

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

v.

GARRY BRAY,

Appellant

No. 1542 EDA 2011

Appeal from the PCRA Order entered May 13, 2011,  
in the Court of Common Pleas of Philadelphia County,  
Criminal Division at No(s): CP-51-CR-1006151-2003

BEFORE: ALLEN, COLVILLE,\* and STRASSBURGER,\* JJ.

MEMORANDUM BY STRASSBURGER, J.:

**FILED DECEMBER 09, 2013**

Garry Bray (Appellant) appeals from the order dismissing his timely Post-Conviction Relief Act (PCRA)<sup>1</sup> petition without a hearing. After careful consideration we affirm the PCRA court's order.

On August 21, 2003, Appellant was arrested and charged with, *inter alia*, criminal homicide stemming from the stabbing death of his girlfriend as she attempted to move out of the home she shared with Appellant. On January 28, 2005, Appellant pleaded guilty to murder generally and, following a degree of guilt hearing, was convicted of first-degree murder and possession of instruments of a crime.<sup>2</sup> On February 11, 2005, Appellant,

---

<sup>1</sup> 42 Pa.C.S. §§ 9541-9546.

<sup>2</sup> 18 Pa.C.S. §§ 2502 and 907, respectively.  
(Footnote Continued Next Page)

\*Retired Senior Judge assigned to the Superior Court.

through counsel, filed a motion seeking to withdraw his guilty plea, on the basis that he was unfairly misled as to the possible outcomes of the degree of guilt hearing. The trial court denied Appellant's motion and, on March 15, 2005, Appellant was sentenced to life imprisonment for his homicide conviction and to a concurrent 2½ to 5 year term of imprisonment for the possession of instruments of a crime conviction.

Appellant filed a timely direct appeal. On March 6, 2007, a panel of this Court affirmed his judgment of sentence. **See Commonwealth v. Bray**, 927 A.2d 648 (Pa. Super. filed March 6, 2007) (unpublished memorandum). Appellant did not petition our Supreme Court for allocatur.

On March 7, 2008, Appellant filed a timely *pro se* petition for post[-]conviction relief, alleging six complaints of trial counsel ineffectiveness and trial court error. [Two of those claims were previously litigated on direct appeal.] PCRA counsel was appointed, and, on June 3, 2010, counsel filed an amended petition requesting that [A]ppellant's right to file a petition for allowance of appeal to the Supreme Court be reinstated. Appellant subsequently withdrew the claim in his amended petition and, on February 11, 2011, filed a supplemental amended petition complaining that trial counsel was ineffective for failing to explain the material elements of murder, the concepts of malice and diminished capacity, as well as for failing to present diminished capacity as a defense. On March 18, 2011, the Commonwealth filed a motion to dismiss alleging that [A]ppellant's complaints were meritless.

[T]he [PCRA court] determined that [A]ppellant was not entitled to PCRA relief. A notice pursuant to Pa.R.Crim.P. 907, indicating that the petition would be dismissed after twenty (20) days without further proceedings, was filed and served on

(Footnote Continued) \_\_\_\_\_

[A]ppellant on March 28, 2011. On May 13, 2011, [A]ppellant's PCRA petition was formally dismissed. This appeal followed.

PCRA Court Opinion, 8/24/2011, at 3-4 (footnotes omitted).

Appellant raises three issues for this Court's review.

A. Whether [] Appellant was denied rights guaranteed to him both under the Sixth and Fourteenth Amendments of the U.S. Constitution, as well as provisions of the Pennsylvania Constitution, and all applicable laws of the Commonwealth of Pennsylvania when counsel failed to explain to him the material elements of murder prior [to] advising him to enter into a plea to murder generally?

B. Whether [] Appellant was denied rights guaranteed to him both under the Sixth and Fourteenth Amendments of the U.S. Constitution, as well as provisions of the Pennsylvania Constitution, and all applicable laws of the Commonwealth of Pennsylvania when counsel failed to explain the concept of malice?

C. Whether [] Appellant was denied rights guaranteed to him both under the Sixth and Fourteenth Amendments of the U.S. Constitution, as well as provisions of the Pennsylvania Constitution when counsel failed to explain the concept of diminished capacity and failed to present any evidence in this regard?

Appellant's Brief at 5.

"On review of orders denying PCRA relief, our standard is to determine whether the PCRA court's ruling is free of legal error and supported by the record." **Commonwealth v. Boyer**, 962 A.2d 1213, 1215 (Pa. Super. 2008). 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). We also observe that "[t]here is no absolute right to an evidentiary hearing on a PCRA petition,

and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary.” **Commonwealth v. Jones**, 942 A.2d 903, 906 (Pa. Super. 2008).

Claims of ineffective assistance of counsel raised in the context of a guilty plea may provide a basis for relief only if counsel’s ineffectiveness caused the plea to be entered into involuntarily or unknowingly. **Commonwealth v. Lynch**, 820 A.2d 728, 732 (Pa. Super. 2003) (citations omitted). To succeed under the PCRA, Appellant bears the burden of proving the following three prong test: “(1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel’s deficient performance.” **Id.** “To succeed in showing prejudice, the defendant must show that it is reasonably probable that, but for counsel’s errors, he would not have pleaded guilty and would have gone to trial.” **Commonwealth v. Rathfon**, 899 A.2d 365, 369-70 (Pa. Super. 2006).

Appellant entered a guilty plea to murder generally. As this Court explained in Appellant’s direct appeal:

At the outset, we note the distinction between a plea of guilty and a plea of guilty to murder generally, which is a unique plea. **See** Pa.Crim.P. 590(C) and 803(A). A plea of guilty to murder generally is a defendant’s acknowledgement that he participated in certain acts with criminal intent. **Commonwealth v. Mitchell**, 528 Pa. 546, 550, 599 A.2d 624, 626 (1991). After such a plea, the trial court must hold a degree of guilt hearing to

determine whether the homicide was murder of the first, second, or third degree, or voluntary manslaughter. **Commonwealth v. White**, [910 A.2d 648, 660-61 (Pa. 2006)]. The Commonwealth has the burden to prove, beyond a reasonable doubt, a higher degree of murder than third degree. **Commonwealth v. Flanagan**, 587 Pa. 587, \_\_\_, 854 A.2d 489, 494 (2004). The judge before whom the plea was entered will determine the degree of guilt. Pa.R.Crim.P. 590(c).

**Commonwealth v. Bray**, 927 A.2d 648 (Pa. Super. 2007) (unpublished memorandum).

By pleading to murder generally, a defendant is not admitting that he committed the homicide with malice or any other intent. "A plea of guilt to the general charge of murder is not a plea of guilt to murder of the first degree." **Commonwealth v. Mitchell**, 599 A.2d 624, 626 (Pa. 1991). Rather, it is "simply an acknowledgement by a defendant that he participated in certain acts with a criminal intent." **Id.** Moreover, while a plea to murder generally raises a presumption of malice, the defendant, as did Appellant in this case, still has the opportunity to rebut the presumption to obtain a verdict of voluntary manslaughter. **Commonwealth v. White**, 910 A.2d 648, 661 (Pa. 2006). "Thus, although the defendant has pled guilty to murder generally, an essential question remains: the defendant's state of mind at the time of the killing." **Id.**

In order to ensure that a defendant's plea to murder is knowing and voluntary, our Supreme Court requires the trial court, at a minimum, to ask the following questions during a plea colloquy:

- 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 a 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 ranges 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?

Comment to Pa.R.Crim.P. 590(c).<sup>3</sup> “[W]hile [our Supreme Court] has admonished that a complete failure to inquire into any one of the six, mandatory subjects generally requires reversal [...] it has in more recent cases moved to a more general assessment of the knowing, voluntary and intelligent character of the plea, considered on the totality of the circumstances.” ***Commonwealth v. Flanagan***, 854 A.2d 489, 500-01 (Pa. 2004) (internal citations omitted).

Instantly, Appellant contends that he should be permitted to withdraw his plea because he was never fully advised of the elements of each type of

---

<sup>3</sup> In 2008, our Supreme Court added a seventh question to this list: “(7) Does the defendant understand that the Commonwealth has a right to have a jury decide the degree of guilt if the defendant pleads guilty to murder generally?” However, as this inquiry was not in place in 2005 when Appellant entered his plea, it is not relevant to our determination.

murder or of the concept of malice. Appellant's Brief at 12. However, a review of the totality of the circumstances surrounding Appellant's guilty plea hearing belies Appellant's assertions.

The notes of testimony indicate that the trial court explained to Appellant the nature of his plea as follows.

THE COURT: You understand that by pleading guilty to the charge of murder generally what that means is that you are admitting that you committed the act and caused the death of the victim in this case, and that this act was some sort of criminal homicide. I will then hold a hearing and make a determination as to what degree of murder or manslaughter you have committed.

\* \* \*

THE COURT: When you plead guilty to murder generally you admit that you did the act that caused the death of the victim, and that that act was some form of criminal homicide. Upon your plea of guilty to murder generally, you can be found guilty of murder in the first degree, murder in the second degree, murder in the third degree, voluntary manslaughter, or involuntary manslaughter.

N.T., 1/28/2005, at 3-4, 8. Appellant twice acknowledged his understanding of the oral colloquy.

Moreover, as noted by the trial court, Appellant had completed a written guilty plea colloquy wherein he acknowledged that "[t]he facts of the case have been read to me. The crimes and the elements of the crime(s) have been explained to me. I committed the crime(s), and that is why I am pleading guilty." Written Plea Colloquy, 1/25/2005, at 3. Appellant noted on the record that he had reviewed this form in its entirety with his attorney.

The form was signed by Appellant, trial counsel, the assistant district attorney, and the trial judge. In a separate portion, Appellant's trial counsel certified that he explained the contents of the written colloquy to Appellant and that Appellant appeared to understand the explanations. After hearing Appellant's responses to the oral and the written colloquy, the trial court concluded that Appellant's guilty plea was "knowing, intelligent, and voluntary." *Id.* at 13.

This Court is aware that

[t]he longstanding rule of Pennsylvania law is that a defendant may not challenge his guilty plea by asserting that he lied while under oath, even if he avers that counsel induced the lies. A person who elects to plead guilty is bound by the statements he makes in open court while under oath and he may not later assert grounds for withdrawing the plea which contradict the statements he made at his plea colloquy.

***Commonwealth v. Pollard***, 832 A.2d 517, 523 (Pa. Super. 2003) (internal citations and quotations omitted). Seven years after entering his guilty plea, Appellant cannot disavow his answers to the written and oral colloquies. ***See generally, Commonwealth v. Pollard***, 832 A.2d 517 (Pa. Super. 2003); ***see also Commonwealth v. Morrison***, 878 A.2d 102, 107 (Pa. Super. 2005) (citations omitted) (rejecting challenge to guilty plea after reviewing both the oral and written guilty plea colloquy, and noting that "[o]ur Supreme Court has repeatedly stressed that where the totality of the circumstances establishes that a defendant was aware of the nature of the charges, the plea court's failure to delineate the elements of the crimes at



the oral colloquy, standing alone, will not invalidate an otherwise knowing and voluntary guilty plea”).

Moreover, Appellant’s argument at the degree of guilt hearing focused on the absence of malice in an effort to mitigate Appellant’s degree of guilt to manslaughter. **See Bray**, unpublished memorandum at 3. Putting forth such a strategy at the degree of guilt hearing refutes Appellant’s claim that counsel never described to him the various types of murder and manslaughter, as well as the concept of malice. **See, e.g., Commonwealth v. Shaffer**, 446 A.2d 591 (Pa. 1982) (acknowledging that, even though trial court never instructed the defendant with the elements of the crime to which he pled guilty, “we may presume that, absent an assertion that [the defendant] did not understand the nature of the crimes, counsel explained the nature of the offense in sufficient detail to give him notice of that which he admits by entering a plea of guilty”).

Accordingly, based on the totality of the circumstances, Appellant’s claim that he was not fully apprised of the elements of murder or the concept of malice is without merit. It is well-settled that “[c]ounsel cannot be ineffective for failing to raise a meritless claim.” **Commonwealth v. Small**, 980 A.2d 549, 570 (Pa. 2009) (citation omitted). Thus, we conclude

that the trial court did not err in denying Appellant's first two requests for relief.<sup>4</sup>

Finally, Appellant contends that trial counsel was ineffective for failing to explain the concept of diminished capacity to Appellant, and for failing to present evidence of his diminished capacity at the degree of guilt hearing.

Appellant's Brief at 14. The PCRA court noted

[a] defense of diminished capacity admits liability, while contesting the degree of culpability based upon a defendant's inability to possess a particular mental state. Diminished capacity is an extremely limited defense and must be proven by extensive psychiatric testimony addressing only mental disorders that affect the ability to form specific intent. In order to assert a successful diminished capacity defense, a defendant must provide extensive psychiatric testimony establishing he suffered from one or more mental disorders which prevented him from formulating the specific intent, to kill. During his colloquy, [A]ppellant testified that he had never been confined to a mental institution or been treated for mental illness. Moreover, [A]ppellant failed to provide any documentation showing that he

---

<sup>4</sup> We further note that, "[i]n a case where ample, competent evidence in support of a guilty plea is made a matter of record, allegations of manifest injustice arising from the guilty plea must go beyond a mere claim of technical recitation of the legal elements of the crimes." *Id.* at 501 (citing **Commonwealth v. Martinez**, 453 A.2d 940, 943 (Pa. 1982)). Here, the evidence of Appellant's guilt of first-degree murder was overwhelming. As we stated in Appellant's direct appeal, "Appellant committed a vicious and brutal attack on his girlfriend in the basement of the apartment by stabbing her approximately 23 times." *Bray*, unpublished memorandum at 1. The medical testimony presented at the degree of guilt hearing, coupled with the trial court's determinations that Appellant's testimony was largely incredible, the absence of serious provocation or heat of passion, and the trial court's inference of specific intent to kill from the manner in which Appellant attacked his victim, *see* N.T., 7/31/05, at 236-37, fully supports Appellant's first-degree murder conviction.

suffered from a mental disorder with his petition, nor did he indicate in his petition that he had informed trial counsel at the time of trial that he had a psychiatric history. Accordingly, trial counsel cannot be deemed ineffective for failing to act on information of which he was unaware.

PCRA Court Opinion, 8/24/2011, at 9 (internal citations omitted).

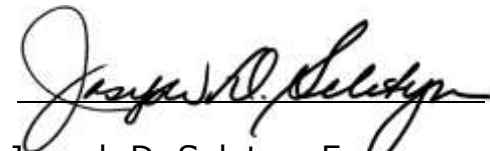
It is clear that Appellant would be prejudiced had counsel neglected to present mitigating evidence during the degree of guilt hearing. However, the record before this Court, including Appellant's supplemental amended PCRA petition wherein this claim is raised, contains no allegations to support his bald claim of ineffectiveness. As such we discern no error on the part of the trial court for dismissing Appellant's third claim without a hearing.

As we have determined that Appellant's issues lack merit, we affirm the order of the PCRA court denying Appellant relief.

Order affirmed.

Judge Colville Concur in Result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/9/2013