J-S63030-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DAVID RAY SNYDER,	:	
	:	
Appellant	:	No. 312 MDA 2013

Appeal from the Order Entered January 15, 2013,
In the Court of Common Pleas of Clinton County,
Criminal Division, at No. CP-18-CR-0000367-2011.

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

MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 13, 2013**

Appellant, David Ray Snyder, appeals from the order entered on January 15, 2013, in the Court of Common Pleas of Clinton County, denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA").[1] Upon review, we affirm.

After being accused of exposing his genitals to a nine-year-old girl at Riverview Park, Appellant was charged with the following crimes: corruption of minors,[2] open lewdness,[3] indecent exposure,[4] and two counts of unlawful

*Retired Senior Judge assigned to the Superior Court.

[1] 42 Pa.C.S.A. §§ 9541-9546.

[2] 18 Pa.C.S.A. § 6301(a)(1)(ii).

[3] 18 Pa.C.S.A. § 5901.

[4] 18 Pa.C.S.A. § 3127(a).

contact with a minor.[5] Appellant entered pleas of *nolo contendere* to count 2, open lewdness, and count 5, unlawful contact with a minor. On July 16, 2012, Appellant was sentenced as follows: at count 5, unlawful contact with a minor, a felony of the third degree, fourteen to seventy-two months of incarceration at a State Correctional Institution; at count 2, open lewdness, a misdemeanor of the third degree, a period of twelve months of probation, to be served consecutively to the sentence imposed at count 5. Appellant was also designated as a sexually violent predator.

Appellant did not file post-sentence motions or a direct appeal. Appellant filed, *pro se*, a PCRA petition on September 25, 2012. The PCRA court appointed counsel, who filed an amended PCRA petition on November 21, 2012. Following a hearing, the PCRA court issued an order on January 15, 2013, denying Appellant's amended PCRA petition. This timely appeal followed. Appellant filed a Pa.R.A.P. 1925(b) statement pursuant to court order.

Appellant presents the following issues for review:

> 1. Whether the lower Court improperly found that Defendant's sentence was legal when it concluded that the charges of Unlawful Contact with a Minor and Open Lewdness did not merge for sentencing purposes?
>
> 2. Whether the lower Court improperly found the Defendant's sentence was proper and complied with the Plea Agreement when the sentencing court did not merge the two counts for sentencing purposes, despite the fact that the Judge at the time

[5] 18 Pa.C.S.A. § 6318.

> Defendant pled guilty told Defendant that the charges would merge for sentencing purposes and where the written guilty plea colloquy suggested the counts would merge?
>
> 3. Whether the lower Court improperly found the Defendant's plea was knowing and voluntarily when Defendant's counsel did not adequately explain the range of sentences that Defendant could receive?
>
> 4. Whether the lower Court improperly found that Defendant's counsel was not ineffective when trial counsel failed to file a motion to suppress a photo lineup where the line up contained two images of the same person?

Appellant's Brief at 5 (verbatim).[6]

Our standard of review for an order denying PCRA relief is whether the record supports the PCRA court's determination and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Berry***, 877 A.2d 479, 482 (Pa. Super. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001).

In his first issue, Appellant argues that the offense of open lewdness is a lesser included offense of the unlawful contact with a minor offense. Appellant's Brief at 13. Appellant maintains:

> The contact that [Appellant] had with the victim was when he allegedly exposed himself to the minor child. Once he exposed himself to the minor child, the contact and the open lewdness occurred. Accordingly, the offenses should merge for sentencing purposes.

[6] Although Appellant lists four issues in his statement of questions involved, he notes in his brief that he is no longer pursuing the fourth issue listed. As such, we will not review Appellant's fourth issue.

Id. Thus, Appellant asserts, the trial court's sentence of fourteen to seventy-two months on the unlawful contact charge, followed by twelve months of probation on the open lewdness charge, is an illegal sentence and therefore must be set aside. ***Id.***

"A claim that crimes should have merged for sentencing purposes raises a challenge to the legality of the sentence. Therefore, our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Nero***, 58 A.3d 802, 806 (Pa. Super. 2012), *appeal denied*, 72 A.3d 602 (Pa. 2013). "An illegal sentence must be vacated." ***Id.***

Our legislature has defined the circumstances under which convictions for separate crimes may merge for the purpose of sentencing:

> **§ 9765. Merger of sentences**
>
> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S.A. § 9765. Our Supreme Court determined that:

> the plain language of Section 9765 reveals a legislative intent 'to preclude the courts of this Commonwealth from merging sentences for two offenses that are based on a single criminal act unless all of the statutory elements of one of the offenses are included in the statutory elements of the other.' ... [Our Supreme Court] held that when each offense contains an element the other does not, merger is inappropriate.

Commonwealth v. Quintua, 56 A.3d 399, 401 (Pa. Super 2012) (quoting ***Commonwealth v. Baldwin***, 985 A.2d 830, 837 (Pa. 2009)).

To determine whether offenses are greater and lesser-included offenses, we compare the elements of the offenses. If the elements of the lesser offense are included within the elements of the greater offense and the greater offense has at least one additional element, which is different, then the sentences merge. ***Nero***, 58 A.3d at 807 (quoting ***Commonwealth v. Anderson***, 650 A.2d 20, 24 (Pa. 1994)). If both crimes require proof of at least one element that the other does not, then the sentences do not merge. ***Id.***

With these principles in mind, we proceed to examine the respective elements of both statutes to determine if each requires proof of an element not required by the other. The statute defining the crime of open lewdness provides as follows:

> **§ 5901. Open lewdness**
>
> A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.

18 Pa.C.S.A. § 5901. "Lewd" acts involve "sexuality or nudity in public." ***Commonwealth v. Fenton***, 750 A.2d 863, 866 (Pa. Super. 2000). Section 5901 pertains to conduct that: "1) involves public nudity or public sexuality, and 2) represents such a gross departure from accepted

community standards as to rise to the level of criminal liability." ***Commonwealth v. Tiffany***, 926 A.2d 503, 511 (Pa. Super. 2007).

The statute defining the crime of unlawful contact with minors provides:

> **§ 6318. Unlawful contact with minor**
>
> **(a) Offense defined.**--A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:
>
> (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).
>
> (2) Open lewdness as defined in section 5901 (relating to open lewdness).
>
> (3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).
>
> (4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).
>
> (5) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).
>
> (6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

18 Pa.C.S.A. § 6318. A defendant need not be successful in completing the purpose of his communication with a minor in order to be found guilty of § 6318(a). ***Commonwealth v. Reed***, 9 A.3d 1138, 1146 (Pa. 2010).

Rather, a defendant is guilty if he *contacts* a minor for the purpose of engaging in that prohibited behavior. ***Reed***, 9 A.3d at 1146 (emphasis in original). ***See also Commonwealth v. Morgan***, 913 A.2d 906, 910 (Pa. Super. 2006) (stating that "[o]nce Appellant contacts or communicates with the minor ***for the purpose of*** engaging in the prohibited activity, the crime of unlawful contact with a minor has been completed.") (emphasis in original).

In this case, the minor victim described the following circumstances to the investigating officer:

> [The minor victim] related that she was riding her bike and playing in the park with some friends. She stated that she was riding her bike by herself for a little bit too. I asked her where she was riding her bike and she related that she was riding her bike around the park. She related that this is when a guy came out of the bathroom and had his pants down and had his pee pee out. She related that she rode her bike around again and the guy said Hi to her and she rode by again and he had his pants down again with his pee pee out.

Affidavit of Probable Cause by Officer Kimberly Patterson, 9/12/11.

Here, the unlawful contact proscribed by 18 Pa.C.S.A. § 6318 took place when Appellant said "Hi" to the minor victim. This contact was clearly initiated for the purpose of effectuating the offense of open lewdness. Appellant's argument that the open lewdness offense is a lesser included offense of unlawful contact with a minor is premised upon Appellant's erroneous assertion that his act of open lewdness was the contact with the minor.

While both crimes were carried out contemporaneously, such a circumstance does not result in merger. Once Appellant intentionally communicated with the minor **for the purpose of** getting her attention and engaging in the prohibited activity of exposing himself, the crime of unlawful contact with a minor had been completed. The offense of open lewdness need not have been carried out in order for Appellant to have committed the unlawful contact with minors offense. Conversely, the offense of open lewdness requires the engagement in a lewd act, which the actor knows is likely to be observed by others who would be affronted or alarmed. Since each offense requires proof of an element that the other does not, the offenses do not merge. Thus, Appellant's sentence was not illegal and the trial court did not commit error in failing to merge the two charges for purposes of sentencing.

In his second issue, Appellant argues that his *nolo contendere* plea was not voluntary, knowing and intelligent. Appellant's Brief at 14. Appellant maintains that based on the trial judge's statement at the plea hearing that the judge suspected the counts for open lewdness and unlawful contact with a minor would merge, and the prosecutor's agreement, Appellant also believed that the offenses would merge for sentencing. ***Id.*** at 14-15. The "no contest plea statement" prepared by Appellant's attorney also suggests that the sentences would merge. ***Id.*** When Appellant was

sentenced, the court found that the two offenses did not merge. ***Id.*** Because Appellant was expecting a sentence that merged the two offenses, which he did not receive, Appellant maintains that his *nolo contendere* plea was not knowing, voluntary and intelligent and he, therefore, should be permitted to withdraw his plea.

"Initially, we note that, in terms of its effect upon a case, a plea of nolo *contendere* is treated the same as a guilty plea." ***Commonwealth v. Miller***, 748 A.2d 733, 735 (Pa. Super. 2000). "When reviewing a trial court's denial of a motion to withdraw a guilty plea, we will not disturb the court's decision absent an abuse of discretion." ***Id.***

Post-sentence motions to withdraw a guilty plea are subject to higher scrutiny than pre-sentence requests since courts strive to discourage entry of guilty pleas as sentence-testing devices. ***Commonwealth v. Flick***, 802 A.2d 620, 623 (Pa. Super. 2002). Therefore, a showing of manifest injustice is required to withdraw a guilty plea after imposition of sentence:

> [I]n order to withdraw a plea after sentencing the defendant must show that the court, by denying withdrawal, would be sanctioning a manifest injustice. Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly.

Commonwealth v. Gunter, 771 A.2d 767, 771 (Pa. 2001). "In determining whether a guilty plea was entered knowingly and voluntarily, ... a court 'is free to consider the totality of the circumstances surrounding the plea.'" ***Commonwealth v. Flanagan***, 854 A.2d 489, 513 (Pa. 2004). In

order to ensure a voluntary, knowing, and intelligent plea, trial courts are required to ask the following questions in the guilty plea colloquy:

> 1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or nolo contendere?
>
> 2) Is there a factual basis for the plea?
>
> 3) Does the defendant understand that he or she has the right to a trial by jury?
>
> 4) Does the defendant understand that he or she is presumed innocent until found guilty?
>
> 5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?
>
> 6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?
>
> 7) Does the defendant understand that the Commonwealth has a right to have a jury decide the degree of guilt if defendant pleads guilty to murder generally?

Pa.R.Crim.P. 590, cmt.; ***see also Commonwealth v. Pollard,*** 832 A.2d 517, 522–523 (Pa. Super. 2003).

We first note that an on-the-record colloquy was conducted. N.T., *Nolo Contendere* Plea Hearing, 1/12/12. As the record reflects, the trial court conducted the colloquy in accordance with requirements set forth in Pa.R.Crim.P. 590. ***Id.*** at 2-8; ***See also Pollard***, 832 A.2d at 522-523.

A review of that colloquy reflects the following exchange regarding sentencing:

> The Court: I would suspect that Count 2 and Count 5 merge.

> [Commonwealth]: I would agree, Your Honor …
>
> The Court: So, the most you could get would be seven years and Fifteen Thousand Dollars. Do you understand that?
>
> [Appellant]: Yes.

N.T., 1/12/12, at 4.

While the trial court's statement that it suspected that the two counts would merge may have caused Appellant some confusion, we cannot agree that, given the totality of circumstances, Appellant's plea was not voluntary and knowing on this basis. As noted, the trial court stated that it "suspected" that the two counts would merge for sentencing purposes. Such commentary cannot be interpreted as a statement that the offenses would unquestionably merge. Furthermore, Appellant was advised that the most his sentence would be was seven years and fifteen thousand dollars. Appellant was in fact sentenced to no more than seven years.

Moreover, there is no evidence in the sentencing transcript that, after Appellant learned that the counts would not merge, Appellant objected to the sentence. Additionally, despite being advised that he could file a motion within ten days of sentencing seeking to modify such sentence, Appellant failed to do so.

Also of relevance is trial counsel's testimony at the PCRA hearing that, after sentencing, Appellant was not pleased with the sentence due to the fact that Appellant was deemed a sexually violent predator. N.T., 12/19/12

at 49. At no point did Appellant tell trial counsel that he wished to withdraw his plea on the basis that the two offenses did not merge for sentencing. ***Id.*** at 49-50. Furthermore, trial counsel testified that there was no agreement with the Commonwealth that the counts would merge. ***Id.*** at 46. In addressing the claim that Appellant believed the counts would merge, trial counsel stated:

> In fact, the document that you just handed me, the no contest plea statement, includes the standard range for the open lewdness offense, as well. And, also, if there had been any type of agreement to merger, I would never have included the aggregate sentence of eight years and $17,500, because the maximum would have been seven years and $15,000.

Id. at 47. Counsel further testified that the issue of merger never came up at sentencing, and that trial counsel did not raise the issue of merger because he did not believe that the two offenses merged for sentencing purposes. ***Id.*** at 49.

A review of the written plea statement reveals no representation that the two offenses would merge. The written plea agreement includes the following statements:

> 25. I understand and agree that I am pleading guilty or *nolo contendere* to the crimes listed below. I understand, and my lawyer has explained to me, the elements of these crimes and the possible penalties for them. By pleading guilty, I agree and admit that I committed each element of these crimes, or by pleading nolo contendere. I do not contest that I committed each element of these crimes. I agree that the Commonwealth can prove that I committed each element of these crimes beyond a reasonable doubt. I am pleading … nolo contendere, to the following crimes:

> A.) Unlawful Contact with a Minor, a felony of the 3rd degree, and the maximum penalty for this crime is 7 yrs in jail and a $15,000.00 fine. …
>
> B.) Open Lewdness, a misdemeanor of the 3rd degree, and the maximum penalty for this crime is 1yr in jail and a $2,500.00 fine.
>
> 26. I could be sentenced to the maximum penalty for each of these crimes and the total maximum sentence I could receive is 8 yrs in jail and a $17,500.00 fine.

No contest plea statement, 1/12/12 at 6-7.

In reviewing the totality of circumstances, we cannot agree with Appellant's assertion that his plea was entered unknowingly and involuntarily based on the trial court's "suspicion," and the Commonwealth's off-handed agreement that the offenses would merge for sentencing. Appellant has failed to carry the burden of establishing manifest injustice in the trial court's refusal to allow him to withdraw his plea after sentencing. Therefore, the PCRA court did not abuse its discretion in refusing Appellant's request to withdraw his plea.

In his third issue, Appellant argues that his plea was not knowingly and voluntarily entered because Appellant's trial counsel did not adequately explain the range of sentences that Appellant could receive. Appellant's Brief at 15. Appellant maintains that he understood that the sentence for unlawful contact with minors would be six to fourteen months, not that six to fourteen months was the minimum range. ***Id.*** at 16. Appellant avers that immediately after receiving the sentence of fourteen to seventy-two months

on the unlawful contact with a minor charge, Appellant informed his attorney that he wished to withdraw his *nolo contendere* plea. ***Id.*** Appellant asserts that because his plea was not understandingly tendered, he must now be permitted to withdraw it. ***Id.***

As outlined above, in order to be permitted to withdraw his plea post-sentence, Appellant must establish that his plea was not tendered knowingly, intelligently, voluntarily, and understandingly. ***Gunter***, 771 A.2d at 771. In making that determination, "a court 'is free to consider the totality of the circumstances surrounding the plea.'" ***Flanagan***, 854 A.2d at 513.

During the *nolo contendere* plea, the trial court advised Appellant of the potential range of sentences:

> The Court: Okay. Count 2, Open Lewdness, is a third degree misdemeanor. You could go to jail for up to a year and get a fine of up to Twenty-five Hundred Dollars on that charge. Do you understand that?
>
> [Appellant]: Yes.
>
> The Court: And the Unlawful Contact With a Minor is a third degree felony. You could go to jail for up to seven years and get a fine of Fifteen Thousand Dollars on that count. Do you understand that?
>
> [Appellant]: Yes.

N.T., *Nolo Contendere* Plea Hearing, at 3-4. Additionally, the trial court advised:

> The Court: Do you understand that there's no agreement with regard to sentencing except that you would be sentenced in the standard range and that standard range calls for a minimum sentence of between six and --
>
> [Commonwealth]: Fourteen.
>
> The Court: -- fourteen months. Do you understand that?
>
> [Appellant]: Yes.

Id. at 5-6.

Furthermore, there is no indication in the record that Appellant objected when the sentencing court announced Appellant's sentence. As noted, Appellant failed to file a post-sentence motion seeking modification of sentence, and he did not file a motion to withdraw his plea. Additionally, Appellant's written plea statement outlines the potential sentences for the offenses.

Moreover, Appellant's trial counsel, Attorney Strouse, testified at the PCRA hearing that he explained to Appellant, in layman terms, the potential sentences. The trial court made the following determination regarding this testimony:

> Although six (6) month minimum sentence to fourteen (14) month minimum sentence is a sentence possibility pursuant to the plea agreement, Attorney Strouse testified adamantly that Attorney Strouse explained to [Appellant] in layman terms how the Sentencing Guidelines operated, and that there was a spectrum of time for incarceration, regulated by the Sentencing Guidelines, within which [Appellant's] sentence would fall. The possible maximum sentence in this case for both counts was eight (8) years imprisonment. Attorney Strouse additionally testified that because of his client's difficulty with reading,

> Attorney Strouse *thoroughly* reviewed the relevant court documents and processes with [Appellant] before sentencing. Attorney Strouse explained to [Appellant] that the six (6) to fourteen (14) month sentence was the standard range per the Pennsylvania Sentencing Guidelines, and that [Appellant's] minimum sentence would be somewhere between six (6) and fourteen (14) months with a maximum sentence being possibly seven (7) years for [Appellant's conviction of unlawful contact with a minor. Ultimately, this [trial court] finds credibility with Attorney Strouse on the issue of six (6) to fourteen (14) month sentence possibility, and finds that [Appellant] was aware of the procedural and legal situation and possible incarceration periods before signing the plea agreement and entering his nolo contendere plea before then President Judge Williamson.[1]
>
> > [1]This Court also recognizes that at the hearing on December 19, 2012, Attorney Strouse testified that [Appellant] had raised the issue of withdrawing his plea after sentencing, but had done so under the auspices of not wanting to register as a sexually violent predator. [Appellant] was not aware of that element of his plea agreement prior to sentencing and conveyed to Attorney Strouse that he wanted to withdraw his plea based on *that* aspect and *not* on the element of the 6-14 month possibility. Attorney Strouse was not aware of [Appellant's] confusion with the 6-14 month sentence *until* the hearing on December 19, 2012.

Trial Court Opinion, 1/15/13, at 5-6 (emphasis in original).

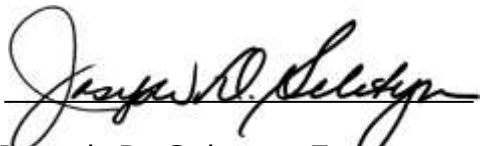
The PCRA court found trial counsel's testimony that counsel thoroughly explained the sentencing ranges and possibilities to Appellant to be credible and the record supports the PCRA court's findings. "[T]he trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence." ***Commonwealth v. Morris***, 958 A.2d 569, 576 (Pa. Super. 2008). "We are

precluded from reweighing the evidence and substituting our judgment for that of the factfinder." ***Commonwealth v. Judd***, 897 A.2d 1224, 1234, (Pa. Super. 2006).

Given the above, we conclude there is no arguable merit to the claim that Appellant's plea was entered unknowingly or involuntarily. Thus, the PCRA court did not err in refusing Appellant's request to withdraw his plea.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013