

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
ANTHONY BIDDING,	:	No. 32 MDA 2012
	:	
Appellant	:	

Appeal from the Order, November 28, 2011,
in the Court of Common Pleas of Luzerne County
Criminal Division at No. CP-40-CR-0002208-2008

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 12, 2013

Appellant, Anthony Bidding, comes before us challenging the denial of relief on his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 *et seq.* Finding no error, we affirm.

A brief recitation of the facts and procedural history follow. On October 24, 2005, the police were summoned to 18 Vine Street in Edwardsville for a reported robbery and assault. The resident, Peter Lach, was found bound and beaten on his kitchen floor. Lach was taken to the hospital but died a few days later as a result of his injuries. Initially, the police made little progress on the investigation. However, two years later, one of the perpetrators was arrested on an unrelated matter and made a statement regarding the Lach homicide. The statement led the police to appellant, who admitted going to the Lach residence with two juvenile

females. The group had planned to break into the home and steal money. However, when they broke in, Lach was present so they bound him with duct tape before taking his money and leaving.

Appellant was charged with second and third degree murder and related charges. A plea agreement was reached; appellant would plead guilty to third degree murder and conspiracy to commit burglary and the Commonwealth would withdraw the remaining charges; there was no agreement regarding sentencing.

A colloquy was conducted on May 19, 2010, and the court accepted appellant's plea. On July 9, 2010, appellant was sentenced to 240 to 480 months' incarceration on the charge of third degree murder and a consecutive 16 to 32 month sentence for conspiracy. (Notes of testimony, 7/9/10 at 21.) On July 16, 2010, a post-sentence motion was filed challenging the discretionary aspects of the sentence; the motion was denied. Thereafter, trial counsel was permitted to withdraw and the court appointed new counsel for appellant.

Appellant did not file a direct appeal. Rather, on August 1, 2011, a PCRA petition was filed challenging the voluntariness of appellant's plea and the effective assistance of counsel. (Docket #27.) A PCRA hearing was held; appellant and Michael T. Vough, Esq., the assistant district attorney assigned to appellant's case, testified.

Appellant averred that he was told if he pled guilty, the Commonwealth would not present any witnesses at sentencing, would not make any statement with regard to sentencing and would not object to any sentence imposed by the court. (Notes of testimony 11/16/11 at 10.) Appellant testified that he would not have pled guilty if not for such a promise. Appellant explained that the written plea agreement stated there was "no agreement as to sentence," but acknowledged the agreement was silent regarding "the type of things that [appellant] believed that [the prosecutor] agreed he would not be doing" at sentencing. (*Id.* at 13-15.) Appellant, referencing the sentencing transcript, claimed the prosecutor violated the agreement by making statements to the court. (*Id.* at 14-15.) Additionally, appellant testified that he answered all of the court's questions under oath. (*Id.* at 20.) He agreed that he had told the sentencing court that he understood the terms of his plea agreement and that no threats or promises had been made to persuade appellant to plead guilty. (*Id.* at 19-20.)

Attorney Vough testified that once a plea agreement had been reached, appellant's defense attorneys had concerns regarding how the Commonwealth would proceed at sentencing. He explained the defense attorneys had concerns about the Commonwealth calling co-defendants to the stand to testify against appellant. (*Id.* at 27.) "They also had concerns

about the Commonwealth advocating for a maximum sentence on the third degree." (*Id.*)

I, at that point, spoke to them and told them I had no intention of calling any witnesses at sentencing, and I had no intentions of advocating for a specific sentence. I never said I would remain quiet. Obviously at sentencing it is the Commonwealth's job to present some evidence or some argument, but my position with them was I would not call any witnesses at the sentencing, and I would not advocate for a specific sentence being a term of years, and that's the agreement that I had with [defense counsel] prior to [appellant] pleading guilty.

Id. Attorney Vough testified that he did not call any witnesses at sentencing and did not advocate for a specific sentence; he did not ask for a minimum or a maximum sentence. (*Id.* at 28-29.) Attorney Vough explained that he asked the Court to issue a sentence that was commensurate with the crime. (*Id.* at 28.)

On cross-examination, Attorney Vough continually testified that he presented facts to the court it needed to impose a sentence. (*Id.* at 29-35.) He denied that he had made a "side-deal" with appellant and again averred that it was an open plea to third degree murder and the defense had concerns that he addressed when telling appellant he would not call witnesses or advocate for a specific sentence. He again explained that it was not a part of the plea agreement. (*Id.* at 30-31.)

Following a PCRA hearing, the court issued an order denying appellant's petitions on November 28, 2011. (Docket #38.) On

December 27, 2011, appellant filed a notice of appeal from the denial of PCRA relief. (Docket #39.) New counsel was appointed. Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

Herein, appellant presents the following issues:

1. Did the PCRA Court err as a matter of law and/or abuse its discretion in failing to grant relief in the nature of leave to withdraw Defendant's plea where the record established that the Commonwealth entered into a plea agreement with Defendant and/or made a promise or representation that induced the Defendant's plea and, thereafter, violated the terms of the plea agreement or promise/representation at the time of sentencing thereby causing the Defendant's plea to be involuntary?

2. Did PCRA Counsel render ineffective assistance where he failed to raise Trial Counsel's failure to place [the] promise or plea agreement that induced the Defendant to plea on the record at the time of his plea and Trial Counsel's failure to request that the Defendant be granted leave to withdraw his plea, either by objection at the time of sentencing or by filing a Post-Sentence Motion to Withdraw Plea, where the Commonwealth made a [sic] an agreement, promise or representation that induced the Defendant's plea and then violated that agreement, promise or representation at the time of sentencing thereby rendering the plea involuntary?

Appellant's brief at i.

Our standard of review of a PCRA court's denial of a petition for post-conviction relief is well settled. We must examine whether the record

supports the PCRA court's determination, and whether the PCRA court's decision is free of legal error. ***Commonwealth v. Hall***, 867 A.2d 619, 628 (Pa.Super. 2005), ***appeal denied***, 86 Pa. 756, 895 A.2d 549 (2006). 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). Our scope of review is limited by the parameters of the PCRA. ***Commonwealth v. Hellman***, 867 A.2d 542, 544 (Pa.Super. 2005), ***appeal denied***, 583 Pa. 669, 876 A.2d 393 (2005).

The issue before the PCRA court was one of credibility. The PCRA clearly credited the district attorney's testimony that there was nothing in addition to the written plea agreement promised to appellant. A PCRA court's credibility findings are to be accorded great deference. ***Commonwealth v. Johnson***, 600 Pa. 329, 356, 966 A.2d 523, 539 (2009) ("A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts."). After a thorough review of the record of the guilty plea hearing, the sentencing hearing, the PCRA hearing, the briefs of the parties, the applicable law, and the well-reasoned opinion of the PCRA court, it is our determination that there is no merit to the questions raised. The PCRA court's opinion, filed on May 10, 2012, comprehensively discusses and properly disposes of the first issue presented as well as appellant's allegation in his second issue that guilty plea counsel was ineffective. Accordingly, we

adopt that opinion as our own and affirm the first issue presented on that basis.¹

We now turn to appellant's claim that PCRA counsel rendered ineffective assistance. Recently, in *Commonwealth v. Ford*, 44 A.3d 1190 (Pa.Super. 2012), this court analyzed four Pennsylvania Supreme Court cases discussing issues of PCRA counsel ineffectiveness when not raised before the PCRA court below. The *Ford* panel concluded, "claims of PCRA counsel ineffectiveness cannot be raised for the first time after a notice of appeal has been taken from the underlying PCRA matter." *Id.* at 1201.

[I]ssues of PCRA counsel effectiveness must be raised in a serial PCRA petition or in response to a notice of dismissal before the PCRA court Therefore, we hold that, absent recognition of a constitutional right to effective collateral review counsel, claims of PCRA counsel ineffectiveness cannot be raised for the first time after a notice of appeal has been taken from the underlying PCRA matter.

Id. at 1200. Thus, we may not address appellant's claim of PCRA counsel's ineffectiveness. Even if we were to reach the issue, we would conclude that the issue is meritless.

Order affirmed.

¹ Our review of the sentencing hearing indicates that Officer Hanlon, one of the prosecuting officers, responded to a question posed by the court at the time of sentencing and suggested the court impose the maximum sentence . He was not called as a witness for the Commonwealth; rather, he was present in court and the judge asked him for a sentencing recommendation. The district attorney did not advocate for a particular sentence at the hearing.

COMMONWEALTH OF PENNSYLVANIA:

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

v.

CRIMINAL DIVISION

ANTHONY BIDDING

NO. 2208 of 2008

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OPINION

I. Background & Factual History

This matter comes before the Court pursuant to Defendant, Anthony Bidding's Post-Conviction Relief Act Petition ("PCRA") appeal from the judgment of sentence to the above-captioned Case Number which became final on July 9, 2010 at a sentencing hearing before this Honorable Court. Previously, on or about May 19, 2010, Defendant pled guilty pursuant to a plea agreement of murder of the third-degree (1 Count) and conspiracy to commit burglary (1 Count). Defendant received a sentence with an aggregate term of incarceration of 256 months to 512 months as Defendant's sentences were run consecutive, and Defendant was credited with 798 days for time served. Defendant filed post sentence motions on July 16, 2010 challenging the discretionary aspect of his sentence and said motions were denied by this Court on this date. Subsequently, conflicts trial counsel were allowed to withdraw their appearance and PCRA conflicts counsel was appointed.

On August 1, 2011, Defendant filed a PCRA motion through his PCRA conflicts counsel and thereafter filed a supplemental motion on November 3, 2011. Both of Defendant's motions challenged the voluntariness of Defendant's plea and/or challenged the effective assistance of counsel and sought to withdraw Defendant's guilty plea. On November 16, 2011, a PCRA hearing was held before this Court and on November 28, 2011, an order was issued denying

Defendant's PCRA motions. Thereafter, Defendant filed a Notice of Appeal to this Court through former PCRA conflicts counsel on December 27, 2011. On January 10, 2012 former PCRA counsel was removed and this Court appointed new appellate conflict counsel. Pursuant to Pa.R.A.P. 1925(b), Defendant filed a Concise Statement of Matters Complained of on Appeal on February 7, 2012. Commonwealth responded to Defendant's Concise Statement of Matters Complained of on Appeal on February 14, 2012.

Factually, Defendant claims that his Trial Counsel had negotiated an alleged agreement with the Commonwealth's assistant district attorneys to provide that the Commonwealth would not call co-defendants at Defendant's sentencing, nor would the Commonwealth seek a specific term in regard to Defendant's sentence of incarceration. Defendant admits that no documentation exists to support the aforementioned allegations. (PCRA Hearing Notes of Testimony "N.T." at 4).

Instantly, Defendant raises the following issues on appeal:

- a. Did the PCRA Court err as a matter of law and/or abuse its discretion in failing to grant relief in the nature of leave to withdraw Defendant's plea where the record established that the Commonwealth entered into a plea agreement with Defendant and/or made a promise or representation that induced the Defendant's plea and, thereafter, violated the terms of the plea agreement or promise/representation at the time of sentencing thereby causing the Defendant's plea to be involuntary?
- b. Did the PCRA Court err as a matter of law and/or abuse its discretion in failing to grant relief in the nature of leave to withdraw Defendant's plea where the record established that the Commonwealth entered into a plea agreement with Defendant and/or made a promise or representation that induced the Defendant's plea and, thereafter, violated the terms of the plea agreement or promise/representation at the time of sentencing and Trial Counsel either failed to ensure that the term was placed on the record at the time of the plea and/or failed to request that the Defendant be allowed to withdraw his plea by either objecting at the time of sentencing or filing a motion to withdraw the Defendant's plea upon the grounds that the Defendant's plea was illegally induced?
- c. Did PCRA counsel render ineffective assistance where he failed to raise Trial Counsel's failure to place promise or plea agreement that induced the Defendant to

plea on the record at the time of his plea and Trial Counsel's failure to request that the Defendant be granted leave to withdraw his plea, either by objection at the time of sentencing or by filing a Post-Sentence Motion to Withdraw Plea, where the Commonwealth made an agreement or promise or representation that induced the Defendant's plea and then violated that agreement, promise or representation at the time of sentencing thereby rendering the plea involuntary?

II. Discussion

This matter comes before the Court on Defendant's appeal of the denial of his Motion for Post Conviction Relief Petition. In order to be eligible for relief to the provisions of the PCRA statute, a petitioner must prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the seven enumerated circumstances set forth at 42 Pa.C.S.A. § 9543(a)(2). In addition, a petitioner must demonstrate that the issues raised have not been previously litigated or waived, and that failing to litigate the issue prior to or during trial or a direct appeal could not have been the result of any rational strategic decision by counsel. 42 Pa.C.S.A. § 9543(a)(3).

A. DEFENDANT'S GUILTY PLEA WAS KNOWING AND VOLUNTARY AND NOT ILLEGALLY INDUCED BY PROMISE OR AGREEMENT WITH THE COMMONWEALTH.

Instantly, Defendant's first two matters complained of on appeal both center on the claim that his guilty plea was involuntary due to being induced by an alleged oral agreement with the Commonwealth. Traditionally, the trial court is afforded broad discretion in sentencing criminal defendants "because of the perception that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." *Commonwealth v. Ward*, 524 Pa. 48, 568 A.2d 1242, 1243 (1990). Long standing precedent in Pennsylvania affords sentencing courts discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences

already imposed. 42 Pa.C.S.A. §9721; *Commonwealth v. Graham*, 661 A.2d 1367 (Pa. 1995). Considering the seriousness of the nature of the charges of murder of the third degree and conspiracy to commit burglary and the impact upon Defendant's victims renders the sentence imposed reasonable. Under Pennsylvania's Sentencing Code, 42 Pa.C.S. § 9701 et seq., a trial court must "follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." *Id.* § 9721(b). The court must also consider the statutory Sentencing Guidelines, which were promulgated in order to address the problems associated with disparity in sentencing. *See Id.*

The Sentencing Guidelines enumerate aggravating and mitigating circumstances, assign scores based on a defendant's criminal record and based on the seriousness of the crime, and specify a range of punishments for each crime. "In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 Pa.C.S. § 9721(b); *see* 204 Pa.Code § 303.1(d). The Sentencing Guidelines are not mandatory, however, so trial courts retain broad discretion in sentencing matters, and therefore, may sentence defendants outside the Guidelines. *See* 42 Pa.C.S. § 9721(b); *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa.Super.1997). If a court departs from the sentencing recommendations contained in the Sentencing Guidelines, it must "provide a contemporaneous written statement of the reason or reasons for the deviation." 42 Pa.C.S. § 9721(b); *see* 204 Pa.Code § 303.1(d). The sentencing court is in a superior position to "view the defendant's character, displays of remorse, defiance or indifference and the overall effect and nature of the

crime." *Commonwealth v. Jones*, 418 Pa.Super. 93, 613 A.2d 587, 591 (1992) (en banc). Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review. *Id.*

Where the district attorney enters into and keeps a plea bargain to recommend a certain sentence to the court, *and the defendant clearly understands this recommendation is not binding on the court*, the plea is not rendered invalid merely because the court rejects the district attorney's recommendation. *Commonwealth v. Dickerson*, 449 Pa. 70, 76, 295 A.2d 282, 285 (1972) (emphasis added). In *Commonwealth v. Porreca*, 528 Pa. 46, 595 A.2d 23 (1991), the Pennsylvania Supreme Court adopted the analysis of *Dickerson* noting that there is a difference between a plea bargain in which the defendant knows that the court may not honor a sentencing recommendation and one in which the defendant expects the recommendation to be honored. *Id.* In the former case, the failure of the court to sentence according to the recommendation of the Commonwealth does not give rise to a defendant's right to withdraw the plea. *Id.*

It is also well established that "[t]he plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." *Santobello v. New York*, 404 U.S. 257, 261-62, 92 S.Ct. 495, 498, 30 L.Ed.2d 427, 432-33 (1971). Pennsylvania Rule of Criminal Procedure 319 (now Rule 590 (B)) addresses the concern that a plea bargain must be voluntary and knowing, and provides, inter alia, that the court, before which the plea is presented, must conduct an inquiry on the record to determine whether the defendant understands and concurs in the agreement and that the plea is understandingly and voluntarily tendered. Pa.R.Crim.P. 319(b)(2), (3), *supra*.

Instantly, testimony and evidence presented at the PCRA hearing on November 16, 2011 demonstrates that Defendant's plea was understandingly and voluntarily entered was properly extensive under Pa.R.Crim.P 319 or 590(B), and provides as follows:

The Court: Okay. I note that there was a typed plea agreement that is of record that was signed on May 19, 2010 by the Defendant, Paul Galante and Mark Bufalino, and for the Commonwealth, Michael Vough, James McMonagle, Officer Harold Bond, Detective Larry Fabian, Trooper Christopher Kane. Correct?

Mr. McMonagle: Yes, Judge.

The Court: So I am clear, the record is that he pled guilty to count two, murder of the third degree, a Felony I, and count three, criminal conspiracy, burglary, a Felony I, also gave the minimums and maximums, the remaining charges would be withdrawn. It says, *defendant will pay all costs. There is no agreement as to the sentence Defendant will receive.* That was the written, signed agreement?

Mr. McMonagle: It was, Judge.

The Court: The court is taking notice of that obviously as part of the judicial record. There was also made part of the record a written guilty plea colloquy that each answer is marked, each page is initialed by Anthony Bidding, and it is signed by Anthony Bidding, Mark Bufalino and Paul Galante, that was also filed on May 19th, 2010.

PCRA Hearing N.T. at 6-7.

Additionally, upon direct examination of the Defendant at the PCRA hearing, the Defendant responded as follows when questioned about his guilty plea:

Mr. McMonagle: You would agree with me that on question No. 11 it asks if you understood the terms of your plea agreement?

Defendant: Yes.

Mr. McMonagle: And you said that you did?

Defendant: Yes.

Mr. McMonagle: And then there's question No. 14 on page three that asks you, *Have any promises been made to you to enter your guilty plea other than the terms of the plea agreement?* Do you see that?

Defendant: Yes.

Mr. McMonagle: And you answered, *No*, right?

Defendant: Yes.

PCRA Hearing N.T. at 19-20.

Here, the Sentencing Court has clearly and expressly complied with the requirements of 42 Pa.C.S. § 9721(b) by imposing a sentence that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." *Id.* § 9721(b). Instantly, the Sentencing Court enjoys the superior position to best appreciate Defendant's character, lack of remorse and indifference, and the overall effect and nature of the crime upon the victims.

Additionally, as evidenced above through the Court's inquiry of the Commonwealth as to their position on sentencing of the Defendant as testified to during the PCRA hearing, the Commonwealth stated they have no specific position as to sentencing in terms of years and they only asked this Court to issue a sentence that was commensurate with the crime. (PCRA Hearing N.T. at 28). Furthermore, the Court went to painstaking lengths to make it abundantly clear to Defendant and counsel for both parties, both during the guilty plea colloquy and at the Sentencing Hearing, that sentencing was to be determined by the Court and that discretion properly remains with this Court. After careful review of the record, this Court finds no substantive merit to either of Defendant's allegations that his guilty plea was induced by promises from the Commonwealth and thereby an involuntary plea. Additionally, Defendant's sentence comports with the Sentencing Guidelines as it is within the standard range.

B. DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS AS DEFENDANT'S GUILTY PLEA WAS NOT ILLEGALLY INDUCED AND THERE WAS NO BASIS FOR COUNSEL TO CHALLENGE DEFENDANT'S GUILTY PLEA.

In turning to Defendant's final issue on appeal of ineffective counsel in failing to challenge the guilty plea and/or seek leave to withdraw the guilty plea, this Court has found that the clear and credible testimony of the assistant district attorney handling the matter for the Commonwealth established that there was no agreement with Defendant with regard to his sentence. As the record fails to establish any agreement between the parties as to the term of sentence, Defendant's plea was not illegally induced and there can therefore be no basis for trial counsel to challenge Defendant's plea and Defendant's ineffective assistance of counsel claim fails.

It is well-established that the burden is on the defendant to establish that his attorney was ineffective. *Commonwealth v. Hall*, 701 A.2d 190 (1997), cert. denied, 523 U.S. 1082, 118 S.Ct 1534 (1998). To prove ineffective assistance of counsel, defendant must show, by preponderance of the evidence, ineffective assistance of counsel which, in circumstance of the particular case, so undermined the truth-determining process that no reliable adjudication or guilt or innocence could have taken place. *Commonwealth v. Kimball*, 724 A.2d 326 (1999).

Defendant here, like all other defendants, must demonstrate: (i) that the underlying claim is of arguable merit; (ii) that counsel had no reasonable basis designed to effectuate defendant's interests for the act in question; and (iii) that counsel's ineffectiveness actually prejudiced defendant. See *Commonwealth v. Snyder*, 870 A.2d 336 (Pa. Super. 2005). Failure to satisfy any prong of the test requires that the claim be dismissed. *Commonwealth v. Moser*, 921 A.2d 243 (Pa. Super. 2007), citing *Commonwealth v. O'Bidos*, 849 A.2d 243 (Pa. Super. 2004), appeal denied, 860 A.2d 123 (2004).

Instantly, Defendant's claims of ineffective counsel fail. As the record fails to establish any agreement between the parties as to the term of sentence, Defendant's plea was not illegally induced and there can therefore be no basis for trial counsel to challenge Defendant's plea.

In conclusion, no credible evidence was presented in support of Defendant's ineffective assistance of counsel claims during the PCRA hearing; rather, the testimony and review of the record evidences that Defendant's Trial Counsel represented Defendant effectively and zealously. Accordingly, no meritorious issues for appeal exist with regard to Defendant's final issue on appeal.

III. Conclusion

Based on the foregoing and after careful review of the record and Defendant's Guilty Plea, Sentencing Transcripts, and conducting a full PCRA hearing on these matters, the Court finds no substantive merit to Defendant's allegations contained in his PCRA Petition and said Petition was properly denied at the PCRA hearing conducted on November 16, 2011 before this Court.

END OF OPINION