

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MICHAEL EUGENE SWAGGARD

Appellant

No. 1762 MDA 2013

Appeal from the PCRA Order September 6, 2013
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0003354-2011

BEFORE: BENDER, P.J.E., MUNDY, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J.:

FILED JULY 15, 2014

Appellant Michael Swaggard appeals *pro se* from the order of the Court of Common Pleas of Berks County denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9542, *et seq.* We affirm.

On September 12, 2012, Swaggard pled guilty in six docket numbers, including possession with intent to deliver controlled substances¹ at docket CP-06-CR-0003354-2011. Swaggard's plea agreement provided he would receive a sentence of 4 to 8 years of incarceration on this charge. Swaggard did not file post-sentence motions or a direct appeal.

On April 15, 2013, Swaggard filed a "Petition for Writ of Habeas Corpus Ad Subjudiciendum" and a "Petition for Production of Notes of

¹ 35 § 780-113(a)(30).

Testimony.” The trial court treated the petitions as a PCRA petition and appointed counsel. Counsel filed a no-merit letter pursuant to ***Commonwealth v. Finley***² and ***Commonwealth v. Turner***,³ and an application to withdraw as counsel.

On July 30, 2013, the trial court issued a notice of its intent to dismiss the petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907 and granted counsel’s application to withdraw. Swaggard filed a petition to proceed *pro se*, dated July 29, 2013 and docketed August 2, 2013. On August 19, 2013, the court granted Swaggard’s motion to proceed *pro se*, noting it granted counsel’s application to withdraw. Swaggard filed a response to the notice of intent to dismiss. On September 6, 2013, the court dismissed the PCRA petition. Swaggard timely appealed and both he and the trial court complied with Pennsylvania Rule of Appellate Procedure 1925.

Swaggard raises the following questions on appeal:

1. Whether [the appointed PCRA attorney] provided ineffective assistance where he failed to thoroughly review the record in order to determine the merits of the Appellant’s claim in regards to him being sentenced outside the guidelines without sufficient reason before seeking to withdraw which is a prerequisite of ***Turner/Finley***.

² 550 A.2d 213 (Pa.Super.1998).

³ 544 A.2d 927 (Pa.1988).

2. Whether the PCRA court abused its discretion and or erred as a matter of law where the court permitted [the appointed PCRA attorney] to withdraw without conducting its own independent review of the record in order to determine the merits of the Appellant's claim, but denied the Appellant PCRA relief based solely on an adoption of [the attorney's] inadequate no-merit analysis of the Appellant's claim.

Appellant's Brief at iv.

Swaggard first contends PCRA counsel was ineffective. Swaggard waived this claim by failing to claim ineffectiveness of PCRA counsel after receipt of the withdrawal letter and notice of intent to dismiss. **See** Opinion 12/2/13, at 4. Swaggard's response to the court's notice of intent to dismiss his PCRA petition argued he was entitled to an evidentiary hearing because the trial court abused its discretion in sentencing him outside the sentencing guidelines. This was an issue of fact. **See** Response to Notice of Intent to Dismiss 8/19/13. Swaggard did not allege ineffectiveness of PCRA counsel. Swaggard's petition to proceed *pro se* stated PCRA counsel "confused the issues by asserting that the Petitioner's claim is pertaining to a knowing and voluntary plea, rather than the imposition of a sentence outside the guidelines without reason." Petition to Proceed *Pro Se*, at ¶ 2. Swaggard made this statement in support of his argument that the court should permit him to proceed *pro se*, not in support of an argument that PCRA counsel was ineffective. Accordingly, Swaggard waived his PCRA counsel ineffectiveness claim because he failed to allege PCRA counsel was ineffective following

receipt of counsel's withdrawal notice and the court's notice of intent to dismiss. **Commonwealth v. Pitts**, 981 A.2d 875, 880 n.4 (Pa.2009).

Swaggard next contends the trial court erred because it failed to conduct an independent review of the record and denied relief based on PCRA counsel's inadequate analysis. This claim lacks merit.

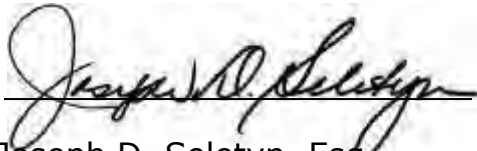
The trial court conducted an independent review. Opinion 12/2/13, at 4. Moreover, the claim advanced by Swaggard, i.e., that the trial court imposed an excessive sentence, lacks merit. This is a challenge to the discretionary aspects of sentencing, which is not a cognizable claim under the PCRA. **Commonwealth v. Fowler**, 930 A.2d 586, 593 (Pa.Super.2007). Further, during the guilty plea colloquy, the court noted that the guilty plea agreement called for a sentence of 4 to 8 years imprisonment for possession with intent to deliver. N.T. 9/12/12, at 4. Swaggard signed this agreement. **Id.** at 7; Statement Accompanying Defendant's Request to Enter a Guilty Plea. The sentence was within the standard sentencing guidelines range. The assistant district attorney noted Swaggard was a repeat felon, the offense gravity score was 8, the standard sentencing guidelines range was 40 to 52 months, the aggravated range was 61 months, and the mitigated range was 31 months. N.T. 9/12/12, at 4-5.

Swaggard was bound by the plea agreement terms, which provided for a sentence of 4 to 8 years for the possession with intent to deliver charge. **Commonwealth v. Parsons**, 969 A.2d 1259, 1268 (Pa.Super.2009) ("[W]hen the parties enter the plea agreement on the record, and the court

accepts and approves the plea, then the parties and the court must abide by the terms of the agreement.”). Further, the assistant district attorney and the court correctly outlined the applicable sentencing guidelines range, as Swaggard had two prior burglary offenses, which gave him a prior record score of Repeat Felony 1 and Felony 2 Offender, also known as RFEL, not a prior record score of 3 or 5, as Swaggard alleged.⁴ **See** 204 Pa. ADC. §§ 303.4, 303.7.

Order affirmed.

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: 7/15/2014

⁴ Swaggard’s brief alternately argues his prior record score was 3, 5, or 8. **See** Appellant Brief at iv, 4, 5, 9. The sentencing guidelines do not include a prior record score of 8, and we assume Swaggard meant to argue he should have had a prior record score of 3 or 5. 204 Pa. Code § 303.4.