NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ANTHONY KNOX Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1069 WDA 2013

Appeal from the PCRA Order of June 19, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No.: CP-02-CR-0004221-2010

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED APRIL 25, 2014**

Anthony Knox ("Knox") appeals from the June 19, 2013 order dismissing his petition for relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541, *et seq*. We affirm.

The PCRA court has summarized the factual and procedural history of this case as follows:

> [O]n March 7, 2010, [Knox] sent his [daughter and son (collectively, "the children")] into the basement to play and a few minutes later, the children heard a "blood-curdling scream."[1] The children ran upstairs and saw [Knox] stabbing their mother repeatedly. When [Knox] saw the children, he chased them back into the basement, grabbed [his daughter], choked her and, when she fell, hit her twice in the back of the head with a hammer until she passed out. When she regained

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1 The quotations within the block quote refer to the trial court's April 18, 2011 opinion issued in response to Knox's direct appeal.

> consciousness, [Knox] again chased her outside with a knife in his hand. After [his daughter] left the house, [Knox] tried to strangle [his son, but eventually stopped after his son pleaded with him]. When police and emergency personnel arrived, [the mother[2]] was transported to the hospital, where she was pronounced dead. She had suffered 29 separate stab wounds, including incised wounds to the face and neck, 9 stab wounds to her chest, [and] 11 stab wounds to her back and left flank.
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> [Knox] was charged with [Criminal Homicide], Criminal Attempt[,] and Aggravated Assault – Serious Bodily Injury.[3] [Knox] appeared before [the trial court] on January 24, 2011 and [pleaded] guilty to Third[-]Degree Murder[4] and all remaining charges. [Knox] was immediately sentenced to a term of imprisonment of twenty (20) to forty (40) years at the Criminal Homicide charge, plus additional consecutive sentences of seven (7) to twenty (20) years at each of the Criminal Attempt charges, for an aggregate term of imprisonment of 34 to 80 years. Timely Post-Sentence Motions were filed and were denied by [the trial court] on January 31, 2011. [Knox's] judgment of sentence was affirmed by the Superior Court on November 9, 2011[,[5]] and [Knox's] subsequent Petition for Allowance of Appeal was denied by our Supreme Court on April 10, 2012.[6]
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> No further action was taken until December 3, 2012, when [Knox] filed a [timely] *pro se* [PCRA petition]. Counsel was appointed and an Amended Petition followed. After reviewing the record, [the PCRA court] dismissed the Amended Petition without a hearing on June 19, 2013. This appeal followed.

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2 The mother's name was Mara Knox.

3 18 Pa.C.S. §§ 2501(a), 901(a), and 2702(a)(1).

4 18 Pa.C.S. § 2502(c).

5 ***Commonwealth v. Knox***, 38 A.3d 916 (Pa. Super. 2011) (table). Although Knox filed two separate direct appeals at 421 WDA 2011 and 623 WDA 2011, this Court consolidated the appeals, by order, on April 25, 2011.

6 ***Commonwealth v. Knox***, 42 A.3d 291 (Pa. 2012) (table).

PCRA Court Opinion ("P.C.O."), 7/10/2013, at 1-2 (footnotes omitted). On June 26, 2013, Knox filed a notice of appeal. That same day, the PCRA court ordered Knox to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On July 3, 2013, Knox timely complied. On July 10, 2013, the PCRA court issued a Rule 1925(a) opinion.

Knox raises the following issues for our consideration:

> 1. Did the trial court err in denying [Knox's] PCRA petition since plea/post[-sentence] motion counsel was ineffective for failing to raise sentencing claims that the sentence of 34-80 years was excessive, that the trial court failed to consider the factors at 42 Pa.C.S. § 9721(b) and that the consecutive sentences created an excessive sentence, causing all three claims to be waived in [Knox's direct appeal]?
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> 2. Did the trial court err in denying [Knox's PCRA petition] since [plea counsel] was ineffective for advising [Knox] to reject a 20-40 year aggregate sentence (for all counts) plea offer for [third degree murder], and instead advis[ed Knox] to plead generally to [third degree murder, two counts of attempted homicide, and two counts of aggravated assault,] since Knox "would get less but no more than 20-40 years for all counts" since [Knox] had no prior record. Hence, [Knox's] plea was involuntary since its acceptance was premised on the improper advice of plea counsel?

Brief for Knox at 3 (capitalization modified). We will address each claim in turn.

Our standard of review in the PCRA context is well-established:

> Our standard of review of the denial of a PCRA petition is limited to examining whether the court's determination is supported by the evidence of record and free of legal error. This Court grants

> great deference to the findings of the PCRA court if the record contains any support for those findings. Further, the PCRA court's credibility determinations are binding on this Court, where there is record support for those determinations.

Commonwealth v. Anderson, 995 A.2d 1184, 1189 (Pa. Super. 2010). Both of Knox's claims allege ineffective assistance of counsel ("IAC"). The attendant legal standards, also, are well-defined:

> In Pennsylvania, counsel is presumed effective, and a defendant bears the burden of proving otherwise. In order to be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel's action or inaction. When determining whether counsel's actions or omissions were reasonable, we do not question whether there were other more logical course of actions which counsel could have pursued: rather, we must examine whether counsel's decisions had *any* reasonable basis. Further, to establish prejudice, a petitioner must demonstrate that but for the act or omission in question, the outcome of the proceedings would have been different. Where it is clear that a petitioner has failed to meet any of the three, distinct prongs . . ., the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met.

Commonwealth v. Steele, 961 A.2d 786, 796-97 (Pa. 2008) (citations and internal quotation marks omitted; emphasis in original); ***see Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987). "[T]he ***Pierce*** test requires the PCRA petitioner to set forth the three[-]prong standard of ineffectiveness as it relates to the performance of counsel." ***Commonwealth v. Jones***, 876 A.2d 380, 386 (Pa. 2005) (citing ***Pierce***,

527 A.2d at 975). Furthermore, "a petitioner must . . . individually discuss substantively each prong of the ***Pierce*** test." ***Steele***, 961 A.2d at 797.

In his first issue, Knox asserts that his trial counsel was ineffective for failing to file post-sentence motions challenging his sentence under three different theories: (1) that Knox's sentence was "manifestly excessive;" (2) "that the trial court erred in failing to consider the factors at 42 Pa.C.S. § 9721(b);" and (3) "that the imposition of consecutive sentences . . . created a manifestly excessive sentence." Brief for Knox at 13. Although Knox's direct appellate counsel raised these issues in his subsequent appeal, this Court ultimately found that Knox had waived the issues for failure to raise them in post-sentence motions. ***See*** Brief for Knox at 13; ***Commonwealth v. Knox***, 421 WDA 2011, slip op. at 2-3 (Pa. Super. Nov. 9, 2011). Knox essentially is arguing that trial counsel was ineffective for failing to preserve various challenges to the discretionary aspects of his sentence.[7] Knox "requests that the [Superior Court] reinstate his post sentencing rights *nunc pro tunc* so that he can properly challenge the discretionary aspects of his sentence." ***Id.*** at 14. We decline to do so. Even assuming, *arguendo*, that Knox has established the arguable merit of

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[7] Post-sentence counsel did file a "Motion to Reconsider Sentence" on January 28, 2011. That motion argued that Knox "acknowledged his guilt and show[ed] deep remorse for his actions[,]" and requested that the sentencing court "reconsider his sentence and impose a sentence of incarceration concurrent at all counts." Knox's Motion to Reconsider Sentence, 1/28/2011, at 2 (unpaginated).

his first claim, he has failed to demonstrate that counsel's failure to raise certain issues in post-sentencing motions was without a reasonable basis. Furthermore, Knox's argument addressing prejudice is flawed.[8]

With regard to the reasonableness of counsel's actions, our standard of review is well-established:

> Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had

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[8] With regard to prejudice, Knox argues that "counsel's failure to . . . perfect a requested appeal is the functional equivalent of having no counsel at all," and that "the denial of counsel at this stage is so fundamental that it constitutes prejudice *per se*." Brief for Knox at 15. Knox cites to ***Commonwealth v. Lantzy***, 736 A.2d 564, 571-72 (Pa. 1999), in support of his allegation. Knox's argument is inapposite. The Pennsylvania Supreme Court has distinguished ***Lantzy*** in the context of failing to preserve issues:

> It is well-established that the decision whether to presume prejudice or to require an appellant to demonstrate actual prejudice "turns on the magnitude of the deprivation of the right to effective assistance of counsel." ***Roe v. Flores-Ortega***, 528 U.S. 470, 482 (2000). As we observed in ***Lantzy***, the failure to perfect a requested direct appeal is the functional equivalent of having no representation at all. The difference in degree between failures that completely foreclose appellate review, and those which may result in narrowing its ambit, justifies application of the presumption in the more extreme instance.

Commonwealth v. Halley, 870 A.2d 795, 801 (Pa. 2005). The holding in ***Halley*** cited our holding in ***Commonwealth v. Hernandez***, 755 A.2d 1 (Pa. Super. 2000). In ***Hernandez***, this Court announced a similar distinction, reasoning that a failure to preserve certain issues for direct appeal did not carry the same prejudicial presumption as a failure of counsel that results in a total denial of a direct appeal. 755 A.2d at 9 n.4. We reasoned that "counsel's conduct may, in fact, have been effective, despite not raising every issue which the defendant believes is meritorious." ***Id.*** Therefore, Knox's argument that we may presume prejudice is incorrect.

> some reasonable basis designed to effectuate his client's interests. ***Commonwealth v. Ali***, 10 A.3d 282, 291 (Pa. 2010). Where matters of strategy and tactics are concerned, "[a] finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." ***Commonwealth v. Colavita***, 993 A.2d 874, 887 (Pa. 2010) (internal quotation omitted).

Commonwealth v. Spotz, 84 A.3d 294, 311-12 (Pa. 2014) (internal citations modified). Instantly, Knox has not organized his discussion with reference to the three IAC prongs discussed above. Knox explicitly addresses only the issue of prejudice in his argument section. Even were we to construe Knox's argument as generally addressing the arguable merit of his first claim, there is only one sentence discussing the reasonableness of trial counsel's actions: "[PCRA counsel] communicated via email with [post-sentence counsel] on 4/12/2013, and [post-sentence counsel] stated that when she filed the motion to modify sentence she only included claims that she believed were appropriate." Brief for Knox at 16. Beyond noting that post-sentence counsel considered the scope of her post-sentence motion to be reasonable, Knox has offered no argument seeking to rebut counsel's assertion, nor any other discussion addressing the reasonableness of counsel's decision. Although counsel's January 28, 2011 motion to modify sentence ultimately was denied, Knox has not demonstrated why a petition including the issues listed above carried a substantially greater chance of success. ***See Spotz***, *supra*. "Failure to address any prong of the [IAC] test will defeat an effectiveness claim." ***Commonwealth v. Williams***, 899 A.2d

1060, 1063 (Pa. 2006). Because Knox has failed to demonstrate that there was no reasonable basis for counsel's actions, we conclude that his first claim is without merit. ***See Steele***, *supra*. Accordingly, we do not address the other two IAC prongs. ***Id.***

In his second issue, Knox argues that his guilty plea was entered involuntarily.[9] Specifically, Knox argues that he was induced to plead guilty by erroneous legal advice from trial counsel:

> [Knox] avers that he was told by [trial counsel] that there was a 20-40 aggregate sentence plea offer from the Commonwealth if [Knox pleaded] to Murder 3, two counts of attempted homicide and the remaining counts. [Knox] also avers that [trial counsel] advised him to accept part of the offer and reject the 20-40 year plea agreement and to plead generally to Murder 3 and the remaining counts since [Knox] had no prior record and would get a lower aggregate sentence than 20-40 years and at worst would get 20-40 years. [Knox's] general plea was premised upon the advice of counsel. [Knox] avers that his plea was involuntary since [trial] counsel gave improper advice in counselling him to reject the plea offer of 20-40 years' imprisonment for all counts, and he therefore respectfully request[ed] to withdraw his plea[.]

Brief for Knox at 19. Our standard of review is as follows:

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[9] Knox submitted a *pro se* "Motion to Withdraw My Plea" on February 1, 2011. Therein, Knox baldly requested that the trial court permit him to withdraw his January 24, 2011 guilty pleas. Because Knox was represented by counsel at the time he submitted his *pro se* petition, the trial court was precluded from taking action on the motion. ***See*** 210 Pa. Code § 3304 ("Where a litigant is represented by an attorney before the Court and the litigant submits for filing a petition, motion, brief or any other type of pleading in the manner, it shall not be docketed but forwarded to counsel of record."). The certified record does not confirm that the trial court forwarded Knox's *pro se* motion to his counsel. Knox does not raise an issue related to his *pro se* motion. Consequently, we will not address it further.

> "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." ***Commonwealth v. Moser***, 921 A.2d 526, 531 (Pa. Super. 2007). "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." ***Id.*** Moreover, "[t]he law does not require that [the defendant] be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [his] decision to plead guilty be knowingly, voluntarily and intelligently made." ***Moser***, 921 A.2d at 528-29 (quoting ***Commonwealth v. Yager***, 685 A.2d 1000, 1004 (Pa. Super. 1996) (*en banc*)).

Commonwealth v. Anderson, 995 A.2d 1184, 1192 (Pa. Super. 2010) (internal citations modified or omitted, brackets in original). "[D]isputes over any particular term of a plea agreement must be resolved by objective standards. A determination of exactly what promises constitute the plea bargain must be based upon the totality of the surrounding circumstances and involves a case-by-case adjudication." ***Id.*** at 1192 (quoting ***Commonwealth v. Kroh***, 654 A.2d 1168, 1171 n.1 (Pa. Super. 1995)).

Knox avers that he was offered a plea agreement by the Commonwealth, which would have set his aggregate sentence at twenty to forty years' incarceration at all counts in this case. Knox further claims that he rejected this offer upon the advice of trial counsel. However, the only evidence adduced by Knox respecting this claim are uncorroborated email communications that do not support Knox's version of events. In his brief, Knox reproduces alleged email communications with trial counsel and the assistant district attorney who prosecuted Knox. Specifically, trial counsel

denies that the Commonwealth ever offered Knox a plea agreement respecting the length of his sentence:

> There was never an agreement as to sentence. I discussed potential sentences with [the assistant district attorney], but she did not offer a specific sentence. [Knox] was made aware that the only agreement was to the charge of murder in the third degree; the remaining counts on the information would remain, [Knox] would waive [a] pre-sentence [investigation], and be sentenced by the court. . . . Since there was not an offer as to sentence, I could not advise him to reject it. . . . I did advise [Knox] that the judge could, and likely would, sentence consecutively.

Brief for Knox at 19. The reproduced correspondence from the assistant district attorney also indicates that the Commonwealth never offered Knox a plea agreement regarding sentence: "There was no term of years offered. It was a general plea to Third[-Degree Murder] and attendant charges." ***Id.*** at 20. The transcript of the sentencing hearing also is devoid of any indication that Knox was ever offered a term of years as part of his plea agreement. Rather, Knox pleaded guilty to all charges "with the sentence to be determined by the [c]ourt." Notes of Testimony ("N.T."), 1/24/2011, at 3. Furthermore, the Commonwealth asserts that Knox's plea agreement never contemplated the length of Knox's sentence, but was confined to allowing Knox to plead to third-degree murder in exchange for the Commonwealth not pursuing a harsher charge: "[T]he Commonwealth was not willing to offer a specific sentence in exchange for a guilty plea, despite its desire to spare [Knox's] children from having to testify, and had offered a plea to

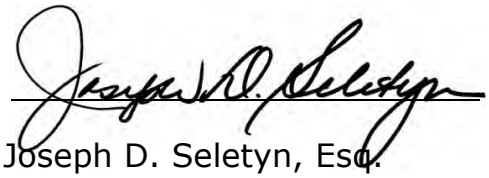
third[-]degree murder in what it believed was a first[-]degree case for that reason . . . ." Commonwealth's Brief at 21.

Based upon the foregoing discussion, we cannot conclude that Knox was offered a term of years as part of an initial plea offer. Based upon the totality of the circumstances, ***see Anderson***, *supra*, Knox simply has failed to establish that the initial offer of a twenty to forty-year aggregate sentence ever was made. The reproduced correspondence does not corroborate Knox's version of events, nor does anything in the certified record.

While we recognize that "a plea's validity may be compromised when counsel issues erroneous advice on how the law will affect the duration of a client's sentence," ***Commonwealth v. Hickman***, 799 A.2d 136, 142 (Pa. Super. 2002) (citing ***Hill v. Lockhart***, 474 U.S. 52, 56 (1985)), there is no evidence of such erroneous advice in this case. Knox's only theory of IAC regarding his guilty plea is that counsel erred by advising him to reject a generous initial plea offer from the Commonwealth. In the absence of **any** evidence establishing that the initial plea offer actually was made, we cannot conclude that counsel provided erroneous evidence regarding an illusory issue. Knox has not demonstrated that counsel's advice was in any way erroneous and, therefore, has failed to establish the arguable merit of his second IAC claim. ***See Steele***, *supra*. Thus, Knox's second claim fails.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

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