

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CP-41-CR-2139-2017
	:	CP-41-CR-1972-2017
v.	:	
KASAN SANDERS	:	PCRA-MOTION TO
Defendant	:	WITHDRAW AS COUNSEL

OPINION AND ORDER

Kasan Sanders (Petitioner) originally filed a *pro se* petition for Post Conviction relief (PCRA) on November 19, 2020. After an evidentiary hearing, Judge Marc F. Lovecchio¹ granted the Petitioner's request for relief and reinstated his right to file a direct appeal to the Superior Court. A timely appeal was filed at docket number 2139-2017 only. The Superior Court rejected his appeal by opinion dated August 23, 2022.

Petitioner subsequently filed another *pro se* petition for relief on October 11, 2022 to both docket numbers as listed above. Donald F. Martino, Esquire was appointed to represent Petitioner and he filed a Motion to Withdraw as Counsel-Turner/Finley letter with the Court on April 14, 2023. Preliminary conference on the petition was held on April 28, 2023. Upon review of the petition and case materials, the Court agrees with PCRA counsel and finds that Petitioner has failed to raise any meritorious issues in his PCRA Petition in either case, and the Petition therefore should be dismissed.

Background

Petitioner was charged to docket number 1972-2017 with four counts of Possession with the Intent to Deliver², four counts of Delivery of a Controlled Substance³, four

¹ Judge Lovecchio retired November 2, 2021.

² 35 P.S. § 780-113(a)(30).

³ 35 P.S. § 780-113(a)(30).

counts of Possession of a Controlled Substance⁴, and four counts of Criminal Use of a Communication Facility⁵. The charges related to four undercover purchases of drugs by the Narcotics Enforcement Unit (NEU) of the Lycoming County District Attorney's Office.

As a result of those controlled purchases, the NEU obtained a search warrant for the residence located at 513 High Street, City of Williamsport. The product of the search warrant resulted in the charges filed in 2139-2017. Petitioner was subsequently charged with four counts of Persons not to Possess a Firearm⁶, two counts of Possession with the Intent to Deliver⁷, two counts of Possession of a Controlled Substance⁸.

Under 2139-2017 Petitioner proceeded to non-jury trial before Senior Judge Dudley N. Anderson on October 12, 2018. He was convicted only on the Persons not to Possess charges, as the PWID and PCS charges were severed from the case.

On September 6 2019, just before his jury trial was to begin to docket number 1972-2017, Petitioner pled guilty to four (4) counts of delivery of a controlled substance with a negotiated plea agreement of 2-4 years.

Judge Lovecchio sentenced Petitioner on December 11, 2019 under both docket numbers to an aggregate term of 12-24 years' incarceration.⁹ This sentence consisted of the 2-4 year negotiated agreement under 1972-2017 and two consecutive terms of 5-10 years' incarceration for two of the Persons not to Possess charges from 2139-2017. On January 23, 2019, Judge Lovecchio granted the Post Sentence motion and reconsidered Petitioner's sentence. He amended the sentence to an aggregate sentence of seven (7) to fourteen (14)

⁴ 35 P.S. § 780-113(a)(16).

⁵ 18 Pa. C.S.A. § 7512.

⁶ 18 Pa. C.S.A. § 6105.

⁷ 35 P.S. § 780-113(a)(30).

⁸ 35 P.S. § 780-113(a)(16)

⁹ Petitioner waived his right to be sentenced by Judge Anderson on 2139-2017.

years, sentencing the Petitioner on only one of the Persons not to Possess counts. No direct appeal of Petitioners cases was taken.

On November 19, 2020 Petitioner filed a PCRA petition requesting reinstatement of his direct appeal rights. After an evidentiary hearing on both July 16 and 22, 2021, Judge Lovecchio concluded that Petitioner wanted trial counsel to file an appeal and there was no reasonable basis for counsel not to do so. *See* Opinion, 9/16/2021. On September 16, 2021, Judge Lovecchio reinstated Petitioner's direct appeal rights in 2139-2017 and found that Petitioner withdrew his claim under 1972-2017 sometime during the PCRA hearing. New counsel was appointed and filed a timely appeal which was denied by the Superior Court on August 23, 2022. The Superior Court determined, just as Judge Lovecchio did, that Petitioner was not entitled to a *Franks*¹⁰ hearing because he had no reasonable expectation of privacy in the location that had been searched. Opinion, 8/23/2022 at p. 11. No appeal was taken from the Superior Court decision, and Petitioner's case became final on September 22, 2022.

Petitioner again filed a *pro se* PCRA petition on October 11, 2022. In his petition, he alleged that police illegally induced the confidential informant to encourage the Petitioner to sell controlled substances, Petitioner was entrapped into engaging in illegal behavior and his guilty plea was unlawfully induced under docket 1972-2017. Although docket number 2139-2017 is included in the petition, the Court can find no issue raised by Petitioner which involved this case.

Discussion

To be eligible for relief under the PCRA, the petitioner must plead and prove that his conviction or sentence resulted from ineffective assistance of counsel which so undermined

¹⁰ *Franks v. Delaware*, 438 U.S. 154 (1978).

the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa. C. S. §9543(a)(2) and that the allegation of error has not been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). A claim is previously litigated under the PCRA if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. 42 Pa.C.S. § 9544(a)(2). An allegation is deemed waived “if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state postconviction proceeding.” 42 Pa.C.S. § 9544(b).

The law presumes counsel has rendered effective assistance, and to rebut that presumption, the petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. *Commonwealth v. Kohler*, 36 A.3d 121, 132 (Pa. 2012). “[T]he burden of demonstrating ineffectiveness rests on [the petitioner].” *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010). To satisfy this burden, a petitioner must plead and prove by a preponderance of the evidence that: “(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different.” *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the petitioner's ineffective assistance of counsel claim. *Commonwealth v. Jones*, 811 A.2d 994, 1002 (Pa. 2002).

Whether the guilty plea was voluntary, knowing, and intelligent

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. Section 9544(b). Petitioner chose to withdraw the claim in his earlier PCRA petition. *See* N.T., 7/22/2022 at pp. 27, 29-30. Since the Petitioner had the chance to litigate this issue but chose to withdraw it at the prior PCRA hearing, this issue is waived.

In the event the Superior Court determines that the issue has not been waived, PCRA Court finds that Petitioner's guilty plea was knowing, intelligently, and voluntarily entered.

In a PCRA claim where a guilty plea was entered and honored by the sentencing judge, the Court is directed to look to whether the plea was knowingly, intelligently, and voluntarily entered. *Commonwealth v. Moury*, 992 A.2d 162, 175 (Pa. Super. 2010). Manifest injustice is required to withdraw guilty plea which is requested after a sentence has been imposed. *Commonwealth v. Flick*, 802 A.2d 620, 623 (Pa. Super. 2002). Such a manifest injustice occurs only when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly. *Commonwealth v. Persinger*, 615 A.2d 1305, 1308 (Pa. 1992). It does not matter if Petitioner is pleased with the outcome of his decision to plead guilty as long as he did so knowingly, voluntarily, and intelligently. *Commonwealth v. Yager*, 685 A.2d 1000, 1004 (Pa. Super. 1996). Petitioner must demonstrate a "miscarriage of justice . . . which no civilized society could tolerate, in order to be entitled to relief." *Commonwealth v. Allen*, 732 A.2d 582, 588 (Pa. 1999). A trial court must, at a minimum, evaluate the following six areas:

(1) Does the Petitioner understand the nature of the charges to which he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the Petitioner understand that he has a right to trial by jury? (4) Does the Petitioner understand that he is presumed innocent until he is found guilty? (5) Is the Petitioner aware of the permissible ranges of sentences and/or fines for the offenses charged? (6) Is the Petitioner aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Young, 695 A.2d 414, 417 (Pa. Super. 1997).

In *Yeomans*, the Superior Court further summarized:

In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the Petitioner understood what the plea connoted and its consequences. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. Thus, even though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the Petitioner had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

Commonwealth v. Yoemans, 24 A.3d 1044, 1047 (Pa. Super. 2011) (citing

Commonwealth v. Fluharty, 632 A.2d 312, 314 (Pa. Super. 1993)).

In Judge Lovecchio’s Opinion and Order dated September 16, 2021, he reviewed the Petitioner’s guilty plea colloquy at docket number 1972-2017 and made the following findings regarding the oral colloquy he had with the Petitioner.

During the colloquy, Petitioner indicated that: he did not want to go to trial. (Transcript, 9/6/19 at 10); he wanted to take responsibility for what he did (Id. at 4); they both were getting high in the house. (Id.); he already “accepted” his guilt and there was no need to hide it. (Id. at 6); he was “the middleman” (Id.); he was willing to take responsibility for four deliveries (Id. at 8); and they were all, “in cohorts”(Id. at 9). He admitted as well that the Confidential Informant (CI) bought heroin from him probably 90 times (Id. at 20). He noted that it was his decision to plead guilty and he wanted to accept “his part” (Id. at 11,12).

He did say that he thought Mr. Welickovitch could have fought more for him and that during the suppression hearing he didn't do a background on the CI. (Id. at 14-15). He was satisfied with Mr. Welickovitch’s representation in the district attorney giving him deal. (Id. at 16). He specifically admitted that Mr. Welickovitch was not making him plead guilty (Id.). Other than thinking that Mr. Welickovitch could have done a better job with the legal issues, he didn’t do anything wrong or fail to do anything that was causing him to plead guilty. (Id. at 16-17). As for his guilty plea, he stated, “ain’t nobody making me do it. (Id. at 18.)

CI Coercion and entrapment

On the remaining issues discussed by Petitioner in his *pro se* motion, that the police unlawfully induced the CI to work with the police to purchase controlled substances from the Petitioner and that Petitioner was entrapped into committing these offenses, the Court finds that these issues are also waived.

Initially, the Court would refer back to the colloquy and admissions of guilt Petitioner offered during his oral colloquy. Petitioner was unequivocal in his acceptance of responsibility for the four deliveries. In fact, his recitation of the facts at his plea undermines his claim that the CI was pressured into what s/he was doing; he had sold to him/her about 90 times. Guilty Plea excerpt, *supra*.

At the time of his plea, Judge Lovecchio advised him at that he was giving up his right to file an appeal on any motions that were filed beforehand, and the Petitioner appeared to understand by answering “yeah.” Guilty Plea, 9/6/2019 at p.13. It was clear at the time of his plea he would have the opportunity to go forward with a trial as the jury had already been selected, but he did not want to. *Id.* at p.12. In fact, Judge Lovecchio specifically advised the Petitioner the areas he could challenge on appeal. *Id.*

Petitioner completed a written guilty plea colloquy which Judge Lovecchio also reviewed. On the written colloquy, Petitioner answered the following questions:

14. Do you understand that if you plead guilty you are waiving or giving up your right to present any defenses that either you or your attorney may think that you have to the crime or crimes charged? yes
15. a. Do you understand that by pleading guilty you are waiving or giving up your right to file any pretrial motions and waiving any such motions already filed? yes

A plea of guilty is a waiver of all defects and defenses except those concerning the jurisdiction of the court, validity of the guilty plea and the legality of the sentence imposed.

Commonwealth v. Moyer, 497 Pa. 643, 444 A.2d 101 (1982); *Commonwealth v. Reichle*, 589 A.2d 1140, 1141 (Pa. Super. 1991). Therefore, PCRA Court finds that he has waived his challenges on these issues as well.

Conclusion

Based on the foregoing, this Court finds no basis upon which to grant Petitioner's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to dismiss Petitioner's PCRA Petition. Petitioner may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the petition.

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COMMONWEALTH OF PENNSYLVANIA

v.
KASAN SANDERS
Defendant

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CP-41-CR-2139-2017
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MOTION TO
WITHDRAW AS COUNSEL

ORDER

AND NOW this day of November, 2023, it is hereby **ORDERED AND DIRECTED** as follows:

1. Petitioner is hereby notified, pursuant to Pennsylvania Rule of Criminal Procedure 907(1), that it is the intention of this Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for Leave to Withdraw Appearance filed on April 14, 2023 by Donald F. Martino, Esquire is hereby **GRANTED**. Mr. Martino no longer represents Petitioner. Petitioner may represent himself or he may hire counsel to represent him.
3. **Petitioner will be notified at the address below through means of certified mail.**

By the Court,

Nancy L. Butts, President Judge

cc: DA (MWade)
 Donald F. Martino, Esq.
 Kasan Sanders QB 1402
 SCI Benner Township
 301 Institution Drive
 Bellefonte, Pennsylvania 16823
 Clerk of Courts