

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
KEVIN EDMONDSON	:	
	:	
Appellant	:	No. 2802 EDA 2017

Appeal from the PCRA Order August 1, 2017
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0011488-2011

BEFORE: BOWES, J., SHOGAN, J., and KUNSELMAN, J.

MEMORANDUM BY BOWES, J.:

FILED MAY 1, 2019

Kevin Edmondson appeals from the August 1, 2017 order denying him PCRA relief. After thorough review, we affirm.

On February 11, 2011, Appellant robbed and fatally shot Dwayne Smith and robbed Ronald Stewart at gunpoint. Appellant entered a negotiated guilty plea to third-degree murder, two counts of robbery, and three violations of the Uniform Firearms Act on June 11, 2013. The court immediately sentenced him to the aggregate agreed-upon sentence of twenty-seven and one-half years to fifty-five years of imprisonment. Appellant did not file a post-sentence motion or a direct appeal.

On May 19, 2014, Appellant filed the instant timely *pro se* PCRA petition alleging three bases for relief: (1) that counsel was ineffective for failing to

file a requested direct appeal;¹ (2) that his plea was not knowingly, voluntarily, or intelligently entered; and (3) that his sentence was illegal as the court had no authority to impose a sentence for felony-murder on both the murder charge and the predicate offense.² Counsel was appointed. Two years later, *in lieu* of filing an amended petition, counsel moved to withdraw pursuant to **Turner/Finley**,³ and filed a no-merit letter.

On June 30, 2017, the court issued Rule 907 notice of its intention to dismiss the PCRA petition, and appended to it a copy of counsel's no-merit letter. Appellant filed a response in opposition to dismissal in which he added several new claims and argued that an evidentiary hearing was warranted. Specifically, Appellant alleged that his guilty plea was unlawfully induced and the product of a confession that was coerced by threats and promises. Appellant also maintained that plea counsel was ineffective for failing to insist on a presentence investigation, as it would have revealed Appellant's mental health issues and provided mitigating evidence for purposes of sentencing. Finally, Appellant faulted PCRA counsel for characterizing Appellant's

¹ Arguably, Appellant would have been entitled to an evidentiary hearing on the factual issue of whether counsel failed to file a requested appeal. However, although Appellant identified this issue of plea counsel ineffectiveness in his Pa.R.A.P. 1925(b) concise statement, he abandoned that issue on appeal.

² Appellant pled guilty to third-degree murder. Felony murder, which does have a predicate offense, is second-degree murder.

³ **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa.Super. 1988).

ineffectiveness claims as “bare,” and maintained that it was counsel’s duty to do an investigation independent of the District Attorney’s file, and to communicate with his client, and identify claims that could support PCRA relief.

On August 1, 2017, the court denied PCRA relief without a hearing. Appellant filed a timely notice of appeal, and both Appellant and the court complied with Pa.R.A.P. 1925.⁴ On appeal, Appellant presents six questions for our review:

- A. Was [Appellant]’s procedural and substantive due process rights violated, when the Commonwealth failed to present the [Appellant] with notice of the accusation, as it relates to the Sixth Amendment of the U.S.C. & Title 18 Pa.C.S. § 104(3)(4)[?]
- B. Was the [Appellant]’s sentencing order completed in error constituting an illegal sentence [?]
- C. Was all counsel ineffective for failing to protect this [Appellant] from the illegal sentencing procedures, resulting in an unlawfully induced guilty plea [?]

⁴ Appellant filed a Rule 1925(b) concise statement of errors complained of on appeal with his notice of appeal, and prior to being ordered to do so by the court. He alleged that counsel was ineffective for failing to file a notice of appeal to challenge the legality of his sentence and for allowing his client to accept an unlawfully induced plea. In addition, he alleged that he was denied procedural and substantive due process when counsel failed to introduce evidence of his mental health disability at sentencing; that he was not provided with notice of the charges pursuant to the 6th Amendment and 18 Pa.C.S. § 104(3)(4); that his sentence was illegal; and that there was error in the sentencing order. He filed a second Rule 1925(b) concise statement in response to the court’s order in which he reiterated the same grounds identified in his earlier filing.

- D. Was counsel ineffective for allowing the [Appellant] to be sentenced to a term of imprisonment for robbery and third[-] degree murder?
- E. Did the trial court impose an illegal sentence upon the [Appellant], when it imposed the statutory maximum penalty, pursuant to 18 Pa.C.S. §§ 1102.1(d), where said sentencing statute . . . was declared unconstitutional in its entirety[?] Noting: The sentence possessed NO statutory authorization, when imposed outside of the Sentencing Code 42 Pa.C.S. §§ 9721(a)(a.1)(1-7).
- F. Was counsel ineffective for failing to introduce onto the record [Appellant]'s mental health disabilities/deficiency, pursuant to 42 Pa.C.S. § 9543(a)(2)(i-ii)[?]

Appellant's brief at unnumbered 3 (unnecessary capitalization omitted).

To be eligible for PCRA relief, a petitioner must prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2). These circumstances include a constitutional violation or ineffectiveness of counsel that "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Id.* at (a)(2)(i) and (ii).

A petitioner is not entitled to a PCRA evidentiary hearing as a matter of right. Where there is no genuine issue concerning any material fact, the PCRA court can decline to hold a hearing. On appeal, "we examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and in denying relief without an evidentiary hearing." ***Commonwealth v. Derrickson***, 923 A.2d 466, 468 (Pa.Super. 2007); **see**

also Pa.R.Crim.P. 907(1). When we review a PCRA order, we must determine whether the findings of the PCRA court are supported by the record and whether the court's legal conclusions are free from error. **Commonwealth v. Montalvo**, 2019 Pa. LEXIS 1722, *20-22 (Pa. 2019); **Commonwealth v. Hannibal**, 156 A.3d 197, 206 (Pa. 2016). In doing so, we review the PCRA court's findings and the evidence of record in the light most favorable to the prevailing party. **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012).

In his first issue, Appellant presents a constitutional challenge based on an alleged lack of notice of the charges against him. The issue was not raised in his PCRA petition as a basis for relief, and thus, it is waived. **See Commonwealth v. Jones**, 912 A.2d 268, 278 (Pa. 2019) (citing **Commonwealth v. Albrecht**, 720 A.2d 693, 706 (Pa. 1998) (providing that a claim for post-conviction relief cannot be raised for the first time on appeal to this Court)). Although it was asserted in his response to the Rule 907 notice to dismiss without a hearing, the PCRA court did not address it, nor was it obligated to do so. **See Commonwealth v. Rykard**, 55 A.3d 1177, 1192 (Pa.Super. 2012) (where in response to PCRA court's notice of dismissal petitioner raised two new claims of trial counsel ineffectiveness, but did not seek permission to amend his petition to add the latter claims, the PCRA court was not required to address the issues). Since Appellant did not seek permission to amend his petition to raise this additional issue, it is not properly before us. Moreover, had he properly preserved it, he would not be entitled

to relief. The record establishes that Appellant was provided with the criminal information listing the charges, he was arraigned on the charges, and they were listed in the written guilty plea colloquy that Appellant executed prior to the sentencing hearing.⁵

Next, Appellant contends that no sentencing order was entered, and that this deficiency renders his sentence illegal. Again, Appellant did not raise this issue in his PCRA petition. Furthermore, it does not fall within the well-recognized categories of illegal sentencing issues that are cognizable under the PCRA. **See Commonwealth v. Smith**, 194 A.3d 126, 137 (Pa.Super. 2018) (reiterating that “illegal sentence” is a term of art that applies to claims that sentence fell outside the legal parameters of the applicable statute, claims involving merger/double jeopardy, claims implicating the rule in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), and its progeny, and Eighth Amendment cruel and unusual punishment claims). Moreover, even if the claim was properly before us, it would not merit relief as the certified record contains the sentencing order.

Appellant’s third and fourth issues implicate the effectiveness of both plea counsel and PCRA counsel. It is well established that counsel is presumed to have rendered effective assistance. **Commonwealth v. Sepulveda**, 55

⁵ The notes of testimony from the guilty plea hearing and sentencing are not contained in the certified record. There is no indication that Appellant requested that these proceedings be transcribed and be made part of the certified record, and it was his obligation to do so.

A.3d 1108, 1117 (Pa. 2012). In order to obtain relief on a claim challenging counsel's performance, a PCRA petitioner must satisfy the performance and prejudice test announced in **Strickland v. Washington**, 466 U.S. 668, 687 (1984), and articulated in **Commonwealth v. Pierce**, 527 A.2d 973, 975 (Pa. 1987). The petitioner must demonstrate all of the following: "(1) the underlying substantive claim has arguable merit; (2) counsel did not have a reasonable basis for his or her act or omission; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance" such that there is a reasonable probability that the result of the proceeding would have been different absent counsel's error or omission. **Commonwealth v. Wholaver**, 177 A.3d 136, 144 (Pa. 2018). "A petitioner's failure to satisfy any prong of the ineffectiveness test is fatal to the claim". **Id.**

Appellant argues that plea counsel was ineffective for failing to protect him from illegal and unconstitutional sentencing procedures that resulted in an unlawfully induced guilty plea. According to Appellant, PCRA counsel was also ineffective for filing a **Turner/Finley** no-merit letter when such a non-frivolous issue existed.

The issue, while not precisely what Appellant pled in his PCRA petition, touches on his claim that his plea was involuntary. Appellant's claim of PCRA counsel ineffectiveness was properly raised in his response to the Rule 907

notice, and thus, it is properly before us on appeal.⁶ **Commonwealth v. Smith**, 121 A.3d 1049, 1056 (Pa.Super. 2015).

It is difficult to discern the factual basis for Appellant's complaint that the sentencing procedure violated his constitutional rights and/or unlawfully induced his guilty plea. He suggests that the court ignored its judicial oath to uphold the Constitution by permitting an "unlawfully imposed guilty plea." Appellant's brief at unnumbered 15-16. We note that Appellant did not raise this issue of judicial impropriety in his PCRA petition below, and even if it was cognizable under the PCRA, that issue is not preserved for our review.

Furthermore, while Appellant pled in his PCRA petition that his plea was unknowing, involuntary, or unintelligent because counsel did not inform him of the rights and conditions of his plea, Appellant has not articulated what counsel failed to tell him or how it would have altered his decision to enter a negotiated plea. Moreover, the record reflects that Appellant completed and signed a written guilty plea colloquy in which the terms of the plea were specified. Thus, Appellant did not plead facts that could sustain a finding that

⁶ As this Court noted in **Commonwealth v. Smith**, 121 A.3d 1049, 1054 (Pa.Super. 2015), "[t]he purpose of a Rule 907 pre-dismissal notice is 'to allow a petitioner an opportunity to seek leave to amend his petition and correct any material defects, the ultimate goal being to permit merits review by the PCRA court of potentially arguable claims.'" (quoting **Commonwealth v. Rykard**, 55 A.3d 1177, 1189 (Pa.Super. 2012)). It also provides an opportunity for Appellant or counsel to object to the dismissal and point out to the PCRA court any perceived errors that could be potentially amended. The response is also the opportunity for the petitioner to object to counsel's effectiveness at the PCRA level. **Id.**

his underlying claim had arguable merit, or that had counsel properly informed him, there was a reasonable probability that he would not have pled guilty. **See Commonwealth v. Fears**, 86 A.3d 795, 807 (Pa. 2014) (holding that showing of prejudice required proof that he would not have pled guilty and would have achieved a better outcome at trial). Since plea counsel was not ineffective in this regard, PCRA counsel cannot be deemed ineffective for failing to raise this issue in an amended PCRA petition. No relief is due on these ineffectiveness claims.

In his fourth and fifth claims, Appellant argues that counsel was ineffective for permitting him to be sentenced to imprisonment for robbery and third-degree murder. He alleges that the crimes were not recognized as crimes by the Pennsylvania legislature, and that the statutory definitions are too vague to provide notice to the public of what conduct is criminal. In addition, he cites **Commonwealth v. McKenna**, 383 A.2d 174 (Pa. 1978), in support of his claim that the statutes under which he was sentenced, 18 Pa.C.S. §§ 1102 (sentence for murder) and 1103 (sentence of imprisonment for felony), were held to be unconstitutional, and are still unconstitutional. Since Appellant did not raise these issues in his PCRA petition, they are waived.

Appellant contends herein that his sentence is illegal. Although Appellant did not properly preserve this claim, we may entertain it in this timely PCRA petition. **See Commonwealth v. Ballance**, 2019 Pa. Super.

LEXIS 92, *1 (Pa.Super 2019) (reaffirming that a court may entertain a challenge to the legality of sentence so long as it has jurisdiction to hear the claim, as in a timely PCRA petition). We note the following. This was a negotiated plea. Appellant's sentences for third-degree murder and robbery did not exceed the statutory maximums. While the sentence imposed on the third-degree murder conviction was the statutory maximum, the court did not impose any additional sentences on the three firearms violations. Hence, the sentences were not illegal, and Appellant is not entitled to relief on that basis.

Appellant's final issue is that plea counsel was ineffective in failing to introduce mitigating evidence consisting of his alleged mental health disabilities at the time of sentencing, and that PCRA counsel was ineffective in failing to identify and pursue this claim. Again, as to plea counsel, this ineffectiveness issue is not properly before the Court as it was not asserted as a basis for relief in Appellant's PCRA petition. Furthermore, there is no evidence in the certified record that Appellant suffered from mental health disabilities.⁷ Moreover, Appellant did not plead that he advised plea counsel or PCRA counsel of his purported mental health issues, or that they knew or

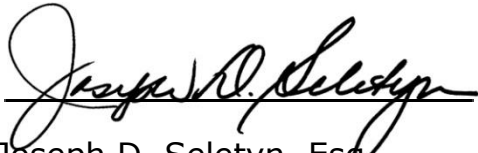
⁷ Instead, Appellant improperly attached school records and assessments to his appellate brief. ***See In re S.M.***, 176 A.3d 927, 934 (Pa.Super. 2017) (noting it is black letter law that appellate courts cannot consider anything that is not part of the certified record, and that material included only in briefs, but which is not part of the record, cannot be considered).

J-S46010-18

should have known, and thus, there is no basis for finding plea counsel or PCRA counsel ineffective in failing to identify and prosecute this claim.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/1/19