

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA  
Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

JAMES RUSSELL MCDONALD, JR.

Appellant

No. 1374 WDA 2013

Appeal from the Judgment of Sentence of November 14, 2012

In the Court of Common Pleas of Allegheny County  
Criminal Division at No.: CP-02-CR-0000149-2012

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

MEMORANDUM BY WECHT, J.: FILED: April 24, 2014

James McDonald appeals his November 14, 2012 judgment of sentence. We affirm.

On August 27, 2012, McDonald pleaded guilty to aggravated assault—serious bodily injury, two counts of simple assault, and recklessly endangering another person.<sup>1</sup> At the plea hearing, the Commonwealth's attorney summarized the facts underlying the charges to which McDonald pleaded guilty as follows:

On or about October 9<sup>th</sup> of 2001[, Officer Volker of the North Versailles Police Department] was dispatched to Domlysella's [] Sports Bar for a panic alarm. Upon arrival[,] the officer observed the victim Daniel [Glunt] had been physically assaulted by Clay McDonald as well as his brother, [McDonald.]

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<sup>1</sup> 18 Pa.C.S. §§ 2702(a)(1), 2701(a)(1), and 2705, respectively. McDonald also pleaded guilty to three summary offenses.

[McDonald] was highly intoxicated at the time of the encounter. The officer later discovered that there was another victim involved by the name of [Raymond Rennie, who] was also punched and kicked by both the co-defendant and [McDonald] in this case.

Injuries were observed on Daniel [Glunt] that he had blood from his head, as well as some injuries to his upper torso and that he was laying the middle of the street when the officers arrived. Mr. Rennie also was bleeding and had some injuries as a result of this incident.

This is on video surveillance . . . that documents the entire fight.

Notes of Testimony ("N.T."), 8/27/2012, at 21-22. After an extensive colloquy, the trial court determined that McDonald's plea was knowing, intelligent, and voluntary, and accepted the plea. ***Id.*** at 23. McDonald was placed on house arrest pending the preparation of a pre-sentence investigation report; sentencing was deferred.

On November 14, 2012, McDonald appeared before the trial court for sentencing. The trial court sentenced McDonald to sixty to one hundred and twenty months' incarceration on the aggravated assault count, which related to McDonald's assault on Mr. Glunt, and six to twelve months' incarceration on the simple assault count relating to the assault on Mr. Rennie. The trial court ordered the sentences to run consecutively to each other. N.T., 11/14/2012, at 48-49. No further penalty was imposed on the remaining counts. ***Id.***

On November 20, 2012, McDonald filed a motion to withdraw his guilty plea. On November 27, 2012, the trial court denied the motion. Initially, McDonald did not file a direct appeal. However, on March 15, 2013,

McDonald filed a "Request for Sentencing Order and Docket Sheet," and on March 25, 2013, McDonald filed a "Motion for Appointment of Counsel." The trial court construed these motions to be motions for post-conviction relief, and appointed counsel to represent McDonald. On July 9, 2013, appointed counsel filed an a petition for relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. In the PCRA petition, McDonald averred that trial counsel was ineffective for, *inter alia*, failing to file a direct appeal. On August 7, 2013, the trial court reinstated McDonald's rights to file post-sentence motions and a direct appeal from the judgment of sentence.

On August 14, 2013, McDonald filed post-sentence motions. Therein, McDonald argued that his guilty plea was improperly induced by trial counsel and, therefore, was involuntary. McDonald also alleged that trial counsel was ineffective by inducing McDonald to plead guilty with incorrect information and advice. **See** Post-Sentence Motions, 8/14/2013, at 3-5. On August 20, 2013, the trial court denied McDonald's motions.

On August 26, 2013, McDonald filed a notice of appeal. In response, the trial court directed McDonald to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). McDonald timely complied. On September 20, 2013, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

McDonald raises the following issue for our consideration:

Did the trial court err in denying [McDonald's] post[-]sentencing motions since [McDonald's] guilty plea was involuntary since he was coerced by trial counsel into pleading guilty since after

having told trial counsel [] that he wanted to proceed with a jury trial she told him that if he went to trial and was convicted of aggravated assault (a felony [one], with a maximum sentence of [twenty] years), he could be sentenced to [twenty] years['] imprisonment or *more* at that count alone, and the more insistent [McDonald] was on a jury trial the more trial counsel "insisted" on a plea, causing [McDonald] to be "mentally stressed" by the time he pled. Trial counsel also promised [McDonald] that he would receive time-credit for house arrest served prior to sentencing (he was not entitled to or granted that credit), which also prompted him to plead guilty. Trial counsel also promised [McDonald] that if he pled guilty he would "go to a program at the veteran's hospital, rather than jail" (that did and had not been likely to occur); moreover, trial counsel directed [McDonald] where and when to answer "yes" or "no" on the written guilty plea colloquy, using her answers rather than his own.

Brief for McDonald at 3-4 (emphasis in original).

Although intertwined, McDonald presents two distinct arguments in his brief. First, McDonald argues that trial counsel was ineffective in her representation of McDonald leading up to, and during, the entry of McDonald's guilty plea. Second, McDonald argues that the trial court erred in denying his request to withdraw his guilty plea after sentencing because his plea was not knowing, intelligent, and voluntary due to trial counsel's improper inducement of that plea. **See** Brief for McDonald at 11-13.

We begin with McDonald's claim that trial counsel was ineffective, and conclude that this issue is not cognizable in this direct appeal. Recently, in ***Commonwealth v. Holmes***, 79 A.3d 562 (Pa. 2013), our Supreme Court considered "the reviewability of claims of ineffective assistance ("IAC") of counsel on post-verdict motions and direct appeal." ***Id.*** at 563. Following a

comprehensive review of the language codified in the PCRA and decisions from our courts, the Supreme Court reaffirmed the principle that IAC claims must be deferred until collateral review, and, thus, are not reviewable on direct appeal. ***Id.*** The Court crafted two exceptions to this general proscription. First, the Court held that a trial court may, in its discretion, entertain IAC claims where extraordinary circumstances exist such that review of the claim would best serve the interests of justice. ***Id.*** at 563, 577. Second, the Court “repose[d] discretion in trial courts” to review IAC claims during post-sentence motions “only if (1) there is good cause shown, and (2) the unitary review so indulged is preceded by the defendant’s knowing and express waiver of his entitlement to seek PCRA review from his conviction and sentence, including an express recognition that the waiver subjects further collateral review to the time and serial restrictions of the PCRA.” ***Id.*** at 563-64, 577-80.

Instantly, extraordinary circumstances do not exist in this case such that McDonald’s IAC claim warrants review on direct appeal. Moreover, there is no indication in the record that McDonald expressly waived his right to PCRA review. ***See also Commonwealth v. Barnett***, 25 A.3d 371 (Pa. Super. 2011) (*en banc*) (holding that this Court cannot review ineffective assistance of counsel claims on direct appeal absent a defendant’s waiver of PCRA review). Consequently, in light of ***Holmes***, McDonald’s ineffective assistance of counsel claim is not cognizable in this direct appeal.

We now turn to McDonald's claim that the trial court erred in denying his request to withdraw his guilty plea. A criminal defendant "has no absolute right to withdraw a guilty plea; rather, the decision to grant such a motion lies within the sound discretion of the trial court." ***Commonwealth v. Muhammad***, 794 A.2d 378, 382 (Pa. Super. 2002) (citation omitted). A trial court should only grant a motion to withdraw a guilty plea after sentencing upon a defendant's demonstration that "prejudice on the order of a manifest injustice" would result if the motion is not granted. ***Id.*** (citing ***Commonwealth v. Carpenter***, 725 A.2d 154, 164 (Pa. 1999)). "A plea rises to the level of manifest injustice when it was entered into involuntarily, unknowingly, or unintelligently." ***Commonwealth v. Stork***, 737 A.2d 789, 790 (Pa. Super. 1999) (citation omitted). To make this assessment, we must evaluate the totality of the circumstances. ***Commonwealth v. Broaden***, 980 A.2d 124, 129 (Pa. Super. 2009).

We have reviewed the guilty plea hearing transcript, the sentencing transcript, the parties' arguments presented to this Court, and the trial court's opinion. Having done so, we agree with the trial court that the totality of the circumstances clearly indicate that McDonald's plea was knowing, intelligent, and voluntary, and not the product of improper inducement by trial counsel. The trial court set forth its reasoning, which we adopt as our own, as follows:

[McDonald] alleges that his plea was not voluntary, knowing and intelligent because he was coerced and misinformed by counsel. [McDonald's] allegations are not supported by the record.

[McDonald] stated during the verbal plea colloquy that he did not suffer any mental illness or infirmity which would in any way limit his ability to participate in the plea proceeding. [McDonald] indicated that he does have mental health issues, but stated that he is taking his mental health medications as prescribed by his physician. He stated that he was able to understand everything that was happening at the plea hearing and was competent and able to make decisions in his own best interest. He further indicated that he was able to communicate with counsel regarding his rights and counsel stated that she believed he understood everything she explained to him. Counsel indicated that she did not have any concerns regarding his competence to proceed with the plea.

Furthermore, [McDonald] completed an eleven page written colloquy, which he indicated at the time of the plea hearing that he read, understood and answered honestly. [McDonald] indicated to the Court during the verbal plea colloquy that no one forced, threatened or coerced him in any way with regard to his decision to waive his right to a jury trial and plead guilty instead. He also stated that nothing was promised him in exchange for his guilty plea.

As to the specific allegation that trial counsel misinformed him as to the potential sentence, the record belies this claim. [The trial court] listed the charges to which [McDonald] pled and explained to him the maximum sentences the court could impose. At the conclusion thereof, [McDonald] again indicated his understanding. At no point did [McDonald] indicate that he did not understand or that the information placed on the record contradicted prior advice from counsel.

At the conclusion of the recitation of the facts of the case, [McDonald] and his counsel were afforded the opportunity to make additions or corrections to the record. [McDonald] stated that he was pleading guilty to the charges as read and was pleading guilty because he was, in fact, guilty. Nothing in [McDonald] behavior or demeanor supports his contention that his plea agreement was not [knowing, intelligent, or voluntary.]

As indicated above, [McDonald] fully participated in a verbal plea colloquy, completed a written colloquy and was represented by counsel throughout the plea proceedings. [McDonald] stated that he was pleased with the level of representation provided. A defendant is bound by the statements he makes during his

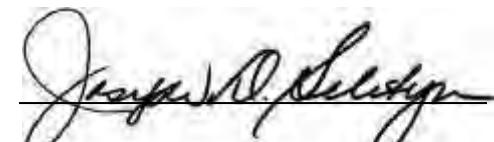
plea colloquy, and may not assert grounds for withdrawing the plea that contradict statements made when he pled. **Commonwealth v. Lewis**, 708 A.2d 497[, 502] (Pa. Super. 1998) [citation omitted]. The record support a finding that the plea was voluntary, knowingly and intelligently entered into by [McDonald].

Trial Court Opinion, 9/20/2013, at 4-5 (references to notes of testimony omitted).

Viewing the totality of these circumstances, we conclude that McDonald has not demonstrated that manifest injustice would result if he was not permitted to withdraw his plea. Thus, the trial court did not abuse its discretion in denying McDonald's post-sentence motion to withdraw his guilty plea.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/24/2014