NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ANDROTY PEREZ, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1709 EDA 2012

Appeal from the PCRA Order May 25, 2012
In the Court of Common Pleas of Monroe County
Criminal Division at No.: CP-45-CR-0001213-2010

BEFORE: BOWES, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: January 8, 2013

Appellant, Androty Perez, appeals from the order of May 25, 2012, which denied, following a hearing, his first petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On June 10, 2010, Appellant was arrested following a motor vehicle stop. Appellant was subsequently charged with two counts of manufacture, delivery, or possession with intent to manufacture or deliver (PWID),[1] two counts of intent to possess a controlled substance by a person not

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* Retired Senior Judge assigned to the Superior Court.

[1] 35 P.S. § 780-113(a)(30).

registered,[2] and one count each of use/possession of drug paraphernalia,[3] firearms not to be carried without a license,[4] possession of a firearm with the manufacturer's number altered,[5] crime committed with a firearm,[6] driving without a license,[7] driving an unregistered vehicle,[8] and operation of a vehicle without the required financial responsibility.[9] On September 8, 2010, Appellant pleaded guilty to PWID and firearms not to be carried without a license. At sentencing, the trial court granted Appellant's request to withdraw his guilty plea. The trial court placed Appellant's case on the January 2011 criminal trial term.

On December 6, 2010, Appellant's counsel filed a motion for leave to withdraw appearance. Following a hearing, the trial court granted counsel's motion, and subsequently appointed new counsel for Appellant.

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[2] 35 P.S. § 780-113(a)(16).

[3] 35 P.S. § 780-113(a)(32).

[4] 18 Pa.C.S.A. § 6106(a)(1).

[5] 18 Pa.C.S.A. § 6110.2(a).

[6] 18 Pa.C.S.A. § 6103.

[7] 75 Pa.C.S.A. § 1501(a).

[8] 75 Pa.C.S.A. § 1301(a).

[9] 75 Pa.C.S.A. § 1786(f).

On May 4, 2011, Appellant entered a second open guilty plea to PWID and firearms not be carried without a license. Appellant was immediately sentenced to an aggregate term of incarceration of not less than five years nor more than ten years.

On June 7, 2011, despite being represented by counsel, Appellant filed a *pro se* motion for reconsideration of sentence. The trial court scheduled a hearing on the motion and notified counsel of the hearing.[10] Counsel failed to appear at the scheduled hearing. The trial court denied the motion following a second hearing on the matter. Appellant did not file a direct appeal.

On January 25, 2012, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel and granted leave to file an amended petition. Counsel did not file an amended petition.[11] A hearing took place on March 5,

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[10] We note that the trial court should not have scheduled the matter for a hearing. It is well settled under Pennsylvania law that there is no right to hybrid representation either at trial or on the appellate level. ***See Commonwealth v. Ellis***, 626 A.2d 1137, 1139 (Pa. 1993). When a defendant, who is represented by counsel, files a *pro se* motion, brief, or petition, the court should forward the document to counsel. ***See Commonwealth v. Jette***, 947 A.2d 202, 204 (Pa. Super. 2008). We further note the motion was untimely.

[11] The trial court in its order appointing the public defender to represent Appellant, granted counsel leave to file an amended petition "to cure any defects in the original PCRA petition" on or before February 20, 2012. (PCRA Court Order, 1/30/12 at ¶2). Counsel elected to proceed to hearing on the *pro se* petition. Our Court has recognized that the determination of whether to file an amended petition requires the exercise of professional

(Footnote Continued Next Page)

2012. On May 25, 2012, the PCRA court issued an opinion and order denying the PCRA petition. The instant, timely appeal followed.[12]

On appeal, Appellant raises the following issue for our review:

> Was the court's decision to deny [Appellant's] PCRA claim for ineffective assistance of counsel supported by the evidence and free of legal error?

(Appellant's Brief, at 4).

We review a 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,

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

judgment. ***Commonwealth v. Padden***, 783 A.2d 299, 308 (Pa. Super. 2001). In cases where a defendant is prejudiced or rendered "uncounseled" or "abandoned," post-conviction counsel has been found ineffective. ***See Commonwealth v. Powell***, 787 A.2d 1017, 1019 (Pa. Super. 2001); ***Commonwealth v. Priovolos***, 746 A.2d 621, 625 (Pa. Super. 2000); ***Commonwealth v. Davis***, 526 A.2d 440 (Pa. Super. 1987) (failure to file amended petition or supporting brief constructively denied petitioner right to PCHA counsel even though counsel did appear before court to make argument)

However, we find that counsel adequately represented Appellant at the PCRA evidentiary hearing herein and, therefore, counsel was not *per se* ineffective in not file an amended petition. Appellant's issues all related to his guilty plea and his main concern was counsel's alleged assurance of his eligibility for Boot Camp. (***See*** N.T. PCRA Hearing, 3/05/12, at 19-20). ***See Commonwealth v. Murray***, 836 A.2d 956, 961 (Pa. Super. 2003), *reversed on other grounds by* ***Commonwealth v. Robinson***, 970 A.2d 455 (Pa. Super. 2009) (*en banc*) (remand unnecessary where counsel did not file an amended petition but advocated on behalf of client at evidentiary hearing).

[12] 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) statement relying on its May 25, 2012 opinion and order.

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).

Appellant claims that he received ineffective assistance of plea counsel. (***See*** Appellant's Brief, at 7). 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. 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). 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).

In his sole issue, Appellant claims that his guilty plea was not knowing and voluntary because counsel mistakenly advised him that he would be eligible for state motivational boot camp. (***See*** Appellant's Brief, at 7-9). At the PCRA hearing, plea counsel testified that his understanding of the plea was that Appellant would plead guilty to one count of PWID and one count of possession of a firearm without a license and that, in return, the

Commonwealth would *nolle pros* the remaining nine charges and would waive the mandatory minimum sentences. (***See*** N.T. PCRA Hearing, 3/05/12, at 7-8, 11). Counsel further stated that the sentencing recommendation was for five to ten years incarceration. (***See id.*** at 11). Counsel noted that he reviewed the Presentence Investigation Report and its recommendation of five to ten years with Appellant prior to entering the guilty plea. (***See id.*** at 15). Counsel testified that he had discussed the possibility of boot camp with Appellant but his understanding was that eligibility was determined by the correctional facility; counsel stated that he did not otherwise research the possibility of Appellant's eligibility for boot camp. (***See id.*** at 18). Counsel averred that he never promised Appellant that he would be eligible for boot camp, that eligibility for boot camp was not part of the terms of the plea agreement, and that Appellant decided to plead guilty based upon the Commonwealth's agreement to waive the mandatory sentences. (***See id.*** at 18, 20). Appellant testified that he agreed to plead guilty because counsel told him he would be eligible for boot camp. (***See id.*** at 31, 38). Appellant admitted, however, that he was aware before entry of both the first and second guilty pleas that the sentencing recommendation was for five to ten years incarceration and that there was no mention of boot camp. (***See id.*** at 35-37).

In its decision denying the PCRA petition, the trial court credited counsel's testimony that he never promised Appellant that he would be

sentenced to boot camp and did not credit Appellant's testimony to the contrary. (***See*** PCRA Court Opinion, 5/25/12, at 6-7). The credibility findings of the court are entitled to great deference, particularly where, as here, the PCRA court was also the trial court. ***See Commonwealth v. Martin***, 5 A.3d 177, 197 (Pa. 2010), *cert. denied*, 131 S.Ct. 2960 (U.S. 2011). We have no authority to disturb a credibility finding, if it is supported by the record. ***See Commonwealth v. Dennis***, 17 A.3d 297, 305 (Pa. 2011) ("Indeed, where the record supports the PCRA court's credibility determinations, such determinations are binding on a reviewing court.") (citation omitted).

Also, 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?
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> (2) Is there a factual basis for the plea?
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> (3) Does the defendant understand that he has a right to trial by jury?
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> (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?
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> (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, and 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, 5/04/11; N.T. Guilty Plea Hearing, 5/03/11, at 2-8). At the guilty plea hearing, Appellant testified that he understood the written colloquy, his answers, and the nature of the charges he was pleading guilty to, was satisfied with the advice of counsel, and admitted his guilt. (***See*** N.T. Guilty Plea Hearing, 5/04/11, at 2-8). Appellant did not make any complaints or voice any dissatisfaction with counsel's representation during the plea colloquy. (***See id.***). In the written colloquy, Appellant agreed that the sentencing recommendation was five to ten years. (***See*** Written Guilty Plea, 5/03/11, at 1). Appellant further testified that he was entering the plea voluntarily of his own free will.

(***See*** N.T. Guilty Plea Hearing, 5/04/11, at 7-8). This guilty plea was identical in all respects to the first plea deal that Appellant eventually withdrew. (***See*** Written Guilty Plea Colloquy, 9/08/10, at 1-2; Written Guilty Plea Colloquy, 5/03/11, at 1-2; N.T. PCRA Hearing, 3/05/12, at 7, 9-10). Appellant never sought to withdraw his second plea. While Appellant did file a *pro se* motion for reconsideration of sentence, the basis of that motion was not his ineligibility for boot camp, but rather that he objected to the sentences being run consecutively. (***See*** N.T. Motion Hearing, 7/19/11, at 5-6). Appellant reiterated at that hearing that he pleaded guilty because he was not comfortable going to trial; Appellant did not state that he pleaded guilty because he was promised boot camp. (***See id.*** at 8-9). Appellant 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, at this juncture, 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, his claim of ineffective assistance of counsel lacks merit.

Order affirmed. Jurisdiction relinquished.