NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CLINT DELULLO, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1966 WDA 2012

Appeal from the PCRA Order December 6, 2012
In the Court of Common Pleas of Jefferson County
Criminal Division at No.: CP-33-CR-0000078-2009

BEFORE: SHOGAN, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED MAY 29, 2013**

Appellant, Clint DeLullo, appeals from the order denying his first petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541–9546, after a hearing. Appellant chiefly claims that he received ineffective assistance of counsel because his defense lawyer incorrectly advised him of a potential mandatory minimum sentence, causing him to go to trial and receive a longer sentence than a rejected plea bargain would have provided. We affirm.

On September 17, 2009, a jury convicted Appellant of involuntary deviate sexual intercourse (IDSI), person less than sixteen years of age; statutory sexual assault; aggravated indecent assault, person less than

---

* Retired Senior Judge assigned to the Superior Court.

sixteen years of age; indecent assault, person less than sixteen years of age; and corruption of minors.

The convictions arose from a sexual encounter between Appellant, then age twenty-three, and a thirteen-year-old girl, which the Commonwealth alleged to have occurred on November 28, 2008, the day after Thanksgiving. At the time, Appellant had recently been released on probation for a prior sexual offense with a minor. He was living with Nancy Moore, and her sons, Nick and Jake. (***See*** N.T. Trial, 9/17/09, at 111). At trial, Ms. Moore, who described herself as "like a mother" to Appellant, (***id.*** at 171), offered an alibi for him on the day in question, testifying that they went out together to pick up a Christmas tree. (***See id.*** at 163).

In April of 2009, defense counsel informed Appellant by letter of the Commonwealth's offer of a plea agreement. The letter, in pertinent part, read as follows:

> **In exchange for your plea of guilty to Aggravated Indecent Assault, you would receive a sentence of 5-10 years SCI, and the DA will agree that he will not amend the charges against you to include IDSI (which has a 20 year maximum term). All other charges would be withdrawn.**
>
> * * *
>
> Your offer from the DA is therefore at the bottom of the range of permissible sentence options available to the [c]ourt, given the mandatory minimum.
>
> * * *

> **In the event you refuse the offer he** [the DA] **intends to amend the criminal information to include the charge of IDSI (giving or receiving oral sex). IDSI is a more serious offense that carries a 20 year maximum sentence, the same mandatory minimum (in this instance) and an automatic lifetime registration under Meagan's Law.** Given your prior letter[1] to this office, I suspect you prefer to take your chances at trial, but I still need to convey the offer to you and you should consider it carefully before making any decision.

(Appellant's Exhibit A, Letter of John M. Ingros, Esq. to Clint A. DeLullo, 4/17/09, at unnumbered pages 1-2) (first emphasis in original; second emphasis added).[2] In a subsequent letter, defense counsel added, in pertinent part:

> Regarding your chances at trial, if I had such skill in predicting the future my chosen occupation would be a professional gambler. I think that if the DA agrees to limit the time of the offense to within an hour or two of the noon time alleged in the complaint then the outcome of the trial would turn, in large part, on the credibility of Nancy [Moore] and your brother as opposed to the 'victim'. Remember, though, that the Judge will surely allow the jury to be informed that you have, on more than one occasion, engaged in sexual relations with minors. . . . I won't say that this will be an easy sell, but it isn't impossible. **The downside is that by rejecting the DA's offer, he has promised to amend the charges to include IDSI, which carries a higher penalty than any of the offenses you are presently charged with.**

---

[1] Appellant did not move for the admission of the "prior letter" into the certified record.

[2] The letters, comprising Exhibits A-E, which the trial court submitted as a supplement to the certified record, are also included as exhibits to PCRA counsel's Brief in Support of PCRA Petition, filed 9/14/12.

(Appellant's Exhibit B, Letter of John M. Ingros, Esq. to Clint A. DeLullo, 4/28/09 at unnumbered page 1) (quotation marks in original; emphasis added). In a succeeding letter, counsel also discussed at length the risks and benefits of Appellant's taking the witness stand to testify in his own defense. (Appellant's Exhibit D, Letter of John M. Ingros, Esq. to Clint A. DeLullo, 7/29/09, at unnumbered pages 1-2).

Appellant elected to go to trial. While he did not testify,[3] Ms. Moore presented the alibi defense. The jury convicted him of all the charges previously noted. He was later determined to be a Sexually Violent Predator.

On April 7, 2010, the trial court sentenced him to an aggregate term of not less than sixteen years and eight months nor more than forty-five years' incarceration in a state correctional institution, with credit for time served.[4]

---

[3] (***See*** N.T. Trial, 9/17/09, at 150-51).

[4] Except for Appellant's ineffectiveness claim about receiving misinformation on the mandatory minimum sentence for IDSI, and a brief reference to the sentencing guidelines at the end of his brief, the term of sentence itself is not at issue in this appeal. However, the minimum sentence in years is variously described in the record, including this Court's previous memorandum on direct appeal, and the PCRA court's instant opinion, as fifteen years, sixteen years, and seventeen years eight months' incarceration, and the maximum is alternatively stated as fifty-five years. (***See e.g., Commonwealth v. DeLullo***, 40 A.3d 188 (Pa. Super. 2011), 804 WDA 2010, unpublished memorandum at 2 (Pa. Super. filed December 9, 2011); PCRA Court Opinion, 12/06/12, at 1). We rely on the sentencing
(Footnote Continued Next Page)

The court denied Appellant's post sentence motion on April 20, 2010. This Court affirmed the judgment of sentence on December 9, 2011. (***See DeLullo***, ***supra*** at 7). Appellant did not file a petition for allowance of appeal.

On April 25, 2012, Appellant filed a timely *pro se* PCRA petition. The PCRA court appointed counsel, who filed an amended PCRA petition, and supporting brief. The PCRA court held a hearing on October 30, 2012.[5] On December 6, 2012, the PCRA court denied the petition, with an accompanying opinion. This timely appeal followed, on December 13, 2012.[6]

(Footnote Continued) ———————————

order, which is consistent with the transcript of the sentencing hearing, as adjusted for the correction at the end of the hearing. (***See*** Sentencing Order, 4/07/10; ***see also*** N.T. Sentencing Hearing, 4/07/10, at 9, 14). We note that the minimum sentence of sixteen years and eight months' incarceration is the minimum specified in Appellant's Post Sentence Motion, and in Appellant's Brief. (***See*** Post Sentence Motion, 4/19/10, at unnumbered page 2 ¶ 5; Appellant's Brief, at 13). For clarity, we also note that the date of the title page of the sentencing hearing transcript, April 7, 20**09**, is obviously a typographical error, as the stated date predates the trial, which occurred on September 17, 2009.

[5] Appellant appeared by videoconference.

[6] The PCRA court ordered a statement of errors on December 14, 2012. ***See*** Pa.R.A.P. 1925. Appellant timely complied, on December 26, 2012. The PCRA court filed a Rule 1925(a) opinion on January 3, 2013, referencing its opinion of December 6, 2012.

Appellant raises four questions for our review:[7]

> (1) Was [Appellant's] trial attorney ineffective, and [Appellant] prejudiced thereby, by incorrectly advising [Appellant], during the plea bargaining stage, that the crime of Involuntary Deviate Sexual Intercourse (IDSI) carried a 5 year mandatory minimum sentence, rather than the actual 10 year mandatory minimum sentence pursuant to 42 Pa.C.S.A. Sec.9718 [sic], when such incorrect advice caused [Appellant] to: reject the plea offer he would have otherwise accepted had he known the mandatory minimum sentence for IDSI was 10 years, go to trial, get convicted of, *inter alia*, IDSI, and receive a jail sentence well in excess of what was offered in the proposed plea agreement?
>
> (2) Is [Appellant] entitled to either reinstatement of the original plea offer, or a new trial, regarding his claim that his trial attorney was ineffective, and he was prejudiced thereby, when his attorney incorrectly advised him, during the plea bargaining stage, that the mandatory minimum sentence for the crime of IDSI was 5 years, rather than the actual 10 year mandatory minimum sentence applicable pursuant to 42 Pa.C.S.A. Sec.9718 [sic]?
>
> (3) Was [Appellant]'s trial attorney ineffective, and [Appellant] prejudiced thereby, when his attorney, during sentencing hearing on the conviction of IDSI, failed to object to the Commonwealth's not giving reasonable and proper pre-sentencing notice to [Appellant] of its intent to proceed under the provisions of 42 Pa.C.S.A. Sec.9718 [sic] and have the court impose the mandatory minimum sentence of 10 years for IDSI?
>
> (4) Is [Appellant], do [sic] to his trial attorney's ineffectiveness in failing to object at sentencing to the

---

[7] We note for the benefit of counsel that the questions as presented do not comply with Pa.R.A.P. 2116 ("The statement of the questions involved must state **concisely** the issues to be resolved, expressed in the terms and circumstances of the case but **without unnecessary detail**."). Pa.R.A.P. 2116(a) (emphases added). The statement of questions "will be deemed to include every subsidiary question fairly comprised therein." ***Id.***

> Commonwealth's improper pre-sentencing notice of its intent to proceed under 42 Pa.C.S.A. Sec. 9718 for the IDSI conviction, now entitled to a remand to the lower court for resentencing without the application of the mandatory sentencing provisions of 42 Pa.C.S.A. Sec.9718 [sic] being applied to his IDSI conviction?

(Appellant's Brief, at 4-5).

An ineffective assistance of counsel claim that arises out of the plea bargaining process is within the scope of section 9543(a)(2)(ii) of the PCRA. ***See Commonwealth ex rel. Dadario v. Goldberg***, 773 A.2d 126, 131 (Pa. 2001).

Our standard of review for the denial of a PCRA petition is well-settled:

> Our standard of review is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error. ***Commonwealth v. Colavita,*** 606 Pa. 1, 993 A.2d 874, 886 (2010). Our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the party who prevailed in the PCRA court proceeding. ***Id.***
>
> * * *
>
> It is well-settled that counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. ***Strickland v. Washington,*** 466 U.S. 668, 687–91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). [Our Supreme] Court has described the ***Strickland*** standard as tripartite by dividing the performance element into two distinct components. ***Commonwealth v. Pierce,*** 515 Pa. 153, 527 A.2d 973, 975 (1987). Accordingly, to prove trial counsel ineffective, the petitioner must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) the petitioner was prejudiced by counsel's act or omission. ***Id.*** A claim of

> ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs.
>
> With regard to the reasonable basis prong, we will conclude that counsel's chosen strategy lacked a reasonable basis only if the petitioner proves that the alternative strategy not selected offered a potential for success substantially greater than the course actually pursued. ***Commonwealth v. Koehler***, ——— Pa. ———, 36 A.3d 121, 132 (2012). To establish the prejudice prong, the petitioner must demonstrate that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness. ***Id.***

Commonwealth v. Busanet, 54 A.3d 35, 45-46 (Pa. 2012).

In pertinent part, the PCRA provides that to be eligible for relief on a claim of ineffectiveness, the petitioner must plead and prove by a preponderance of the evidence, "[t]hat the conviction or sentence resulted from: . . . ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii).

> Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted). Similarly, "[t]his Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. The findings of a post-conviction

court will not be disturbed unless they have no support in the record." ***Commonwealth v. Hickman***, 799 A.2d 136, 140 (Pa. Super. 2002) (citations omitted).

We address Appellant's first two claims together. Both the PCRA court and the Commonwealth accept that Appellant's defense counsel gave him erroneous advice that the mandatory minimum sentence for IDSI was five years' incarceration, rather than the actual ten. (***See*** PCRA Ct. Op., 12/06/12, at 2; Commonwealth's Brief, at 1). We agree.[8]

---

[8] In pertinent part, section 9718 of the sentencing statute provides that:

> **(a) Mandatory sentence.**—
>
> (1) A person convicted of the following offenses when the victim is under 16 years of age shall be sentenced to a mandatory term of imprisonment as follows:
>
> * * *
>
> 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse)—not less than ten years.

42 Pa.C.S.A. § 9718(a)(1). Section 3123, in relevant part, provides that:

> A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant . . . (7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.

18 Pa.C.S.A. § 3123(a)(7).

However, Appellant's assertion that his jury conviction is the product of ineffective assistance of counsel, because of the incorrect advice offered during consideration of the plea offer, fails to present a claim which merits relief.

> Appellant may only obtain relief if [he] pleads and proves by a preponderance of the evidence that [his] **conviction** resulted from ineffective assistance of counsel that, under the circumstances, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. ***See*** 42 Pa.C.S. § 9543(a)(2)(ii).

Commonwealth v. King, 57 A.3d 607, 613 (Pa. 2012) (emphasis added).

Here, Appellant does not claim that trial counsel's ineffective assistance in assessing the plea offer led to an unreliable conviction. Rather, Appellant maintains that "the plea offer was much more favorable than the actual sentence, and it is reasonably probable that, but for counsel's errors, [Appellant] would have accepted the plea offer, pled guilty, and not gone to trial." (Appellant's Brief, at 13).

> It is clear that a criminal defendant's right to effective counsel extends to the plea process, as well as during trial. However, allegations 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**. Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.

Commonwealth v. Wah, 42 A.3d 335, 338-39 (Pa. Super. 2012) (internal quotation marks and citations omitted; emphasis added).

In this case, notably, Appellant did not enter a guilty plea at all. Therefore, he cannot and does not argue that plea counsel's advice led him to enter a plea which was not knowing, voluntary and intelligent. Rather, he asserts that he chose to go to trial on the basis of faulty advice. However, once Appellant decided to exercise his constitutional right to be tried by a jury of his peers, and the jury convicted him, he only has a PCRA remedy if his "conviction resulted from ineffective assistance of counsel that, under the circumstances, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***King***, ***supra*** at 613 (citing 42 Pa.C.S.A. § 9543(a)(2)(ii)).

The authority Appellant offers in support of his claim is readily distinguishable. Appellant first cites ***Commonwealth v. Napper***, 385 A.2d 521, 524 (Pa. Super. 1978) ("Defense counsel has a duty to communicate to his client, not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant's chances at trial.") (citation omitted). (***See*** Appellant's Brief, at 17, 20). Appellant analogizes his situation to the facts in ***Napper***, arguing that:

> [B]y incorrectly advising [Appellant] of the mandatory minimum sentence for IDSI, [counsel] failed to give professional advice regarding the actual (*i.e.*, 10 year mandatory minimum sentence that applied to IDSI) danger inherent in rejecting the pro-offered [sic] 5 year to 10 year sentence for a plea to aggravated sexual assault.

(***Id.*** at 20).

The ***Napper*** Court reasoned that counsel was ineffective on the following facts:

> Counsel advised appellant of the terms of the offer, but neither recommended that appellant should accept it, nor gave any advice on the advisability of accepting it. Appellant told counsel that if the offered sentence would mean "state time" (more than two years) he didn't want to plead guilty. After pleading not guilty, appellant went to trial, with the consequences reviewed above [jury conviction of two counts of aggravated robbery; sentenced to two consecutive terms of five to twenty years].

Napper, ***supra*** at 522.

However, this Court has subsequently observed of the ***Napper*** decision that, "[n]evertheless, we remain mindful that post-conviction claims may not be freely granted without a substantial demonstration by the petitioner to show not merely the abstract merit of his claim, but also its impact on the result in his case." ***Commonwealth v. Chazin***, 873 A.2d 732, 734 (Pa. Super. 2005), *appeal denied*, 887 A.2d 1239 (Pa. 2005).

The ***Chazin*** Court added:

> Significantly, although ***Napper*** analyzes a post-conviction claim of IAC, it pre-dates our Supreme Court's recognition that "**the defendant must show that the deficient performance prejudiced the defense [by showing] that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.**" ***Commonwealth v. Pierce***, 515 Pa. 153, 527 A.2d 973, 975 (1987) (citing ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); ***see also Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326, 330 (1999) (analyzing prejudice requirement under ***Pierce***) ("[A] successful ineffective assistance of counsel claim requires a showing by the defendant that, but for counsel's act or omission, the outcome of the proceedings would have been different.").

Id. at 736 (emphasis added).

"Allegations 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**." ***Wah***, ***supra*** at 338 (emphasis added). Further, here, having elected to go to trial, Appellant must show that counsel's errors were so serious as to **deprive him of a fair trial**, "whose result is reliable." ***Chazin***, ***supra***, at 736. This he did not do.

Additionally, Appellant's own exhibits confirm that defense counsel, in compliance with ***Napper***, conveyed not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant's chances at trial. (***See*** Appellant's Exhibits A, B, D, ***supra***); ***see also Napper***, ***supra*** at 524.

Moreover, Appellant's fixed focus on one item that plea counsel misstated disregards the extensive additional accurate advice counsel gave Appellant, in writing, on the risks and benefits of accepting or rejecting the Commonwealth's plea bargain, the Commonwealth's commitment to add IDSI if Appellant did not agree to the plea offer, and the **correct** recitation of the **maximum** sentence exposure for IDSI, **twenty years' incarceration**. The PCRA court specifically found that:

> Attorney Ingros testified credibly about [Appellant's] repeated averments that he could not risk accepting **any** negotiated plea, and it had nothing to do with his supposed belief that his sentencing exposure if he was found guilty was no

> greater than his sentencing exposure under the terms of the district attorney's April 2009 offer.

(PCRA Ct. Op., 12/06/12, at 2) (emphasis in original).

The PCRA court noted that Appellant was already facing "a harsh penalty on his pending probation violations," (***id.***), and Appellant's belief that he had a strong alibi defense. (***See id.***; ***see also*** N.T. PCRA Hearing, 10/30/12, at 60 ("Q. And did you believe going into that trial that you had a very solid, concrete alibi? A. Yes."")). The PCRA court's finding that Appellant had multiple reasons, rightly or wrongly, for choosing to go to trial, rather than accept the plea offer, is supported by the record.

Similarly, Appellant fails to explain, and otherwise disregards, trial counsel's express understanding from Appellant's prior letter, which Appellant did not choose to have included in the certified record, that he, Appellant, had already indicated that he preferred to take his chances at trial. (***See*** Appellant's Exhibit A, ***supra*** at unnumbered page 2).

The PCRA court notes that counsel had informed Appellant **in writing** that he faced a maximum exposure for IDSI of twenty years' incarceration. (***See*** PCRA Ct. Op., 12/06/12, at 2; ***see also*** Exhibit A, ***supra*** at unnumbered page 2). Therefore, Appellant's repeated claim that counsel informed him that he was only facing five to ten years if convicted is bellied by the record. (***See*** N.T. PCRA Hearing, 10/30/12, at 61, 62, 63, 64).

Appellant also cites ***Hickman***, ***supra***. (***See*** Appellant's Brief, at 17, 20, 22). However, Appellant's reliance on ***Hickman*** is misplaced, because

that case involved detrimental reliance on legal advice (boot camp eligibility) to **enter** a guilty plea, **not** reject one and go to trial, as occurred here. ***See Hickman***, ***supra*** at 141.

On independent review, we agree with the conclusion of the PCRA court: "What [Appellant] ultimately complains about, then, is that he, in retrospect, made the wrong decision. That is not grounds [to] obtain relief on the alleged ineffective assistance of counsel." (PCRA Ct. Op., 12/06/12, at 3). We agree. Appellant's first question does not merit relief. Because there is no merit to Appellant's first claim of ineffectiveness, his second claim, that he is consequently entitled to reinstatement of the original plea offer, or a new trial, does not merit relief either.[9]

We also address Appellant's third and fourth questions together. In the third question, Appellant asserts that defense counsel was ineffective because he failed to object to the Commonwealth's late notice of its

---

[9] We observe that the argument section of Appellant's brief does not comply with Pa.R.A.P. 2119, by failing to divide the argument into as many parts as there are questions to be argued. (***See*** Appellant's Brief, at 14-30); ***see also*** Pa.R.A.P. 2119(a). Notably, in the middle of the argument on question one, Appellant asserts that he would have testified at trial but for the advice of defense counsel. (***See*** Appellant's Brief, at 22-23). However, Appellant fails to develop an argument in support of this issue. (***See id.***). Accordingly, it is waived. Pa.R.A.P. 2119(a). Also, this issue is not fairly included in Appellant's claim of ineffective advice on mandatory minimum sentencing. (***See id.*** at 4-5); ***see also*** Pa.R.A.P. 2116. Furthermore, Appellant did not include this issue in his statement of errors. (***See*** Statement of Errors, 12/26/12); ***see also*** Pa.R.A.P. 1925(b)(4)(vii). It would be waived for those reasons as well.

invocation of the mandatory minimum sentence of ten years' incarceration for IDSI. (***See*** Appellant's Brief, at 4). Appellant argues that he should have received "reasonable notice" pursuant to 42 Pa.C.S.A. § 9718(c). (***Id.*** at 27).

In support, he cites ***Commonwealth v. Leonhart***, 517 A.2d 1342 (Pa. Super. 1986), *appeal denied*, 531 A.2d 428 (Pa. 1987). (***See id.*** at 26-27). He asserts that, consequently, counsel was ineffective for failure to object. (***See*** Appellant's Brief, at 25-30). Appellant maintains that because section 9718 was amended effective January 1, 2007, adding a reasonable notice requirement, there is now "no distinction between a conviction arising from pleas of guilty and convictions following trials." (***Id.*** at 28). He argues that he was prejudiced by counsel's failure to object at sentencing, and asserts this case should be remanded for resentencing on the IDSI conviction, without application of the mandatory minimum sentence provided at section 9718. (***See id.*** at 30). We disagree.

Subsection (c) of section 9718 provides as follows:

> **(c) Proof at sentencing.**—The provisions of this section shall not be an element of the crime, and notice of the provisions of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

42 Pa.C.S.A. § 9718(c).

First, we observe that ***Leonhart*** is readily distinguishable, as it involved a guilty plea, not a jury conviction. ***See Leonhart***, ***supra*** at 1343. Appellant concedes this. (***See*** Appellant's Brief, at 26). Furthermore, after ***Leonhart***, this Court consistently held that "such notice is only required where guilty pleas are involved." ***Commonwealth v. Crum***, 551 A.2d 584, 589 (Pa. Super. 1988), *appeal denied*, 562 A.2d 318 (Pa. 1989).[10]

In a similar situation, our Supreme Court has held that "[o]nce a trial court has determined that the Commonwealth has established the requirements of a legislatively mandated sentence, the trial court has no discretion to deviate its sentence from that which is defined by statute." ***Commonwealth v. Vasquez***, 744 A.2d 1280, 1282 (Pa. 2000) (citations

---

[10] Thus, while ***Leonhart*** has not been overruled, the range of its impact has been substantially circumscribed. ***See***, ***e.g.***, ***Commonwealth v. Schmuck***, 561 A.2d 1263 (Pa. Super. 1989):

> I agree with the majority that [ ] ***Leonhart,*** [***supra***] is inapposite. ***Leonhart*** stands for the rather limited proposition that, just as a person pleading guilty or *nolo contendere* must be informed of the **maximum penalties** which may result from a plea, a person entering a guilty or *nolo contendere* plea must also be informed of any **mandatory minimum penalties** which may apply. The reasoning in ***Leonhart*** does not extend beyond the narrow context of **uninformed** pleas.

Id. at 1266 (Kelly, J., concurring) (emphases in original). As a result, ***Leonhart*** is frequently distinguished. ***See, e.g.***, ***Commonwealth v. Zorn***, 580 A.2d 8, 9 (Pa. Super. 1990).

omitted); ***see also Schmuck***, ***supra*** at 1265-66 (holding counsel not ineffective for failing to raise, in post-trial motions and in first appeal, lack of notice by Commonwealth prior to trial of its intention to request imposition of minimum sentence set forth in 42 Pa.C.S.A. § 9718(a)).

Next, we note that Appellant has failed to develop an argument that counsel was ineffective. (***See*** Appellant's Brief, at 25-30). Specifically, he does not prove in what way he was prejudiced. Rather, Appellant merely invokes section 9718(c), concludes he was *ipso facto* prejudiced, and attempts to distinguish caselaw to the contrary as inapplicable. (***See id.***). This fails to prove ineffectiveness.

> [T]o prove trial counsel ineffective, the petitioner must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) the petitioner was prejudiced by counsel's act or omission. [***Commonwealth v. Pierce***, 515 Pa. 153, 527 A.2d 973, 975 (1987)]. A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs.
>
> * * *
>
> To establish the prejudice prong, the petitioner must demonstrate that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness. [***Commonwealth v. Koehler***, 36 A.3d 121, 132 (Pa. 2012)].

Busanet, ***supra*** at 45-46.

Here, Appellant fails to prove any of the three ***Pierce*** prongs. Most notably, he asserts, but fails to prove, prejudice, merely claiming that "[h]ad the mandatory sentence provisions not been applied, it is **conceivable**, that

the sentencing court, in exercising its discretion, and in reviewing the sentencing guidelines, **could very well have** sentenced [Appellant] to a lesser term of incarceration for IDSI." (Appellant's Brief, at 29-30) (emphases added).

This is sheer unsupported speculation, which stands in stark contrast to the stated reasons the trial court gave in imposing sentence. After the judge noted that he had presided at the jury trial, considered the presentence investigation report, the evidence from the recent Megan's Law proceeding, and Appellant's prior record, he stated, in pertinent part, that:

> [T]he one thing that strikes me right off the bat is you were on probation for statutory sexual assault and have committed a statutory sexual assault. . . . I believe that the fact that you've now committed two statutory sexual assault type offenses and offenses where age is involved in the children[,] you being older than them and required by law not to have sexual contact with them[,] you have done this[.] . . . I further think that on the maximum end of these sentences **you have to be given the maximum possible sentence**.

(N.T. Sentencing Hearing, 4/07/10, at 6-7) (emphasis added).

Accordingly, Appellant has failed to prove prejudice, and therefore, ineffectiveness. Appellant's argument that the cases limiting ***Leonhart*** were decided before section 9718 was amended does not obviate the requirement that he plead and prove the three ***Pierce*** prongs of ineffectiveness to obtain PCRA relief. (***See*** Appellant's Brief, at 26-27).

We understand Appellant's argument that the caselaw preceding the statutory amendment does not address the new notice requirement.

However, we conclude on review that the policy considerations contained in the previous caselaw continue to be viable. This Court has previously explained:

> It is quite clear, however, that the reasoning in ***Leonhart*** does not extend beyond the narrow context of uninformed pleas. In ***Commonwealth v. Crum,*** [***supra***], the Commonwealth argued that the trial court had erred in failing to impose the mandatory sentence set forth in § 9718 following appellee's conviction of rape. This Court declared that notice of the applicability of § 9718 is required only where guilty pleas are involved, and then, only prior to the acceptance of the guilty plea. ***Id.,*** [ ] at 589. In so holding, the court opined:
>
> > A knowing and voluntary guilty plea must provide the opportunity to a defendant to assess his chances of obtaining a reduced sentence as opposed to going to trial. A defendant may well take his chances at trial rather than entering a guilty plea if he is made aware that entering a guilty plea will require imposition of a five-year mandatory minimum sentence by the court. . . . [A] knowing and voluntary guilty plea must apprise the defendant of this fact [mandatory sentence] to permit him to make an informed decision about the plea. **Such a requirement is not relevant to trial as the offense, as detailed in the statute, prescribes a mandatory sentence [ ], and the appellant has made his choice to obtain any benefits which accrue to his defense and possible acquittal by going to trial.**
>
> ***Id.*** (emphasis added).

Commonwealth v. Boyles, 606 A.2d 1201, 1205 (Pa. Super. 1992).

Therefore, even in consideration of the amended statute, Appellant has failed to prove ineffectiveness of counsel at sentencing, and in particular, failed to prove any specific way he was prejudiced by lack of prior notice of

the Commonwealth's intent to request imposition of the statutorily mandated minimum sentence, after the jury had convicted him of IDSI.

Moreover, as an intermediate court of appellate review, we are "bound by existing precedent under the doctrine of *stare decisis"* and "continue to review the appeal before us in accordance with currently controlling precedent." ***Dixon v. GEICO***, 1 A.3d 921, 925-26 (Pa. Super. 2010) (citation omitted). "This Court continues to follow controlling precedent as long as the decision has not been overturned by our Supreme Court." ***Id.*** (citing ***Marks v. Nationwide Ins. Co.,*** 762 A.2d 1098, 1101 (Pa. Super. 2000).

Appellant has failed to prove he was prejudiced. Therefore, he has failed to overcome the presumption of effectiveness. Because we conclude that Appellant failed to prove counsel was ineffective at sentencing, we also conclude that Appellant is not entitled to a remedy under the PCRA. Appellant's third and fourth questions do not merit relief. The PCRA court properly denied the petition.

Order affirmed.

Shogan, J., concurs in the result.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: 5/29/2013