

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
WILLIAM JOSEPH WHITEHEAD,	:	
	:	
Appellant	:	No. 1873 WDA 2013

Appeal from the PCRA Order November 14, 2013
In the Court of Common Pleas of Cameron County
Criminal Division No(s).: CP-12-CR-0000001-2011

BEFORE: BOWES, JENKINS, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED JUNE 30, 2014

Appellant, William Joseph Whitehead, appeals from the order entered in the Northampton County Court of Common Pleas, denying his first petition for relief filed pursuant to the Post Conviction Relief Act¹ ("PCRA"). Appellant claims that trial counsel was ineffective in advising him in the plea process in failing to ensure that the on-the-record guilty plea colloquy disclosed the elements of the offense of aggravated assault in understandable terms. We affirm.

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

On November 22, 2011, Appellant entered an open guilty plea to aggravated assault. On January 17, 2012, Appellant was sentenced to a period of incarceration of not less than five years nor more than ten years. He did not file a post-trial motion or direct appeal. Appellant filed a timely *pro se* PCRA petition on January 16, 2013. Counsel was appointed and filed an amended PCRA petition. A hearing was held on August 23, 2013 and Appellant appeared by video conference at his request. **See** Mot. for Video Conference, 5/17/13. The PCRA petition was denied. This appeal followed. Appellant filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The PCRA court incorporated its November 15, 2013 memorandum opinion denying the amended PCRA petition in its Pa.R.A.P. 1925(a) opinion.

Appellant raises the following issue for our review:

1. Was [Appellant] rendered ineffective assistance of counsel, and thereby entitled to a new trial, where his counsel, at time of (sic) guilty plea to Aggravated Assault, failed to ensure that the on-the-record guilty plea colloquy disclosed the elements of the offense charged in understandable terms, failed to ensure the record guilty plea colloquy demonstrated [Appellant] understood the nature of the charge he was pleading guilty to, and in counsel's failing to ensure [Appellant] entered a knowing and understanding plea of guilty.

Appellant's Brief at 4.

Appellant contends that guilty plea counsel caused him to enter an unknowing and involuntary plea because the record does not show that he understood the elements of the crime of aggravated assault. **Id.** at 13. He

avers that although the factual basis for the guilty plea was outlined in the guilty plea colloquy, the elements of the crime charged were not explained to him. **Id.** at 14-15. Appellant states that he executed a nine page written guilty-plea colloquy, however, it did not contain any reference to the elements of the crime nor the factual basis for the plea. **Id.** at 15-16.

We note the relevant standard of review:

[A]n appellate court reviews the PCRA court's findings to see if they are supported by the record and free from legal error. This Court's scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party In addition, [t]he level of deference to the hearing judge may vary depending upon whether the decision involved matters of credibility or matters of applying the governing law to the facts as so determined.

Commonwealth v. Fahy, 959 A.2d 312, 316 (Pa. 2008) (quotation marks and citations omitted). "Furthermore, we note that we are bound by the PCRA court's credibility determinations where there is record support for those determinations." **Commonwealth v. Santiago**, 855 A.2d 682, 694 (Pa. 2004).

"To be eligible for relief under the PCRA, a petitioner must plead and prove his conviction resulted from one or more of the bases set forth in 42 Pa.C.S. Section 9543." **Commonwealth v. Woodrow**, 743 A.2d 458, 459 (Pa. Super. 1999.) In **Woodrow**, the defendant pleaded guilty, and subsequently in a PCRA petition averred that his "plea was unlawfully induced by counsel's ineffectiveness." **Id.** This Court noted that "where a

party has entered a guilty plea, the truth-determining process is not implicated.” **Id.** at 460. This Court found that the defendant was not entitled to relief because he “has not alleged his innocence with respect to any of the charges.” **Id.**

To be eligible for PCRA relief, a petitioner must establish “[a] plea of guilty [was] unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.” 42 Pa.C.S. § 9543(a)(2)(iii). “A defendant is permitted to withdraw his guilty plea under the PCRA if ineffective assistance of counsel caused the defendant to enter an involuntary plea of guilty.” **Commonwealth v. Kersteter**, 877 A.2d 466, 468 (Pa. Super. 2005).

Our longstanding test for ineffective assistance of counsel derives from the standard set by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). **See Commonwealth v. Pierce**, 515 Pa. 153, 527 A.2d 973, 976 (1987) (adopting the federal standard in Pennsylvania). Under **Pierce**, a petitioner must prove that: (1) the underlying legal claim is of arguable merit; (2) counsel had no reasonable strategic basis for proceeding as he did; and (3) there is a reasonable likelihood that, but for the challenged act of counsel, the outcome of the proceedings would have been different. **Id.** at 975. **See also Commonwealth v. Dennis**, 950 A.2d 945, 954 (Pa. 2008). The failure to satisfy any one of the three prongs is fatal to a petitioner’s claim.

Commonwealth v. Clark, 961 A.2d 80, 85 (Pa. 2008). With respect to a guilty plea, the prejudice prong is satisfied by showing that “it is reasonably probable that, but for counsel’s errors, [a petitioner] would not have pleaded

guilty and would have gone to trial. The reasonable probability test is not a stringent one.” **Commonwealth v. Hickman**, 799 A.2d 136, 141 (Pa. Super. 2002) (citations and quotation marks omitted).

Our Supreme Court has repeatedly stressed that where the totality of the circumstances establishes that a defendant was aware of the nature of the charges, the plea court’s failure to delineate the elements of the crimes at the oral colloquy, standing alone, will not invalidate an otherwise knowing and voluntary guilty plea. **Commonwealth v. Schultz**, 505 Pa. 188, 477 A.2d 1328 (1984); **Commonwealth v. Martinez**, 499 Pa. 417, 453 A.2d 940 (1982); **Commonwealth v. Shaffer**, 498 Pa. 342, 446 A.2d 591 (1982). “Whether notice [of the nature of the charges] has been adequately imparted may be determined from the totality of the circumstances attendant upon the plea [.]” **Martinez, supra.** at 420, 453 A.2d at 942.

Commonwealth v. Morrison, 878 A.2d 102, 107 (Pa. Super. 2005) (*en banc*).

The PCRA court found no merit to Appellant’s claim and opined:

Here, the totality of the circumstances demonstrates that [Appellant] was aware of the nature of the offense to which he pled guilty. At the time of entry of his plea, [Appellant] executed and initialed each page of an extensive nine-page written guilty plea colloquy. The colloquy included the acknowledgement that [Appellant] was entering the plea knowingly and with full understanding of the consequences of said plea. Moreover, the written colloquy recognized that [Appellant] had sufficient time to consult with his attorney before reading the document and entering the plea of guilty and that [Appellant’s] attorney had gone over the document and explained everything satisfactorily. The colloquy also included a listing of the charges by name, citation, and maximum sentence and fine.

At time of oral colloquy [the Commonwealth] provided a factual recitation of the incident [Appellant and victim] “became apparently quite intoxicated and [Appellant] broke a ceramic bowl over [victim’s] head and then cut his face with a portion of the bowl.” At the time of the entry of his plea, [Appellant] was placed under oath and acknowledged that he had heard the factual recitation of the incident that resulted in the filing of the charges . . . and confirmed that those facts supported the entry of his guilty plea. [Appellant] affirmed that he had the opportunity to review the written colloquy with [counsel], had the opportunity to ask any questions, and had any question answered to his satisfaction before completing the document. [Appellant] further indicated that he read and understood the nine-page plea colloquy. Importantly, [Appellant] stated he had the opportunity to speak with [counsel] regarding the charges that were filed against him, that he understood the elements of those charges, and the maximum penalties that the Court could consider imposing for those offenses. In particular, when asked by the Court if he understood the elements, [Appellant] responded “Oh, yeah.” [Appellant] asserted he was satisfied with [counsel’s] representation and believed he had been an effective advocate.

At the time of the PCRA hearing, [counsel] testified that he reviewed the written guilty plea colloquy with [Appellant] at the Potter County Jail on July 16, 2011, and significantly, specifically reviewed 18 Pa.C.S. § 2702(a)(4),^[2] aggravated assault, and explained the elements of the charge to [Appellant]. The written plea colloquy was then signed by [Appellant] on that date. [Counsel] also reviewed the elements of the offense of

² Aggravated assault is defined in pertinent part as follows:

(a) Offense defined.—A person is guilty of aggravated assault if he:

(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon[.]

18 Pa.C.S. § 2702(a)(4).

aggravated assault with [Appellant] at the Potter County Jail prior to [Appellant] entering his guilty plea on November 22, 2011. [Counsel] also testified that he explained to [Appellant] the statutory definitions of bodily injury, serious bodily injury, and deadly weapon, and explained to [Appellant] what the Commonwealth was alleging had occurred [Appellant] did not voice any misunderstanding regarding the elements of the offense until the filing of his PCRA.

While [Appellant] testified at the PCRA hearing that [counsel] did not explain the elements of aggravated assault or define bodily injury, or deadly weapon, this Court does not find his testimony to be credible. [Appellant] testified during the PCRA hearing that he received a copy of the criminal complaint with affidavit of probable cause. Initially, [Appellant] indicated he did not remember reading the affidavit of probable cause detailing the acts alleged to have occurred. However, he later testified that he probably did receive a copy of the information listing the elements of the offenses for which he was charged. He further testified that he remembered his attorney mailing to him a copy of the charges that were filed by the [Commonwealth] after his preliminary hearing, including the recitation that [he] was charged with attempting to cause or intentionally or knowingly did cause bodily injury to another with a deadly weapon in the nature of broken pieces of a clay bowl to cut the victim's forehead, nose, cheeks, narrowly missing his eye, causing severe lacerations requiring sutures and leaving severe facial scarring and forced broken fragments of glass into the victim's mouth and forcibly closed the victim's jaw causing cuts in his mouth.

The oral colloquy on November 22, 2011, did not include the Court engaging [Appellant] in a recitation of the elements of the crime. However, the Court specifically asked [Appellant] if he understood what the elements were and [he] affirmed that he did.

PCRA Ct. Op, 11/15/13, at 4-6 (citations omitted). The PCRA court did not find Appellant's testimony that counsel "did not explain the elements of

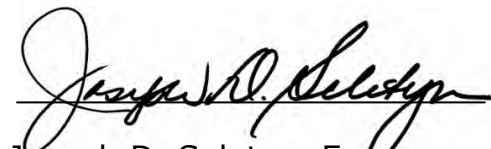
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aggravated assault or define bodily injury, or deadly weapon” to be credible. **Id.** at 5. The PCRA court found that Appellant “was aware of the nature of the offenses and entered a knowing and voluntary plea.” **Id.** at 7. Finding the underlying claim lacked arguable merit, the court concluded that “there was a reasonable basis for counsel’s conduct and that [Appellant] was not prejudiced.” **Id.** We agree no relief is due.

The PCRA court found guilty plea counsel was credible. We are bound by the credibility determinations of the PCRA court. **See Santiago**, 855 A.2d at 695. Instantly, viewing the totality of the circumstances, Appellant was aware of the nature of the charge of aggravated assault. **See Morrison**, 878 A.2d at 107. The court’s failure to recite the elements of the crime at the oral guilty plea colloquy did not invalidate the knowing and voluntary plea. **See id.** Therefore, Appellant’s claim that guilty plea counsel was ineffective is without merit. **See** 42 Pa.C.S. § 9543(a)(2)(ii); **Fahy, supra; Kersteter, supra.**

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/30/2014

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