to seek a suppression of evidence. He never once claimed that he entered his guilty plea because Attorney Welickovitch was not "fighting" for him or because Attorney Welickovitch "did nothing."

Trooper Edward Dammer also testified. He stated that prior to this investigation he did not know Defendant or Leonard Dubose. The police report listed Leonard Dubose as a possible suspect because Officer Bell had stopped Dubose and thought Dubose had similar physical characteristics to the person who sold to Trooper Dammer's CI. Specifically, Dubose was close in age and size to Defendant and both had full beards.

Trooper Dammer was in the vehicle with the CI for the first controlled purchase from Defendant. Trooper Dammer looked directly at Defendant's face while he was in the vehicle for the transaction with the CI. Defendant asked him who he was and Trooper Dammer told him that he was the CI's uncle. Trooper Dammer also testified that Defendant had very distinctive tattoos on his forearms. Trooper Dammer definitively testified that Defendant was the person from whom the CI purchased heroin from at the Sheetz and Defendant was the person Trooper Dammer saw in the vehicle for the first controlled buy. The prosecutor showed Trooper Dammer a photograph of Leonard Dubose and Trooper Dammer stated that he never met that person.

Petitioner has not met his burden. Specifically, Petitioner has not met his burden of establishing prejudice.

A claim for ineffective assistance of counsel in connection with advice whether to plead guilty is cognizable under the PCRA. 42 Pa. C.S. § 9543(a)(2)(ii). A concession of guilt does not, per se, foreclose PCRA relief. *Commonwealth v. Lynch,* 820 A.2d 728, 731-32 (Pa. 2003); *Commonwealth v. Haven,* 32 A.3d 697, 725 (Pa. 2011). However, 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. Waah,* 42 A.3d 335, 338 (Pa. Super. 2012).

With respect to the prejudice prong required to establish ineffectiveness, a petitioner 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. Rathfon,* 899 A.2d 365, 370 (Pa. Super. 2006).

Petitioner has not met this burden. First, he is bound by the statements he made under oath at his guilty plea hearing and may not assert grounds at this time that would contradict those statements. *Commonwealth v. Turettsky,* 925 A.2d 876 (Pa. Super. 2007). During his guilty plea colloquy, he admitted under oath several things. He stated that he did not suffer from any condition that would cause him not to understand what was going on. He admitted that he had enough time to discuss his case in general, his decision to plead guilty and the consequences of pleading guilty with Attorney Welickovitch. He admitted that Attorney Welickovitch answered his questions and addressed his concerns. He admitted that Attorney Welickovitch did not do anything in any way that caused him to plead guilty. He admitted that Attorney Welickovitch did not fail to do anything which in anyway caused him to plead guilty. He admitted that Attorney Welickovitch did nothing wrong which caused him to plead guilty. When given an opportunity to raise any questions or concerns to the court, he indicated that he had none. Furthermore, he indicated that his decision to plead guilty was his choice and no one else's choice. He understood that it was an open plea and that the worst-case scenario or sentence for him could be twenty-seven (27) to fifty-four (54) years.

While he asserted during the PCRA hearing that he raised issues involving Attorney Welickovitch in his letters to the court, Petitioner did not claim in any of his letters following his guilty plea and sentencing that he pled guilty because Attorney Welickovitch failed to seek a suppression or a line-up.

In conjunction with these prior assertions, the court does not find Petitioner credible in connection with his statements at the PCRA hearing. His testimony was clearly self-serving, contradicted his prior statements under oath and in letters that he wrote to the court, were internally inconsistent and, when considered in total, were far from persuasive. Indeed, when the court considered Petitioner's testimony as a whole, Petitioner pled guilty, not because of anything that Attorney Welickovitch failed to do, but because Petitioner simply hoped for a more lenient sentence than what he actually received.

Finally, Petitioner's guilty plea was clearly knowing, intelligent and voluntary. He was acutely aware of what the Commonwealth needed to prove, the maximum penalties, the open nature of the plea, the rights he was giving up in pleading guilty and the fact that it was his choice and his choice alone. Accordingly, the court concludes that Petitioner has failed to demonstrate by a preponderance of the evidence that but for counsel's alleged errors, he would not have pleaded guilty and would have gone to trial.

Based on counsel's and the officers' testimony, the court also finds that Defendant has failed to meet his burden of proof to establish the other prongs for an ineffective assistance of counsel claim regarding his identification and suppression issues.

With respect to the identification issue, the court finds that counsel had a reasonable basis not file a motion for a line-up. Mr. Welickovitch credibly testified that identification was not really an issue in the controlled buy case. The Commonwealth had photographs of Defendant from at least one of the controlled buys. The Commonwealth introduced the photographs as evidence at the PCRA hearing. The photographs clearly depict Defendant and he is wearing a Pirate baseball cap.

Trooper Dammer also credibly testified that he was in the driver's seat of

the vehicle during one of the deliveries and the individual who sold the controlled substances was Defendant. Trooper Dammer had never met Leonard Dubose and Dubose was not the individual who sold controlled substances to the CI. Trooper Dammer also offered a credible explanation of why he listed Dubose as a suspect on some of the paperwork.

Furthermore, since the Commonwealth had the photographs and Trooper Dammer's identification testimony, the outcome of the proceedings would not have changed even if the CI could not identify Defendant in a line-up.

The court also rejects Defendant's arguments that but for the illegal entry into the apartment, Trooper Dammer would have never had the opportunity to identify Defendant at City Hall. Officer Bell credibly testified that Defendant and one of the other males gave him a false name and both had outstanding warrants. Therefore, even if Officer Bell had not entered the apartment and found controlled substances, Officer Bell would have taken Defendant into custody on his outstanding warrant and transported him to City Hall.

With respect to the claim that counsel was ineffective for failing to file a motion to suppress evidence, the court finds that the claim lacks arguable merit, counsel had a reasonable basis for not filing the motion, and Defendant was not prejudiced. Officer Bell had probable cause and exigent circumstances to enter the apartment to prevent the destruction of evidence until he could secure a warrant. Although the Superior Court recently held in the *Barr* case[1] that the odor of marijuana alone is not enough to establish probable cause, case law prior to *Barr* was such that the odor of marijuana alone could be sufficient to establish probable cause. Counsel cannot be deemed ineffective for failing to predict developments or changes in the law. *Commonwealth v. Gribble*, 863 A.2d 455, 464 (Pa. 2004). Furthermore,

there were additional facts and circumstances that made it likely that the males, including Defendant, were not lawfully possessing marijuana pursuant to the Medical Marijuana Act (MMA). The female from the domestic disturbance told Officer Bell that the males upstairs were involved in drug activity. Defendant and another individual provided a false name to Officer Bell. One of the males lied about which upstairs apartment was theirs. One of them tried to flee. An occupant inside the residence failed to come to the door when Officer Bell knocked and the occupant began moving furniture once Officer Bell informed the occupant that the Williamsport Police were at the door. In fact, the occupant had moved a refrigerator to barricade the door. The conduct of these individuals evinced consciousness of guilt. The totality of the circumstances would lead an officer, viewing the facts in a common sense manner, to reasonably believe that criminal activity was occurring inside the apartment. Furthermore, the sounds coming from inside the residence reasonably led Officer Bell to believe that evidence was being destroyed, giving him exigent circumstances to immediately enter the apartment.

The court also finds that Mr. Welickovitch had a reasonable basis for not filing a suppression motion. Mr. Welickovitch credibly testified that if he had filed a motion to suppress, the Commonwealth likely would have revoked the offer for a guilty plea to possession of a controlled substance for a concurrent sentence.

The court finds counsel was ineffective at sentencing for failing to notify the court or to state on the record that pursuant to the plea agreement the sentences were to run concurrently.

O R D E R

[1] *Commonwealth v. Barr*, 2020 PA Super 236, 2020 WL 5742680 (Sept. 25, 2020).

AND NOW, this ___ day of November 2020, following a hearing and for the reasons set forth above, the court grants in part and denies in part Defendant's PCRA petition. The court denies the claims contained in Defendant's written PCRA petition, but grants Defendant's oral amendment. The court schedules a re-sentencing hearing for **December 4, 2020 at 8:30 a.m. in Courtroom #4 of the Lycoming County Courthouse** during which the court will correct Defendant's sentence so that it comports to the parties' plea agreement.

Defendant 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 Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant 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, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to Defendant by certified mail, return receipt requested.

By the Court,

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Helen Stolinas, Esquire
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