NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MITCHELL J. GRIFFIN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3237 EDA 2013

Appeal from the PCRA Order October 8, 2013
in the Court of Common Pleas of Pike County
Criminal Division at No.: CP-52-CR-0000509-2012

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.: **FILED JUNE 30, 2014**

Appellant, Mitchell J. Griffin, appeals from the denial of his first petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541–9546. Appellant claims ineffective assistance of plea counsel. We affirm.

The underlying facts in this collateral appeal are not in substantial dispute. On October 10, 2012, Appellant and Chad T. Hedglin, his co-conspirator and half-brother, entered the More For Less store in Milford, PA, displayed a box cutter and robbed the clerk, Clarissa Rivas, of seventy-five dollars. (***See*** N.T. Plea, dated 2/21/13 and filed 6/12/13, at 7). After the clerk identified both co-conspirators in two separate photo arrays, police arrested Appellant and Hedglin. Appellant was charged with robbery, theft

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* Retired Senior Judge assigned to the Superior Court.

by unlawful taking or disposition, receiving stolen property, and conspiracy to commit robbery—threat of serious bodily injury. (***See*** Complaint, 10/18/12, at 2-3).

On February 20, 2013, defense counsel hand-delivered a letter to Appellant, who was then incarcerated at the Lackawanna County Correctional Facility. (***See*** Letter of Mark E. Moulton, Esq. to Mitchell Griffin, 2/20/13). The letter informed Appellant that the Pike County District Attorney was offering a plea agreement: if Appellant entered a plea of guilty to robbery, 18 Pa.C.S.A. § 3701(a)(1)(ii), a felony of the first degree, he would be "subject to a sentence within the Pennsylvania Standard Range [sic] of sentencing guidelines[.]"[1] (***Id.*** at 1). All other charges would be dismissed. (***See id.***).

There is no dispute that in the letter counsel erroneously advised Appellant that the Offense Gravity Score (OGS) for robbery was seven. (***See id.***). Based on this erroneous assumption, counsel advised Appellant that if he took the plea his minimum sentence "would be no less than 12 months and no more than 18 months." (***Id.*** at 1).

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[1] In pertinent part, the statute provides that "[a] person is guilty of robbery if, in the course of committing a theft, he . . . threatens another with or intentionally puts him in fear of immediate serious bodily injury[.]" 18 Pa.C.S.A. § 3701(a)(1)(ii).

When he testified at the PCRA hearing, plea counsel conceded that the actual OGS for robbery under the Sentencing Guidelines is ten. (***See*** N.T. PCRA Hearing, 9/03/13, at 15). Counsel also agreed that under the Sentencing Guidelines, the standard range for a minimum sentence based on an OGS of ten would be between forty to fifty-four months.[2] (***See id.*** at 16). Appellant does not dispute that he was correctly informed that the maximum sentence for robbery would be twenty years' incarceration.[3] (***See id.*** at 44; ***see also*** Appellant's Brief, at 16 ("The reality is, there is no dispute that the Appellant was aware of the maximum sentence.")).

In the same letter communicating the plea offer, noting that the Commonwealth had solid identification evidence, the possibility that Appellant's co-defendant would accept a guilty plea, and other considerations, counsel "strongly advise[d Appellant] to take the plea offer

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[2] On cross-examination, counsel testified that he briefly discussed with Appellant that a deadly weapons enhancement could increase the sentence, but it was his understanding that, as part of the plea, there would not be a weapons enhancement. (***See*** N.T PCRA Hearing, at 21). There is no discussion of a weapons enhancement in the plea offer letter. (***See*** Letter of Mark E. Moulton, Esq. to Mitchell Griffin, ***supra*** at 1-2).

[3] ***See*** 18 Pa.C.S.A. § 1103(1) (providing maximum sentence of imprisonment for conviction of felony of first degree at not more than twenty years).

which we expect will result in a sentence of twelve to twenty four months." (Letter of Mark E. Moulton, Esq. to Mitchell Griffin, ***supra*** at 2).[4]

The next day, February 21, 2013, after a written and an oral colloquy, Appellant entered a negotiated guilty plea to one count of robbery, a felony of the first degree, which the court accepted. (***See*** N.T. Plea, 2/21/13, at 8). The court set sentencing for April 19, 2013.

Plea counsel testified at the PCRA hearing that on the night before sentencing he realized, after review of the presentence investigation report (PSI), that the correct OGS for the robbery count was ten. (***See*** N.T. PCRA Hearing, 9/03/13, at 13). Counsel further testified that he informed Appellant of the corrected OGS (and the consequent higher minimum sentence range) in the morning, before sentencing. (***See id.*** at 23).

Appellant denied any discussion with plea counsel about the higher OGS. (***See id.*** at 38-39). Rather, he testified that he learned about the higher OGS from the PSI. (***See id.*** at 38). Appellant conceded that at sentencing, counsel informed him that the Commonwealth was seeking a five year minimum sentence, but that he was trying to get the minimum reduced to four years. (***See id.*** at 39).

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[4] We note the discrepancy in the plea offer letter between the supposed maximum sentence of "no more than 18 months" and the expectation of a sentence "of twelve to twenty four months." (Letter of Mark E. Moulton, Esq. to Mitchell Griffin, ***supra*** at 1, 2).

On April 19, 2013, the court, after giving Appellant the opportunity to allocute, sentenced him to a term of not less than four nor more than ten years' incarceration in a state correctional institution, with credit for time served. (***See*** N.T. Sentencing, 4/19/13, at 11; ***see also*** Order, filed 4/22/13, at 1). As part of the negotiated plea, all related charges were dismissed. (***See*** Court Commitment, 4/23/13; ***see also*** PCRA Court Opinion, 12/09/13, at 1).

Attorney Moulton filed a "Motion to Modify" the sentence on April 26, 2013. The motion chiefly argued that Hedglin was the initiator of the crime, and that Appellant was addressing the "chemical addictions" which prompted this robbery as well as his conviction of other crimes as part of a multi-state crime spree. (***See*** Motion to Modify, 4/26/13, at 1 ¶ 5, ¶ 7; unnumbered page 2 ¶ 11).[5] The motion mentioned offense gravity scores in passing but did not specifically address the OGS discrepancy referenced in this appeal. (***See id.*** at unnumbered page 2 ¶ 12).

The court denied the motion to modify on April 29, 2013. (***See*** Order, 4/29/13). Appellant did not file a direct appeal. Appellant filed a *pro se* PCRA petition on May 13, 2013. On May 16, 2013, the PCRA court appointed current counsel, (***see*** Order, 5/16/13), who filed an amended

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[5] (***See also*** N.T. Sentencing, 4/19/13, at 5 ("[A]s a result of the crime spree that they were on, he will be spending a significant amount of time either in Pennsylvania or New Jersey or Delaware or any number of other states.")).

petition. After the hearing on September 3, 2013, the PCRA court denied the amended petition. (***See*** Order, 10/08/13). This timely appeal followed, on October 15, 2013.[6]

Appellant raises three overlapping questions for our review:

> I. Whether the [PCRA] [c]ourt erred in determining that [plea] Counsel did not render ineffective assistance of counsel?
>
> II. Whether the [PCRA] [c]ourt erred in determining that [Appellant] was aware of the proposed sentences(s), potential consequences and the correct OGS at the time of the sentencing?
>
> III. Whether the [PCRA] [c]ourt erred in determining that the guilty plea was not induced by ineffective assistance of counsel, thus determining that [Appellant's] Amended PCRA [petition] did not have merit?

(Appellant's Brief, at 4).

Our standard and scope of review for the denial of a PCRA petition are well-settled.

> [A]n appellate court reviews the PCRA court's findings of fact to determine whether they are supported by the record, and reviews its conclusions of law to determine whether they are free from legal error. The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level.
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> The issues presented on appeal involve ineffective assistance of trial counsel, and thus, we begin with a summary

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[6] Appellant filed a counseled statement of errors on October 18, 2013. ***See*** Pa.R.A.P. 1925(b). The PCRA court filed an opinion on December 9, 2013. ***See*** Pa.R.A.P. 1925(a).

> of the legal framework governing PCRA petitions raising such claims. As relevant here, 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. 42 Pa.C.S. § 9543(a)(2)(ii). Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. In Pennsylvania, we have refined the ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)] performance and prejudice test into a three-part inquiry. ***See*** [***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987)]. Thus, to prove counsel ineffective, the petitioner must show that: (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result. If a petitioner fails to prove any of these prongs, his claim fails. . . . To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Commonwealth v. Spotz, 84 A.3d 294, 311-12 (Pa. 2014) (quotation marks and most citations omitted). The ***Spotz*** Court further explained:

> Our role under the PCRA is one of limited appellate review. ***Commonwealth v. Johnson***, 600 Pa. 329, 345, 966 A.2d 523, 532 (2009) ("Our standard of review in PCRA appeals is limited to determining whether the findings of the PCRA court are supported by the record and free from legal error."). In fulfilling this role, as indicated ***supra,*** we must defer to the PCRA court's findings of fact and credibility determinations, which are supported by the record. ***Johnson***, 600 Pa. at 345, 966 A.2d at 532 ("The findings of a post-conviction court, which hears evidence and passes on the credibility of witnesses, should be given great deference.") (quotation and quotation marks omitted). The PCRA court, and not the appellate courts, has personally observed the demeanor of the witnesses, and as we indicated in ***Johnson***, when a PCRA hearing is held, "we expect the PCRA court to make necessary credibility determinations." ***Id.*** at 358, 966 A.2d at 539. ***See Commonwealth v. Basemore***, 560 Pa. 258, 293–94, 744 A.2d 717, 737 (2000) (offering that particularized assessment of the

> credibility of testimony is essential to resolution of ineffectiveness claims and that such assessment "is most appropriately accomplished, in the first instance, by the finder of fact").

Id. at 319.

A claim of ineffective assistance of counsel that arises from the plea-bargaining process is cognizable under the PCRA. ***See Commonwealth ex rel. Dadario v. Goldberg***, 773 A.2d 126, 131 (Pa. 2001) (holding that, where appellant's counsel admitted that at the time he relayed Commonwealth's plea offer, he mistakenly believed the sentencing range for sexual assault was four to twelve months of imprisonment although in fact, sentencing range for sexual assault was thirty-six to fifty-four months' incarceration, petitioner's ineffectiveness claims were within scope of PCRA, even though claims did not appear to implicate time-of-trial truth-determining process in traditional sense). This Court has further explained:

> A criminal defendant has the right to effective counsel during a plea process as well as during a trial. ***Hill v. Lockhart***, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985). Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea. ***Commonwealth v. Allen***, 557 Pa. 135, 732 A.2d 582 (1999). Where the defendant enters his plea on the advice of counsel, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " ***Hill***, 474 U.S. at 56, 106 S. Ct. 366, 88 L.Ed.2d 203 (quoting ***McMann v. Richardson***, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)); ***See also Tollett v. Henderson***, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (holding that a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice

> he received from counsel was not within the standards set forth in ***McMann***.").

Commonwealth v. Hickman, 799 A.2d 136, 141 (Pa. Super. 2002) (holding counsel ineffective for inducing guilty plea by erroneous advice that appellant would be eligible for boot camp and early parole a full year and a half before his minimum sentence is served). "[S]uch advice deprives the defendant of knowing his true minimum sentence." (***Id.*** at 142).

> To determine a defendant's actual knowledge of the implications and rights associated with a guilty plea, a court is free to consider the **totality of the circumstances** surrounding the plea. The concept of examining the totality of the circumstances surrounding a plea in order to determine whether a plea was voluntarily, knowingly, and intelligently entered, is well established. Indeed, as the law makes clear, a trial court may consider a wide array of relevant evidence under this standard in order to determine the validity of a claim and plea agreement including, but not limited to, transcripts from other proceedings, off-the-record communications with counsel, and written plea agreements.

Commonwealth v. Allen, 732 A.2d 582, 588-89 (Pa. 1999) (footnote and citation omitted) (emphasis added).

Here, Appellant's first question objects generally to the PCRA court's determination that plea counsel did not render ineffective assistance. (***See*** Appellant's Brief, at 4). It does not present a specific allegation of court error for our review. "To be eligible for post-conviction relief, an appellant must establish by a preponderance of the evidence that his conviction or sentence resulted from one or more of the errors or defects listed in 42

Pa.C.S. § 9543(a)(2)[.]" ***Commonwealth v. Albrecht***, 720 A.2d 693, 698 (Pa. 1998).

Instead, Appellant posits that "but for plea counsel's errors, he would not have pled guilty and would have gone to trial[,]" citing ***Hickman***, ***supra***. (Appellant's Brief, at 14). Appellant maintains that "[t]here should be no reason to find either person [Appellant and plea counsel] not credible." (***Id.***). We disagree.

First, Appellant's reliance on ***Hickman*** is misplaced. The facts are readily distinguishable. In ***Hickman***, this Court concluded that counsel's erroneous advice about boot camp eligibility, not at issue here, which offered the prospect of completing his sentence a year and a half before the actual minimum, deprived the defendant of knowing his true minimum sentence. ***See Hickman***, ***supra*** at 142.

Here, by contrast, the negotiated plea only offered a sentence in the standard range of the Sentencing Guidelines, not a specific minimum from which to reckon the "odds" of going to trial. At the guilty plea hearing Appellant agreed with the prosecutor that there was "no specific agreement about how much or how little time[.]" (N.T. Guilty Plea, 2/21/13, at 8; ***see also*** Commonwealth's Brief, at 12).

Despite Appellant's self-serving assertion that his entire reason for taking the plea was his understanding of the standard range sentence, (***see*** N.T. PCRA Hearing, 9/03/13, at 36-37), there were numerous other factors -

evident from the record - making the plea agreement advantageous. The Commonwealth would have had strong identification evidence from the victim if it went to trial. Appellant faced numerous charges. If he entered a plea, all other charges except robbery would be dropped. The sentence for robbery would be in the standard range, not the aggravated range.

In fact, this is exactly what happened. Facing a possible sentence of ten to twenty years' incarceration on the robbery charge alone, Appellant received a four year minimum sentence.

Even more importantly, before sentencing, counsel apprised Appellant of the corrected OGS, and revised minimum sentence, as evidenced by his own admission that counsel told him the Commonwealth was seeking an even higher minimum sentence. Based on our review of the totality of circumstances, the record supports the PCRA court's conclusion that the information supplied by counsel to Appellant was corrected before sentencing, giving Appellant an ample opportunity at sentencing to voice any objections he had. He did not.

Further, despite Appellant's assertion that "[t]here should be no reason to find either person [Appellant and plea counsel] not credible," (Appellant's Brief, at 14), the PCRA court found plea counsel more credible than Appellant. (***See*** PCRA Ct. Op., at 7). We defer to the credibility assessments of the PCRA court. ***See Spotz***, ***supra*** at 319. In the totality

of circumstances, we conclude that counsel did not render ineffective assistance. Appellant's first claim does not merit relief.

In his second question, Appellant asserts PCRA court error in the determination that Appellant was aware of the range of sentences and the correct OGS at the time of sentencing. (***See*** Appellant's Brief, at 4). However, in the argument section of the brief, he concedes that "[t]he fact that [ ] Appellant became aware of the correct OGS and the recommended sentence prior to sentencing is not in dispute[.]" (***Id.*** at 17). Accordingly, Appellant's second issue is abandoned.

Appellant maintains, nevertheless, that his now-conceded awareness of the correct OGS is irrelevant. (***See id.***). From this premise, Appellant engages in a somewhat meandering and unfocused argument which asserts that counsel should have filed a motion to withdraw the plea, that the entry of the original plea was not knowing, voluntary, and intelligent, that counsel made no effort to correct his errors after discovery, and questioning whether the PCRA court went far enough in its plea inquiry. (***See id.*** at 17-20).

Accordingly, the new claims raised in this argument are waived. ***See*** Pa.R.A.P. 2116 ("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.").

Moreover, they would not merit relief. Since it is undisputed that counsel originally gave erroneous advice before the guilty plea, but testified that he later corrected the advice before sentencing, an inquiry into the

propriety of the guilty plea formalities is essentially unnecessary and irrelevant in the context of this appeal. The real issue is whether Appellant can plead and prove ineffectiveness by counsel's actions or inactions after the error was discovered prior to sentencing.

We observe that Appellant disputes counsel's testimony that he communicated with him (Appellant) about the higher OGS before sentencing. However, the PCRA court assessed the conflicting testimony and determined that plea counsel was more credible. (***See*** PCRA Court Opinion, 12/09/13, at 7). "We must defer to the PCRA court's findings of fact and credibility determinations, which are supported by the record." ***Spotz***, ***supra*** at 319 (citation omitted).

We note further that Appellant, although given the opportunity to address the sentencing court, never raised any issue about the change in the OGS or the minimum sentence. Instead, he told the court that he accepted responsibility for his actions, expressed a general desire to turn his life around, and promised to work on self-improvement. (***See*** N.T. Sentencing, 4/19/13, at 7-8).

It also bears noting that at the PCRA hearing Appellant conceded that during sentencing counsel informed him that the Commonwealth was seeking a five year minimum sentence, but that he was trying to get it reduced to four. (***See*** N.T. PCRA Hearing, 9/03/13, at 39). Therefore, Appellant admitted that he was personally aware at the time of the

sentencing hearing that the minimum sentence recommendations exceeded those he had heard previously. Yet he made no mention of this discrepancy in his remarks to the sentencing court. The PCRA court could properly infer from the totality of the circumstances that before sentencing, counsel appropriately informed Appellant of the correct range of sentencing options, and Appellant voluntarily continued with the plea agreement as offered. Appellant's second claim is abandoned, and his substituted claims are waived and would not merit relief.

Finally, in his third question, Appellant claims PCRA court error in rejecting his assertion that his guilty plea was induced by ineffective assistance of counsel. (***See*** Appellant's Brief, at 4). We disagree.

Appellant's third question, a variation on his first, repeats many of the issues previously raised, notably, that his plea was not knowing, voluntary, and intelligent; that his plea was induced by counsel's ineffectiveness; and that, but for counsel's erroneous advice, he would have gone to trial. (***See id.*** at 21-24).

Appellant presents no new argument which would challenge our previous analysis or change our disposition. He has already conceded that by the time of sentencing he was aware of the corrected OGS and revised minimum sentence range. He knew he was facing a maximum of twenty years' incarceration (on the robbery charge alone) if he did not take the plea. The plea offered the opportunity to have all the remaining charges

dismissed. The PCRA court's finding that plea counsel was effective, and Appellant's plea was knowing, voluntary and intelligent, is supported by the record. We decline to disturb it.

Furthermore, Appellant fails to prove that but for counsel's incorrect advice, he would not have taken the plea. Numerous other factors still militated in favor of acceptance. Appellant received corrected advice about the sentencing range, and chose not to raise the issue at sentencing. He received the benefit of the plea his counsel had negotiated.

On the final page of the argument section, Appellant asserts that the colloquy "at the **time of the plea** falls short of the requirements set forth [in ***Commonwealth v.***] ***Willis***[, 369 A.2d 1189, 1189(Pa. 1977)] and [***Commonwealth v.***] ***Dilbeck***, [353 A.2d 824 (Pa. 1976)]." (***Id.*** at 24) (emphasis in original).

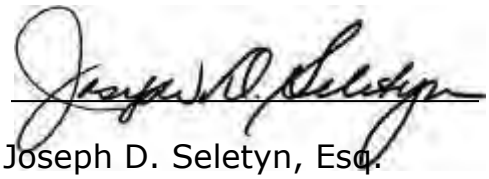
Appellant's reliance is misplaced. This Court has long recognized the abrogation of ***Willis*** and ***Dilbeck*** for the requirement of inquiry into "mandatory areas" for the plea colloquy, in favor of the totality of the circumstances test. ***See Commonwealth v. Knight***, 618 A.2d 442, 445 n.2 (Pa. Super. 1992) (finding contention specious); ***see also Allen***, ***supra*** at 588-89. Moreover, Appellant was fully informed of the correct sentence ranges before he was sentenced. He still could have objected, or asked for remedial action to be taken, or both. He chose not to do so. Appellant fails to demonstrate how he was prejudiced by plea counsel's

initial error. His claim of ineffectiveness fails to meet the ***Strickland***/***Pierce*** prejudice prong. His PCRA claims do not merit relief.

Our reasoning differs from that of the PCRA court. However, we may affirm the decision of the PCRA court if there is any basis on the record to support the PCRA court's action, even if we rely on a different basis in our decision to affirm. ***See Commonwealth v. Blackwell***, 936 A.2d 497, 499 (Pa. Super. 2007).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/30/2014