IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-0000973-2018**
	:	**CP-41-CR-0001053-2018**
vs.	**:**	
	:	
CORY STEPHON WILLIAMS,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This Opinion is written in support of the court's order entered on December 21, 2020, which denied Appellant's claims that plea counsel was ineffective for failing to file a motion to suppress evidence in CR-973-2018 and failing to file a motion for a line-up in CR-1053-2018. The relevant facts follow.

Under CR-1053-2018, on May 1, 2019, Appellant pleaded 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.

Appellant 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.

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

On May 24, 2019, the court sentenced Appellant 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.

On August 22, 2019, Appellant filed a Post Conviction Relief Act (PCRA) petition in which he asserted claims of ineffective assistance of plea counsel. The court appointed counsel to represent Appellant. PCRA counsel filed amended PCRA petitions on December 9, 2019 and March 3, 2020.

Under CR-953-2018, Appellant claimed that his counsel was ineffective in advising him to plead guilty when trial counsel should have filed a motion to suppress all items seized from his residence. Appellant asserted that if counsel had filed the motion to suppress, the court would have been constrained to grant it and suppress the evidence.

Appellant alleged that despite there being meritorious grounds for a suppression of the items seized from his apartment, plea counsel failed to file a suppression motion. He contended that the entry into the apartment was without probable cause, exigent circumstances or a search warrant.

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

The court initially granted a hearing under CR-973-2018, but it gave

Appellant notice of its intent to dismiss his petition under CR-1053-2018. However, because of Appellant's response, the court vacated its notice and granted Appellant a hearing in both cases.

The court held evidentiary hearings on June 2, 2020 and July 27, 2020. At the hearing on June 2, 2020, Appellant orally amended his PCRA petition to include a claim that pursuant to a plea agreement reached by between plea counsel and the Commonwealth, his sentence under 973-2018 was to be served concurrent with his sentence under 1053-2018.

Appellant filed his brief in support of his PCRA petition on August 20, 2020, and the Commonwealth filed its brief in opposition to the majority of Appellant's PCRA petition on August 31, 2020.[1]

On November 18, 2020, the court issued an Opinion granting Appellant's sentencing claim and scheduling a re-sentencing hearing, but denying Appellant's ineffectiveness claims related to the failure to file a motion to suppress and the fail to request a line-up.[2] On December 21, 2020, the court re-sentenced Appellant and advised him of his right to appeal.

On January 20, 2021, Appellant filed a notice of appeal. In his statement of matters complained of on appeal, Appellant asserted:

1. The [c]ourt erred in finding that counsel was not ineffective for failing to move for suppression or a line-up, and advising Williams to enter a plea of guilty in these matters.
2. The [c]ourt erred in finding that Williams failed to prove the element of prejudice under the PCRA.

[1] The Commonwealth conceded that Appellant's sentence under 953-2020 was to be concurrent with his sentence under 1053-2020.

[2] The court originally scheduled the re-sentencing hearing for December 4, 2020, but that hearing was continued to December 21, 2020, because the court was unavailable due to illness. The court vacated the Order that accompanied the Opinion issued on November 18, 2020 so that the court would not lose jurisdiction to re-sentence Appellant if Appellant desired to appeal the claims that the court was denying.

3. The [c]ourt erred in finding that prior counsel was not ineffective for failing to file for suppression.
4. The [c]ourt erred in finding that prior counsel was not ineffective for failing to file for a line-up.

It appears that issues 1 and 2 are subsumed within issues 3 and 4. Therefore, the court will not separately address issues 1 and 2, but rather will address those issues within its discussion of issues 3 and 4.

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

Appellant alleged that despite there being meritorious grounds for a suppression of the items seized from his apartment, plea counsel failed to file a suppression motion. Appellant contended that the entry into the apartment was without probable cause, exigent circumstances or a search warrant. Appellant also contended that but for the illegal entry into the apartment, Trooper Edward Dammer would never have identified him in CR-1053-2018. The court did not agree.

At the PCRA hearings, Officer Joshua Bell, Plea Counsel Matthew Welickovitch, Appellant and Trooper Dammer testified.

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. (Transcript, 6/2/2020, at 7-12.)

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—Appellant 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 Appellant, gave false names. Both had outstanding warrants. (Transcript, 6/2/2020, at 12-19, 24, 26-30).

Officer Bell went to the door of the other 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. (Transcript, 6/2/2020, at 18-19, 32-34)

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. (Transcript, 6/2/2020, at 20).

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 Appellant's description. (Transcript, 6/2/2020, at 35-37).

Matthew Welickovitch testified that he represented Appellant in both of 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 Appellant 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 Appellant 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 Appellant 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. (Transcript, 6/2/2020, at 44-47, 52, 54, 59, 63-67, 71, 74).

Appellant testified that he spoke with both Attorney Welickovitch and his paralegal, Elizabeth McCray, and asked them to file a suppression motion in the possession case and Attorney Welickovitch indicated to Appellant that he was going to file one but he "never did." (Transcript, 7/27/2020, at 6-7).

While Appellant 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. (Transcript, 7/27/2020, at 10-11).

Appellant 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 Appellant's oral motion for newly appointed counsel. Appellant 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, Appellant claimed that he did not have any contact and did not speak with his counsel in person since November of 2018. (Transcript, 7/27/2020, at 13, 17, 19-22; Order re Request for New Counsel dated 1/29/2020)

Appellant conceded, however, that on March 6, 2019, the date for the

hearing on his motion for newly appointed counsel, Appellant indicated that he was satisfied with the representation of Attorney Welickovitch and was no longer seeking newly appointed counsel. (Transcript, 7/27/2020, at 19; Order dated 3/6/2019).

Appellant 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." (Transcript, 7/27/2020, at 19-20).

In reviewing the file, the court takes judicial notice of two letters Appellant 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 Appellant's court file.

In the letter received on June 5, 2019, Appellant requested a reconsideration of his sentence. He did not reference anything regarding pleading guilty because of any failures of counsel.

In his letter received on June 26, 2019, in pertinent part, he referenced his desire to withdraw his plea not because Attorney Welickovitch failed to do anything but because Attorney Welickovitch allegedly misled him regarding the terms of the plea deal. 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 Appellant did he claim that Attorney Welickovitch failed 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."

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).

With respect to the claim that counsel was ineffective for failing to file a motion to suppress evidence, the court found that the claim lacked arguable merit, counsel had a reasonable basis for not filing the motion, and Appellant 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[3] 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 Appellant, 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. Appellant 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, reasonably to believe that criminal activity was occurring inside the apartment. Furthermore, the sounds coming from inside the residence reasonably led Officer Bell to believe that the occupant or occupants inside the apartment were destroying evidence, giving him exigent circumstances to enter the apartment immediately. *Commonwealth v. Dial*, 285 A.2d 125 (Pa. 1971)(exigent circumstances existed to believe evidence would be destroyed when officers heard sounds of running after they knocked and announced who they were); *Commonwealth v. Paul*, 790 EDA 2019, 2020 WL 1677685, *2-*3 (Pa. Super. 4/6/2020)(exigent circumstances are an exception to the warrant requirement, excusing the need for a warrant where prompt police action is imperative – i.e., when the delay in obtaining a search warrant would result in personal injury or the loss of evidence). Therefore, Appellant's claim that Officer Bell lacked probable cause or exigent circumstances to enter the apartment lacks merit.

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

[3] *Commonwealth v. Barr*, 240 A.3d 1263 (Pa. Super. 2020).

possession of a controlled substance for a concurrent sentence.

Appellant was charged not only with possession of a controlled substance, but also with criminal conspiracy to deliver a controlled substance (heroin), an ungraded felony which carried a maximum penalty of 30 years in jail and a maximum fine of $500,000; possession of a small amount of marijuana, an ungraded misdemeanor which carried a maximum penalty of 30 days in jail and a $500 fine; and possession of drug paraphernalia, an ungraded misdemeanor with a maximum penalty of one year in jail and a maximum fine of $2,500. If counsel had advised Appellant to reject the plea offer and filed a motion to suppress, the court would have denied the motion to suppress and Appellant would have been facing the prospect of a much greater sentence in this case.

Additionally, Appellant failed to prove prejudice. Even if plea counsel had filed a motion to suppress, the court would have denied it.

The court also found that Appellant's testimony was not credible. While Appellant claimed that he only pled guilty because plea counsel was not fighting for him, the letters Appellant wrote to the court and Appellant's statements made in connection with his guilty plea belied his claim. Appellant's letters only expressed his dissatisfaction with the sentence imposed by the court. Appellant did not mention in his letters any complaint with plea counsel's failure to file a motion to suppress or a motion for a line-up in his cases. Furthermore, during Appellant's guilty plea, he indicated the following:

(1) it was his decision to plead guilty;

(2) nobody was forcing him or pressuring him into pleading guilty;

(3) nobody gave him any promises that caused him to plead guilty;

(4) he was satisfied with the representation of his attorney;

(5) he had a sufficient amount of time to discuss with his attorney the decision to plead guilty and the consequences of pleading guilty; and

(6) his attorney had not done anything wrong and had not failed to do anything which in any way caused him to plead guilty.

Transcript, 5/24/2019, at 4-5.

The court also rejected Appellant's arguments that but for the alleged illegal entry into the apartment, Trooper Dammer would have never had the opportunity to identify Appellant at City Hall.

Officer Bell credibly testified that Appellant 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 Appellant into custody on his outstanding warrant and transported him to City Hall.

Trooper Dammer credibly testified that, when Appellant was in custody at City Hall, Trooper Dammer was contacted by phone and advised that there was an individual there that matched the description of the suspect from the controlled buys. Trooper Dammer went to City Hall and identified Appellant. Trooper Dammer testified that Appellant was the person who was in the vehicle with him and the confidential informant (CI) during the first controlled buy and Appellant was the person who the CI bought heroin from at Sheetz during the second controlled buy. Trooper Dammer stated that as soon as he walked into City Hall he recognized Appellant. He also recognized Appellant by his tattoos. Trooper Dammer testified that he observed Appellant's tattoos on his forearms during the first controlled buy when he was in the vehicle with the CI and Appellant. Although the tattoos were amateur tattoos that were difficult to read, they had very distinctive block type. Transcript, 7/27/2020,

at 34-37. The Commonwealth introduced a photograph of the tattoos on Appellant's forearms as Commonwealth Exhibit 11. Transcript, 7/27/2020, at 46-47. Furthermore, Appellant was wearing the same clothes he had been wearing during the second controlled buy at Sheetz.

For the foregoing reasons, the court rejected Appellant's claims with respect to CR-973-2018.

Under CR-1053-2018, Appellant claimed that plea counsel was ineffective in advising Appellant to plead guilty when his counsel should have filed a motion for a line-up to determine whether the CI could identify him. Appellant asserted, "challenging the identification testimony would likely have changed the outcome" of this case. Again, the court could not agree.

Matthew Welickovitch testified that he represented Appellant in this case after the preliminary hearing. 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 Appellant interacting with the 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 Appellant 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 Appellant 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.

Appellant testified that prior to entering his guilty plea, he spoke with both Attorney Welickovitch and his paralegal, Elizabeth McCray, and asked them to file a motion for a line-up in the delivery case. Appellant noted that someone else was named as a suspect and although there were some physical similarities, there were differences as well. As a result, Appellant asked Attorney Welickovitch for a "line-up plenty of times."

While Appellant was ready for trial, and while he believed that he had "a very good chance at trial", 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 Appellant that this court was "happy" that the labs came back low and that this court was "on his side."

When Appellant 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, 5/1/2019, at 6-7).

With respect to the sentence, Appellant acknowledged that there was no plea agreement except for the Commonwealth to drop charges. (Guilty Plea Transcript, 5/1/2019, 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-case scenario for him could be twenty-seven (27) to fifty-four (54) years.[4] (Guilty Plea Transcript, 5/1/2019, 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.

Appellant also 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

[4] The court inadvertently misadvised Appellant regarding the maximum penalties for the deliveries of heroin. The court advised Appellant that the maximum for each of those crimes was 20 years in jail and a maximum of fine of $250,000. The correct maximum penalties for each of those crimes would be 30 years in jail and a fine of $500,000 for a second or subsequent violation of 35 Pa.C.S. §780-113(a)(30) when the substance is heroin. 35 Pa. C.S.A. §780-113(f)(1); 35 Pa. C.S.A. §780-115. Therefore, the actual worst-case scenario was 37 years to 74 years. This error, however, did not adversely affect Appellant's guilty plea, because the court did not impose a sentence in excess of the advised amount. *See Commonwealth v. Barbosa*, 819 A.2d 81, 82 (Pa. Super. 2003)(if a defendant enters an open guilty plea and justifiably believes that the maximum sentence is less than what he could receive by law, he may not be permitted to withdraw the plea unless he receives a sentence greater than what he was told.).

29, 2019, the court indicated that it would hold a hearing on Appellant's oral motion for newly appointed counsel. Appellant 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, Appellant claimed that he had not had any contact and had not spoken with his counsel in person since November of 2018.

Appellant conceded, however, that on March 6, 2019, the date for the hearing on his motion for newly appointed counsel, Appellant indicated that he was satisfied with the representation of Attorney Welickovitch and was no longer seeking newly appointed counsel.

Appellant 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."

The court took judicial notice of two letters that Appellant 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 Appellant's court file.

In the letter received on June 5, 2019, Appellant requested a reconsideration of his sentence. He referenced how he believed that the court would impose a lesser sentence 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, Appellant referenced his desire to withdraw his plea not because Attorney Welickovitch failed to do anything but because Attorney Welickovitch allegedly misled him. According to Appellant, 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 Appellant did he claim that Attorney Welickovitch failed to request a line-up. 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 Appellant 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 Appellant and both had full beards. (Transcript, 7/27/2020, at 24-30.)

Trooper Dammer was in the vehicle with the CI for the first controlled purchase from Appellant. Trooper Dammer looked directly at Appellant's face while he was in the vehicle for the transaction with the CI. Appellant asked him who he was and Trooper Dammer told him that he was the CI's uncle. Trooper Dammer testified that Appellant had very distinctive tattoos on his forearms. Trooper Dammer also testified that, through binoculars, he observed Appellant engage in the transaction with the CI at Sheetz. Trooper Dammer definitively testified that Appellant was the person from whom the CI purchased heroin from at the Sheetz and Appellant 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. (Transcript, 7/27/2020, at 33-37.)

The court found that Appellant did not meet his burden of proof to show that plea counsel was ineffective for failing to file a motion for a line-up or for advising him to plead guilty.

Appellant's claim that plea counsel should have filed a motion for a line-up

to determine if the CI could identify him lacked merit. To obtain a conviction against Appellant, the Commonwealth did not need the CI to identify Appellant in this case, because the Commonwealth had photographs that clearly showed Appellant interacting with the CI and Trooper Dammer could identify Appellant as the seller in both transactions.

Attorney Welickovitch credibly testified that based on the photographs, surveillance DVD, and the observations of law enforcement officers, including but not limited to Trooper Dammer who could testify that Appellant was the individual making the transactions with the CI, identification was not an issue this case. Transcript, 6/2/2020, at 52, 62-67, 71, 74-75, 81-83.

Attorney Welickovitch had reasonable bases for not filing a motion for a line-up in this case. As previously noted, identification was not really an issue in this case. Moreover, the Commonwealth was willing to dismiss some of the charges and utilize the lower sentencing guidelines for heroin instead of fentanyl if Appellant entered an otherwise open guilty plea.

Finally, Appellant did not show prejudice. It was Appellant's burden to prove that he met all of the elements of an ineffective assistance of counsel claim. Appellant did not show prejudice because he did not show that there was a reasonable probability that if counsel had filed a motion for a line-up that such a motion would have been successful, i.e., the court would have granted the motion, the CI would not have been able to identify him, the Commonwealth could not have proved that he was the perpetrator without the CI's identification, or that Appellant would not have pled guilty.

The court also did not find that this was a case where counsel's advice induced Appellant to enter a plea that was not knowing, intelligent or voluntary. Regardless

of counsel's advice to Appellant, the court advised Appellant that the actual sentence was completely up to the court. The court stated,

> Now there's no plea agreement in this case except the Commonwealth's going to drop those other charges. So it's up to me to decide what an appropriate sentence would be under the circumstances. In deciding what an appropriate sentence would be I have to take into account the guideline ranges. I have to take into account your prior record score. I have to take into account the offense gravity score of these particular offenses, and it may depend on the weight of the substance involved and the type of substance involved. I have to take into account your history and characteristics, you know, what type of upbringing, what type of education, what type of employment, what type of mental health issues if there are, what type of substance abuse issues if—if there are. But I would have to take into account all of that; do you understand that? (Transcript, 5/1/2019, at 4-5).

Appellant replied, "Yes." The court continued, "Now I'm not telling you because it is going to happen, and in all likelihood it will not happen, but I have to tell you because the law requires. The worst case scenario for you could be 27 to 54 years; do you understand that?" (Transcript, 5/1/2019, at 5). Again, Appellant replied, "Yes."

The law is clear that a defendant may not use a guilty plea as a sentence-testing device and that disappointment in the sentence imposed is not a valid basis to withdraw a plea. *Commonwealth v. Bedell*, 954 A.2d 1209, 1212 (Pa. Super. 2008); *Commonwealth v. Muhammad*, 794 A.2d 378, 383 (Pa. Super. 2002). That is precisely what Appellant is attempting to do in this case.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

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