

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MICKEY CASTILLO,	:	
	:	
Appellant	:	No. 1970 MDA 2012

Appeal from the Order entered on October 26, 2012
in the Court of Common Pleas of Luzerne County,
Criminal Division, No. CP-40-CR-0000848-2009

BEFORE: PANELLA, MUNDY and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 12, 2013**

Mickey Castillo ("Castillo") appeals from the Order denying his Petition for relief filed under the Post Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S.A. §§ 9541-9546. Counsel for Castillo has filed a Petition to withdraw as counsel. We affirm and grant counsel's Petition to withdraw.

On April 14, 2010, Castillo entered a guilty plea, pursuant to a plea agreement, to possession with intent to deliver cocaine and conspiracy to commit possession with intent to deliver cocaine. The plea agreement provided for a four to eight-year "mandatory [prison] sentence pursuant to the weight mandatory." N.T., 4/14/10, at 3.

The trial court conducted a colloquy and informed Castillo that the court could reject the plea agreement. **Id.** at 5. After the colloquy, the trial court found that Castillo had entered the guilty plea knowingly and

voluntarily. **Id.** at 8. The trial court indicated that, before sentencing Castillo, the court wanted to obtain Castillo's prior record from Luzerne County Adult Parole and Probation "to determine exactly where this sentence falls." **Id.**

On July 8, 2010, the sentencing court stated that, although the Commonwealth had recommended a four to eight-year sentence pursuant to the plea agreement, it was "solely my discretion" as to what sentence to impose. N.T., 7/8/10, at 14. The standard range of the guidelines called for a sentence of 60 to 78 months on the criminal conspiracy charge. **Id.** at 11. The sentencing judge indicated that she was "a little concerned because [the plea recommendation] is ... a year short of what his standard range, based upon the history of selling drugs, calls for." **Id.** The sentencing court sentenced Castillo to a prison term of four to eight years and a consecutive probation term of two years. Castillo did not file a motion to modify sentence or a direct appeal of the judgment of sentence.

On July 14, 2011, Castillo filed a timely *pro se* PCRA Petition. The PCRA court granted Castillo's request to proceed *pro se* and appointed stand-by counsel. Subsequently, Castillo filed a *pro se* Motion requesting that his stand-by counsel, Jeffrey Yelen, Esquire ("Yelen"), be appointed as PCRA counsel. The PCRA court granted the Motion and appointed Yelen as counsel for Castillo. Yelen filed a "Comprehensive Brief" in support of Castillo's PCRA Petition. After a hearing, the PCRA court denied the PCRA

Petition. Castillo then filed a *pro se* Notice of appeal. The PCRA court appointed Matthew Kelly, Esquire (“Kelly”), to represent Castillo in this appeal. The PCRA court also ordered the filing of a Rule 1925(b) Concise Statement of matters complained of on appeal. Castillo timely complied with that Order.

On June 27, 2013, Kelly filed with this Court a Petition to withdraw as counsel and a “No-Merit **Turner/Finley**” brief. **See Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988).

We will first address Kelly’s Petition to withdraw.

Counsel petitioning to withdraw from PCRA representation must proceed ... under [**Turner, supra**, and **Finley, supra**, and] ... must review the case zealously. **Turner/Finley** counsel must then submit a “no-merit” letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel’s diligent review of the case, listing the issues which petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Counsel must also send to the petitioner: (1) a copy of the “no merit” letter/brief; (2) a copy of counsel’s petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.

[W]here counsel submits a petition and no-merit letter that ... satisfy the technical demands of **Turner/Finley**, the court—trial court or this Court—must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief.

Commonwealth v. Doty, 48 A.3d 451, 454 (Pa. Super. 2012).

In the instant case, Kelly has complied with the requirements of **Turner/Finley**. Accordingly, we must conduct our own review and determine if Castillo's claims lack merit. **Doty**, 48 A.3d at 454.

"When reviewing an order of a PCRA court, our standard of review is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error." **Commonwealth v. Hill**, 42 A.3d 1085, 1089 (Pa. Super. 2012).

Castillo first claims that he is eligible for a Recidivism Risk Reduction Incentive ("RRRI") and should have been sentenced accordingly. Here, the record shows that the trial court obtained a report of Castillo's prior record, and thereafter concluded that, pursuant to section 4503(3) of the RRRI statute, Castillo's "criminal history and instant crimes render him statutorily ineligible for RRRI participation ..."¹ Trial Court Opinion, 7/14/11, at 4. Based on the record before us, we conclude that Castillo's claim lacks merit.

Castillo next claims that the sentencing court abused its discretion by deviating from the guilty plea agreement by imposing a consecutive probation term of two years. This is not a cognizable claim under the PCRA. **See Commonwealth v. Wrecks**, 934 A.2d 1287, 1289 (Pa. Super. 2007)

¹ Section 4503(3) provides that an "eligible offender" for RRRI must not have been found guilty of, previously convicted of, or adjudicated delinquent for "an attempt or conspiracy to commit a personal injury crime as defined under section 103 of the ... Crime Victims Act," except for a third-degree misdemeanor simple assault. **See** 61 Pa.C.S.A. § 4503(3).

(holding that requests for relief with respect to the discretionary aspects of a sentence are not cognizable in PCRA proceedings).

Even if this issue was cognizable, we would conclude that it lacks merit. “Where the district attorney enters into and keeps a plea bargain to recommend a certain sentence to the court, and the defendant clearly understands this recommendation is not binding on the court, ... the plea is not rendered invalid merely because the court rejects the district attorney’s recommendation.” ***Commonwealth v. Dickerson***, 295 A.2d 282, 285 (Pa. 1972).

In the instant case, at the guilty plea hearing, the Commonwealth informed the court of the plea agreement, after which the court conducted a colloquy of Castillo, during which the following occurred:

THE COURT: Do you understand ... that the Court can reject your plea agreement?

[Castillo]: Yes.

THE COURT: And if I were to reject the plea agreement you would be allowed to withdraw your guilty plea and it would be as if it never occurred.

[Castillo]: Yes.

N.T., 4/14/10, at 5. After the colloquy, the trial court found that Castillo had entered the guilty plea knowingly and voluntarily. ***Id.*** at 8.

At the sentencing hearing, the sentencing court indicated that although the Commonwealth had recommended a four to eight-year prison sentence pursuant to the plea agreement, it was “solely [the court’s]

discretion” as to what sentence to impose. N.T., 7/8/10, at 14. The sentencing court stated that it had made this clear at the guilty plea proceeding. **Id.** After the sentence was imposed, Castillo did not file a Motion to modify sentence or a direct appeal of the judgment of sentence. Based on the record, which reflects that Castillo understood that the sentence recommendation of the Commonwealth was not binding, we conclude that Castillo’s claim lacks merit.

Next, Castillo claims that his trial counsel was ineffective for failing to challenge the legality of the search warrant.

In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, 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. Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. The petitioner bears the burden of proving all three prongs of the test.

Commonwealth v. Kersteter, 877 A.2d 466, 468-69 (Pa. Super. 2005) (citations omitted).

“[T]o be valid, a guilty plea must be knowingly, voluntarily and intelligently entered.” **Commonwealth v. Bedell**, 954 A.2d 1209, 1212-13 (Pa. Super. 2008).

In order to ensure a voluntary, knowing, and intelligent plea, trial courts are required to ask the following questions in the guilty plea colloquy:

- 1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contendere*?
- 2) Is there a factual basis for the plea?
- 3) Does the defendant understand that he or she has the right to a trial by jury?
- 4) Does the defendant understand that he or she is presumed innocent until found guilty?
- 5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?
- 6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

The guilty plea colloquy must affirmatively demonstrate that the defendant understood what the plea connoted and its consequences....

Id. at 1212-13 (citations omitted).

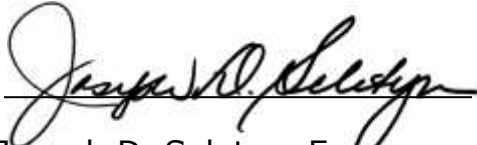
The record of the guilty plea hearing reveals that the colloquy addressed all of the above factors. Thus, we conclude, as did the trial court, that Castillo entered a knowing and voluntary guilty plea.

Further, the record indicates that pre-trial counsel for Castillo, Mark W. Bufalino, Esquire ("Bufalino"), challenged the legality of the search warrant in the Motion to suppress physical evidence filed on Castillo's behalf. **See** Omnibus Pretrial Motion, 5/18/09, at par. 27. However, prior to a decision on that Motion, Castillo entered his voluntary guilty plea. At the PCRA

hearing, Bufalino testified that he had explained to Castillo that, if Castillo proceeded to a hearing on his Omnibus Pre-Trial Motion (which included the Motion to suppress), there was a possibility that he would lose any possible plea deal with the Commonwealth. N.T., 8/26/12, at 52. Bufalino also testified that he did not recall telling Castillo that the search warrant was valid. **Id.** at 53. Accordingly, Castillo's claim that his counsel was ineffective for failing to challenge the legality of the search warrant lacks merit, as Castillo chose to enter a voluntary and knowing guilty plea. **See Commonwealth v. Johnson**, 966 A.2d 523, 539 (Pa. 2009) (holding that the credibility determinations of the PCRA court should be afforded great deference by the reviewing court).

Order affirmed; Petition to withdraw as counsel granted.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/12/2013