

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-929-2017
 : CR-1286-2017
 vs. :
 :
 :
 MICHAEL WILLITS, :
 Defendant :

OPINION AND ORDER

By way of background, on October 29, 2018 under Information 929-2017 Petitioner pleaded guilty to fleeing or attempting to elude law enforcement, a felony of the third degree; two counts of endangering the welfare of children (EWOC), felonies of the third degree; possession of drug paraphernalia; possession of a small amount of marijuana and various traffic summaries. Under Information 1286-2017, following a trial on October 22, 2018, Petitioner was convicted of tampering with physical evidence, possession of a small amount of marijuana, and possession of drug paraphernalia.

On February 12, 2019, the court sentenced Petitioner to an aggregate term of six (6) to fifteen (15) years' incarceration in a state correctional institution, consisting of one and one-half (1 ½) to three (3) years for fleeing and eluding, two (2) to five (5) years for each count of EWOC, and six (6) months to two (2) years for tampering with physical evidence.

On February 22, 2019, Petitioner filed a motion to reconsider in which he asserted that the court failed to take into consideration that Petitioner pleaded guilty and took responsibility for his actions and that his sentence was unduly harsh and excessive. In an order dated March 6, 2019 and docketed on March 12, 2019, the court denied Petitioner's

motion to reconsider.

Petitioner filed a notice of appeal. In the concise statement that counsel filed on behalf of Petitioner, counsel asserted that the sentence was excessive despite each individual sentence being within the standard range and that the court abused its discretion in determining that Petitioner did not suffer from any significant mental health and substance abuse issues despite the provided documentation the court had for sentencing and was a result of the court's conclusion that Petitioner was not particularly amenable to a more rehabilitation-based sentence.

Petitioner waived his right to counsel and elected to represent himself on appeal. On November 20, 2019, the Pennsylvania Superior Court dismissed Petitioner's appeal for failure to file a brief.

Petitioner filed a timely pro se Post Conviction Relief Act (PCRA) petition. The court appointed counsel to represent Petitioner and directed counsel to file either an amended PCRA petition or a *Turner/Finley* no merit letter.¹ Counsel filed a no-merit letter and a motion to withdraw. Petitioner filed a request for replacement counsel in which he elaborated on his PCRA claims and asserted additional claims.

The court will address Petitioner's issues as they are presented in his request for replacement counsel, because Petitioner was more detailed in that filing. The court will first address Petitioner's claim regarding EWOC in violation 18 Pa. C.S.A. §4304. Thereafter, the court will group Petitioner's claims as: (1) trial court error and/or challenges

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

to the discretionary aspects of sentencing; and (2) ineffective assistance of counsel claims.

Petitioner first asserts that his plea counsel was ineffective for advising him to plead guilty to EWOC-Failure to make/interfere with the making of a report in violation of 18 Pa. C.S.A. §4304(a)(2) because Petitioner is both statutorily and factually innocent of that charge (Count 18). This claim lacks merit. Petitioner was not charged with a violation of section 4303(a)(2). He was charged with two violations of section 4304(a)(1) as a parent or guardian, one count for each of his children that were in the vehicle when he fled from the police resulting in a very dangerous high-speed chase. His guilty plea was taken on this factual basis. The court, however, understands Petitioner's confusion because there is a clerical or typographical error on the docket sheet such that his docket indicates that the violation was for (a)(2) rather than (a)(1). The court will issue a separate order directing the Lycoming County Clerk of Courts to correct this error.

To be eligible for relief under the PCRA, a petitioner must plead and prove that the allegation of error has not been previously litigated or waived. An issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior postconviction proceeding. 42 Pa.C.S.A. §9544(b).

In paragraph 3, Petitioner asserts the court gave 0% due consideration to the treatment plan designed by his own court appointed mental health assessor which developed a comprehensive treatment plan designed to address Petitioner's mental health needs in order to lessen the risk for recidivism and provide the necessary recommendations and resources

for the greatest possible chance of rehabilitation for Petitioner. In paragraph 8, Petitioner asserts that the court abused its discretion, demonstrated an inability to remain impartial, unbiased and without prejudice and violated Petitioner's 8th Amendment right against cruel and unusual punishment by clearly denying him the prescribed mental health treatment called for by the court's own mental health evaluator. Instead, Petitioner contends the court articulated "his own personal views, opinions, and beliefs" about Petitioner's mental health history, needs and potential for rehabilitation based on the mental health assessment. In paragraph 9, Petitioner asserts that the court erred by utilizing the mental health assessment to form a personal opinion of Petitioner and determine punishment other than its lawful use which would be to assess a defendant's mental health and create a comprehensive treatment plan to address a defendant's mental health needs and create the greatest chance of rehabilitation and lessen the likelihood of recidivism in the future.

The court finds that Petitioner cannot prevail on these claims as a matter of law. First, Petitioner waived these claims. In the concise statement of matters on appeal, trial counsel on behalf of Petitioner asserted that the sentence was excessive despite each individual sentence being within the standard range and the court abused its discretion in determining that Petitioner did not suffer from any significant mental health and substance abuse issues despite the provided documentation the court had for sentencing and was a result of the court's conclusion that Petitioner was not particularly amenable to a more rehabilitation-based sentence. The mental health assessment was part of the "provided documentation." At sentencing, Petitioner was essentially arguing for a county sentence with

mental health services in the community during his parole based on the assessment that trial counsel had Petitioner complete to support such a sentence.² Petitioner could have challenged on appeal the court's alleged improper use of the assessment and the court's failure to impose either a county sentence or a shorter state sentence. Instead, Petitioner chose to represent himself and then failed to file an appellate brief in support of the claims. Since these claims could have been pursued on appeal but were not due to Petitioner's failure to file a brief, these claims are waived. Moreover, these claims are challenges to the discretionary aspects of sentencing, which are not cognizable (or cannot be pursued) under the PCRA. *Commonwealth v. Torres*, 223 A.3d 715, 716 (Pa. Super. 2019); *Commonwealth v. Wrecks*, 934 A.2d 1287, 1288 (Pa. Super. 2007); *Commonwealth v. Fowler*, 930 A.2d 586, 593 (Pa. Super. 2007), *appeal denied*, 944 A.2d 756 (Pa. 2008).

In paragraph 10, Petitioner asserts that the court erred and violated his 5th Amendment rights to due process and fair sentencing by impermissibly considering his decision to exercise his constitutional right to a trial by jury in determining his sentence. The court finds that this claim also was waived by failing to present it in the motion to reconsider or on appeal.

Additionally, however, Petitioner's claim is factually inaccurate. Petitioner entered an open guilty plea under Information 929-2017; he did not exercise his right to a trial by jury. Furthermore, the court's comments were in response to Petitioner's arguments

²The assessment was not court-ordered. Rather, defense counsel arranged for Ms. Finn to conduct an assessment of Petitioner which counsel used at sentencing to try to persuade the court to impose a county sentence. Counsel was acting in Petitioner's interests, despite the fact that he ultimately could not dissuade the

that the court failed to consider or adequately consider the fact that Petitioner pleaded guilty and accepted responsibility.

Petitioner's formal court arraignment was scheduled for June 12, 2017.

Arraignment is the first event at the Common Pleas level after a charge is held for court by a Magisterial District Judge (MDJ). Petitioner entered an open guilty plea on October 29, 2018, the date that case 929-2017 was scheduled for trial.³ Therefore, in rejecting Petitioner's arguments regarding acceptance of responsibility, the court noted that Petitioner "did plead guilty, but he did not do so until 16 months after arraignment and immediately prior to trial. A trial [in case 1286-2017] and an eleventh hour guilty plea [in case 929-2017] do not represent an acceptance of responsibility that would justify a sentencing reduction."⁴

Petitioner's remaining allegations relate to assertions of ineffective assistance of sentencing counsel and PCRA counsel.

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must plead and prove that the claim has arguable merit; counsel lacked a reasonable basis for his action or failure to act; and prejudice, i.e., but for counsel's action or failure to act there is a fair probability that the results of the proceeding would have been different.

court from imposing a sentence of state incarceration.

³The arraignment date and Petitioner's trial date are reflected in documents in his court file and on his docket sheet. The court may take judicial notice of its own records in the same case. See *Commonwealth v. Bond*, 516 Pa. 171, 532 A.2d 339, 343-343 (1987); *Commonwealth v. Byrd*, 472 A.2d 1141, 1145 (Pa. Super. 1984); *Hawkey v. Workers' Comp. Appeal Bd.*, 425 A.2d 40, 42 n.3 (Pa. Commw. 1981).

⁴The court understands Petitioner's arguments that he was willing to accept responsibility for his convictions and that the delay was the result of the Commonwealth's initial unwillingness to drop certain charges that either he was acquitted or the Commonwealth ultimately agreed to dismiss as part of his plea. While such may explain the delay, it does not change the fact that his plea was entered 16 months after his arraignment and on the eve of trial.

Commonwealth v. Hairston, 249 A.3d 1046, 1061-1062 (Pa. 2021); *Commonwealth v. Parker*, 249 A.3d 590, 595 (Pa. Super. 2021). When the alleged ineffectiveness relates to an alleged failure to call a witness, the petitioner must plead and prove that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the petitioner a fair proceeding. *Commonwealth v. Selenski*, 228 A.3d 8, 16 (Pa. 2020).

For a proposed witness's testimony to be admissible at a PCRA evidentiary hearing, a petitioner must provide a certification signed by the witness stating the witness's name, address, date of birth and substance of testimony and include any documents material to that witness's testimony. 42 Pa. C.S.A. §9545(d); Pa. R. Crim. P. 902(A)(15). If a petitioner is unable to obtain the signature of a proposed witness, the petitioner shall include a certification signed by petitioner or petitioner's counsel but the certification must set forth the basis of the petitioner's information and the petitioner's efforts to obtain the witness's signature. 42 Pa. C.S.A. §9545(d)(1)(ii).

Petitioner's pro se filings do not satisfy these requirements. The filings also contain several inaccuracies and misconceptions. For example, the court considered Petitioner's entire criminal history, including convictions from other counties and other states, convictions for offenses that were committed as a juvenile and transferred to adult court, and juvenile adjudications of delinquency. When the court considered those prior

offenses, the “look back” period was from the dates Petitioner committed the offenses in his current cases (April 28, 2017 and May 15, 2017) to the dates of his convictions or adjudications of his prior offenses. It was not from the date of sentencing for his current offenses or to the commission of his prior offenses. Thus, when referring to convictions or felonies within the past twelve years, the court was referring to convictions or adjudications occurring since approximately 2005. Furthermore, the court’s focus was not on the precise number of years but rather the offenses comprising Petitioner’s **entire** criminal history. When Petitioner discusses his lack of a significant criminal history, he fails to discuss his felony firearm conviction from New Jersey or his two convictions in 2006 for burglaries graded as felonies of the second degree that he committed as a juvenile but were transferred to adult court. It is unclear to the court whether Petitioner is contesting that he was convicted of these offenses or if he believes that they do not count in his prior record score. Petitioner should clarify such in any future filings or at any hearing.

Petitioner also mistakenly believes that the mental health assessment was court-ordered and therefore Rule 569 applies. The court did not order Petitioner to be examined by anyone for trial or for sentencing. Instead, in an effort to obtain a county sentence for Petitioner, counsel arranged for an individual to prepare an assessment of Petitioner’s history and background and presented it to the court. As the comment to Rule 569 makes clear, Rule 569 applies to situations where the Commonwealth is seeking to compel an examination of the defendant. Therefore, the court does not believe Rule 569 applies.

Petitioner also contends that the court sentenced him utilizing a prior record score (PRS) of RFEL. Although the court believed that the correct PRS for Petitioner was RFEL, the court utilized a PRS of 5, on all of the convictions except tampering with physical evidence, because it was the PRS that the parties agreed to as part of Petitioner's written guilty plea colloquy.

The offense gravity score (OGS) for EWOC was 6. With a PRS of 5, the standard minimum guideline range for EWOC was 21 to 27 months. The court imposed a minimum sentence of two years or 24 months for each count of EWOC. In comparison, with a PRS of RFEL, the standard minimum guideline range would be 27 to 40 months.

Similarly, the court sentenced within the standard minimum guideline range for a PRS of 5 with respect to fleeing/eluding law enforcement. The OGS for fleeing/eluding was 5. Therefore, the standard minimum guideline range was 12 to 18 months. The court's minimum sentence for fleeing/eluding was 1 ½ years or 18 months. If the court had utilized a PRS of RFEL, the guideline ranges would have been 24 to 26 months for fleeing/eluding. Clearly, the court did not sentence Petitioner utilizing a PRS of RFEL for this offense. If it had, Petitioner's minimum sentences likely would have been higher.

The court imposed a minimum sentence of 6 months for tampering with physical evidence. The OGS was 2. The minimum sentence imposed was within the standard guidelines for a PRS of RFEL or 5. The guidelines were 6 to <12 months or 1 to 9 months, respectively.

Petitioner contends that sentencing counsel was ineffective in several other

respects, including failing to call Dr. Calvert as a witness, failing to review the Pre-Sentence Investigative (PSI) report with him, failing to investigate the credentials of Ms. Finn who conducted the assessment, failing to consult with him regarding the assessment, and failing to correct errors made in the PSI and made by the court at sentencing, among others. The court understands that Petitioner is not happy with his sentence. Sometimes, it is not clear to the court what Petitioner is contending counsel should have done or how Petitioner believes counsel's act or failure to act negatively impacted him, his sentence or his case.

The court notes that, contrary to the no-merit letter filed by PCRA counsel, claims implicating the discretionary aspects of sentencing raised in the context of an ineffective assistance of counsel claim are cognizable under the PCRA. *Commonwealth v. Sarvey*, 199 A.3d 436, 455 (Pa. Super. 2018). Furthermore, prior to the court entering a final PCRA order, Petitioner has asserted a claim that PCRA counsel was ineffective in failing to investigate, develop and address his claims and instead mischaracterized the entirety of the issues he wished to raise. Therefore, the court must appoint new counsel to represent Petitioner to assist him in developing his claims of ineffective assistance of sentencing counsel and PCRA counsel. See *Commonwealth v. Betts*, 240 A.3d 616, 623-624 (Pa. Super. 2020).

ORDER

AND NOW, this ___ day of October 2021, the court notifies Petitioner of its intention to dismiss his claims of trial court error related to the discretionary aspects of his sentencing as both waived and not cognizable under the PCRA. To be cognizable under the

PCRA, the court finds that these claims must be presented in the context of claim of ineffective assistance of counsel. *Sarvey, supra*. However, the court appoints Julian Allatt as new PCRA counsel to represent Petitioner on his ineffective assistance of counsel claims and schedules an evidentiary hearing before Senior Judge Kenneth D. Brown for **December 10, 2021 at 2:00 p.m. in courtroom #4 of the Lycoming County Courthouse.** On or before December 1, 2021, any amended PCRA petition and/or any witness certifications for any witness other than Petitioner shall be filed.

The court notes that Petitioner filed a Motion for a Grazier Hearing on September 13, 2021. This matter will be addressed at the above-scheduled hearing.

Attorney Allatt shall be compensated at his contracted hourly rate.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
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