NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KENNETH C. STRAUSSER, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1052 EDA 2012

Appeal from the PCRA Order March 22, 2012
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0001580-2010

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J., and SHOGAN, J.

MEMORANDUM BY BENDER, J. Filed: January 28, 2013

Kenneth C. Strausser, Jr., (Appellant) appeals from the order denying his petition for post-conviction relief filed pursuant to the Post Conviction Relief Act (PCRA), § 9541 – 9546. Appellant claimed trial counsel provided ineffective assistance of counsel (IAC) which caused him to unknowingly, unintelligently, and involuntarily enter his guilty plea. The PCRA court determined that Appellant's IAC claims lacked arguable merit. After careful review, we affirm.

The PCRA court summarized the facts leading to Appellant's arrest and conviction as follows:

> According to the July 12, 2010 Affidavit of Probable Cause, Officer Dailey (hereinafter "Dailey") of the Lehigh Township Police Department observed [Appellant] operating a 1995 black Crown Victoria sedan on Route 507 in Lehigh Township, Wayne County, on July 9, 2010. Dailey had previous knowledge that [Appellant]'s operating privileges were suspended and that there

> were outstanding warrants for [Appellant]. Dailey activated his lights in order to effectuate a lawful vehicle stop; however, [Appellant] began to flee the scene. [Appellant] entered Interstate 380 in Coolbaugh Township while Dailey continued his pursuit.
>
> [Appellant] exited Interstate 380 onto Route 611 and continued south before turning onto Laurel Drive. While traveling eastbound on Laurel Drive, [Appellant] continually sought to flee police and eventually lost control of his steering as he approached Pope Road. According to witnesses, [Appellant] had travelled into the west bound lane of Laurel Drive, causing oncoming traffic to swerve to avoid being hit. [Appellant] lost control of his vehicle while avoiding oncoming traffic and entered into a yaw, striking a tree on the southern side of the eastbound lane. The impact caused fatal injuries to [Appellant]'s passenger, his wife Allison Strausser, as well as their unborn child. A preliminary investigation indicated that [Appellant] was traveling over 60 miles per hour in the 35 mile per hour zone. On July 11, 2010, Detective Daniel Jones confirmed that [Appellant]'s operating privileges were suspended or revoked and that there were in fact fifteen (15) outstanding traffic warrants for [Appellant]'s arrest.

PCRA Court Opinion (PCO), 3/22/12, at 1 – 2.

The Commonwealth charged Appellant with five counts: 1) homicide by motor vehicle, 75 Pa.C.S. § 3732; 2) fleeing or attempting to elude police officer, 75 Pa.C.S. § 3733; 3) accidents involving death or personal injury while not properly licensed, 75 Pa.C.S. § 3742.1; 4) involuntary manslaughter, 18 Pa.C.S. § 2504; 5) recklessly endangering another person, 18 Pa.C.S. § 2705; and 6) resisting arrest, 18 Pa.C.S. § 5104.

Appellant initially pleaded not guilty and was appointed conflict counsel. After substantial pre-trial litigation, however, Appellant ultimately pleaded guilty to counts 1 and 5. On August 30, 2011, the trial court sentenced Appellant to an aggregate term of 36 – 84 months' incarceration.

The trial court denied Appellant's motion for reconsideration of sentence. Appellant did not file a direct Appeal.

On December 8, 2011, Appellant filed a *pro se* PCRA petition alleging IAC that he claims caused his guilty plea to be unlawfully induced. Appellant was appointed PCRA counsel and the PCRA court held an evidentiary hearing on March 5, 2012. On March 22, 2012, the PCRA court issued an order and opinion denying Appellant's PCRA petition. The instant appeal followed.

At the evidentiary hearing, Appellant indicated that he was initially reluctant to enter a plea. N.T., 3/5/12, at 5. He recalled that his mother spoke to trial counsel and that she relayed the content of that conversation to Appellant which had been that a deal for 18 – 36 months' incarceration had been arranged. ***Id***. She told Appellant that he should take the deal, at which point Appellant changed his mind and decided to plead guilty. ***Id***. Appellant stated that trial counsel also told him directly that a deal had been arranged for him to serve 18 – 36 months' incarceration if he were to plead guilty. ***Id***. PCRA counsel asked Appellant if "the only reason [he] took the plea [was] because [Appellant was] promised a certain amount of time?" ***Id***. at 6. Appellant answered, "[y]es." ***Id***.

Appellant testified that he was in special education classes while going through school, and that he collects Social Security due to his mental infirmity. ***Id***. at 7. He claimed that Social Security classifies him as "mentally retarded." ***Id***. Appellant maintained that trial counsel, while aware of those facts, did not take them into consideration when explaining

the nature and consequences of the plea. ***Id***. at 11. Appellant vaguely remembered the judge telling him at the guilty plea what the maximum punishments were and that there was no guarantee that the sentences imposed would be concurrent rather than consecutive. ***Id***. at 13.

Trial counsel testified that he never had any difficulties explaining things to Appellant, except during the preliminary hearing when Appellant was still hysterically upset over the loss of his wife and unborn child. ***Id***. at 19. Trial counsel also testified that it never occurred to him to have Appellant evaluated for his mental infirmity:

> I didn't find [Appellant] to [be at the] point where he didn't understand what he was doing. I mean he's had a history with this Court, I know over a number of years he's been in numerous court proceedings over [a] number of years in this Court, I think that there was nothing there at that particular point to substantiate that.

Id. at 23.

Trial counsel met with Appellant "numerous times" and never experienced trouble relaying information to him. ***Id***. at 17. When asked if he promised Appellant a sentence of 18 – 36 months' incarceration, trial counsel replied:

> I wouldn't have phrased it that way, our Courts don't accept closed plea agreements and I know I would have explained that to him, that that was the case. I honestly, even today when I came here, I don't recall what the sentencing was to be truthful with you, I do know that it was beyond what the recommendation was from probation. Judge Miller seemed to deviate from the recommendation of probation, which was I think the gravamen of what happened here, quite frankly.

Id. at 18.

Appellant's mother also testified at the evidentiary hearing. She first said that trial counsel told her there was a set sentence that had been agreed upon. ***Id***. at 24. She then said that trial counsel called it a "definite offer." ***Id***. She agreed that trial counsel told her that the agreement was between trial counsel and the prosecutor (and not the judge). ***Id***. at 25.

Appellant presents a single question for our review:

> Was it ineffective assistance of counsel to fail to adequately explain to [Appellant] the range of sentences, confirm that there had been no agreement to a specific sentence, and to determine whether [Appellant] understood the proceedings before him?

Appellant's Brief, at 5.

Appellant first asserts that counsel did not explain to him all of the consequences of his plea, particularly the range of potential sentences that were on the table. ***Id***. at 10. Second, he maintains that he was not aware that he was not getting a specific sentence. ***Id***. at 12. Finally, Appellant claims trial counsel should have "looked into his background to determine whether Appellant was competent to understand all of the proceedings …." ***Id***. at 13. Thus, Appellant argues, because trial counsel failed to determine that Appellant's plea was made knowingly, intelligently, and voluntarily, there is a presumption that trial counsel provided IAC. ***Id***. at 14. If he had fully understood the nature and consequences of his plea, Appellant contends, he would not have accepted it. Appellant relies on two federal

cases to support his arguments: ***Missouri v. Frye***, 132 S. Ct. 1399 (2012), and ***Lafler v. Cooper***, 132 S. Ct. 1376 (2012).

Our standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Smith***, 995 A.2d 1143, 1149 (Pa. 2010). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id***.

> "[A]ll constitutionally-cognizable claims of ineffective assistance of counsel may be reviewed in a PCRA petition." ***Commonwealth ex rel. Dadario v. Goldberg***, 565 Pa. 280, 773 A.2d 126, 130 (2001) (holding that PCRA afforded relief for ineffective assistance of counsel where trial counsel misinformed defendant of sentencing range). The Sixth Amendment guarantees the effective assistance of counsel at all stages of a criminal proceeding, including during the plea process. ***See Hill v. Lockhart***, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). If the ineffective assistance of counsel caused the defendant to enter an involuntary or unknowing plea, the PCRA will afford the defendant relief. ***Commonwealth v. Hickman***, 799 A.2d 136, 141 (Pa. Super. 2002).

Commonwealth v. Lynch, 820 A.2d 728, 731-32 (Pa. Super. 2003).

> To establish a claim of ineffective assistance of counsel, a defendant must demonstrate three things: that the underlying claim has arguable merit, that counsel's performance was not reasonably designed to effectuate the defendant's interests, and that counsel's unreasonable performance prejudiced the defendant. ***Commonwealth v. Heggins***, 809 A.2d 908, 913 (Pa. Super. 2002). "[T]he voluntariness of [the] plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." ***Hickman***, 799 A.2d at 141 (internal quotation marks and citation omitted).

Id. at 733.

Thus, to establish a meritorious claim of IAC, Appellant must first establish that the underlying claim has arguable merit. The PCRA court found that Appellant's

> testimony regarding a guaranteed 18 – 36 month prison sentence is not credible. On the other hand, [trial counsel] credibly testified that he discussed with [Appellant] and his mother the sentencing guidelines. We have no doubt, based on the testimony provided, that [trial counsel] provided competent advise to [Appellant] regarding the advantages of a plea agreement.
>
> In addition to finding [trial counsel]'s testimony credible regarding the sentencing guidelines, we find that [Appellant]'s plea was voluntary, knowing, and intelligent, despite his claims that he is mentally impaired and did not understand the nature of the guilty plea.

PCO, at 10 – 11.

The PCRA went on to summarize the following facts that undermine Appellant's claim:

> On July 7, 2011, Defendant pled guilty to Count One: Homicide by Vehicle and Count 5: Recklessly Endangering another Person in open court before the Honorable Linda Wallach Miller. The Judge conducted an on-the-record inquiry to determine whether Defendant understood and voluntarily accepted the terms of his plea agreement. While Defendant argues that he did not understand the plea agreement and was unaware that he could receive a sentence in excess of 18-36 months, we find that the record does not support this argument. Based on the following information contained within Defendant's Guilty Plea Colloquy form that was signed and dated by Defendant on July 7, 2011, we find no reason to believe that Defendant was unaware of what he was doing:
>
> 1. I am pleading guilty to the following charges:

> Count 1 Homicide by Vehicle 18 P.S. § 3732A F-3 (when there is not a conviction for DUI arising from the same incident) Offense Gravity Score "6"
>
> Count 5 Recklessly Endangering another Person 18 P.S. § 2705 (Offense Gravity Score "3")

2. I am aware that the penalties for each of the above charges can be aggregated by the Court at sentencing for a possible maximum sentence of:

> **Homicide by Vehicle, F-3, Seven Years and $15,000.00 fine; Recklessly Endangering another Person, M-2, Two Years, $5,000.00 fine**[.]

3. In return for this guilty plea, the Commonwealth has agreed to the following:

> Nolle Prosequi remaining charges in the above captioned criminal information. **The Commonwealth is not opposed to concurrent sentencing if the Court is so inclined.**

...

6. I understand all of the elements of each offense listed above and am guilty of them because I did the following:

> On or about July 9, 2010, I was in the command and control of a motor vehicle in Coolbaugh Township near the village of Tobyhanna. I was operating the vehicle recklessly in excess of the speed limit while being pursued by police. I lost control of my vehicle and it struck a tree resulting in the death of my wife and unborn child.

7. I understand and give up all of the following rights:

> -To have a trial by jury or by a judge
> -To have the Commonwealth prove my guilt beyond a reasonable doubt
> -To participate in the selection of a jury, and to challenge any juror for cause, and/or exercise any preemptory challenges that I would otherwise be entitled to

-To cross examine any Commonwealth witness, and to testify or remain silent at trial, or compel any witness on my behalf to testify
-To have an attorney provided to me for free to help at trial if I cannot afford one
-To challenge any illegal evidence
-To give up the presumption of innocence I have, and to give up my right to challenge anything that may have been improper in the investigation and prosecution of my case by the Commonwealth

8. I am not mentally disabled or under the influence of any drug or alcohol, nor am I suffering from any disability which affects my own free will, and am free of duress. I am giving up my trial rights knowingly, voluntarily, and intelligently.

9. I retain the right to contest the following:

(a) Jurisdiction of the Court

(b) Legality of the sentence

(c) Validity of this plea, including claims involving my constitutional right to effective counsel

10. I have had an opportunity to discuss this plea agreement with my attorney, with whom I am satisfied. I have read this document in its entirety, understand it completely, and believe this plea is in my best interest.

[Guilty Plea Colloquy, 7/7/11, p. 1-21]

The guilty plea colloquy form makes it very clear that Defendant understood what the maximum sentence was in his case according to Question Two (2). Also, according to the form, Defendant attested to the fact that he was not under any mental disability that would prevent him from a knowing, intelligent, and voluntary plea. There is no evidence on the record other than unsubstantiated assertions from Defendant that he suffers from a mental disability that made him unable to understand the nature of the proceedings. Attorney Weidenbaum credibly testified that he was unaware of any mental disability that would prevent Defendant from understanding the proceedings. Attorney Weidenbaum also testified that he had represented

> Defendant in previous matters and never felt it necessary to have Defendant's mental capacity evaluated.
>
> From the above facts and guilty plea colloquy form, we find that Defendant's guilty plea was valid and as such, his argument is without merit and thus does not overcome the presumption of trial counsel's competence. Additionally, the facts support our conclusion that Defendant was aware of the possible sentence he could receive as a result of his guilty plea prior to his sentencing and that he was well aware that sentencing was discretionary with the Court. As such, Defendant is again unable to satisfy the first prong of the test for ineffective assistance of counsel, therefore we need not address whether he has met the other two prongs.

PCO, at 13 – 16 (emphasis in original, footnote omitted).

Our review of the record is in accordance with the summary given by the PCRA court. We conclude that the "determination of the PCRA court is supported by the evidence of record and is free of legal error." ***Smith***, 995 A.2d at 1149. Appellant has failed to demonstrate the arguable merit prong of his IAC claim because the PCRA court found that his testimony underlying the claim lacked credibility, particularly in light of the plea colloquy and trial counsel's testimony to the contrary.

Appellant's reliance on ***Frye*** and ***Lafler*** is irrelevant given our conclusion that his IAC claim lacks arguable merit. Both ***Frye*** and ***Lafler*** involved the applicability of IAC standards in the context of plea offers. In ***Frye***, the Supreme Court of the United States (SCOTUS) held that the defendant's trial counsel provided IAC by failing to communicate formal plea offers from the prosecutor to his client before the pleas' fixed deadlines expired. 132 S.Ct. at 1408. In ***Lafler***, SCOTUS held that because defendant's trial counsel provided IAC by advising the defendant to reject an

offer for a plea agreement, the defendant was entitled to have the prosecutor re-offer the agreement. 132 S. Ct. at 1391.

While ***Frye*** and ***Lafler*** stand for the proposition that defendants are entitled to the effective assistance of competent counsel during plea negotiations, in both of those cases the factual issue of whether counsel had provided deficient performance was not at issue. In ***Frye***, there was no dispute that counsel failed to communicate the plea offers; the issue before the court was whether counsel had a duty to do so. 132 S.Ct. at 1408. In ***Lafler***, both parties had conceded that counsel had rendered a deficient performance. 132 S. Ct. at 1384. In this case, by contrast, Appellant's assertion of deficient performance is a matter of dispute, and the PCRA court reasonably concluded based upon its review of record, including its assessment of the credibility of Appellant's and trial counsel's testimony and Appellant's plea colloquy, that trial counsel had not performed deficiently.

Because the PCRA court's denial of Appellant's PCRA petition was supported by the factual record and free of legal error, we affirm the PCRA court's order denying Appellant's PCRA petition.

Order affirmed.