

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

WARREN MICHAEL JONES, JR.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 227 WDA 2013

Appeal from the Judgment of Sentence October 10, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0008793-2012

BEFORE: BOWES, ALLEN, and LAZARUS, JJ.

MEMORANDUM BY BOWES, J.: FILED: December 10, 2013

Warren Michael Jones, Jr. appeals from his October 10, 2012 judgment of sentence of three to six years imprisonment with RRRI eligibility imposed by the court following a negotiated guilty plea to two counts of possession with intent to deliver heroin ("PWID"), delivery of a controlled substance (heroin), and possession of a small amount of marijuana. After careful review, we affirm.

The facts as gleaned from the summary of the evidence provided by the Commonwealth at the plea hearing are as follows. In August 2012, Pennsylvania State Trooper Jeffrey Brautigam arrested co-defendant Heather Bonnoni in Westmoreland County in possession of heroin. In a subsequent interview, she provided information regarding her supplier. The next day, the trooper followed Bonnoni, her boyfriend, and her sister as they drove to

the Miracle Mile Plaza in Monroeville. They parked in the Taco Bell parking lot and Bonnini and her boyfriend exited the vehicle. They proceeded toward Starbucks. A short time later, police surveillance units observed a white Tahoe driven by Appellant enter the lot. Bonnini and her boyfriend approached the Tahoe and Bonnini entered the passenger seat. Police observed Appellant and Bonnini exchange items, and then police moved in as Bonnini was exiting the vehicle. She admitted to police that she had a brick of heroin inside her bra. Appellant was removed from the vehicle. A large plastic bag with four additional bricks of heroin was sitting on the driver's side floor in plain view and a marijuana blunt was recovered from the middle console. Appellant consented to the search of the vehicle, which yielded \$1,703 in cash. Appellant admitted that he sold the brick of heroin to Bonnini for \$350 and informed police that he had purchased the heroin for \$275 per brick.

The drugs were forwarded to the State Regional Lab at Greensburg. Analysis confirmed that the drugs, individually packaged in approximately 250 white glassine packets labeled either "Purina" or "VIP," were heroin, a Schedule 1 narcotic, and weighed a total of 6.3 grams.

On October 10, 2012, Appellant, represented by privately-retained counsel, and following a thorough colloquy by the trial court, pled guilty pursuant to a negotiated plea agreement. The Commonwealth's attorney placed the agreement on the record:

The Commonwealth has agreed to no more than the mandatory sentence of 3 to 6 years. He is RRRI eligible. His alternative minimum sentence is 27 months. He will plead to the Information and the sentence will be imposed at Count 2, possession with intent to deliver. There will be no further penalty at any of the remaining counts.

N.T., 10/10/12, at 4. The trial court then asked Appellant if he understood the Commonwealth's statement, and whether the outlined plea agreement met his expectations. Appellant stated that he understood and that the agreement was consistent with his understanding. The trial court described each of the charges and the maximum penalties for each and Appellant acknowledged that he understood the charges to which he was pleading guilty as well as the maximum penalties for each charge. The Commonwealth summarized the evidence that would be offered at trial. After further colloquy, the trial court found that Appellant's plea was knowing, intelligent and voluntary. Appellant waived the right to a presentence investigation prior to sentencing and the Commonwealth asked the court to implement the plea agreement. The court sentenced Appellant in accordance with the agreement, informed him that he had ten days to file a motion seeking modification of his sentence or challenge the validity of his plea, thirty days to appeal to the Superior Court on certain enumerated grounds, and the right to appointed counsel to file those motions and appeals. Appellant also completed a written guilty plea explanation of defendant's rights form earlier.

On November 6, 2012, Appellant filed a *pro se* motion seeking modification of his sentence to include eligibility for boot camp in light of his age, the fact that this was his first offense, and the non-violent nature of the offenses. He averred therein that counsel of record had abandoned him without filing post-sentence motions and asked the court to permit him to proceed *nunc pro tunc*. He also filed a *pro se* motion for leave to proceed *in forma pauperis*. On November 9, 2012, new privately-retained counsel entered his appearance on Appellant's behalf, and filed a notice of appeal to this Court and a motion for leave to proceed *in forma pauperis*. The trial court ordered Appellant to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal on February 20, 2013, and he complied on May 31, 2013, alleging therein that his guilty plea was not intelligent and voluntary and that he was advised to plead guilty despite a meritorious suppression claim. The trial court issued its Rule 1925(a) opinion.

Appellant presents two issues for our review:

- I. Whether the plea of guilty was not voluntary, knowing or intelligent since the Commonwealth of Pennsylvania did not give Appellant notice of the mandatory sentence until the guilty plea hearing?
- II. Whether the plea of guilty was not voluntary, knowing or intelligent since the guilty plea was motivated by defense counsel advising that there was no meritorious suppression motion?

Appellant's brief at viii.

Appellant alleges that his guilty plea was not voluntary, knowing or intelligent and seeks to withdraw it and go to trial. The law is settled that there is no absolute right to withdraw a guilty plea. **Commonwealth v. Broaden**, 980 A.2d 124 (Pa.Super. 2009). When a defendant seeks to withdraw his plea prior to imposition of sentence, generally it is permitted “for any fair and just reason,” provided the Commonwealth is not substantially prejudiced. **Commonwealth v. Kirsch**, 930 A.2d 1282, 1284-1285 (Pa.Super. 2007). Stricter scrutiny, however, governs a post-sentence motion to withdraw a guilty plea to discourage defendants from entering pleas as “sentence-testing devices.” **Id.** at 623. A defendant must establish that manifest injustice would result if he was not permitted to withdraw the plea. A showing that a plea was not entered knowingly, intelligently, and voluntarily, has been held to meet that standard. **Broaden, supra** at 129. The decision to grant or deny a motion to withdraw a guilty plea rests within the trial court's discretion, and we will not disturb the court's decision on such motion unless the court abused that discretion. **Commonwealth v. Gordy**, 73 A.3d 620 (Pa.Super. 2013).

In the instant case, Appellant, while represented by counsel, filed a *pro se* post-sentence motion with the trial court.¹ He did not seek to

¹ There is no indication in the certified record that plea counsel sought to withdraw from representation, and thus, Appellant's *pro se* motion was a nullity. **Commonwealth v. Nischan**, 928 A.2d 349 (Pa.Super. 2007). (Footnote Continued Next Page)

withdraw his guilty plea; he sought only modification of his sentence to include eligibility for boot camp. The trial court did not rule on the motion. Appellant retained new counsel who filed a timely notice of appeal on his behalf. Allegations that his plea was not knowing, intelligent and voluntary were advanced for the first time in his Pa.R.A.P. 1925(b) statement. Now, on appeal, Appellant claims that his guilty plea was not voluntary and intelligent because the Commonwealth did not notify him prior to the plea hearing of its intention to proceed pursuant to 42 Pa.C.S. § 9712² and seek the mandatory minimum sentence. The trial court found this issue waived because Appellant failed to preserve it below. **See** Pa.R.A.P. 302(a); ***In re F.C. III***, 2 A.3d 1201 (Pa. 2010).

We agree with the trial court that the issue is waived. A challenge to the validity of a guilty plea is one of the claims that must be raised in the trial court either by a motion to withdraw guilty plea prior to sentencing or by a post-sentence motion after sentencing in order to be reviewed on direct
(Footnote Continued) _____

While it should have been forwarded to counsel, there is no notation in the record to that effect. If we assume there was a breakdown in the court system, and treat Appellant's *pro se* motion as properly filed, it does not result in preservation of his issues since Appellant did not seek withdrawal of his plea therein.

² Appellant's reliance upon 42 Pa.C.S. § 9712 is misplaced as that provision relates solely to mandatory minimums imposed for offenses committed with a firearm. The amount of heroin involved, 6.3 grams, triggered the mandatory minimum provision of The Controlled Substance, Drug, Device and Cosmetic Act, 18 Pa.C.S. § 7508(a)(7)(ii).

appeal. **Commonwealth v. Rush**, 959 A.2d 945 (Pa.Super. 2008). Appellant did not make such a claim or seek such relief in the trial court. In short, the issue of the voluntariness of the plea was not raised in the trial court, and hence, is not preserved for review.

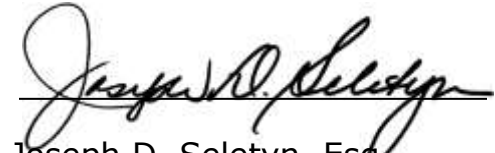
Even if the issue had been preserved, it would not afford relief. In determining whether a plea is valid, the court must examine the totality of circumstances surrounding the plea. **Commonwealth v. Flanagan**, 854 A.2d 489, 500 (Pa. 2004); **Broaden, supra**. Our review of the certified record reveals that Appellant answered, initialed, and signed a written guilty plea explanation of defendant's rights form on October 10, 2012. Furthermore, Appellant was present in court when the Commonwealth's attorney apprised the trial court of the terms of the negotiated plea, which included "the mandatory sentence of 3 to 6 years." N.T., 10/10/12, at 4. The court turned to Appellant and asked him if the Commonwealth's recitation of the plea agreement conformed to his understanding. Appellant confirmed that he understood everything outlined by the Commonwealth's attorney. Shortly thereafter, the trial court recited the charges and their maximum penalties and Appellant stated that he understood the information. **Id.** at 7. The court then sentenced Appellant in accord with the negotiated plea agreement. The proceeding complied with the mandates of Pa.R.Crim.P. 590(B), governing such plea agreements. **See also Commonwealth v. Wilkins**, 277 A.2d 341 (Pa. 1971).

The instant case involved a negotiated guilty plea. Thus, Appellant knew exactly what sentence he would receive before he pled guilty. Moreover, he was told prior to the plea that the mandatory minimum would be imposed. Thus, we find no merit in Appellant's claim that his plea was unknowingly and involuntarily entered. **See Commonwealth v. Boyles**, 606 A.2d 1201, 1206 (Pa.Super. 1992) (acknowledging that while notice of the mandatory minimum was required before the defendant entered an open guilty plea, since the defendant was so informed, "his plea was knowingly, intelligently and voluntarily made.").

Appellant's second issue, that his guilty plea was unknowing and unintelligent because it was motivated by counsel's representation that there was no meritorious suppression motion, is also waived for failure to raise the issue below. Pa.R.A.P. 302(a). Furthermore, even if it had been preserved, it would not afford relief at this juncture. Appellant's contention that the drug seizure was constitutionally infirm and that counsel's advice to plead guilty was incompetent implicates the effectiveness of plea counsel and such claims are generally deferred to collateral review. **See Commonwealth v. Holmes**, 2013 Pa. LEXIS 2577 (Pa. 2013) (reaffirming **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002)) and holding that, absent certain circumstances, claims of ineffective assistance of counsel are to be deferred to Post Conviction Relief Act (PCRA) review.

Judgment of sentence 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: 12/10/2013