

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37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. | : | |
| | : | |
| WILLIAM ROBERT METTERHAUSER, | : | |
| | : | |
| Appellant | : | No. 1304 EDA 2012 |

Appeal from the PCRA Order March 30, 2012
 In the Court of Common Pleas of Lehigh County
 Criminal Division No(s): CP-39-CR-0005091-2009
 CP-39-CR-0005092-2009

BEFORE: STEVENS, P.J., BOWES, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED MAY 03, 2013

Appellant, William Robert Metterhauser, appeals from the order entered in the Lehigh County Court of Common Pleas denying his timely petition filed pursuant to the Post Conviction Relief Act ("PCRA"). Appellant was sentenced following a plea of *nolo contendere* to one count of aggravated assault and one count of possession with the intent to deliver.¹ Appellant contends that the PCRA court erred when it denied his PCRA petition alleging ineffectiveness of counsel for not reviewing all proper

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S. § 2702(a)(6); 35 P.S. § 780-113(a)(30).

defenses and not ensuring that he could properly hear and understand his plea. We affirm.

The PCRA court summarized the relevant factual history:

On October 8, 2009, members of the Pennsylvania State Police obtained a search warrant for [Appellant's] residence

* * *

Because of the multiple levels of the home, as well as where the occupants were, the Special Emergency Response Team, upon entry, broke into different groups. Prior to entry, the police utilized a loud speaker to announce to the residents that they were coming in to enter with a search warrant.

* * *

[The police knew Appellant resided in the basement of the home.] The entry [to the basement] was narrow, down approximately eight steps. Corporal Matthew Tremba was the first man on line [.] He had a shield and a weapon and indicated that he saw the barrel of a gun sticking out as he [entered the basement]. He described that the gun was pointed to his center mass and wasn't initially put down upon entry. . . . [Appellant] was [subsequently] secured in that bedroom.

PCRA Ct. Op., 8/6/12, at 3-4.

The PCRA court summarized the relevant procedural history:

On February 7, 2011, [Appellant] pled *nolo contendere* . . . to one count of Aggravated Assault in case number 5091 of 2009 and one count of Possession with the Intent to Deliver in case 5092 of 2009. On March 7, 2011, [Appellant] was sentenced to serve no less than two years nor more than ten years in a state correctional institution in case 5091 of 2009, to be served concurrently with the no less than [six] months nor more than two years sentence imposed in case 5092 of 2009.

[Appellant] filed a Motion for Reconsideration of Sentence on March 10, 2011 and a Motion to Withdraw Plea of *Nolo Contendere* on March 14, 2011. A hearing in these matters was held April 4, 2011 and at the conclusion, the Court denied both Motions. [Appellant did not take a direct appeal].

On November 22, 2011, [Appellant] filed a *pro se* [timely] motion under the PCRA. . . . The Office of the Public Defender was appointed to represent [Appellant]. On March 30, 2010 a Hearing was held[, during which trial counsel testified,] and at the conclusion the Court found [Appellant's] claims to be without merit and dismissed and denied the PCRA.

On April 25, 2012, [Appellant] filed a Notice of Appeal and on April 27, 2012, [Appellant] was directed to file a [Pa.R.A.P.] 1925[(b)] statement. On May 17, 2010 a 1925[(b)] statement was filed[.]

Id. at 2-3 (footnotes omitted).

Instantly, Appellant raises the following issue for our review:

Whether the lower court erred by denying [Appellant's PCRA] petition based upon [Appellant's] belief that his counsel was ineffective for failing to properly investigate and explain possible defenses as well as ensuring that [Appellant] could adequately hear, understand, and knowingly enter into the *nolo contendere* plea based upon [Appellant's] inadequate ability to hear?

Appellant's Brief at 7. We identify two separate issues in this appeal.²

² We note that Appellant's brief does not conform with the requirement in Pa.R.A.P. 2116(a) that each issue be raised separately and each question "be followed by an answer stating simply whether the court or government unit agreed, disagreed, did not answer, or did not address the question." Pa.R.A.P. 2116(a). However, these defects are not substantial enough to warrant dismissal. **See** Pa.R.A.P. 2101.

In his first issue, Appellant argues “counsel did not properly review the defenses to the charge of Aggravated Assault, which defenses included the ‘castle’ defense regarding [Appellant’s] ability to protect himself while in his own residence.” **Id.** at 10. Appellant contends, “[Counsel] did not adequately and fully discuss this matter with him during his preparation for the [trial] or pursue such other investigations and/or evidence that would have supported this defense.” **Id.** at 11.

This Court has stated:

We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court’s ruling if it is supported by evidence of record and is free of legal error. This Court may affirm a PCRA court’s decision on any grounds if the record supports it. Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted).

To be eligible for relief through a PCRA petition:

(a) [T]he petitioner must plead and prove by a preponderance of the evidence . . . :

(2) That the conviction or sentence results from one or more of the following:

(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.

42 Pa.C.S. § 9543(a)(2)(ii).

Counsel is presumed effective and will only be deemed ineffective if the petitioner demonstrates that counsel's performance was deficient and he was prejudiced by that deficient performance.

* * *

To properly plead ineffective assistance of counsel, a petitioner must plead and prove: (1) that the underlying claim has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act. If a petitioner fails to plead or meet any elements of the above-cited test, his claim must fail.

Commonwealth v. Burkett, 5 A.3d 1260, 1271-72 (Pa. Super. 2010) (internal citations omitted). Allegations that counsel was ineffective for failing to investigate certain defenses "raise claims that undermine the truth-determining process and thus are cognizable." ***Commonwealth v. Dukeman***, 605 A.2d 418, 421 (Pa. Super. 1992).

In the instant matter, Appellant's trial counsel, Carmen Marinelli, Esq., testified at the PCRA hearing that he thoroughly discussed all possible defenses with Appellant. N.T. PCRA Hr'g, 3/30/12, at 67. In addition, trial counsel specifically testified about his explanation of the defenses which he believed Appellant meant by the phrase "castle" defense:

[PCRA Counsel]: One of the issues that [Appellant] discussed was the Castle Doctrine. He indicated that he knew what it was, but he also discussed it with you. Is that something you and [Appellant] discussed in regards to a defense?

[Trial counsel]: We—we discussed the defenses that were available to [Appellant]. The defenses were that he could protect himself, he could protect his property, he could protect other people if he truly believed they were in danger.

Q: So, you explained all of that to [Appellant]?

A: We explained all of those and we explained that they were defenses that are brought out at time of trial. . . .

Id. at 57-58.

Further, Appellant testified at the PCRA hearing that trial counsel explained the relevant defenses, even if he did not use the word “castle.”

[PCRA Counsel]: We’re on the lawyer part. Did he advise you of what – if your conduct was justified or not and what those matters of law were with regard to justification?

[Appellant]: I believe so. Yes.

Q: Oh. Did he tell you what defenses you had in this case and explain them to you? Did he tell you, you had a right to defend your home? That you had a right to defend your wife? The right to defend yourself? Was that explained to you?

A: I believe so.

* * *

Q: . . . What did he tell you about your rights to defend yourself, your home and your wife? What did he say specifically to you?

A: I kept on claiming Castle Doctrine

Q: Which means what to you, sir?

A: I was aware of what Castle Doctrine means.

Q: Did your lawyer explain to you what those defenses were in Castle Doctrine?

A: Somewhat, yes.

Q: What did he tell you?

A: You have the absolute right to defend your home, your family and yourself in a home invasion. And the State Police did not identify themselves because the door—they identified themselves upstairs where I couldn't hear—the door to the stairwell was closed.

Id. at 15-17.

The PCRA court found that “While [trial counsel] did not specifically recall discussing the ‘Castle Doctrine’ by name, it is this Court’s belief that [trial counsel] discussed the sum and substance of that defense with [Appellant] while preparing the case for trial and prior to the entry of the *nolo contendere* plea.” PCRA Ct. Op. at 10. “[Trial counsel] testified that he was seeking to introduce evidence at trial that demonstrated that [Appellant’s] home was previously entered into and that [Appellant] reacted to the police entry in light of this and [Appellant’s] diminished hearing.” **Id.** at 10-11.

We agree with the PCRA court that Appellant’s claim of counsel’s ineffective assistance for not discussing the relevant defenses lacks merit.

Accordingly, we discern no error by the PCRA court. **See Ford**, 44 A.3d at 1194; **see also Burkett**, 5 A.3d at 1272.

In addressing Appellant's second issue, initially we note that he testified he discovered that he suffered from hearing loss when he was nineteen years old. N.T. PCRA Hr'g at 90. On appeal he argues he "made clear that he has a significant hearing deficien[cy] and that his [trial] counsel did not make appropriate arrangements or otherwise make sure that [he] could properly hear all of the testimony and/or evidence during the completion of his plea agreement." Appellant's Brief at 10. Appellant contends, "[T]his lack of preparation resulted in [his] not hearing all of the terms and conditions of the plea fully, including the allowance of the court to use judicial discretion in regards to the minimum sentence to be imposed upon [him]." **Id.** at 10. Appellant argues, "[H]ad everything been properly explained to him and had he been aware of the exact terms of the plea agreement, he would not have pled Nolo Contendere to the charges, but rather would have proceeded to trial." **Id.** at 12.

"The law does not require that appellant be pleased with the outcome of his decision to enter a plea of guilty: 'All that is required is that [appellant's] decision to plead guilty be knowing, voluntary and intelligently made.'" **Commonwealth v. Moser**, 921 A.2d 526, 528-29 (Pa. Super. 2007). "A defendant is bound by the statements he makes during his plea colloquy, and may not assert grounds for withdrawing the plea that

contradict statements made when he pled.” ***Commonwealth v. Stork***, 737 A.2d 789, 790-91 (Pa. Super. 1999). “A defendant is permitted to withdraw his guilty plea under the PCRA if ineffective assistance of counsel caused the defendant to enter an involuntary plea of guilt.” ***Commonwealth v. Kersteter***, 877 A.2d 466, 468 (Pa. Super. 2005).

To determine whether a defendant entered an involuntary, unknowing, or unintelligent plea

the colloquy must inquire into the following areas: “(1) the nature of the charges; (2) the factual basis of the plea; (3) the right to trial by jury; (4) the presumption of innocence; (5) the permissive range of sentences; and (6) the judge’s authority to depart from any recommended sentence.” This court evaluates the adequacy of the guilty plea colloquy and the voluntariness of the resulting plea by examining the totality of the circumstances surrounding the entry of that plea.

Commonwealth v. Muhammad, 794 A.2d 378, 383-84 (Pa. Super. 2002) (citing ***Commonwealth v. Burkholder***, 719 A.2d 346, 349 n.5 (Pa. Super. 1998)). Additionally, the official comment to Pa.R.Crim.P. 590 states that when determining whether to accept a guilty or *nolo contendere* plea:

At a minimum the judge should ask questions to elicit the following information:

- (1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contendere*?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he or she has the right to trial by jury?

(4) Does the defendant understand that he or she is presumed innocent until found guilty?

(5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?

(6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

(7) Does the defendant understand that the Commonwealth has a right to have a jury decide the degree of guilty if the defendant pleads guilty to murder generally?

Pa.R.Crim.P. 590, *comment*. "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." ***Commonwealth v. Hickman***, 799 A.2d 136, 141 (Pa. Super. 2002) (internal citations omitted).

In the instant case, at the beginning of the plea hearing, the trial court repeatedly asked Appellant if he could adequately hear:

The Court: Good morning. Can you hear me?

[Appellant]: Yes.

Q: Good.

A: So long as you talk at this volume, I can hear.

Q: All right. I'm Judge Brenner.

A: Good morning.

Q: Good morning. You heard me?

A: Yes.

N.T. *Nolo Contendere* Hr'g, 6/8/12, at 2. Additionally, at the plea hearing, the trial court stated:

The Court: . . . Likewise, the Commonwealth has indicated that they will not be filing a request for the mandatory sentence related to the drugs as well as to the guns. **In addition, there is no other agreement as to sentencing. In other words, they will not request the mandatory, but sentencing is entirely up to me.** Is that your understanding?

[Appellant]: Yes.

Id. at 4 (emphasis added). Appellant then answered multiple questions about his age, family, education, current job, etc. with no hearing problems.

Id. at 6-7.

Additionally, Appellant's trial counsel testified at the PCRA hearing that he informed the court of Appellant's hearing difficulties:

[PCRA counsel]: Specifically, [Appellant] has indicated that you did nothing to assist him in his trial or court proceedings with assistance in his hearing. Could you tell the Court, specifically, what you did, please?

A: . . . Come time for trial, Bill Berndt—I contacted Bill Berndt—Bill Berndt and he had equipment at the courtroom ready for [Appellant] to use on the morning that we were going to go to trial.

Q: And just to clarify, Bill Berndt is the Deputy Court Administrator?

A: That's correct.

Q: Who is responsible for courtroom operations?

A: That is correct. I informed him—actually I informed him 3 o'clock on the Friday afternoon before the Monday

morning . . . needless to say, he put it all together. The electronics or whatever it was, was in the—was in Judge Brenner’s courtroom ready to get set up and ready to go as soon as we were going to start picking a jury.

Q: Jumping to the hearing issue, did you advise both Judge Brenner and Judge Platt of [Appellant’s] hearing difficulties?

A: Absolutely.

Q: And accordingly, did everyone try to speak into the microphone or speak louder when there weren’t these headphones available?

A: Absolutely. And there were a number of times when [Appellant] would say “I can’t hear you,” and I know Judge Platt would speak louder and I know Judge Brenner would also speak louder and ask him can you hear me now? To—you know and they did.

Q: So, any time [Appellant] indicated he had an issue with hearing, the judges and court personnel accommodated that requested and repeated what they said or spoke louder?

A: And they asked him if he—if he understood what they were saying after they did that. Yes.

* * *

Q: So, in your opinion, he always spoke up when he couldn’t hear?

A: He spoke up a lot. Yes.

* * *

Q: Well, [trial counsel], at any point did the [Appellant] seek to terminate the proceedings because he didn’t hear and he didn’t understand and it was all going over his head?

A: No.

N.T. PCRA Hr'g at 51-53, 81, 83.

In light of the foregoing, we review the trial court's plea colloquy:

The Court: . . . you've heard what the District Attorney has said the testimony would be if this matter would go to trial. Is this what you're saying that could be proven against you beyond a reasonable doubt for the elements of those offenses, and that you are pleading Nolo Contendere?

[Appellant]: I'm pleading Nolo Contendere. I'm pleading Nolo Contendere.

Q: . . . I have before me what's called a Nolo Contendere Colloquy. Have you read all those questions?

A: Yes I have.

Q: Did you answer them all?

A: Yes.

Q: Are all your answers true and correct?

A: Yes.

Q: Did you understand them all?

A: Yes.

Q: If, as you went through here, if you had any questions about it, did [trial counsel] answer your questions and assist you in the completion of this colloquy?

A: Yes.

[Trial counsel]: I was with him when he filled it out in the entirety, Your Honor.

* * *

The Court: As you stand here today, [Appellant], you are presumed to be innocent. The burden would be upon the Commonwealth to prove you guilty beyond a reasonable doubt of all the elements of the offenses. You'd have a right to a trial. It could be a trial before a Judge alone, but if you wanted, a trial by jury. Twelve jurors, whose verdict would have to be unanimous, finding you guilty beyond a reasonable doubt of all the elements of the offense.

You would have a right to participate with your counsel in the selection of the jury, which would be drawn from a panel, which would be drawn at random from all the citizens here in Lehigh County. At the trial, you, through your counsel, would have a right to cross-examine any witnesses called by the Commonwealth.

In other words, confront them, look eye-to-eye at them. You also, at your side of the case, would have a right to call witnesses who could testify on your behalf. You, at the trial, would have a right to testify yourself, but you wouldn't have to. You'd also have a right to remain silent, and I would instruct the jury that the fact that you remained silent, they should not make any adverse inference against you by reason of that fact. And by entering this plea of Nolo Contendere, in both of these cases, you are waiving your right to that trial. Do you understand that?

A: Yes.

Q: Do you, likewise, understand that you are waiving your right to, at this point, to challenge the validity, the lawfulness or constitutionality of any search that was made in this case; do you understand that?

A: Yes.

* * *

Q: Has anyone made any threats or promises, other than the plea agreement, in order to induce you to enter this Plea of Nolo Contendere?

A: No.

J. S09038/13

Q: Are you doing this of your own free will and your choosing?

A: Yes.

N.T. *Nolo Contendere* Hr'g at 13-17.

With respect to Appellant's ineffective counsel claim, the PCRA court concluded:

While it is obvious that [Appellant] has a hearing problem, it is also quite obvious that he has no trouble asking for clarification when he either cannot hear at all or when he is having difficulty hearing. Based on the record before the Court and the fact that [Appellant] answered the questions posed to him appropriately, we cannot find that [Appellant] was unaware of or confused by the *nolo contendere* or sentencing proceedings.

PCRA Ct. Op. at 13.

We agree with the PCRA court that Appellant's claim that counsel was ineffective lacks merit. **See Kersteter, supra**. Accordingly, we discern no error by the PCRA court. **See Ford**, 44 A.3d at 1194.

Order affirmed.

Judgment Entered.



Prothonotary

Date: 5/3/2013