

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

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|-------------------------------|---|--------------------------|
| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
|                               | : | PENNSYLVANIA             |
| Appellee                      | : |                          |
|                               | : |                          |
| v.                            | : |                          |
|                               | : |                          |
| SHAWN MICHAEL SIMMS,          | : |                          |
|                               | : |                          |
| Appellant                     | : | No. 1092 WDA 2012        |

Appeal from the PCRA Order June 23, 2012,  
Court of Common Pleas, Westmoreland County,  
Criminal Division at No. CP-65-CR-0002611-2009

BEFORE: FORD ELLIOTT, P.J.E, BOWES and DONOHUE, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: February 5, 2013

Appellant, Shawn Michael Simms (“Simms”), appeals from the order dated June 23, 2012, denying his petition for relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46 (“PCRA”). For the reasons that follow, we affirm.

In its written opinion pursuant to Pa.R.A.P. 1925, the trial court provided the following brief summary of the relevant procedural background of this case:

[Simms] was charged with 73 counts of various sexual activities and related offenses pertaining to four different minor females. On September 29, 2010[, Simms] pled guilty as part of a general plea before this Court to 22 counts. Specifically[, Simms] pled guilty to three counts of involuntary deviate sexual intercourse in violation of 18 Pa.C.S.A. §3123(a)(7), six counts of statutory sexual assault in violation of 18 Pa.C.S.A. §3122.1, one count of aggravated indecent assault in violation

of 18 Pa.C.S.A. §3125(a)(8), four counts of unlawful contact with a minor in violation of 18 Pa.C.S.A. §6318(a)(1), two counts of corruption of minors in violation of 18 Pa.C.S.A. §6301(a)(1), one count of criminal solicitation in violation of 18 Pa.C.S.A. §902(a), four counts of sexual abuse of children in violation of 18 Pa.C.S.A. §6312(b), and one count of possession of child pornography in violation of 18 Pa.C.S.A. §6312(d)(1). In exchange for [Simms] entering a general plea to these charges[,] the Commonwealth dismissed the remaining counts and agreed not to seek a sentence higher than 20 to 40 years [of] incarceration. A presentence investigation was ordered.

[Simms] was sentenced by this Court on April 25, 2011 to a combined sentence of 20 to 40 years [of] incarceration. He was determined to be a sexually violent predator and subject to lifetime registration. [Simms] filed a timely Notice of Appeal with the Pennsylvania Superior Court on May 25, 2011 and trial counsel filed a Motion to Withdraw as Counsel indicating that [Simms] wanted to file claims of ineffective assistance of counsel. This Court granted trial counsel's Motion to Withdraw and appointed present counsel to represent [Simms]. By Order of Court dated June 1, 2011, this Court ordered [Simms] to file a Concise Statement of Errors Complained of on Appeal. Instead a Preaicepe to Discontinue the appeal with Pennsylvania Superior Court was filed on June 20, 2011 and [Simms] filed the present PCRA Petition on December 13, 2011.

Trial Court Opinion, 6/23/2012, at 1-2.<sup>1</sup>

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<sup>1</sup> On September 29, 2010, Simms also pled guilty to one count of failing to comply with registration of sexual offenders in violation of 18 Pa.C.S.A. §4915(A)(1), and one count of failing to provide accurate information in violation of 18 Pa.C.S.A. §4915(A)(3). On April 25, 2011, the trial court sentenced Simms a total of 3 to 6 years of incarceration, to run concurrently with the sentence imposed in the case at issue in this appeal. Simms does not seek PCRA relief in connection with these separate convictions.

The PCRA court dismissed Simms' PCRA petition by order dated June 23, 2012. This timely appeal followed, in which Simms presents two issues for our consideration and determination:

1. Did the PCRA court abuse its discretion by not finding Attorney James Geibig ineffective as counsel as a result of his failure to have [Simms] mentally evaluated to determine competency prior to [Simms'] guilty plea?
2. Did the PCRA court abuse its discretion by determining that James Geibig, Esquire, was not ineffective as counsel for failing to file a [m]otion to [s]ever [Simms'] four cases and instead counseling his client into pleading guilty?

Simms' Brief at 4.

We begin with our standard and scope of review. We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. *Commonwealth v. Burkett*, 5 A.3d 1260, 1267 (Pa. Super. 2010). Our review is limited to the findings of the PCRA court and the evidence of record. *Id.* We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. *Id.* This Court may affirm a PCRA court's decision on any ground where the record supports the PCRA court's decision. *Id.*

Both of Simms' PCRA claims raise issues of ineffective assistance of counsel. In Pennsylvania, counsel is presumed to be effective, and the burden is on the petitioner to prove to the contrary. *Commonwealth v. King*, \_\_\_ A.3d \_\_\_, 2012 WL 6015050 (Pa., November 26, 2012). To prove

ineffectiveness, a petitioner must show that: (1) the claim of counsel's ineffectiveness has merit; (2) counsel had no reasonable strategic basis for his action or omission; and (3) that the error of counsel prejudiced the petitioner so that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. **See, e.g., Commonwealth v. Natividad**, 595 Pa. 188, 207, 938 A.2d 310, 321 (2007). The PCRA court may deny an ineffectiveness claim if the petitioner fails to satisfy any one of these three prongs. **Id.**

For his first claim on appeal, Simms contends that his guilty plea was not made knowingly and voluntarily because trial counsel failed to have a mental health evaluation performed to determine if he was capable of entering the plea. "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, 1192 (Pa. Super. 2010) (quoting **Commonwealth v. Moser**, 921 A.2d 526, 531 (Pa. Super. 2007)). "Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." **Anderson**, 995 A.2d at 1192. Moreover, "[t]he law does not require that [the defendant] be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [his] decision to plead guilty be

knowingly, voluntarily and intelligently made.” *Moser*, 921 A.2d at 528-29 (quoting *Commonwealth v. Yager*, 685 A.2d 1000, 1004 (Pa. Super. 1996) (*en banc*), *appeal denied*, 549 Pa. 716, 701 A.2d 577 (1997)).

In *Commonwealth v. Frey*, 588 Pa. 326, 904 A.2d 866 (2006), our Supreme Court discussed the level of mental competency necessary to enter a plea of guilty to murder, explaining that:

Competence to plead guilty depends upon whether the defendant has the “ability to comprehend his position as one accused of murder and to cooperate with his counsel in making a rational defense,” and whether he has “sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and [has] a rational as well as factual understanding of the proceedings against him.”

*Id.* at 872 (quoting *Commonwealth ex rel. Hilberry v. Maroney*, 424 Pa. 493, 494, 227 A.2d 159, 160 (1967) and *Commonwealth v. Minarik*, 493 Pa. 573, 582, 427 A.2d 623, 628 (1981)); *see also Commonwealth v. Turetsky*, 925 A.2d 876 (Pa. Super.) (*Frey* standards applied to an ineffectiveness claim after the defendant pled guilty to sexual assaults against multiple women), *appeal denied*, 596 Pa. 707, 940 A.2d 365 (2007).

At the PCRA evidentiary hearing, Simms testified that he has a long history of mental health issues:

- Q. Did you have prior mental health treatment in the past?
- A. Extensive.

Q. Could you explain what that is to the Court?

A. I had a therapist when I was about six or seven years old. I have had multiple psychiatrists, psychologists since I was twelve years old. I've been in Monsour Mental Health in-patient two weeks a clip maybe two, three dozen times. Latrobe Mental Health maybe two dozen times. I've been in mental institutions, Clarion, eight month foster home, boot camps, RTF. I've been through the whole works. I've been in the system my whole life.

Q. Do you recall any of the diagnoses you may have been given?

A. I've been diagnosed with anti-social disorder, ODD, OCD. I got the dictionary on me.

Q. Were you once hospitalized for threatening to take the life of your stepmother?

A. I don't really recall that incident. It was more along the lines of suicidal/homicidal ideation, just along those lines.

N.T., 3/12/2012, at 6-7. Based upon this testimony, Simms argues that "it is not unreasonable to suggest that defense counsel was ineffective in his representation for not having [Simms] mentally evaluated prior to either the entry of a guilty plea or the decision to go forward with a trial." Simms' Brief at 12.

While Simms' testimony establishes that he had a prior history of mental health issues, it does not establish that he was suffering from any such infirmity at the time he entered his guilty plea. At the PCRA hearing, Simms testified that he currently had no mental health issues and was not

on any medications. N.T., 3/12/2012, at 8. He could not recall his mental health on the day of his plea hearing, stating that he could “barely remember” the day, but did state that he was not taking any medications at that time. *Id.* at 8, 10. He testified that all of the answers he gave during his plea colloquy were correct. *Id.* at 10. In response to a series of questions posed by counsel for the Commonwealth, Simms demonstrated his comprehension of the nature of the guilty plea hearing. In particular, he testified that at the time of his plea, he understood that all of the sexual offenses with which he had been charged had been included in a single criminal complaint and had been consolidated together for trial; that there were mandatory sentences applicable since there were multiple victims; that those mandatory sentences could result in more prison time than the sentence he received in connection with his plea; and that the Commonwealth had agreed to cap the sentence requested in exchange for his agreement to plead guilty and not go to trial on any charges. *Id.* at 10-11. Finally, Simms testified that he had consulted with his lawyer prior to entering his plea, and he did not indicate that he suffered from any lack of ability to cooperate with his counsel in any respect. *Id.* at 10.

These answers are consistent with Simms’ testimony at the guilty plea hearing. In his written plea colloquy, Simms indicated that he had a history of treatment for mental health issues, but that his current mental health was “satisfactory,” and that he was not under the influence of any medications

that would interfere with his ability to understand “that I am here today for the purpose of entering my plea of guilty.” Guilty Plea Petition, 9/29/2010, at 4. During the plea colloquy, Simms did not express any confusion with the nature of the proceedings, the details of the plea agreement, or the significance of his actions.

Finally, trial counsel (Attorney Geibig) testified at the PCRA evidentiary hearing that he had spoken with Simms on approximately ten occasions prior to the entry of the plea. *Id.* at 18. Attorney Geibig testified that Simms was able to engage in conversation with him about his case, *id.* at 24, and that at no time during his communications with Simms did he ever have reason to question Simms’ mental competence. *Id.* at 19-20 (“I knew he had previous psychiatric treatment, but to my recollection there was no cognitive disabilities in there or anything that would lead me to suspect he wasn’t competent to stand trial.”). *Id.* at 23. In this regard, Attorney Geibig indicated that in connection with the Commonwealth’s notification that it intended to have Simms designated as a sexually violent predator, he had him evaluated by an expert. *Id.* at 19. Neither the expert’s report nor a subsequent conversation between Attorney Geibig and the expert uncovered any reason to believe that Simms was currently suffering from a mental health condition. *Id.* at 19-20.

For these reasons, we conclude that the record on appeal does not contain any evidence to establish, pursuant to the standards set forth in



*Frey* and *Turetsky*, that Simms was not mentally competent to enter his guilty plea. Likewise, the record contains no evidence that Attorney Geibig should have been on notice of mental health issues at or around the time that Simms entered his guilty plea. As a result, the claim that Attorney Geibig was ineffective for failing to insist on an evaluation of Simms' mental competence to enter a guilty plea is without merit.

For his second issue on appeal, Simms argues that his guilty plea was unknowing and involuntary because his counsel provided him with incorrect information regarding the possibility of severing the claims against him by victim. Simms contends that he acknowledged his guilt to Attorney Geibig as to one of the four victims, but steadfastly denied it as to the other three. *Id.* at 5. According to Simms, he asked Attorney Geibig about the possibility of pleading guilty as to the crimes against the one victim, but going to trial and defending against the remaining charges. *Id.* Simms testified that Attorney Geibig responded that "it could not be done" and that "it just couldn't happen." *Id.*

Based upon the testimony of Attorney Geibig at the PCRA evidentiary hearing and Simms' oral colloquy at the plea hearing, however, the trial court, as the finder of fact, concluded that Simms had not been advised that severance was impossible, and that instead Simms decision to accept the plea offer was a knowing and voluntary choice based upon the particular circumstances of his specific case:

Trial counsel testified that he spoke to [Simms] on numerous occasions about his case and that they did discuss the issue of severance. Trial counsel testified that at no time did he indicate that he could not file a severance motion and that he never gave an opinion as to the merits of such a motion. Trial counsel testified that there was an offer from the Commonwealth to 'cap' the sentence if [Simms] plead in reference to all the victims and that he discussed that offer with [Simms]. Trial counsel testified he discussed with [Simms] all the mandatory sentences that applied in his case which totaled 40 to 80 years [of] incarceration. (PCRA Transcript, pp. 20-22).

Trial counsel testified that [Simms] understood that a successful severance motion meant separate trials. [Simms] understood that separate trials meant no agreement from the Commonwealth to 'cap' the sentence which would subject [Simms] to possible consecutive sentences and all the mandatory sentences. Trial counsel testified that he outlined the potential sentence associated with each count of the criminal information and reviewed this with [Simms]. Trial counsel testified that [Simms] understood that a successful motion to sever could actually be worse for [Simms] in reference to sentencing then [*sic*] the offer from the Commonwealth. Trial counsel testified that [Simms] was advised of the pros and cons of a severance motion and that he let [Simms] decide if a motion should be filed. Trial counsel testified that [Simms] decided to proceed with the Commonwealth's offer and not file a motion to sever. (PCRA Transcript, pp. 20-22).

Trial counsel's testimony is consistent with [Simms] testimony at the guilty plea hearing. [Simms] indicated when he pled guilty that he did so because it was in his best interest and that he could not go to trial because of the possible sentence he would face. [Simms] clearly understood the mandatory sentences that applied in his case and that the

Commonwealth was offering to 'cap' the sentence to a period of time below the mandatory sentences.

Trial Court Opinion, 6/23/2012, at 7-8.

Because the trial court's findings of fact in this regard are supported by evidence in the certified record on appeal, they may not be disturbed on appeal. Accordingly, no relief is due on Simms' second issue.

Order affirmed.