

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KENNETH TYLER CARY,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1651 MDA 2012

Appeal from the PCRA Order August 28, 2012  
In the Court of Common Pleas of Lackawanna County  
Criminal Division at No.: CP-35-CR-0002917-2010

BEFORE: DONOHUE, J., ALLEN, J., and PLATT, J.\*

MEMORANDUM BY PLATT, J.

**FILED: MAY 17, 2013**

Appellant, Kenneth Tyler Cary, appeals, *pro se*, from the order of August 28, 2012, which dismissed, without a hearing, his first petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On December 10, 2010, Appellant entered a guilty plea to one count of terroristic threats<sup>1</sup> and one count of simple assault.<sup>2</sup> In return, the Commonwealth *nolle prossed* the remaining charges. The charges arose from an August 21, 2010 incident, wherein Appellant, an inmate at the

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> 18 Pa.C.S.A. § 2706(a)(1).

<sup>2</sup> 18 Pa.C.S.A. § 2701(a).

Lackawanna County Prison, assaulted and threatened two corrections officers.

On March 9, 2011, the sentencing court sentenced Appellant to an aggregate term of incarceration of not less than one year nor more than three years. Appellant filed a timely motion for reconsideration of sentence, which the sentencing court denied. Appellant never sought leave to withdraw his guilty plea and did not file a direct appeal.

On March 5, 2012, Appellant filed a *pro se* PCRA petition. The PCRA court subsequently appointed counsel. On May 21, 2012, counsel filed a **Turner/Finley**<sup>3</sup> letter.<sup>4</sup> On July 6, 2012, Appellant filed a response to counsel's motion for leave to withdraw. On July 24, 2012, the PCRA court granted counsel's request to withdraw and issued notice of its intent to dismiss the petition pursuant to Pennsylvania Rule of Criminal Procedure 907(1). Appellant did not file a response and the PCRA court dismissed the petition on August 28, 2012. The instant, timely appeal followed.<sup>5</sup>

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<sup>3</sup> ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

<sup>4</sup> We note that the **Turner/Finley** letter is not included in the certified record.

<sup>5</sup> Appellant filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b); the PCRA court subsequently issued a Rule 1925(a) opinion.

On appeal, Appellant purports to raise nineteen issues for our review. Six of the issues raise questions concerning the effectiveness of plea counsel; seven of the issues concern the effectiveness of PCRA counsel; five of the issues concern alleged trial and PCRA court error; and one issue concerns alleged Commonwealth error. (**See** Appellant's Brief, at unnumbered pages 3-4).

We review the denial of a post-conviction petition to determine whether the record supports the PCRA court's findings and whether its order is otherwise free of legal error. **See Commonwealth v. Faulk**, 21 A.3d 1196, 1199 (Pa. Super. 2011), *appeal denied*, 2011 Pa. Lexis 3041 (Pa. 2011). To be eligible for relief pursuant to the PCRA, Appellant must establish, *inter alia*, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in 42 Pa.C.S.A. § 9543(a)(2). He must also establish that the issues raised in the PCRA petition have not been previously litigated or waived. **See** 42 Pa.C.S.A. § 9543(a)(3). An allegation of error "is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." **Id.** at § 9544(b).

Initially, we note that Appellant has failed to include the following in his brief:

- (1) A Statement of Jurisdiction pursuant to Pa.R.A.P. 2111(a)(1);

- (2) A Statement of the Scope and Standard of Review pursuant to Pa.R.A.P. 2111(a)(3);
- (3) The Order of the lower court which forms the basis of this appeal pursuant to Pa.R.A.P. 2111(a)(2);
- (4) A Summary of the Argument pursuant to Pa.R.A.P. 2111(a)(6);
- (5) A short conclusion stating the precise relief sought pursuant to Pa.R.A.P. 2111(a)(9); and
- (6) A copy of the Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 2111(a)(11).

We also note that the cover of Appellant's brief does not comply with the requirements of Pa.R.A.P. 2172; the contents of the brief are not in the order specified in Pa.R.A.P. 2111(a); and the numbering of pages does not comply with the requirements of Pa.R.A.P. 2173. Appellant does not include either a table of contents or a table of citations in violation of Pa.R.A.P. 2174. Further, Appellant's Statement of the Questions involved consists of a single, two-page paragraph recitation of alleged issues follow by citations to cases. Thus, it does not comply with the requirements of Pa.R.A.P. 2116. Appellant's Statement of the Case contains only a procedural history and thus does not comply with the requirements of Pa.R.A.P. 2117. Lastly, Appellant's argument utterly fails to comply with any of the requirements of Pa.R.A.P. 2119.

We recognize that Appellant is proceeding *pro se* in his appeal.

Although this Court is willing to liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit upon the appellant. To the contrary, any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing.

***Commonwealth v. Adams***, 882 A.2d 496, 498 (Pa. Super. 2005) (citations omitted). Therefore, because of his failure to adhere to the Rules of Appellate procedure, this Court has the right to quash or dismiss Appellant's appeal pursuant to Pa.R.A.P. 2101. ***See id.*** at 497. Despite this, "in the interest of justice we address the arguments that can reasonably be discerned from this defective brief." ***Commonwealth v. Lyon***, 833 A.2d 245, 252 (Pa. Super. 2003), *appeal denied*, 879 A.2d 782 (Pa. 2005).

Appellant claims that he received ineffective assistance of plea counsel. (***See*** Appellant's Brief, at unnumbered page 3). It is well-settled that "[a] criminal defendant has the right to effective counsel during a plea process as well as during trial." ***Commonwealth v. Rathfon***, 899 A.2d 365, 369 (Pa. Super. 2006) (citation omitted). Further, "[a]llegations 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. Hickman***, 799 A.2d 136, 141 (Pa. Super. 2002) (citation omitted). Also, "[w]here the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends upon whether counsel's advice was within the range of competence

demanded of attorneys in criminal cases.” **Id.** (internal quotation marks and citations omitted).

Counsel is presumed effective, and Appellant bears the burden to prove otherwise. **See Commonwealth v. Bennett**, 57 A.3d 1185, 1195 (Pa. 2012). The test for ineffective assistance of counsel is the same under both the Federal and Pennsylvania Constitutions. **See Strickland v. Washington**, 466 U.S. 668 (1984); **Commonwealth v. Jones**, 815 A.2d 598, 611 (Pa. 2002). Appellant must demonstrate that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel’s ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. **See Commonwealth v. Pierce**, 786 A.2d 203, 213 (Pa. 2001), *abrogated on other grounds*, **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. **See Jones, supra** at 611. Where, as here, Appellant pleaded guilty, in order to satisfy the prejudice requirement, Appellant must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” **Rathfon, supra** at 370 (citation omitted). Appellant has utterly failed to do so.

Here, Appellant makes six allegations of error on the part of plea counsel. (**See** Appellant's Brief, at unnumbered page 3). These allegations are that counsel: (1) failed to investigate properly the underlying crime and obtain the security tape of the incident; (2) failed to show Appellant any discovery; (3) failed to communicate with Appellant; (4) arrived late to Appellant's sentencing; (5) coerced Appellant to plead guilty; and (6) waived the preliminary hearing. (**See id.**).

To begin with, Appellant's arguments are undeveloped, as noted above. After listing each issue, Appellant includes a citation to a case but does not provide any explanation of the relationship between the cited case and his claims. (**See id.**). Further, Appellant's argument with respect to these six claims consists of a single paragraph that contains no citations to the record and consists of declaratory sentences that simply restate the claimed issue. (**See id.** at unnumbered page 5). "This Court will not act as counsel and will not develop arguments on behalf of an appellant." **See Commonwealth v. Hardy**, 918 A.2d 766, 771 (Pa. Super. 2007), *appeal denied*, 940 A.2d 362 (Pa. 2008) (citation omitted). When such deficiencies in a brief hinder our ability to conduct meaningful appellate review, we can dismiss the appeal entirely or find certain issues to be waived. **See** Pa.R.A.P. 2101; **Hardy, supra** at 771. However, for the reasons discussed above, we will discuss those claims that can be expounded upon.

Here, Appellant claims that counsel failed to investigate the incident, failed to obtain a copy of the security video, and failed to show him discovery. (**See** Appellant's Brief, at unnumbered page 3). The record reflects that, approximately one month prior to Appellant's guilty plea, counsel filed a request for discovery with the court, as well as a request for a bill of particulars. (**See** Request for Pre-Trial Discovery and Inspection, 11/03/10; Request for Bill of Particulars, 11/03/10). Thus, the record shows that counsel did attempt to investigate the underlying incident and sought discovery, including the security video; however, once Appellant elected to plead guilty, discovery was no longer necessary. Thus, Appellant's first and second ineffective assistance of plea counsel claims lack merit.

In his third ineffective assistance of plea counsel claim, Appellant claims that counsel failed "to communicate with the defendant before coming to court." (Appellant's Brief, at unnumbered page 3). However, as Appellant fails to explain this claim in any way and fails to show how he was prejudiced by counsel's alleged lack of communication, the claim lacks merit.

In his fourth claim, Appellant alleges that he was prejudiced by counsel's later arrival at sentencing. (**See id.**). Appellant does not point to anything in the record that would substantiate this claim. Further, our review of the sentencing transcript does not show that counsel was tardy. (**See** N.T. Sentencing, 3/09/11, at 2-7). Thus, this claim must fail.



In his fifth claim of ineffective assistance of plea counsel, Appellant claims that counsel induced him to plead guilty even though he was innocent. (**See** Appellant's Brief, at unnumbered page 3). It is long settled that where the record clearly shows that the court conducted a thorough guilty plea colloquy and that the defendant understood his rights and the nature of the charges against him, the plea is voluntary. **See Commonwealth v. McCauley**, 797 A.2d 920, 922 (Pa. Super. 2001). In examining whether the defendant understood the nature and consequences of his plea, we look to the totality of the circumstances. **See id.** At a minimum, the trial court must inquire into the following six areas:

- (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he has a right to trial by jury?
- (4) Does the defendant understand that he is presumed innocent until he is found guilty?
- (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offense 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?

**Id.** (citation omitted); **see also** Pa.R.Crim.P. 590, Comment.

This examination may be conducted by defense counsel or the attorney for the Commonwealth, as permitted by the court. **See**

Pa.R.Crim.P. 590, Comment. Moreover, the examination may consist of both a written colloquy that is read, completed, signed by the defendant, and made a part of the record, and an on-the-record oral examination. **See id.**

Here, Appellant signed a written plea colloquy and engaged in an oral colloquy with the trial court. (**See** Written Guilty Plea, 12/10/10, at 4; N.T. Guilty Plea Hearing, 12/10/10, at 2-7). At the guilty plea hearing, Appellant testified that he was pleading guilty of his own free will, had consulted with counsel, and was satisfied with counsel's representation. (**See** N.T. Guilty Plea Hearing, 12/10/10, at 4). Appellant also testified that he had read and understood the written guilty plea colloquy. (**See id.** at 2-3). Appellant did not make any complaints or voice any dissatisfaction with counsel's representation during the plea colloquy. (**See id.** at 2-7). In the written colloquy, Appellant agreed that he understood the charges against him and understood the nature of his plea, and agreed that he was fully satisfied with counsel's representation. (**See** Written Guilty Plea, 12/10/10, at 1-2 ¶ 5(b), 8(b)). Appellant specifically agreed that counsel, "kn[e]w [] all the facts of [my] case and has had sufficient time to look into any questions either he or [I had] about the case[.]" (**Id.** at 2 ¶ 8). Appellant further testified that he was entering the plea voluntarily of his own free will. (**See** N.T. Guilty Plea Hearing, 12/10/10, at 4; Written Guilty Plea, 12/10/10, at 3 ¶ 8(c)).

Appellant never sought to withdraw his guilty plea, did not file a direct appeal, and never sought reinstatement of his direct appeal rights.

A criminal defendant is bound by the statements he made during his plea colloquy. **See Commonwealth v. Muhammad**, 794 A.2d 378, 384 (Pa. Super. 2002). Thus, a defendant cannot assert grounds for withdrawing the plea that contradict statements made at that time. **See Commonwealth v. Stork**, 737 A.2d 789, 790-91 (Pa. Super. 1999), *appeal denied*, 764 A.2d 1068 (Pa. 2000). Further, “[t]he 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) (*en banc*), *appeal denied*, 701 A.2d 577 (Pa. 1997) (citation omitted). Here, Appellant has not shown that his decision to enter the guilty plea was involuntary. He has therefore failed to prove prejudice. Thus, this claim of ineffective assistance of plea counsel lacks merit.

In his last claim of ineffective assistance of plea counsel, Appellant claims that counsel was ineffective for waiving the preliminary hearing. (**See** Appellant’s Brief, at unnumbered page 3). However, we note that claims in connection with counsel’s conduct with respect to a preliminary hearing are not cognizable under the PCRA. **See Commonwealth v. Lassen**, 659 A.2d 999, 1007 (Pa. Super. 1995) (explaining that claims

relating to preliminary hearings are not cognizable under the PCRA). Therefore, Appellant's final claim of ineffective assistance of plea counsel must fail.

Appellant raises seven claims of ineffective assistance of PCRA counsel: (1) counsel failed to provide Appellant with copies of discovery; (2) counsel did not provide Appellant copies of court-ordered documents; (3) counsel did not respond to Appellant after Appellant sent him research; (4) counsel failed to investigate sufficiently Appellant's claim before writing a **Turner/Finley** letter; (5) counsel failed to investigate plea counsel's ineffectiveness; (6) counsel failed to obtain a copy of the security video; and (7) counsel failed to attempt to withdraw Appellant's guilty plea. (**See** Appellant's Brief, at unnumbered pages 3-4). Again, we note that Appellant's argument with respect to these issues suffers from the same flaws enumerated above and is subject to waiver pursuant to Pa.R.A.P. 2101.

Moreover, Appellant did not raise his concerns about PCRA counsel's stewardship in his response to the **Turner/Finley** letter. (**See** Notification of Appeal of Finley Letter and Withdraw Due to Lack of Merit of PCRA Petition, 7/09/12). Appellant raised the claims for the first time in his Pa.R.A.P. 1925(b) statement. (**See** Appellant's Statement of Matters Complained to Pursuant to Pa.R.A.P. 1925(b), 10/11/12, at 2-3). In a recent decision, this Court held that claims of ineffective assistance of PCRA

counsel must be raised either in a response to a Rule 907 notice or in a serial PCRA petition; they cannot be raised for the first time in a Rule 1925(b) statement or on appeal. **See Commonwealth v. Ford**, 44 A.3d 1190, 1200-01 (Pa. Super. 2012), *appeal denied*, 54 A.3d 347 (Pa. 2012). Thus, we lack jurisdiction to hear Appellant's claims of ineffective assistance of PCRA counsel and, therefore, will not address them.

Appellant raises five claims of alleged error by the trial and PCRA courts: (1) the trial court wrongly denied his motion for reconsideration of sentence; (2) the trial court did not notify him of his right to appeal; (3) the trial court did not send him discovery and violated his due process rights; (4) the PCRA court appointed ineffective counsel; and (5) the PCRA court wrongly dismissed the petition without investigating Appellant's allegations. (**See** Appellant's Brief, at unnumbered page 4). Once more, we note that Appellant's argument is undeveloped and his claims are therefore waived pursuant to Pa.R.A.P. 2101.

Moreover, Appellant's first and third claims of trial court error are waived because they could have been raised on direct appeal and were not. **See** 42 Pa.C.S.A. § 9544(b). Further, Appellant did not raise them in his Appellant's PCRA petition (**see** PCRA Petition, 7/06/12, at 3) and are therefore waived. **See Commonwealth v. Lauro**, 819 A.2d 100, 103 (Pa. Super. 2003), *appeal denied*, 830 A.2d 975 (Pa. 2003) (waiving five issues not in original or amended PCRA petition). Appellant's second claim of trial

court error that he was not informed of his right to appeal, is also not raised in his PCRA petition and, in any event, is belied by the record. (**See** N.T. Sentencing, 3/09/11, at 10; [Notice of] Post Sentence Rights, 3/09/11, at 1). Appellant's fourth and fifth claims regarding alleged error by the PCRA court are meritless since Appellant has not demonstrated that PCRA counsel was ineffective and because we have held that the PCRA court did not err in dismissing Appellant's PCRA petition.

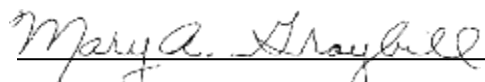
Lastly, Appellant claims that the Commonwealth failed to provide him with a copy of the security video of the incident. (**See** Appellant's Brief, at unnumbered page 4). Appellant's argument is undeveloped and this claim is waived. **See** Pa.R.A.P. 2101. Moreover, as this claim could have been raised on direct appeal and was not, it is waived pursuant to 42 Pa.C.S.A. § 9544(b). Lastly, the claim is not cognizable under 42 Pa.C.S.A. § 9543(a)(2).

Accordingly, for the reasons discussed above, we affirm the PCRA court's dismissal of Appellant's PCRA petition.

Order affirmed. Jurisdiction relinquished.

Donohue, J., concurs in the result.

Judgment Entered.

  
Interim Deputy Prothonotary

Date: May 17, 2013