

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. CR – 1890-2018
vs.	:
	:
LINDA STROUSE,	:
Defendant	: PCRA

OPINION and ORDER

Presently before the Court is Defendant's Petition for Post-Conviction Relief filed on May 22nd, 2023.

Background

On January 4th, 2019, Petitioner was charged with 124 counts of theft and forgery related to monies that she stole and spent from the victim, Rose Strouse, deceased. Rose Strouse was formally the Petitioner's Mother-in-Law. This matter was originally scheduled for a guilty plea on January 14th, 2019, but was continued numerous times until it eventually was put on the trial list on March 4th, 2020. On June 4th, 2021 the Commonwealth filed a motion to amended the information, and on June 7th, 2021 the information was amended to reduce the charges to 25 counts. On the same date the Petitioner plead open to all 25 counts and was sentenced by this Court on September 2nd, 2021.

Thereafter, Petitioner filed a motion for Post Sentence Relief on September 13th, 2021. Argument was held on December 23rd, 2021, and this Court denied her motion by Opinion and Order dated January 12th, 2022. Petitioner did not file a direct appeal. A prior Petition for Post-Conviction Relief was filed by the Petitioner on March 22nd, 2022. After the filing of her petition Donald Martino, Esquire, was appointed as counsel. In this petition the Defendant was seeking relief by way of her appeal rights being reinstated and that her sentence be amended by order

finding that she is RRRI eligible. Upon no objection by the Commonwealth the Defendant's petition was granted and her sentence was amended and her direct appeal rights were reinstated.

The Petitioner filed a timely appeal alleging that the trial Court abused its discretion when imposing her sentence. The Superior Court of Pennsylvania affirmed this Court's sentence on March 3rd, 2023. Defendant's sentence then became final on or about April 3rd, 2023. On May 22nd, 2023 the present timely Petition for Post-Conviction Relief was filed.

By way of her attorney Donald Martino, Esquire, the Defendant filed an amended petition on June 27th, 2023. In the petition the Defendant alleges that the circumstances surrounding her plea, as a whole, establish that her plea was involuntary, unknowing, and unintelligent because of the ineffectiveness of her plea counsel.

Argument on Defendant's amended petition was held on October, 20th, 2023. At the time of argument, the Court heard testimony from Christian Lovecchio, Esquire, Defendant's attorney for her plea and sentencing. The Petitioner also testified. Additional time for testimony was scheduled for November 6th, 2023. At that time the Court heard testimony from Matthew Diemer, Esquire, and Christina Lovecchio, Esquire, was recalled by the Commonwealth.

Discussion

Under Chapter 42, Section 9543 of the Pennsylvania Statutes Annotated (PCRA, Act), a Petitioner is entitled to relief if they can plead and prove by a preponderance of the evidence that he/she has been convicted of a crime and at the time relief is granted he/she is currently serving a sentence of imprisonment and the conviction resulted from one or more of the following:

- (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (v) Deleted.
- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.

Here the Petitioner is alleging ineffective assistance of counsel. In Pennsylvania counsel is presumed to have provided effective representation unless a Petitioner pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome at trial if not for counsel's error. *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); cited by *Commonwealth v. Wilson*, 273 A. 3d 13 (Pa. Super 2022). If the Petitioner fails to prove any of the prongs, their claim fails. *Commonwealth v. Charleston*, 94 A.3d 1012, 1019 (Pa. Super. 2015).

Further, "allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea." *Commonwealth v. Anderson*, 995 A.2d 1184, 1189 (Pa. Super. 2010); quoted by *Commonwealth v. Willis*, 68 A.3d 997 (Pa. Super. 2013). "In terms of its effect upon the case, a plea of nolo contendere is treated the same as a guilty plea". *Commonwealth v. Boatwright*, 590 A.2d 15 (Pa. Super. 1991).

Here, the Petitioner makes multiple claims of ineffectiveness on behalf of her attorney Christopher Lovecchio. The first of these claims was that she was never told the consequences of a nolo contendere plea, that she was never told what the charges were against her, and that she was given a blank colloquy form to sign. She testified that at no point her attorney Lovecchio had read the plea form to her. (Transcript #1 pg. 42). Further, she testified that attorney Lovecchio never discussed a no contest plea with her, just that she had two options, “go to trial or [she] could do an open plea”. (Transcript #1 pg. 42,45). Overall, the Petitioner’s testimony in regard to her plea was that she did not understand the proceedings as nothing was explained to her.

On the contrary, at the time of the hearing attorney Lovecchio testified that, on the day of her plea he went through the charges and the elements of said charges with the Petitioner. (Transcript #1 pg. 7). He also testified that he had gone through each question on the plea colloquy form with the Petitioner and then recorded her answers. (Transcript #1 pg. 13). Further, he stated that he explained to the Petitioner what a nolo contendere plea was. (Transcript #1 pg. 19). Attorney Matthew Diemer, who also testified on the day of the hearing, stated that he was present at the time the Petitioner and Attorney Lovecchio went through and filled out her plea colloquy. Specifically, attorney Diemer testified that the Petitioner’s testimony, that she was handed a blank colloquy form and was asked to sign it, was untrue. (Transcript #2 pg. 6). Additionally, he testified that if the Defendant had a question while her attorney was filling out the colloquy form Attorney Lovecchio answered any of her questions. (Transcript #2 pg. 13).

The Defendant further claims that she was never told prison was a possibility, that she was promised a long probationary sentence, and did not know the sentencing guidelines. She testified that Attorney Lovecchio guaranteed that she would get long term probation. (Transcript

#1 pg. 43-44). She also stated, “the only thing that was told to me is that if I go to trial, I could face up to 12 years”, in response to whether or not Attorney Lovecchio had talked to her at any point about the advisory guideline sentence range. (Transcript #1 pg. 45). She explains throughout her testimony that she was under the belief if she went to trial she could face up to twelve (12) years, but if she took a plea she would get probation.

Attorney Lovecchio testified that, although the standard sentencing ranges were not filed in on the plea colloquy form, he did in fact explain what the ranges would be to the Petitioner. (Transcript #1 pg. 9-10). Also, he states that he made the Petitioner aware that there were no guarantees and the sentence was ultimately up to the Judge. (Transcript #1 pg. 10). Further, it was Attorney Diemer’s testimony that, Attorney Lovecchio told the Petitioner multiple times that he could not guarantee she would not go to prison and that he would argue for probation (Transcript #2 pg. 9).

As for the claims covered above, the Court finds that the Petitioner’s testimony is not credible. Both attorneys testified that the Petitioner was fully aware of her charges. They both testified that Attorney Lovecchio never guaranteed a probationary sentence, rather that the Petitioner was well aware that the Court would determine the sentence in this case. It is clear that Attorney Lovecchio went through the plea colloquy with the Petitioner and answered any questions she had, as well as, recorded her answers to the colloquy questions.

As for the claim that she was never made aware of the suggested minimum sentences, there is no requirement that a Defendant be aware of suggested minimum sentences.

Commonwealth v. Wilson, 829 A.2d 1194 (Pa. Super. 2003). Additionally, based on the testimony presented the Petitioner knew that she could be facing twelve (12) years if she was

convicted at trial and that probation was a possibility. The Petitioner is not entitled to relief based on these claims.

The last issue presented by the Petitioner was that she was unaware of any mandatory minimum sentences at the time prior to entering her plea. The Petitioner was charged and pled to two counts of Theft by Deception, 18 Pa. C.S. § 3922(a)(1). That charge has a mandatory sentence because the victim was over the age of 65 as required by 42 Pa. C.S. A. § 9717(a). The mandatory sentence under the statute is not less than twelve (12) months. The Defendant was sentenced in accordance with that mandatory.

The testimony regarding her knowledge of the mandatory minimum in this case is less than clear. Although Attorney Lovecchio testified that he went over the mandatory minimums with the Defendant, they were never filled in on her plea colloquy. (Transcript #1 pg. 14-15). Additionally, there is no notice in the file that the Commonwealth intended to pursue the minimum sentences. Also, it is this Court's recollection that at the time of sentencing it was unclear whether Defense counsel was previously aware of the mandatory minimums before the date of sentencing.

The Court in *Commonwealth v Zorn*, 580 A.2d 8 (Pa. Super. 1990), ruled that, "section 9712...as well as the other statutory mandatory sentencing provision, requires notice to a defendant of its applicability prior to the entry of a guilty plea, not only prior to sentencing." Further the Court states that, "The legislature could not have intended that a guilty plea be accepted without providing a defendant with knowledge of the full consequences of a guilty plea as opposed to a trial." *Id.*

Throughout the testimony of Attorney Lovecchio, he stated that he made the Defendant aware that he could only argue for a probationary sentence and that he could not guarantee

anything. If Attorney Lovecchio was aware at the time the Defendant's plea of the mandatory minimums associated with her charges he failed to let her know they would apply in this case. Additionally, when Defense counsel was made aware of the mandatory sentences at the time of sentencing he made no attempt to withdraw the plea.

This Court cannot conclude that the Petitioner was made aware of the mandatory sentence required by law at the time of her plea. As a result, the Court finds that the Petitioner's plea counsel was ineffective in regard to her plea on the two counts of Theft by Deception.

ORDER

AND NOW, this **26th** day of **January, 2024**, the Petitioner's Petition for Post-Conviction Relief is granted. A hearing is scheduled for **March 26th, 2024 at 1:30 p.m. in Courtroom number 3 of the Lycoming County Courthouse**, at which time she may motion to withdraw her plea.

BY THE COURT,

Ryan M. Tira, Judge

RMT/kbc

cc: Prothonotary
DA
Donald Martino, Esq.
Gary Weber, Esq.