

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CHRISTOPHER EDWARD HOMONEY,	:	
	:	
Appellant	:	No. 1507 EDA 2012

Appeal from the Order Entered May 16, 2012,
In the Court of Common Pleas of Montgomery County,
Criminal Division, at Nos. CP-46-CR-0001244-2009;
CP-46-CR-0003593-2010; CP-46-CR-0004129-2008;
CP-46-CR-0004205-2008; and CP-46-CR-0009766-2007.

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

MEMORANDUM BY SHOGAN, J.:

Filed: March 8, 2013

Appellant, Christopher Edward Homoney, appeals *pro se* from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

Factually and procedurally, the history is as follows. On February 9, 2011, Appellant entered an open guilty plea to forty-one counts of burglary after being charged with 50 counts of burglary of houses and apartments. Additionally, Appellant pled guilty to one count of terroristic threats for making threatening telephone calls to his ex-wife. On May 9, 2011, the trial court sentenced Appellant to seventeen (17) and one-half (½) to thirty-five

(35) years of imprisonment. The trial court also ordered Appellant to pay restitution in the amount of \$31,910.85.

Following sentencing, Appellant filed a Motion to Modify or Reduce the Judgment of Sentence. The trial court denied Appellant's Motion on May 19, 2011. Appellant failed to exercise his direct appeal rights. Rather, on January 9, 2012, Appellant filed a *pro se* PCRA petition. On January 13, 2012, counsel was appointed to represent Appellant. Counsel subsequently filed a "no merit" letter in accordance with ***Commonwealth v. Finley***, 550 A.2d 231 (Pa. Super. 1988). By Order dated April 13, 2012, the PCRA court issued A Notice of Intent to Dismiss the Amended PCRA Motion pursuant to Rule 907 of the Pennsylvania Rules of Criminal Procedure. On April 16, 2012, Appellant filed objections. Thereafter, the PCRA court issued its Final Order of Dismissal by Order dated May 16, 2012. This appeal followed.

In his brief, Appellant raises the following issues on appeal:

1. Whether Petitioner is entitled to relief from his conviction and sentence because he was not afforded a Mental Health Evaluation of his impaired mental health and competency due to his suffering from Attention Deficit Hyperactivity Disorder, (ADHD), and was deprived his right under the Sixth and Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Constitution.
2. Was Counsel ineffective for having an incompetent Defendant plea guilty without the Petitioner knowing and fully understanding what he was pleading to.

3. Whether guilty plea Counsel was ineffective for failing to file Defendant's Motion to suppress coerced statements revealed under duress and under the influence.
4. Whether Counsel was ineffective for forcing a coerced guilty plea and coaching Petitioner as to what to say in Court.
5. Whether Counsel was ineffective for failing to object to Prosecutor's personal opinion in breaking the original plea bargain and not advising Petitioner of new bargain.
6. Whether Counsel was ineffective for failing to file a Direct Appeal.
7. Was Counsel ineffective for failing to argue Petitioner's discretionary aspects and guilty plea of Terroristic threats.
8. Whether Counsel was ineffective for not arguing discretionary aspects of sentence which was also unreasonable and excessive.

Appellant's Brief at 4 (verbatim, unnumbered in original). Of these issues, Appellant has preserved the ineffectiveness of plea counsel for failing to challenge Appellant's mental competency at the time of his plea, failing to file a motion to suppress "coerced" statements, and failing to file a direct appeal, and the challenge to his "excessive" sentence.¹ Appellant's preserved issues will be addressed *seriatim*.

¹ Appellant has waived issues numbered 1, 4, 5 and 7 for failing to include them in his concise statement. ***See Commonwealth v. Bullock***, 948 A.2d 818, 823 (Pa. Super. 2008), *appeal denied*, 600 Pa. 773, 968 A.2d 1280 (2009) (any issues not raised in a Pa.R.A.P. 1925(b) statement shall be deemed waived); ***Commonwealth v. Oliver***, 946 A.2d 1111, 1115 (Pa. Super. 2008), *appeal denied*, 599 Pa. 690, 960 A.2d 838 (2008) (a finding of waiver is required whenever an appellant fails to raise an issue in a court-ordered Pa.R.A.P. 1925(b) statement). Similarly, Appellant has abandoned

In reviewing the propriety of the PCRA court's dismissal of Appellant's petition, we are limited to determining whether the court's findings are supported by the record and whether the order in question is free of legal error. ***Commonwealth v. Ragan***, 592 Pa. 217, 220, 923 A.2d 1169, 1170 (2007). "Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record." ***Commonwealth v. Boyd***, 923 A.2d 513, 515 (Pa. Super. 2007), *appeal denied*, 593 Pa. 754, 923 A.2d 74 (2007). "Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence." ***Commonwealth v. Hart***, 911 A.2d 939, 941 (Pa. Super. 2006). "It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing." ***Commonwealth v. Turetsky***, 925 A.2d 876, 882 (Pa. Super. 2007), *appeal denied*, 596 Pa. 707, 940 A.2d 365 (2007) (citation omitted).

some issues raised in his concise statement but not raised in his brief on appeal.

Appellant's first three issues challenge the effective assistance of plea counsel. In order to succeed on a claim of ineffective assistance of counsel, an appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's performance lacked a reasonable basis; and (3) that the ineffectiveness of counsel caused the appellant prejudice. ***Commonwealth v. Pierce***, 567 Pa. 186, 203, 786 A.2d 203, 213 (2001). Prejudice requires proof that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. ***Id.*** When it is clear that an appellant has failed to meet the prejudice prong of his ineffective assistance of counsel claim, the claim may be disposed of on that basis alone, without a determination of whether the first two prongs have been met. ***Commonwealth v. Baker***, 880 A.2d 654, 656 (Pa. Super. 2005). Counsel cannot be deemed ineffective for failing to raise a meritless claim. ***Commonwealth v. Small***, 980 A.2d 549, 570 (Pa. 2009).

Appellant first asserts that plea counsel was ineffective for failing to request a mental health evaluation prior to his plea. He contends that he suffers from attention deficit and hyperactivity disorder rendering him incompetent to plead guilty.

A defendant is presumed to be competent to stand trial. ***Commonwealth v. Rainey***, 593 Pa. 67, 101, 928 A.2d 215, 236 (2007). Thus, the burden is on the Appellant to prove by a preponderance of the

evidence that he was incompetent. *Id.* Because a trial judge is in the best position to assess the witness, conclusions as to a defendant's competency must be afforded great deference. *Commonwealth v. Sanchez*, 589 Pa. 43, 64, 907 A.2d 477, 490 (2006), *cert. denied*, 127 S.Ct. 2918 (2007) (citations omitted). In order to prove incompetence to stand trial, make a plea, or be sentenced, a defendant must show either an inability to participate in his own defense or an inability to understand the nature of the proceedings against him. *Rainey*, 593 Pa. at 102, 928 A.2d at 236 (citation omitted).

Our review of the record reflects that at the plea hearing, defense counsel conducted an oral colloquy of Appellant. Appellant indicated that he understood what he was doing, that he was not under the influence of street or therapeutic drugs or alcohol, that there was no reason he could not understand what was happening, that he had never been a patient of a mental institution, that he understood counsel, and that he understood the charges he was pleading to at that time. N.T., 2/9/11, at 6-7. He also indicated his understanding of the sentence that could be imposed for those charges. *Id.* at 8.

Additionally, Appellant executed a written guilty plea colloquy in which he indicated he had a full understanding of the nature and consequences of his plea and that he had never been treated for mental illness. *See* O.R.

Entry 24, Guilty Plea, 10/17/08. Upon review, we discern no evidence that counsel should have known of any incompetency issues. Appellant has failed to demonstrate that counsel was ineffective in failing to request a mental health evaluation prior to his plea. Appellant's first claim fails.

Appellant next asserts that plea counsel was ineffective in failing to move to suppress statements he made to the police. He argues that the statements were coerced and that he was intoxicated when he made them.

"Whether a confession is voluntary is a matter of law, and conclusions of law are subject to plenary review." *Commonwealth v. Nester*, 709 A.2d 879, 881 (Pa. 1998) (citation omitted). When determining whether confessed statements should be suppressed, the touchstone inquiry is whether the confession was voluntary. *Id.* at 882 (citation omitted). "The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess." *Id.* (citation omitted). To determine the voluntariness of a confession, we examine the totality of the circumstances, focusing on the following factors: "the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and

any and all other factors that could drain a person's ability to withstand suggestion and coercion." *Id.* (citation omitted).

Here, the record reflects that Appellant asserted he was intoxicated when he committed the burglaries but he was not intoxicated when he made statements to police. The statements in question were made to several different police officers from several different police departments on several different occasions. No evidence exists to support Appellant's contention that these statements were involuntary or coerced. To the contrary, Appellant sought out police to admit to and provide more information on the burglaries, pointing out locations he had burglarized. **See** Police Criminal Complaint, 1/27/09, at 32-35. As counsel cannot be deemed ineffective for failing to raise a meritless issue, Appellant's allegation of ineffective assistance of counsel fails.

Appellant next asserts the ineffectiveness of plea counsel for failing to file a direct appeal. Appellant acknowledges that he spoke with counsel about filing a direct appeal but contends that counsel advised him to file a PCRA petition.

A lawyer must automatically file a direct appeal if asked to do so by his client. ***Commonwealth v. Gadsden***, 832 A.2d 1082 (Pa. Super. 2003). Appellant herein has failed to plead or prove that he requested counsel to file a direct appeal so that mandate does not apply. However, "the United

States Supreme Court has recognized an ineffective assistance of counsel claim based on counsel's failure to consult with his client concerning the client's right to file a direct appeal from his judgment of sentence." *Id.* at 1086 (referencing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)). In this context, consultation is defined as "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Commonwealth v. Touw*, 781 A.2d 1250, 1254 (Pa. Super. 2001) (quoting *Roe v. Flores-Ortega, supra* at 477). If, as in the present case, an attorney has not engaged in such a conference, this Court must then determine whether counsel had a responsibility to consult with his client. *Touw, supra*. Counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. When making this determination, courts must take into account all the information counsel knew or should have known. *Id.* at 1254 (quoting *Roe v. Flores-Ortega, supra* at 480). To obtain reinstatement of appellate rights, the defendant must establish prejudice in that "there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely

appealed.” *Touw, supra* at 1254 (quoting *Roe v. Flores-Ortega, supra* at 484).

The record reflects that counsel stated under oath that he consulted with Appellant by telephone and in person about filing an appeal and that Appellant specifically advised him not to file an appeal because Appellant wanted to pursue PCRA relief instead. **See** O.R. Entry 56, Petition to Withdraw as Counsel and for Compensation of Attorney Henry Hilles, III. The record fails to reflect any letters from Appellant to counsel or the court about filing an appeal and fails to reflect any motions or petitions of any kind about filing an appeal or being prevented from filing an appeal. In conclusion, herein, Appellant admittedly failed to establish that he asked counsel to file a direct appeal and acknowledges that counsel consulted with him about his appellate rights. Appellant’s Brief at 14. Appellant’s claim that counsel was ineffective for failing to file a direct appeal fails.

Appellant finally argues that counsel was ineffective for failing to challenge the discretionary aspects of his sentence which was unreasonable and excessive. He asserts that a challenge was necessitated because the sentencing judge “concentrated on victim’s impact of alleged crimes and prior record score” and failed to take his age into consideration when factoring his sentence.

Initially, we note that Appellant's ineffectiveness issue challenges the discretionary aspects of his sentence. Our standard of review is one of abuse of discretion. Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. ***Commonwealth v. Shugars***, 895 A.2d 1270, 1275 (Pa. Super. 2006).

Where an appellant challenges the discretionary aspects of a sentence there is no automatic right to appeal, and an appellant's appeal should be considered to be a petition for allowance of appeal. ***Commonwealth v. W.H.M.***, 932 A.2d 155, 162 (Pa. Super. 2007). As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

[a]n appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Id. at 170 (citing ***Commonwealth v. Evans***, 901 A.2d 528 (Pa. Super. 2006)). Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or in a motion to

modify the sentence imposed. *Id.* (citing *Commonwealth v. Mann*, 820 A.2d 788 (Pa. Super. 2003)).

Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question to be evaluated on a case-by-case basis. *Commonwealth v. Kenner*, 784 A.2d 808, 811 (Pa. Super. 2001), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2002). As to what constitutes a substantial question, this Court does not accept bald assertions of sentencing errors. *Commonwealth v. Malovich*, 903 A.2d 1247, 1252 (Pa. Super. 2006). An appellant must articulate the reasons the sentencing court's actions violated the sentencing code. *Id.*

Herein, the first three requirements of the four-part test are met because Appellant brought a timely appeal, raised the challenge in his post-sentence motion and although he failed to include in his appellate brief the necessary separate concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f), the Commonwealth failed to object.² Therefore, we will next determine whether Appellant raises a substantial question requiring us to review the discretionary aspects of the sentence imposed by the sentencing court.

² If an appellant fails to comply with Pa.R.A.P. 2119(f) and the Commonwealth does not object, the reviewing Court may overlook the omission if the presence or absence of a substantial question can easily be determined from the appellant's brief. *Commonwealth v. Anderson*, 830 A.2d 1013, 1017 (Pa. Super. 2003).

Appellant complains that the sentencing court failed to take his age into consideration when factoring his sentence.³ We have held that an allegation that a sentencing court failed to consider or did not adequately consider mitigating factors does not raise a substantial question to justify our review. *Commonwealth v. Eline*, 940 A.2d 421, 435 (Pa. Super. 2007). Accordingly, Appellant's claim of abuse of discretion for failing to consider certain mitigating factors does not present a substantial question for our review.

Moreover, our independent review of the record reveals that the trial court adequately considered all relevant factors prior to imposing the sentence. At the time of sentencing, the court noted that it reviewed the presentence report in the case, and took into account the information and arguments provided by counsel for Appellant and for the Commonwealth, Appellant's allocution, victim impact statements, and considered the positive and negative sides of the situation. N.T., 5/9/11, at 16-17. In addition, the trial court made the following observation concerning the seriousness of the assaults:

³ To the extent that Appellant challenges his consecutive sentence, we have stated that a challenge to the imposition of consecutive rather than concurrent sentences does not present a substantial question regarding the discretionary aspects of sentence. *Commonwealth v. Lloyd*, 878 A.2d 867, 873 (Pa. Super. 2005), *appeal denied*, 585 Pa. 687, 887 A.2d 1240 (2005) (citing *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. 1995)). Thus, we decline to address this issue.

The stark part of that, however, is the fact that you didn't attempt to do anything about [your drug problems]. You had plenty of opportunity before all this happened. You had plenty of opportunities when you were in the jail. You had plenty of opportunities when you got out to try and seek some help for your addiction. And, instead, we're here today for another 41 burglaries.

I can only think that if you had taken the appropriate steps to try and get yourself managed with this drug problem and sought professional help, we may not be here today.

Id. Based on our review, we conclude that the trial court gave adequate consideration to the relevant factors prior to imposing sentence. Thus, any challenge to sentencing would have been meritless. Counsel cannot be deemed ineffective for failing to raise a meritless issue. Accordingly, Appellant's final claim fails.

Order affirmed.