NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. XAVIER VENIAL CLAY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1580 WDA 2012

Appeal from the PCRA Order September 14, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at Nos.: CP-02-CR-0000477-2009
CP-02-CR-0000578-2009
CP-02-CR-0000579-2009
CP-02-CR-0003970-2009

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: March 6, 2013

Appellant, Xavier Venial Clay, appeals from the order dismissing his first petition pursuant to the Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541–9546. Appellant chiefly argues that his open guilty pleas were involuntary, induced by counsel's promise of a much lighter sentence. We affirm.

Appellant committed three armed carjackings and an armed robbery. The charges at CP-02-CR-0003970-2009 involved a carjacking during which he shot the victim in the face. Police alerted to the stolen vehicle spotted

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* Retired Senior Judge assigned to the Superior Court.

him. Appellant attempted to escape on foot after he crashed the vehicle, but the police apprehended him. That night, after signing a ***Miranda***[1] waiver, Appellant confessed to the crimes at issue in this appeal. (***See*** N.T. Trial, 10/19/09, at 45; ***see also*** Commonwealth's Exhibits in Support of Response to Amended Post Sentence Motions, 4/13/10, at Exhibit 1 (transcript of confession)).

On October 19, 2009, after a bench trial on the charges at 3970 the trial court convicted him of aggravated assault, robbery of a motor vehicle, robbery-inflicted serious bodily injury, receiving stolen property, carrying a firearm without a license, fleeing or attempting to elude police, driving with suspended license, accidents involving damage, and failure to obey traffic control devices.[2] (***See*** PCRA Court Opinion, 11/07/12, at 2; Trial Court Opinion, 12/21/10, at 1).

After his conviction of the 3970 charges, on December 16, 2009, following thorough oral and written colloquies, Appellant entered open guilty pleas to all the counts in three other criminal informations, involving two more carjackings at gunpoint and an armed robbery.[3] (***See*** N.T.

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[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] The court acquitted Appellant of attempted homicide and persons not to possess a firearm.

[3] Assistant Public Defender Michael Waltman, Esq. represented Appellant on the plea to the charges at 477, and at the trial on the charges at 3970. *(Footnote Continued Next Page)*

Pleas/Sentencing, 12/16/09, at 20). The court sentenced him on all counts to an aggregate term, including mandatory minimums, of not less than forty-six nor more than ninety-two years' incarceration. (***See id.*** at 29-33).

A week later, Appellant filed a *pro se* motion to withdraw his guilty plea; counsel later filed two amended post-sentence motions, all of which the trial court subsequently accepted *nunc pro tunc*. (***See*** Order, 4/09/10). On April 14, 2010, the trial court permitted plea and trial counsel to withdraw based on Appellant's claims of their ineffectiveness.[4] (***See*** Trial Ct. Op., 12/21/10, at 2). On May 13, 2010, the trial court held a hearing on the post-sentence motions.[5] On May 17, 2010, the court denied the post-sentence motions.

Appellant appealed, asserting ineffectiveness of counsel and challenging the weight and sufficiency of the evidence. This Court dismissed the ineffectiveness claims without prejudice to raising them in a timely PCRA petition, but rejected Appellant's challenges to weight and sufficiency, and affirmed the judgment of sentence. (***See Commonwealth v. Clay***, No. 908 WDA 2010, unpublished memorandum, at 11, 14, 18 (Pa. Super. filed

(Footnote Continued) ––––––––––––––––––––

Assistant Public Defender Rebecca Hudock, Esq. represented Appellant on the pleas to the charges at 578 and 579.

[4] In their place the court appointed present counsel, Scott Coffey, Esq.

[5] For clarity, we observe that the transcript of testimony for the hearing on the post-sentence motions is mis-captioned "PCRA hearing."

August 11, 2011)). Our Supreme Court denied allowance of appeal. (***See Commonwealth v. Clay***, 38 A.3d 822 (Pa. 2012)).

On February 24, 2012, Appellant filed the instant, counseled, timely, first PCRA petition. The Commonwealth filed a response on April 3, 2012. On April 26, 2012, the court filed notice pursuant to Pa.R.Crim.P. 907 of its intention to dismiss the petition without a hearing. The court dismissed the petition on September 14, 2012. This timely appeal followed.[6]

Appellant presents three questions for our review, which we reproduce *verbatim*:

> 1. Did the trial court err in denying appellant's PCRA petition since appellant's guilty pleas at 477-2009, 578-2009 and 579-2009 were involuntary since trial counsel Hudock promised appelant [sic] that if he pled to the instant cases he would receive an aggregate sentence of 10-20 years for all four of appellant's cases, or at least for the three plea cases. Moreover, appellant stated on the record that he was not promised anything in exchange for his pleas since he believed that his plea/trial counsel expected him to provide that answer so that the 10-20 deal would be honored?
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> 2. Did the trial court err in denying appellant's PCRA petition since appellant's guilty pleas at 477-2009, 578-2009 and 579-2009 were involuntary since trial counsel Waltman and Hudock were ineffective for failing to file a suppression motion regarding appellant's statements to police at all four cases since appellant's ***Miranda*** rights were not provided before he was questioned by police (his un-taped statement), his ***Miranda*** rights weren't explained to him at any time (un-taped or taped statements), he

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[6] The court did not order a statement of errors. ***See*** Pa.R.A.P. 1925(b). The court filed a Rule 1925(a) opinion, referencing its opinion of December 21, 2010 on Appellant's post sentence motions. ***See*** Pa.R.A.P. 1925(a).

> was simpley [sic] asked to sign a ***Miranda*** waiver form (the rights therein were not explained to him), he was under the influence of Ectasy [sic] and marijuana and did not comprehend what he was doing by making the statements or comprehend the substance of his statements?
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> 3. Did the trial court err in denying appellant's PCRA petition since the evidence was insufficient to convict appellant, at 3970-2009, of aggravated assault, and trial counsel was ineffective for failing to make a motion for judgment of acquittal at that conviction?

(Appellant's Brief, at 3-4).

Appellant argues that his guilty pleas were involuntary because plea counsel Hudock promised him a sentence of ten to twenty years' incarceration for all four cases. (***See*** Appellant's Brief, at 14). He asserts that both Attorney Hudock and Attorney Waltman were ineffective for failing to file a motion to suppress his confession. (***See id.***). He claims his ***Miranda*** rights were violated, and he was under the influence of drugs when he signed the waiver and confessed. (***See id.***). He also claims the evidence was insufficient to convict him of aggravated assault, and asserts that trial counsel was ineffective for failing to make a motion for judgment of acquittal. (***See id.***). We disagree.

> We begin by noting the following standard of review, guiding our consideration of this appeal. "On appeal from the denial of PCRA relief, our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error." ***Commonwealth v. Calhoun****,* 52 A.3d 281, 284 (Pa. Super. 2012) (citation omitted). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Garcia****,* 23 A.3d 1059, 1061 (Pa. Super. 2011) (internal quotation marks and citation omitted), *appeal denied,* ––– Pa. ––––, 38 A.3d 823 (2012). "The PCRA court's

> factual determinations are entitled to deference, but its legal determinations are subject to our plenary review." ***Commonwealth v. Johnson****,* 600 Pa. 329, 966 A.2d 523, 532 (2009) (internal quotation marks and citations omitted).

Commonwealth v. Nero, 58 A.3d 802, 805 (Pa. Super. 2012).

"Allegations that counsel misadvised a criminal defendant in the plea process are properly determined under the ineffectiveness of counsel subsection of the PCRA[,] not the section specifically governing guilty pleas." ***Commonwealth v. Lynch***, 820 A.2d 728, 730 n.2 (Pa. Super. 2003), a*ppeal denied,* 835 A.2d 709 (Pa. 2003) (citation omitted).

> Counsel is presumed to be effective, ***Commonwealth v. Jones****,* 590 Pa. 202, 912 A.2d 268, 278 (2006); to overcome the presumption, [an appellant] has to satisfy the performance and prejudice test set forth in ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)]. In Pennsylvania, we have applied the ***Strickland*** test by looking to three elements, whether: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) the defendant has shown that he suffered prejudice as a result of counsel's lapse, *i.e.,* that there is a reasonable probability that the result of the proceeding . . . would have been different if counsel had objected. ***Commonwealth v. Pierce****,* 515 Pa. 153, 527 A.2d 973, 975 (1987).

Commonwealth v. Bennett, 57 A.3d 1185, 1195-96 (Pa. 2012).

> [C]laims of counsel's ineffectiveness in connection with a guilty plea will provide a basis for relief only if the ineffectiveness caused an involuntary or unknowing plea. This is similar to the "manifest injustice" standard applicable to all post-sentence attempts to withdraw a guilty plea. 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 knowingly, voluntarily and intelligently made.

Commonwealth v. Yager, 685 A.2d 1000, 1004 (Pa. Super. 1996), *appeal denied*, 701 A.2d 577 (Pa. 1997) (citations and some internal quotation marks omitted).

> The 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.
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> A criminal defendant who elects to plead guilty has a duty to answer questions truthfully. We [cannot] permit a defendant to postpone the final disposition of his case by lying to the court and later alleging that his lies were induced by the prompting of counsel.

Commonwealth v. Pollard, 832 A.2d 517, 523-24 (Pa. Super. 2003) (citations omitted). Finally, we also note that:

> [P]ost-sentence motions for withdrawal are subject to higher scrutiny since courts strive to discourage entry of guilty pleas as sentence-testing devices. A defendant must demonstrate that manifest injustice would result if the court were to deny his post-sentence motion to withdraw a guilty plea. Manifest injustice may be established if the plea was not tendered knowingly, intelligently, and voluntarily. In determining whether a plea is valid, the court must examine the totality of circumstances surrounding the plea.

Commonwealth v. Broaden, 980 A.2d 124, 129 (Pa. Super. 2009), *appeal denied*, 992 A.2d 885 (Pa. 2010) (citations and internal quotation marks omitted).

Here, in his first question, Appellant postulates that his pleas were involuntary because he relied on counsel's promise of an aggregate ten-to-twenty year sentence. (***See*** Appellant's Brief, at 3). The record is unequivocal that there was no negotiated settlement in this case, and that all the pleas were general pleas. (***See*** N.T. Pleas/Sentencing, 12/16/09, at 2). Even Appellant told the court that there were "[n]o promises or threats." (***Id.***). However, Appellant now claims that he lied both in his written and oral guilty plea colloquies. (***See*** Appellant's Brief, at 3, 15).

There is no merit in the claim that Appellant lied under oath, even if he now alleges his lies were induced by counsel. ***See Pollard***, ***supra***. Appellant cannot use the guilty plea process as a sentence-testing device. ***See Broaden***, ***supra***.

Furthermore, plea counsel Hudock testified that "I told [Appellant] there was no agreement and he would be throwing himself at the mercy of Judge Nauhaus and it would be up to him for the sentencing" and "I never once mentioned that I agreed to an offer of 10 to 20, never once in talking to him." (N.T. "PCRA Hearing," 5/13/10, at 43).[7] The trial court expressly found her testimony credible. (***See*** Trial Ct. Op., 12/21/10, at 3). The court's credibility determination is very strongly supported by the certified

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[7] As previously noted, the notes of testimony captioned "PCRA Hearing," are in fact the notes of testimony for the hearing on Appellant's post-sentence motions. (***See*** N.T. "PCRA Hearing," 5/13/10, at 4).

record. We defer to the court's credibility determination. ***See Commonwealth v. Spotz***, 47 A.3d 63, 112 (Pa. 2012) (deferring to PCRA court's assessment of inconsistent testimony); ***see also Nero***, ***supra*** ("The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record.") (citation omitted). There is no arguable merit to Appellant's claim. Furthermore, Appellant fails to plead or prove any of the three ***Pierce*** prongs of ineffectiveness. Appellant's first issue merits no relief.

In his second question, Appellant claims trial and plea counsel were ineffective for failing to file a motion to suppress his confession on the ground that he was not provided timely ***Miranda*** warnings. (***See*** Appellant's Brief, at 3, 18-22). It is undisputed that Appellant received ***Miranda*** warnings, and signed a waiver before his confession. However, he now claims that he was under the influence of Ecstasy and marijuana and did not understand the ***Miranda*** warnings given to him when he signed the waiver form. He posits that he should be permitted to withdraw his guilty pleas and his convictions should be vacated. (***See id.*** at 22). We disagree.

Preliminarily, we observe that a direct challenge to Appellant's confession, or any claimed irregularity in his ***Miranda*** warnings, would be beyond the scope of this appeal.

> When an appellant pleads guilty to the charges against him or her, the grounds for appeal are limited.

> It is well settled that, where a guilty plea has been entered, all grounds of appeal are waived other than challenges to the voluntariness of the plea and the jurisdiction of the sentencing court. Thus allegations of ineffective assistance of counsel in connection with entry of the guilty plea will serve as a basis for relief **only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea**.

Commonwealth v. Boyd, 835 A.2d 812, 815 (Pa. Super. 2003) (quoting ***Commonwealth v. Williams***, 437 A.2d 1144, 1146 (Pa. 1981) (emphasis added).

Here, the primary premise of Appellant's appeal is that he pleaded guilty on the purported expectation of a lower sentence. (***See*** Appellant's Brief, at 14). Consequently, any alleged ineffectiveness relating to filing a suppression motion for a supposed defect in his ***Miranda*** warnings or confession did not and could not have caused his guilty pleas. The suppression issue would be waived. ***See Boyd***, ***supra***.

However, our Supreme Court has decided that a claim of ineffectiveness raises a distinct legal ground for purposes of state PCRA review. ***See Commonwealth v. Collins***, 888 A.2d 564, 573 (Pa. 2005). Therefore, we will address the merits of Appellant's ineffectiveness claim. It does not merit relief.

> [I]ntoxication by the use of **drugs** or alcohol is insufficient, in and of itself, to render a defendant's confession involuntary. Although intoxication is a factor to be considered, the test is whether there was sufficient mental capacity for the defendant to know what he was saying and to have voluntarily intended to say it.

Commonwealth v. Dewitt, 412 A.2d 623, 624 (Pa. Super. 1979) (citations omitted) (emphasis added); ***see also Commonwealth v. Ventura*** 975 A.2d 1128, 1137 -1138 (Pa. Super. 2009), *appeal denied*, 987 A.2d 161 (Pa. 2009):

> [T]he law in Pennsylvania pertaining to the waiver of ***Miranda*** warnings while intoxicated is well-settled:
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> > The fact that an accused has been drinking does not automatically invalidate his subsequent incriminating statements. The test is whether he had sufficient mental capacity at the time of giving his statement to know what he was saying and to have voluntarily intended to say it. Recent imbibing or the existence of a hangover does not make his confession inadmissible, but goes only to the weight to be accorded to it.

Id. at 1137-38 (quoting ***Commonwealth v. Adams***, 561 A.2d 793 (Pa. Super. 1989)). ***Adams***, in turn, concluded that counsel was **not** ineffective for "failing" to file a motion to suppress, despite the appellant's claim that he was too intoxicated to make a voluntary and intelligent waiver of his ***Miranda*** rights, where the record supported a determination that the appellant had sufficient mental capacity at the time of giving his statement to know what he was saying and to have voluntarily intended to say it. ***See Adams***, ***supra*** at 795.

Similarly, in this case, after the hearing on the post-sentence motion the court found that "defendant's confession supplied details of his crimes, gave a lengthy narrative, and it was coherent." (Trial Ct. Op., 12/21/10, at 4, adopted by reference in the PCRA court's Rule 1925(a) opinion, 11/05/12,

at 3). Trial counsel Waltman testified at the hearing that after listening to Appellant's taped statement, he decided that Appellant was "very coherent," answering police questions and giving a lengthy narrative which matched the facts of the police report, and the victims' complaints, very closely. (N.T "PCRA" Hearing, 5/13/10, at 36).[8] Counsel also knew that Appellant had signed a written waiver form, and gave another waiver on the recorded statement. (***See id.***).

Accordingly, Appellant failed to prove that he lacked sufficient mental capacity to "know what he was saying and to have voluntarily intended to say it." ***Adams***, ***supra***. We defer to the factual findings of the PCRA court which are supported by the record. The record supports the PCRA court's finding that Appellant failed to prove that his plea was involuntary. (***See*** Trial Ct. Op., 12/21/10, at 5).

Furthermore, trial counsel's testimony shows that he had a reasonable basis for the decision not to file a motion to suppress. Therefore, Appellant's ineffectiveness claim also fails under the second prong of the ***Pierce*** test. ***See Bennett***, ***supra*** at 1196. The PCRA court properly found that counsel was not ineffective for not filing a motion to suppress. Appellant's second issue does not merit relief.

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[8] ***See*** n.6, ***supra*** at 9.

In his third claim Appellant again asserts ineffectiveness of counsel. (***See*** Appellant's Brief, at 22-24). In this issue he posits that the evidence was insufficient to convict him of aggravated assault. (***See id.***). Therefore, he argues, trial counsel was ineffective for failing to make a motion for judgment of acquittal. (***See id.***). We disagree.

At the outset we note that Appellant fails to develop an argument of counsel's ineffectiveness under the three-pronged ***Pierce*** test. (***See id.***); ***see also Bennett***, ***supra*** at 1196. Rather, Appellant baldly reasserts the argument already presented on direct appeal that he lacked the intent to commit aggravated assault because he was acting out of self-defense. (***See*** Appellant's Brief, at 23-24). This Court considered and rejected Appellant's challenge to the sufficiency of the evidence for aggravated assault in his direct appeal.[9] (***See Clay***, ***supra*** at 14). Therefore, Appellant's previously rejected assertion of insufficiency has no arguable merit. "Counsel cannot be considered to be ineffective for failure to assert a meritless claim." ***Commonwealth v. Pursell***, 495 A.2d 183, 189 (Pa. 1985) (citation omitted). Appellant's third claim fails.

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[9] We note, accordingly, that Appellant's predicate claim of insufficiency was previously litigated within the meaning of the PCRA. ***See*** 42 Pa.C.S.A. § 9544(a)(2) ("For purposes of this subchapter, an issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue[.]").

Order affirmed.