

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

FELIX APONTE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3266 EDA 2011

Appeal from the Judgment of Sentence June 10, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0014738-2007

BEFORE: STEVENS, P.J., BOWES, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.:

Filed: February 21, 2013

Felix Aponte appeals *nunc pro tunc* from the judgment of sentence of five to fifteen years imprisonment that was imposed on June 10, 2009, after he pled guilty to aggravated assault and conspiracy. We defer to collateral review Appellant's allegation that his guilty plea was induced by counsel's ineffectiveness, and we affirm the judgment of sentence.

On August 22, 2008, Appellant entered an open guilty plea to the two noted offenses based on the following facts. On the afternoon of June 1, 2007, Appellant was with his co-defendant Richard Lopez on Orkney and Indiana Avenues in Philadelphia. Lopez's girlfriend, Rosangela Gonzalez, appeared on the street pushing a baby stroller in the company of the baby's

* Former Justice specially assigned to the Superior Court.

father, the victim Luis Clemente. Lopez told Ms. Gonzalez to go home, informed her that she was not permitted to continue walking with Mr. Clemente, and demanded that Mr. Clemente leave the area. Mr. Clemente momentarily left Ms. Gonzalez's company and then met her again on Reese and Indiana Streets.

Lopez approached his girlfriend and Mr. Clemente with his bike, which he placed in their path. Lopez demanded to know why the victim had not gone home, and Mr. Clemente replied that he was with his baby's mother. At that point, Lopez repeatedly punched Mr. Clemente in the face. Appellant approached the victim from the rear and punched him in the head. Mr. Clemente fell to the ground, unconscious. Lopez picked up the victim by the belt and threw him on the sidewalk. Blood flowed from the victim's ears, nose, and mouth. Appellant and Lopez then left the crime scene together.

The victim's medical records were admitted by stipulation and established that he sustained severe brain damage and was completely disabled as a result of the attack. On June 10, 2009, Appellant was sentenced to five to fifteen years imprisonment.

On June 16, 2010, Appellant filed a timely PCRA petition. Counsel was appointed and filed an amended PCRA petition that raised the averment that Appellant had instructed plea counsel to file an appeal, which directive was ignored. After a hearing, the PCRA court granted the request for reinstatement of Appellant's appellate rights. This appeal followed.

Appellant raises the single question, "Should the Defendant/Appellant be permitted to withdraw his guilty plea where, under a totality of the circumstances, the plea was unlawfully induced by trial counsel, and where the circumstances make it likely that the inducement caused Appellant to plead guilty, thus making the plea unknowing and involuntary?" Appellant's brief at 3.

Thus, in this direct appeal, Appellant's sole challenge is to plea counsel's ineffectiveness. *See* Appellant's brief at 10-11. This claim must be deferred to collateral review pursuant to the dictates of our Supreme Court in *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), wherein our Supreme Court held that a claim of ineffective assistance of counsel cannot be entertained on direct appeal. *See Commonwealth v. Barnett*, 25 A.3d 371, 377 (Pa.Super. 2011) (*en banc*) (pursuant to *Grant's* refinement in *Commonwealth v. Liston*, 977 A.2d 1089 (Pa. 2009), and *Commonwealth v. Wright*, 961 A.2d 119, 148 n.22 (Pa. 2008), the Superior Court is not permitted to review ineffective assistance of counsel claims on direct appeal unless the defendant has expressly, knowingly, and voluntarily waived PCRA review).

In *Commonwealth v. Blye*, 33 A.3d 9 (Pa.Super. 2011), we were confronted with the precise procedural scenario as that in the present case. The defendant pled guilty to numerous crimes in exchange for a negotiated sentence. He filed a PCRA petition and was granted reinstatement of his

right to file a post-sentence motion and a direct appeal. In the reinstated post-sentence motion, the defendant averred that he was entitled to withdraw his guilty plea on the basis that it was induced by ineffective assistance of counsel. That motion was denied, and the direct appeal in ***Blye*** ensued. The defendant repeated the averment contained in the post-sentence motion. In addressing this allegation, we applied ***Grant, supra***, and ***Barnett, supra***, and dismissed the defendant's challenge to his guilty plea without prejudice to his right to pursue it in a post-conviction petition.

In the present case, Appellant has not waived his right to seek PCRA relief, and ***Barnett*** and ***Blye*** apply. While Appellant appears to recognize the defect in this direct appeal and seeks remand for an evidentiary hearing, Appellant's brief at 11, that is not the proper procedure. Appellant has not raised any preserved challenge to the validity of his guilty plea, and his claim pertains to plea counsel's ineffectiveness in connection with its entry. As required by the cited precedent, we must dismiss the allegation presented in this appeal without prejudice to Appellant's right to pursue it in the PCRA setting.

Judgment of sentence affirmed.