

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERTO A. TAPIA,	:	
	:	
Appellant	:	No. 2543 EDA 2011

Appeal from the PCRA Order September 12, 2011,
Court of Common Pleas, Bucks County,
Criminal Division at No. CP-09-CR-0006457-2009

BEFORE: GANTMAN, DONOHUE and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: January 11, 2013

Roberto A. Tapia (“Tapia”) appeals from the September 12, 2011 order of the Court of Common Pleas, Bucks County, denying his petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

On January 7, 2010, Tapia pled guilty to two counts of involuntary deviate sexual intercourse and one count each of statutory sexual assault and rape of a child.¹ The Commonwealth *not* proessed the remaining charges.² As English is Tapia’s second language, an interpreter was present at the time of his guilty plea colloquy. Tapia initially participated in a group

¹ 18 Pa.C.S.A. §§ 3123(a)(7), (b), 3122.1, 3121(c).

² These charges included three counts of aggravated indecent assault, one count of unlawful contact with a minor, one count of corruption of minors, and two counts of indecent assault. 18 Pa.C.S.A. §§ 3125(a)(7), (8), 6318(a)(1), 6301(a)(1), 3126(a)(7), (8).

*Retired Senior Judge assigned to the Superior Court.

colloquy with other defendants pleading guilty to unrelated offenses. During this colloquy, the trial court confirmed that Tapia and the other participants could understand the proceedings (*e.g.*, they were not under the influence of drugs, alcohol, or medication) and advised them of the rights they were forfeiting by pleading guilty (*e.g.*, the right to a jury trial, the right to confrontation, the presumption of innocence, and their limited appeal rights). Tapia's counsel was not present for that portion of the colloquy, and the trial court stated on the record that if Tapia had any questions about the beginning of the proceeding, he would be permitted to address those questions upon his counsel's arrival. The trial court waited to address the offense-specific portions of the colloquy until Tapia's counsel arrived.

The trial court then conducted an individual plea hearing for each defendant, during which the Commonwealth summarized the basis for Tapia's charges as follows:

The affiant in this case is Detective Alexander Asmann of the Bristol Township Police Department. On May 15, 2009, he spoke with a single female, initials C_[.]P_[.], date of birth March 17, 1995.

C_[.]P_[.] relayed the following information during that interview: She reported that when she was eight years old, she resided in Bethlehem, Northampton County, Pennsylvania with her mother, her stepfather, [Tapia], whose date of birth is December 15, 1974, and her siblings.

At this residence, C_[.]P_[.] reported that [Tapia] began to grab her and remove her clothes. These encounters would end by C_[.]P_[.] managing to escape

[Tapia's] grasp and subsequently locking herself in a bedroom or the basement.

C[.]P[.] reported that her family moved to Bristol Township, Bucks County, where [Tapia] would continue to grab her and force her to remove her clothes.

When C[.]P[.] was approximately ten years old, while still living in Bethlehem, C[.]P[.] began to insert his penis into her vagina, engaging in intercourse. [Tapia] forcefully — [Tapia] held C[.]P[.] down to facilitate the intercourse. The intercourse between [Tapia] and C[.]P[.] became a routine occurrence, and C[.]P[.] reported that [Tapia] did not use a condom when he had intercourse with her.

On at least five (5) occasions, [Tapia] also did engage in licking C[.]P[.]'s vagina. Further, C[.]P[.] reported that [Tapia] wanted her to perform oral sex on him. She reports that she refused to do so.

C[.]P[.] stated that the last time [Tapia] had sex with her was in February or March of 2009 at the address of 34 Martin Road in Levittown, Bristol Township. C[.]P[.] stated that when she was between the ages of ten and fourteen, [Tapia] had intercourse with her at least 50 times.

On May 21, 2009, C[.]P[.] placed a phone call to [Tapia] that was recorded by Detective Tom Thiel of the Bucks County Detectives pursuant to the Wiretap Act, specifically, Title 18 Section 5704(2)[(jii)].

During that phone call, C[.]P[.] told [Tapia] that she did not want to go to his house any longer because he was having sex with her. [Tapia] responded by apologizing for the sex, calling it a 'big mistake,' and apologizing for never using a condom.

N.T., 1/7/10, at 24-26. Tapia acknowledged to the trial court that these facts were accurate. Tapia expressed to the trial court that he was

knowingly, voluntarily, and intelligently entering his plea, and further indicated that he understood that because he was not a United States citizen, he would be deported as a result of this conviction.

The trial court accepted Tapia's guilty plea and deferred sentencing for Tapia to be evaluated by the Sexual Offenders Assessment Board ("SOAB"). On May 19, 2010, Tapia stipulated to the SOAB evaluator's determination that he was a sexually violent predator and waived his right to a hearing on that finding. The trial court found Tapia to be a sexually violent predator and sentenced him to an aggregate term of 15 to 30 years of incarceration.

Tapia did not file any post-sentence motions or a direct appeal. On February 11, 2011, he filed a timely *pro se* PCRA petition raising various allegations of ineffectiveness of plea counsel. The PCRA court appointed counsel and held a hearing on the petition on July 27, 2011. On September 14, 2011, the PCRA court denied Tapia's request for relief.

Tapia filed a timely notice of appeal. On January 26, 2012, counsel for Tapia filed a motion to this Court requesting that the case be remanded for a **Grazier** hearing,³ as Tapia expressed an interest in proceeding *pro se* on appeal. This Court granted the request on February 27, 2012. The PCRA court held a **Grazier** hearing on July 5, 2012, at which Tapia withdrew his request to represent himself. The trial court notified this Court of the result on July 11, 2012.

³ **Commonwealth v. Grazier**, 552 Pa. 9, 713 A.2d 81 (1998).

On appeal, he raises five issues for our review:

[1.] Was [Tapia's] right to counsel violated when counsel did not stay with him throughout his guilty plea?

[2.] Did [Tapia] receive ineffective assistance of counsel when counsel failed to secure the services of an interpreter at the sentencing hearing?

[3.] Did [Tapia] receive ineffective assistance of counsel when counsel failed to secure an independent examination to determine whether [Tapia] should be classified as a sexually violent offender?

[4.] Did [Tapia] receive ineffective assistance of counsel when counsel failed to procure the services of a translator for [Tapia's] examination by the [SOAB]?

[5.] Did [Tapia] receive ineffective assistance of counsel when counsel failed to secure a witness who would have explained a motive for the testimony of the mother of the victim?

Tapia's Brief at 3.

We review the denial of PCRA relief by "examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." *Commonwealth v. Busanet*, __ Pa. __, 54 A.3d 35, 45 (2012) (citation omitted). "Our 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 party who prevailed in the PCRA court proceeding." *Id.*

As his first issue on appeal, Tapia asserts that plea counsel was ineffective because counsel was not present for the entirety of his guilty plea. Tapia's Brief at 9. The PCRA court found this issue to be without merit. PCRA Court Opinion, 1/5/12, at 6.

In reviewing an allegation of ineffective assistance of counsel, we begin with the assumption that counsel was effective. **Commonwealth v. Pierce**, 515 Pa. 153, 159, 527 A.2d 973, 975 (1987). In order to overcome this presumption, a claimant must establish three prongs or elements: (1) that the underlying claim is of arguable merit; (2) that counsel's action or inaction was not based on a reasonable trial strategy; and (3) that counsel's action or inaction prejudiced the claimant. **Id.** at 158-59, 527 A.2d at 975. "To establish the prejudice prong, the petitioner must demonstrate that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness." **Busanet**, ___ Pa. at ___, 54 A.3d at 46. If the claimant fails to establish any one of these three prongs, his challenge must fail. **Commonwealth v. O'Bidos**, 849 A.2d 243, 249 (Pa. Super. 2004).

In the argument supporting this issue in his appellate brief, Tapia does not discuss any of the elements required for a finding of ineffective assistance of counsel let alone how the facts of the case satisfy those elements. Rather, he baldly states: "Counsel's absence during the guilty plea in the absence of a knowing, intelligent, and voluntary waiver,

especially during one where the charges were as serious as they can be short of murder, constituted ineffective assistance of counsel.” Tapia’s Brief at 9. Because he failed to establish any of the prongs required for an ineffectiveness claim, no relief is due.⁴

As his second issue on appeal, Tapia argues that plea counsel was ineffective for failing to secure a Spanish-language interpreter for his sentencing hearing. Tapia’s Brief at 9-11. He asserts that an interpreter was required pursuant to 204 Pa. Code § 105, and plea counsel took no steps to ensure the presence of an interpreter. Tapia’s Brief at 10. The PCRA court found this issue to be without merit, as Tapia “failed to show that he is a party with limited English proficiency such that 204 Pa. Code § 105 should apply to him.” PCRA Court Opinion, 1/5/12, at 8.

Our review of Tapia’s appellate brief reveals that he failed to make any argument of prejudice, *i.e.*, that the outcome of the proceeding would have

⁴ We note that in his PCRA petition, Tapia sets forth each of the prongs of an ineffectiveness claim, and his claim of prejudice is that he would not have pled guilty if it had been explained to him that he could not appeal the discretionary aspects of his sentence. Supplemental PCRA Petition, 5/9/11, at 4. Even if Tapia had included this claim in his argument on appeal, it would nonetheless fail, as he entered an open (non-negotiated) guilty plea (N.T., 5/19/10, at 18), and thus he had the right to appeal the discretionary aspects of his sentence. ***See Commonwealth v. Tirado***, 870 A.2d 362, 365 n.5 (stating that “while a guilty plea which includes *sentence negotiation* ordinarily precludes a defendant from contesting the validity of his or her sentence other than to argue that the sentence is illegal or that the sentencing court did not have jurisdiction, *open* plea agreements are an exception in which a defendant will not be precluded from appealing the discretionary aspects of the sentence”) (emphasis in the original).

been different if he had been provided a Spanish language interpreter. **See *Busanet***, ___ Pa. at ___, 54 A.3d at 46. Furthermore, we agree with the PCRA court that the issue also lacks merit. Section 105 applies in this context only to parties with limited English proficiency. 204 Pa. Code § 105. Plea counsel testified at the PCRA hearing that he always spoke to Tapia in English during their meetings, and that they “had pretty meaningful conversations[.]” N.T., 7/27/11, at 40. Counsel further testified that when he asked Tapia questions, he provided appropriate responses and never requested an interpreter. ***Id.*** at 56. During his testimony at the PCRA hearing, Tapia admitted that he never told his attorney he had any difficulty understanding him. ***Id.*** at 29. Laura Vandergrift, Tapia’s former coworker, also testified at the PCRA hearing that she always spoke to Tapia in English, and that they discussed such complex matters as his 401(k) and other employee benefits. ***Id.*** at 10-11.

Moreover, the record reflects that Tapia spoke in English to C.P. during the conversation that was recorded by police. Commonwealth’s PCRA Exhibit 2. Indeed, at several points during the conversation, C.S. began speaking Spanish, and Tapia responded to her each time in English. ***Id.***

Finally, the notes of testimony from sentencing indicate that Tapia never expressed an inability to understand what was being said. To the contrary, the record reflects that Tapia was asked a series of questions to which he appropriately responded “yes,” “no,” or “correct,” (***see, e.g.***, N.T.,

5/19/10, at 8) and spontaneously asked the PCRA court a question regarding the SOAB evaluator's ability to testify, as the person present was not the individual who conducted his evaluation. *Id.* at 14. Therefore, Tapia failed to prove that section 105 applied to him.

As Tapia failed to establish merit to his argument or prejudice resulting from counsel's failure to have a translator at his sentencing hearing, plea counsel cannot be deemed to have been ineffective on that basis.

The third and fourth issues raised by Tapia allege ineffective assistance of counsel for failing to obtain an independent assessment to counter the SOAB's finding that he is a sexually violent predator and for failing to have a translator available at his SOAB evaluation. Tapia's Brief at 12-13. Tapia recognizes, however, that an *en banc* panel of this Court in ***Commonwealth v. Masker***, 34 A.3d 841 (Pa. Super 2011) (*en banc*), *appeal denied*, ___ Pa. ___, 47 A.3d 846 (2012), held that ineffective assistance of counsel claims and other defects relating to a sexually violent predator determination are not cognizable under the PCRA. Tapia's Brief at 12-13 n.1; ***Masker***, 34 A.3d at 842. "An opinion of the court en banc is binding on any subsequent panel of the appellate court in which the decision was rendered." Pa.R.A.P. 3103. As such, no relief is due.

As his final issue on appeal, Tapia asserts that plea counsel was ineffective for failing to secure testimony from Laura Vandergrift for trial that she received a call from Tapia's wife after his arrest asking about his

employment benefits. Tapia's Brief at 13. He asserts that this would have provided a "viable defense to the charges," "demonstrat[ing] a motive[.]" *Id.* at 14. The PCRA court correctly found this issue to be wholly without merit, as Tapia admitted his complicity and the case never proceeded to trial. PCRA Court Opinion, 1/5/12, at 9. Although he now appears to be arguing that these charges were fabricated by the victim's mother in an attempt to obtain his employee benefits, the record reflects that he continued to admit his guilt at the PCRA hearing. **See** N.T., 7/27/11, at 23. Therefore, he is entitled to no relief.

Order affirmed.