NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CHRISTIAN DAVID TATARSKI, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1577 WDA 2013

Appeal from the PCRA Order Entered August 6, 2013
In the Court of Common Pleas of Warren County
Criminal Division at No(s): CP-62-CR-0000209-2011

BEFORE: BENDER, P.J.E., LAZARUS, J., and OTT, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED AUGUST 19, 2014**

Appellant, Christian David Tatarski, appeals from the trial court's August 6, 2013 order denying his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We affirm.

The PCRA court set forth the facts and procedural history of this case as follows:

> [Appellant] was initially charged as a juvenile with several counts of Rape, Involuntary Deviant Sexual Intercourse, Aggravated Indecent Assault, Indecent Assault, Sexual Assault, and Criminal Trespass stemming from an incident on or about April 23, 2011. During the incident, [Appellant] raped his female victim per os and per anus. The victim, who was incapacitated by a boot on her foot at the time of the offense, was a minor child who was home alone at the time of the incident. [Appellant] was subsequently charged and certified as an adult at a hearing held [on] May 19, 2011. Thereafter, on December 12, 2011, [Appellant] pled guilty to two of the sixteen counts that he was facing. In exchange for [Appellant's] guilty plea, the remaining fourteen (14) charges against [Appellant] were moved for Nolle Prosequi by the Commonwealth and subsequently

> granted by the Court. On March 30, 2012, [Appellant] was sentenced on two counts of Aggravated Indecent Assault Without Consent to consecutive terms [of 35 to 84 months' incarceration] at each of the two counts, the charges at Count 6 arising per the rape per os and the charges at Count 7 arising per the rape per anus. [Thus, Appellant's aggregate sentence totaled 70 to 168 months' imprisonment.]
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> [Appellant] filed a Motion for Reconsideration of Sentence that was then denied on May 25, 2012. By Monday, June 25, 201, the thirty day period for review of the judgment of sentence had elapsed. Less than one year later, on May 29, 2013, [Appellant], represented by … []PCRA[] counsel Attorney Sebald, filed a timely PCRA [petition]. … [T]he PCRA [petition] having been timely filed within one year of the expiration of the thirty day allowance for appeal, this Court heard the merits of the PCRA [p]etition at the PCRA hearing on July 22, 2013.

PCRA Court Opinion, 8/6/13, at 1-2 (citation omitted).

On August 6, 2013, the PCRA court issued an order denying Appellant's petition. Appellant filed a timely notice of appeal and, herein, he presents the following two issues for our review:

> Whether the [PCRA] court erred as a matter of law, and did not have support in the evidentiary record in not granting Appellant relief under the … []PCRA[] … for ineffective assistance of Appellant's trial counsel regarding counsel's failure to advise Appellant of the possibility that his sentences on criminal charges stemming from multiple dockets could run consecutively and, therefore, rendering Appellant's plea on multiple offenses unknowing, involuntary, and unintelligent[?]
>
> Whether the [PCRA] court erred as a matter of law, and did not have support in the evidentiary record in not granting Appellant relief under the PCRA, for ineffective assistance of Appellant's trial counsel regarding trial counsel's failure to timely object to the court and [the] Commonwealth's failure to adequately warn Appellant of the possibility that his sentences on multiple offenses could run consecutively and therefore rendering Appellant's plea on multiple offenses unknowing, involuntary, and unintelligent[?]

Appellant's Brief at 3 (unnecessary capitalization omitted).

Initially, we note that "[t]his Court's standard of review from the grant or denial of post-conviction relief is limited to examining whether the lower court's determination is supported by the evidence of record and whether it is free of legal error." ***Commonwealth v. Morales***, 701 A.2d 516, 520 (Pa. 1997) (citing ***Commonwealth v. Travaglia***, 661 A.2d 352, 356 n.4 (Pa. 1995)). Where, as here, a petitioner claims that he received ineffective assistance of counsel, our Supreme Court has stated that:

> [A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the "[i]neffective 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." Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner. To obtain relief, a petitioner must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the petitioner. A petitioner establishes prejudice when he demonstrates "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." … [A] properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel's act or omission.

Commonwealth v. Johnson, 966 A.2d 523, 532-33 (Pa. 2009) (citations omitted).

Appellant's two issues are related, and both involve the alleged ineffectiveness of his plea counsel, Alan Conn, Esq. Therefore, we will

address Appellant's claims together. He contends that Attorney Conn was ineffective for failing to advise him, prior to the entry of his plea, that the court could impose consecutive sentences for the two counts of aggravated indecent assault (AIA). Appellant concedes that he was aware of the potential maximum terms of imprisonment he faced regarding each of the two counts of AIA; however, he claims that he "did not realize that he would have to serve those sentences one after the other...." Appellant's Brief at 16. Appellant also asserts that even if Attorney Conn did tell him that his sentences could run consecutively, it is "highly likely that [he] did not even understand the difference between the words 'concurrent' and 'consecutive' or the impact it would have at sentencing." Appellant's Brief at 16. Appellant maintains that there is no evidence in the record that Attorney Conn explained the meaning of these terms to him, or that counsel ensured that he understood them. Appellant also contends that Attorney Conn was ineffective for not objecting to the plea colloquy on the basis that, during that proceeding, no one informed Appellant "that his sentences on multiple counts could run consecutively." Appellant's Brief at 18. Finally, Appellant contends that Attorney Conn rendered ineffective representation by not challenging the validity of his plea and sentence on these grounds in counsel's post-sentence motion for reconsideration.

In support of these claims, Appellant relies on this Court's decision in ***Commonwealth v. Diehl***, 61 A.3d 265, 268 (Pa. Super. 2013). In that case, we explained:

> To be valid, a guilty plea must be voluntary, knowing and intelligent. ***Commonwealth v. Persinger***, 532 Pa. 317, 615 A.2d 1305, 1307 (1992). A plea will not be considered as having been knowing, voluntary and intelligent if the defendant's aggregate sentence exceeds the potential maximum sentence of which the defendant was advised or was otherwise aware during the plea. [***Commonwealth v.***] ***Carter***, 656 A.2d [463,] 466 [Pa. 1995)]; ***Persinger***, 615 A.2d at 1307–08. Indeed, a plea entered where the defendant later receives a sentence higher than the potential penalty of which the defendant was informed constitutes a manifest injustice. ***Persinger***, 615 A.2d at 1307–08. A manifest injustice provides meritorious grounds for post-sentence plea withdrawal. ***Id.***

Commonwealth v. Diehl, 61 A.3d 265, 268 (Pa. Super. 2013).

In ***Diehl***, the record clarified that during the plea proceedings, Diehl was informed of the maximum penalties he faced for each charge, but he was not advised that those sentences could be imposed consecutively. ***Id.*** at 267. Consequently, Diehl believed that the maximum term of incarceration he could receive was 20 years, but he was ultimately sentenced to consecutive terms totaling 20 to 40 years' imprisonment. ***Id.*** After sentencing, Diehl's plea counsel filed a post-sentence motion for reconsideration of Diehl's sentence, but counsel "did not challenge the sentence based on [Diehl's] unawareness of the potential for consecutive penalties." ***Id.***

Diehl ultimately filed a PCRA petition alleging that his plea counsel "was ineffective for not informing [Diehl] that he could receive consecutive sentences, for not objecting to the plea court's failure to advise [Diehl] of that possibility[,] and for not moving to withdraw [Diehl's] guilty plea on the basis that the plea was invalid because [Diehl] was unaware of the potential

for consecutive sentences when he pled guilty." ***Id.*** At the PCRA hearing, Diehl's plea counsel admitted that "he never advised [Diehl] about the possibility of consecutive sentences or about the potential maximum penalty." ***Id.*** Counsel also testified that "he did not notice that the plea court failed to advise [Diehl] about the possibility of consecutive sentences[,]" which is why he did not seek to withdraw Diehl's plea on that basis in his post-sentence motion. ***Id.*** When Diehl took the stand at the hearing, he stated that his counsel never informed him of the possibility of consecutive sentences, and that "he would not have pled guilty had he known about the potential for consecutive sentences." ***Id.*** at 268. Based on this record, we concluded that Diehl's plea counsel was ineffective and his guilty plea was invalid because, "before he pled guilty, [Diehl] was not told by the court, the Commonwealth or his counsel about the potential maximum penalty he faced by virtue of possible consecutive sentences." ***Id.*** at 269.

As in ***Diehl***, in this case, there is no indication that during the guilty plea colloquy, Appellant was informed by the court, the Commonwealth, or Attorney Conn of the possibility that his sentences could be imposed to run consecutively. Attorney Conn also admitted at the PCRA hearing that he did not recall hearing the plea court advise Appellant about the potential for consecutive sentences. N.T. PCRA Hearing, 7/22/13, at 11. Nevertheless, he did not raise this issue in Appellant's post-sentence motion for reconsideration. ***Id.***

However, ***Diehl*** is still distinguishable. At the PCRA hearing, Attorney Conn testified that prior to the plea proceeding, he "thoroughly went over the guilty plea" with Appellant. ***Id.*** at 9. Attorney Conn elaborated:

> [Attorney Conn]: I went through the ranges of sentence, I went through the maximum sentence. I did explain that the charges could be run concurrent or consecutive. I explained to him that I thought there was a good argument for concurrent sentences, but I did mention that it was up to the judge, that the judge could run the charges consecutive.
>
> I also explained Megan's Law, that he would have a lifetime requirement to register.
>
> [The Commonwealth]: Did you make any promises of sentencing?
>
> [Attorney Conn]: No, I explained to him the ranges of sentence and I explained to him what he could get out of it, but I didn't make any promises.
>
> [The Commonwealth]: So you explained the minimum?
>
> [Attorney Conn]: Yes.
>
> [The Commonwealth]: You explained the maximum?
>
> [Attorney Conn]: Yes.
>
> [The Commonwealth]: You explained there were different ways the judge can sentence, consecutive and concurrent?
>
> [Attorney Conn]: That's correct.

Id. at 9-10. Later, on redirect-examination, Attorney Conn testified that he discussed the plea with Appellant "more thoroughly than [with] any other client" because of Appellant's age and the serious nature of the charges. ***Id.*** at 15. Attorney Conn stated that he spoke with Appellant "a number of times[,]" and "informed [him] of all the possibilities involving sentencing."

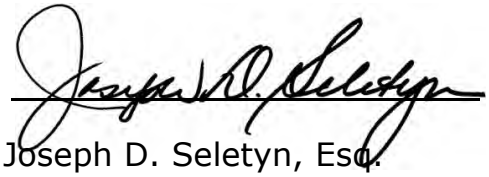
Id. at 11, 15. Attorney Conn testified that he could not comprehend any way in which he could have been more thorough in consulting with Appellant regarding the plea. ***Id.***

Attorney Conn's testimony makes the facts of this case readily distinguishable from ***Diehl***. Attorney Conn repeatedly stated that he thoroughly explained the sentencing possibilities to Appellant, including the fact that Appellant could receive consecutive terms. Counsel also reiterated several times that he informed Appellant of the maximum sentence he faced, as well as all of the various "ranges of sentence" that were possible. ***Id.*** at 10. The PCRA court deemed Attorney Conn's testimony credible, and found that Appellant's guilty plea was knowing, intelligent, and voluntary. The record supports the court's determination; therefore, we will not disturb that decision on appeal. ***See Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001) ("The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record."). Because Appellant was aware of the potential for consecutive sentences, and he was informed of the total maximum period of incarceration he faced, Appellant was not prejudiced by Attorney Conn's failure to object to the omission of such information from the plea colloquy, or counsel's failure to challenge the validity of Appellant's plea on this basis in his post-sentence motion. ***See Commonwealth v. Allen***, 732 A.2d 582, 590 (Pa. 1999) (holding that the trial court should determine a defendant's actual knowledge in the guilty plea colloquy context by looking at the totality of the circumstances to

distinguish whether the plea was voluntarily, knowingly, and intelligently made). Accordingly, Appellant's ineffectiveness claims are meritless and do not convince us that his plea was invalid.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/19/2014