NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HARRIS NEWMAN,	:	
	:	
Appellant	:	No. 1535 EDA 2013

Appeal from the PCRA Order Entered April 24, 2013,
In the Court of Common Pleas of Bucks County,
Criminal Division, at No. CP-09-CR-0001509-2011.

BEFORE: SHOGAN, JENKINS and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 02, 2014**

Appellant, Harris Newman, appeals from the order denying his petition for collateral relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541–9546. We affirm.

The PCRA Court summarized the procedural history of this case as follows:

> On May 11, 2011, [Appellant] pled *nolo contendere* to three counts of conspiracy to provide a controlled substance to a drug dependent person, six felony counts of improper administration of a controlled substance by a practitioner, and six felony counts of delivery or possession with intent to deliver a controlled substance.[1] On June 17, 2011, the [c]ourt

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*Retired Senior Judge assigned to the Superior Court.

[1] On May 9, and 10, 2011, the Commonwealth provided notice of its intent to seek mandatory minimum sentences pursuant to 18 Pa.C.S.A. § 7508 for Counts 10–15. Notice of Mandatory Minimum Sentence, 5/9/11 and 5/10/11.

> sentenced [Appellant] to concurrent sentences of 7 ½ years to 15 years in prison on counts 10, [and] 12–15, a concurrent term of not less than 3 years nor more than 10 years on count 11, and a consecutive 10 years of probation on Counts 1–6.[2] No motion for reconsideration of sentence or appeal was subsequently filed. [Appellant] filed a timely *pro se* PCRA Petition on January 5, 2012.

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[2] The record certified to us on appeal contains an order dated June 3, 2013, and entered on June 4, 2013, which was subsequent to the instant notice of appeal and which provides as follows:

> AND NOW, this 3rd day of June, 2013, pursuant to agreement of counsel and the court's power to correct patent and obvious errors in sentencing, it is hereby ORDERED and DECREED that Defendant's sentence shall be corrected as follows:
>
> > (1) Defendant's sentence of a ten year period of probation under each of Counts 2, 3, 5 and 6 shall be vacated;
> >
> > (2) Defendant's sentence of a ten year period of probation under each of Counts 1 and 4 shall remain effective, and shall remain concurrent to one another; and
> >
> > (3) No further penalty shall be imposed on Counts 2, 3, 5 and 6.

Order, 6/4/13, at 1. At the February 19, 2013 PCRA hearing, the Commonwealth acquiesced in Appellant's assertion of illegal sentences relating to the concurrent ten-year probationary periods imposed for counts two, three, five, and six. N.T., 2/19/13, at 5–6. At that time, the PCRA court advised that it intended to amend the sentence to correct the error at an unspecified later date. ***Id***. at 9.

In its Rule 1925(a) opinion, the PCRA court noted that in light of its "inherent power to correct patent errors beyond the thirty-day statutory limit imposed by 42 Pa.C.S.A. § 5505," it "corrected [Appellant's] sentence" by its order dated June 3, 2013. No issue has been raised related to this sentence correction.

> [Appellant] was appointed counsel. Private counsel was later retained and filed an Amended PCRA Petition on November 13, 2012.[[3]] The Commonwealth filed an Answer to the Amended PCRA Petition on December 4, 2012. A hearing was held on Petitioner's PCRA Claims on February 19, 2013.

PCRA Court Opinion, 8/13/13, at 1.

We glean the underlying facts of the crimes from the plea transcript. At the May 11, 2011 plea colloquy, the Commonwealth asserted the following factual claims as the basis of the *nolo contendere* plea:

> (1) Appellant wrote prescriptions to "C-1," and "C-2," two individuals who participated in a smuggling ring involving buprenorphine, which is generic Suboxone, operating in Bucks County, Pennsylvania, and Stacey Coffey, a patient of Appellant, in exchange for sexual favors;
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> (2) Stacey Coffey, Appellant's patient, died of an overdose on April 17, 2010;
>
> (3) Five days before Stacey Coffey's death, her sister, Hailey Coffey, begged Appellant not to write Stacey any more prescriptions because Stacey previously had overdosed twice using prescription medications;
>
> (4) The day after Hailey warned Appellant, Appellant prescribed Stacey Percocet, Valium, Elavil, Zoloft, and Soma;
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> (5) On April 14 and 15, 2010, Stacey filled prescriptions for zolpidem, known as Ambien, and carisoprodol, generic Soma;
>
> (6) Police recovered two vials at the scene of Stacey's death, one for diazepam, known as Valium, and the other for Soma, which listed Appellant's name as the prescribing physician;

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[3] It appears the delay between the filing of the *pro se* PCRA petition in January 2012 and the counseled, amended petition in November 2012 was due to the appointment and subsequent withdrawal of at least three different counsel due to conflicts of interest and private counsel's ultimate entry of appearance on June 22, 2012.

> (7) Appellant admitted that he prescribed narcotics to persons in different people's names and wrote prescriptions to non-patients;
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> (8) C-2 told police that she became pregnant by Appellant, who gave her $40 for an abortion;
>
> (9) Roderick Muir, who received controlled substances from C-2, stabbed his six-year-old son while in a delusional state brought on by withdrawal from such medications; and
>
> (10) Appellant "wrote hundreds, if not thousands, of illegitimate prescriptions back to 2006."

N.T., 5/11/11, at 21–26.

The PCRA court denied Appellant's petition on April 24, 2013, and Appellant filed a notice of appeal on May 8, 2013. Both the PCRA court and Appellant complied with Pa.R.A.P. 1925.[4] Appellant raises the following issues on appeal:

> I. Were trial counsel ineffective—and did the PCRA Court err by failing to so hold—where counsel:
>
> > A. Failed to support [Appellant's] case for sentencing leniency, and especially for failing to oppose the Commonwealth's more extreme claims relating to conduct over and above the criminal acts actually charged?
> >
> > B. Failed to dispel, and actually created the incorrect impression that [Appellant] was unwilling to accept responsibility for his actions

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[4] The PCRA court ordered Appellant to file a concise statement pursuant to Pa.R.A.P. 1925(b) within twenty-one days of May 17, 2013. Appellant filed a *pro se* statement on May 28, 2013, and counsel, "pursuant to leave of court granted June 26, 2013," filed an amended statement of errors on July 12, 2013. Amended Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b), 7/12/13, at 1.

and had not experienced remorse for the effects of those actions upon his victims?

C. Ineffectively advised [Appellant] against filing a motion for reconsideration of sentence and appeal, and ineffectively failed to file same when request to do so by [Appellant]?

Appellant's Brief at 3. The first two issues include allegations that plea counsel was ineffective for advising Appellant to enter a *nolo contendere* plea rather than a guilty plea and for failing to present Appellant's own testimony at sentencing. We initially address the first two issues together.

Our standard of review of an order denying PCRA relief is whether the findings of the PCRA court are supported by the record and are free of legal error. ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011); ***Commonwealth v. Hernandez***, 79 A.3d 649, 651 (Pa. Super. 2013). It is the appellant's burden to prove, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated circumstances found in 42 Pa.C.S.A. § 9543(2). The PCRA court's credibility determinations, when supported by the record, are binding on this Court. ***Spotz***, 18 A.3d at 259.

Appellant asserts ineffective assistance of counsel pursuant to 42 Pa.C.S.A. § 9543(a)(2)(ii). Counsel is presumed effective, and Appellant bears the burden of proving counsel's ineffectiveness. ***Commonwealth v. Koehler***, 36 A.3d 121, at 132 (Pa. 2012). To rebut that presumption,

Appellant must demonstrate that counsel's performance was deficient and the deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687–691 (1984). Our Supreme Court has characterized the ***Strickland*** standard as tripartite. ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987). Thus, to prove ineffective assistance of counsel, Appellant must demonstrate that: (1) the underlying issue has arguable merit; (2) counsel's performance lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission. ***Koehler***, 36 A.3d at 132. Moreover, counsel cannot be deemed ineffective for failing to raise a meritless claim. ***Commonwealth v. Harris***, 852 A.2d 1168, 1173 (Pa. 2004).

"Where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." ***Koehler***, 36 A.3d at 132 (quoting ***Commonwealth v. Colavita***, 993 A.2d 874 (Pa. 2010)). "To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's error or omission, the result of the proceeding would have been different." ***Commonwealth v. Ly***, 980 A.2d 61, 73 (Pa. 2009). A court is not required to analyze the elements for a claim of ineffective counsel in any particular order; "if a claim fails under any necessary element of the ***Strickland*** test, the court may

proceed to that element first." ***Koehler***, 36 A.3d at 132. When there is an unjustified failure by counsel to file a requested direct appeal, the prejudice prong has been met. ***Commonwealth v. Lantzy***, 736 A.2d 564 (Pa. 1999). Finally, a claim of ineffectiveness for failing to file a post-sentence motion is separate and distinct from a claim that counsel was ineffective for failing to file a requested appeal. ***Commonwealth v. Liston***, 977 A.2d 1089 (Pa. 2009).

Allegations of ineffectiveness in connection with the entry of a guilty plea[5] will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea. ***Commonwealth v. Wah***, 42 A.3d 335, 338 (Pa. Super. 2012). "[T]he law does not require that [the appellant] 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." ***Commonwealth v. Anderson***, 995 A.2d 1184, 1192 (Pa. Super. 2010). Moreover, with regard to the prejudice prong of the ineffectiveness, where an appellant has entered a guilty plea, he must demonstrate "it is reasonably probable that, but for counsel's errors, he would not have pleaded guilty and would have gone to trial."

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[5] "In terms of its effect upon a case, a plea of *nolo contendere* is treated the same as a guilty plea." ***Commonwealth v. Kepner***, 34 A.3d 162, 166 n.2 (Pa. Super. 2011) (citing ***Commonwealth v. Lewis,*** 791 A.2d 1227, 1230 (Pa. Super. 2002)).

Commonwealth v. Timchak, 69 A.3d 765, 770 (Pa. Super. 2013) (citing ***Commonwealth v. Rathfon***, 899 A.2d 365, 370 (Pa. Super. 2006)).

Appellant seeks an order vacating his sentence and imposing a reduced sentence. Appellant's Brief at 26. Appellant argues that as a result of counsel's ineffectiveness in failing to request "sentencing leniency," the trial court entered a sentence "greater than the applicable mandatory minimums." ***Id.*** at 38. Appellant suggests counsel created the "impression" to the sentencing court that Appellant did not take responsibility for his actions by: (1) recommending a *nolo contendere* plea instead of a guilty plea, (2) failing to "make clear to the court" that Appellant admitted "the trading of controlled substances for sex," (3) dissuading Appellant from testifying on his own behalf, and (4) failing to assist Appellant in conveying his remorse. Appellant's Brief at 40–42.[6]

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[6] "Challenges to the discretionary aspects of sentencing are not cognizable under the PCRA. ***See*** 42 Pa.C.S.A. § 9543(a)(2)(vii); [***Commonwealth v.***] ***Evans***, [866 A.2d 442,] 445–445 [(Pa. Super. 2005)]." ***Commonwealth v. Fowler***, 930 A.2d 586, 593 (Pa. Super. 2007). ***Cf. Commonwealth v. Taylor***, 65 A.3d 462, 467 (Pa. Super. 2013) (bald discretionary sentencing challenges are not cognizable under PCRA) (citing ***Evans*** and ***Commonwealth v. Guthrie***, 749 A.2d 502 (Pa. Super. 2000)).

Moreover, as the Commonwealth points out, any direct challenges to the discretionary aspects of sentence were waived in this case because they were not raised and preserved in a post-sentence motion or on direct appeal. ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005) (issues challenging discretionary aspects of sentence must be raised in post-sentence motion or by presenting claim to trial court during the sentencing).

Our review of the record reveals that Appellant admitted that he understood he was facing imposition of mandatory minimum sentences. N.T., 2/19/13, at 42. He testified that he told plea counsel that he did not want to go to trial. Appellant stated, "I was guilty. I didn't want a trial." ***Id***. at 43. Appellant testified that in the five or six meetings with plea counsel prior to entry of the plea, plea counsel discussed the factors and evidence "that would be beneficial to [Appellant] to try to mitigate the sentence[.]" ***Id***. at 41, 43.

Plea counsel, William L. Goldman, who has thirty-nine years of experience in criminal law, N.T., 2/19/13, at 62, testified at the PCRA hearing. He explained the significant and lengthy contacts and meetings with Appellant involving at least three lawyers from his firm assigned to Appellant's case, as follows:

> [W]e had various meetings with [Appellant] preparing the case, preparing the preliminary hearing, reviewing the charges, reviewing the facts as he's alleged them to us, and what his understanding was of what was going on.
>
> We discussed his exposures. We discussed the potential penalties. We discussed the mandatory sentences that were involved. We discussed my discussions with the DA . . . who was assigned to the case. We discussed revelations that he made to Detective Carroll. We discussed his practice, his background, asked him questions about who he was so I could know more about him.

Id. at 63–65. Plea counsel testified that Appellant came to their office fifteen to twenty times to discuss his case, and their "office was always open

to him." ***Id***. at 65. Plea counsel stated that Appellant told him "he could not undergo a trial, did not wish to undergo a trial." ***Id***. at 68.

Plea counsel described his strategy in the case. He testified that Appellant could not "open up" regarding his involvement with his patients that he admitted exchanging sex for drugs. N.T., 2/19/13, at 69. Further, there was a concurrent, pending case wherein "he was being sued by a patient for some consequences of his drug administration." ***Id***. For that reason, plea counsel explained that he advised Appellant of "the civil limitations in civil court of a *nolo contendere* plea." ***Id***. Plea counsel further described the basis for counsel's strategy in recommending a plea of *nolo contendere* versus a guilty plea, as follows:

> [Appellant] still maintained that he couldn't admit to the number of times that he had sex with, I believe it was—one of the women.
>
> * * *
>
> [W]e had asked [the ADA] in advance to put together the facts that he wanted to read into the record to justify the [guilty] plea.
>
> Generally in the county the Court would ask, "Do you agree, sir, that you're guilty of the offenses as outlined in the presentation?" And when we received them . . . we went over them with [Appellant, who] was having difficulty accepting those and pleading to those.
>
> So rather than the plea unraveling, we agreed that day that it would be a *nolo contendere* plea . . . .
>
> * * *

> He was having difficulty—the difficulty that [Appellant] had at the time was that he was "I" oriented. We knew that he couldn't take the stand. We believed he would not do well on the stand subject to cross-examination, whether it be trial or at the guilty plea.
>
> Everything that he discussed with us was, "How could I be so dumb? How could I be bamboozled? How could I do this?" And his focus was not on what he did to others. Although designing women, they had a plan, but—he had extreme difficulty, in my opinion, of taking the emphasis off of, "How could this happen to me," as opposed to what he did to others.
>
> And that was part of why we did the *nolo contendere* plea. I don't—I don't admit to the charges, but I don't contest the charges. And we discussed it's the same as a conviction.

N.T., 2/19/13, at 70–72. Plea counsel opined that Appellant "could not accept the facts, we couldn't—a guilty plea would not have gone down on May 11th." ***Id***. at 72. Plea counsel admitted that a guilty plea "certainly sounds more cleansing and more repentant than: I don't contest the charges. But we were having difficulties with [Appellant]." ***Id***. at 73. Plea counsel testified that he and Appellant agreed that it would be more advantageous for Appellant not to speak at sentencing. ***Id***. at 74.

In explaining how he intended to convey Appellant's remorse at sentencing, plea counsel underscored that it was his strategy to refer Appellant to Dr. Shanken-Kaye, a forensic psychologist, who prepared a detailed mental health report for the plea court's consideration. N.T., 2/19/13, at 67. "I'd rather allow someone who has a reputation of

excellence, someone that's trusted by the Courts, someone that works well and makes people better individuals, gives them insight into who they are and why they engage in certain behaviors." ***Id***. at 68.

> We wanted to present [Appellant] to the Court through Dr. Shanken-Kaye, through two esteemed attorneys who knew him, through a husband and wife who knew him, through letters. And then more importantly through Dr. Shanken-Kaye, not only through a report but through live testimony.
>
> The belief was that Dr. Shanken-Kaye could advocate better for [Appellant] than he could.

Id. at 72. Plea counsel continued:

> [I]t was our intent, or strategy, to present [Appellant] through witnesses who would discuss who he was to the community, who he was to his patients. It was clear—his date of birth—it was clear that he had an exemplary background; he had never been in trouble before. All that was clear. We presented the report of Dr. Shanken-Kaye to Judge Finley in advance so he would have that information.
>
> . . . .[W]e were going to present [Appellant], not through his testimony on the stand subject to cross-examination, but rather through character references, individuals who had, we believed, high standing in the community, and through a detailed report from Dr. Shanken-Kaye.

N.T., 2/19/13, at 75. When PCRA counsel asked, "Did you think that it would hurt your case to have [Appellant] make a statement to the Court expressing remorse and acceptance of responsibility?" plea counsel responded, "I thought he attempted to do that in his allocution." Plea counsel acknowledged that he prepared Appellant prior to his allocution. ***Id***. When given the opportunity to speak, Appellant stated:

> I'm really tongue-tied, Your Honor. I've done terrible things. I screwed up. I screwed up patients. I should have been aware of their prior history. I should have been aware of what they were really there for and refer them to a psychiatrist or psychologist or a rehab center. I shouldn't have done that. I should have been able to see through this. I put them at risk. I put them at risk.
>
> And I am truly sorry. I am sorry for what I've done and I'm sorry for what I've done to them and to my friends. Disappointing. And throughout the 30 years or so that I've been practicing, I never thought I'd ever be in this kind of situation. I thought I was smarter than this. I thought I was—I thought I was smarter than this. I just fell from grace. I don't get it.
>
> I feel that—you know, you always wish, wish, wish things were different. I wish things were different, Your Honor. I would hope that you would—I would hope that you would understand that there's no fool like an old fool.
>
> That's about it, Your Honor. That's about it.

N.T., 2/19/13, at 102–103.

Based on the foregoing, we agree with the PCRA court's conclusion that Appellant's allegations that counsel was ineffective for failing to present convincing arguments for sentencing leniency and remorse lack arguable merit. As the PCRA court explained, plea counsel arranged for Appellant to meet with Dr. Shanken-Kaye, "who issued a detailed mental health report" for the plea court's consideration. Dr. Shanken-Kaye testified extensively about Appellant's background, predisposition, and lack of future danger to the community. N.T., 2/19/13, at 82–93. Counsel arranged for character witnesses to testify in court and solicited letters from others. PCRA Court

Opinion, 8/13/13, at 14. Counsel emphasized Appellant's cooperation with the authorities and described Appellant's otherwise spotless record. ***Id***. Moreover, sentencing guidelines direct a judge to impose confinement that is consistent with protection of the public, the gravity of an offense as it relates to the crime's impact on the community, and the rehabilitative needs of the defendant. 42 Pa.C.S.A. § 9721(b); ***Commonwealth v. Walls***, 926 A.2d 957, 962 (Pa. 2007). A judge may use his own discretion when evaluating mitigating or aggravating factors for sentencing. ***Commonwealth v. Fullin***, 892 A.2d 843, 854 n.4 (Pa. Super. 2006); 24 Pa. Code § 303.13.

Even if Appellant's first and second issues did establish arguable merit, plea counsel clearly stated a reasonable basis for his actions. "[P]lea counsel stated that his goal was to 'humanize' [Appellant] and to present him through testimony of the forensic psychologist and various other character witnesses." PCRA Court Opinion, 8/13/13, at 14. As the PCRA court noted, this was done to prevent Appellant from testifying due to the fact that he refused "to fully accept responsibility for his actions and had expressed remorse only for himself, not for the victims." ***Id***. (citing N.T., 2/19/13, at 85–86). Moreover, plea counsel was cognizant of the pending civil lawsuit against Appellant. Plea counsel advised Appellant of the limitations of a plea of *nolo contendere* on that case versus the effect of a guilty plea. Clearly, counsel chose a course that had a reasonable basis

designed to effectuate Appellant's interests. ***Koehler***, 36 A.3d at 132. Finally, the PCRA court explicitly found plea counsel to be a credible witness. PCRA Court Opinion, 8/13/13, at 19. As the court's credibility determination is supported in the record, it is binding on this Court. ***Spotz***, 18 A.3d at 259. These issues have no merit.

In Appellant's final issue, he asserts that the PCRA court erred in failing to "adopt" Appellant's "credible assertion" that he in fact requested counsel to file a motion for reconsideration of sentence and file an appeal, but counsel failed to do so. Amended 1925(b) statement, 7/12/13, at ¶ 3; Appellant's Brief at 47. To address this claim, we focus on Appellant's allegation that plea counsel rendered ineffective assistance of counsel when he failed to file a post-sentence motion challenging the sentence. Phyllis Newman, Appellant's wife, testified at the PCRA hearing that she telephoned plea counsel and left messages for him to "lower the number of years [Appellant] was given." N.T., 2/19/13, at 10. She testified that she was not involved or present during counsel's discussions with Appellant. ***Id***. at 12–13.

Appellant confirmed his wife's testimony that he asked her to contact plea counsel and that counsel "came to see me" five or six days later. N.T., 2/19/13, at 20. While he had no independent recollection of having written a letter to plea counsel, PCRA counsel presented Appellant with a copy of a

letter in which Appellant allegedly asked plea counsel for a "modification of sentence" in addition to discussing issues related to the sale of his medical practice. ***Id***. at 24. The parties stipulated that the letter was postmarked on July 15, 2011, which was subsequent to the expiration of the ten-day period for filing a post-sentence motion. ***Id***. at 24.

Mr. Goldman testified that after sentencing, he asked Attorney Frederic Rubin, "who was admitted to the bar in '75, as well as I was, and has experience in criminal matters," to "discuss anything involving [Appellant's] case directly. I did not have contact with [Appellant] after sentencing." N.T., 2/19/13, at 64, 80.

Plea counsel Rubin testified that he met with Appellant up to twenty times, he gave Appellant his cellular telephone number, and he made himself "very accessible" to Appellant. N.T., 2/19/13, at 100–101. Mr. Rubin testified that he met with Appellant in Bucks County Correctional Institution on June 23, 2011, which was within the ten-day post-sentence motion period. ***Id***. at 102. Mr. Rubin stated that while he did indeed have the fee petition with him that day, it "was not the principal purpose" of the meeting; rather, it was to discuss Appellant's case. ***Id***. Regarding the filing of a post-sentence motion, Mr. Rubin stated:

> Obviously the issue of the sentence came up, options were discussed. All that's true. Where I disagree, I was neither instructed nor asked to file a motion. We talked about it and what would be involved. And I absolutely told him that I

> thought it had no chance at all. And I left that meeting fully believing that he was in agreement to not file it.
>
> I was never instructed or overtly asked to file the motion and then, let's see what happens. That did not happen. That did not occur.

N.T., 2/19/13, at 104–105. Mr. Rubin testified that he never spoke to Appellant's wife, and never received a message that she called. ***Id***. at 115. Mr. Rubin stated that he spoke to Appellant's son Damon sometime between July 11 and 15, 2011. ***Id***. at 116. Damon asked Mr. Rubin to telephone Appellant at Graterford, and Mr. Rubin complied. He described that telephone conversation as follows:

> There's no question that the word "appeal" and the word "sentencing" and "motion" came up in the conversation. There's no dispute about that.
>
> I told [Appellant] how strongly I felt. I reminded him of our prior conversation. I told him that—reminded him and he acknowledged it as best as I recall—that the appellate rights were extremely limited. The motion for reconsideration wasn't pushed by him, wasn't requested. We didn't file it.
>
> And at the end of the conversation, my very strong impression and recollection of it is, he agreed to not file an appeal. I could have filed an appeal on Monday because we still had a day left. And if [Appellant] had instructed me, I think I would have sensed that and I would have filed it.

N.T., 2/19/13, at 116–117.

PCRA counsel also asked Mr. Rubin whether he considered filing a petition to modify sentence *nunc pro tunc*. Mr. Rubin testified that Appellant told him that there was a doctor in Bucks County who was convicted of the

same crimes at the same time who "only got a three year sentence." N.T., 2/19/13, at 118. Mr. Rubin described the various ways he "looked into it" including internet research and discussions with the district attorney's office, but he "found nothing. . . . We came up with nothing." ***Id***. at 118.

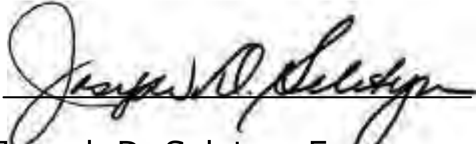
The Commonwealth inquired regarding the decisions and strategy as described by Plea Counsel Goldman, Mr. Rubin, and Appellant, and Mr. Rubin responded, "[Appellant's] very engaged; he's very intelligent. And he was not—he was not a mail-in defendant, if you know what I mean. He was engaged, he understood. He respected our advice and . . . agreed, yeah. There was no question about it." N.T., 2/19/13, at 125.

We conclude that the record supports that all mitigating evidence was presented, there was no new or additional evidence to present that would have affected the sentence, and that a motion to reconsider the sentence would have been unavailing. The PCRA court found counsel to be credible, concluding, "The record reflects that counsel discussed the merits of both seeking reconsideration of the sentence and filing a direct appeal, with [Appellant]," but Appellant agreed not to go forward. PCRA Court Opinion, 8/13/13, at 19. Thus, Appellant cannot demonstrate arguable merit. Further, Appellant has failed to prove he is entitled to any finding of presumptive prejudice due to counsel's alleged failure to file a "requested" direct appeal. ***See Lantzy***, 736 A.2d at 572 (counsel provided *per se*

ineffectiveness where he unjustifiably failed to file an appeal despite defendant's clear direction to do so).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/2/2014