

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

RUSSELL A. TINSLEY

Appellant

No. 438 EDA 2010

Appeal from the Judgment of Sentence January 4, 2008  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): 10503020211 CP-51-CR-0501081-2005

BEFORE: LAZARUS, J., OLSON, J., and FITZGERALD, J.\*

MEMORANDUM BY LAZARUS, J.

**FILED MAY 10, 2013**

Russell Tinsley appeals, *nunc pro tunc*, his judgment of sentence imposed in the Court of Common Pleas of Philadelphia County. Upon careful review, we affirm.

On September 25, 2007, Tinsley entered a negotiated plea of *nolo contendere*<sup>1</sup> to involuntary deviate sexual intercourse<sup>2</sup> and simple assault,<sup>3</sup>

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 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). The standards for a trial court's acceptance of a guilty plea are identical to those for a plea of *nolo contendere*. See Pa.R.Crim.P. 590 and Comment thereto.

<sup>2</sup> 18 Pa.C.S.A. § 3123(a)(1).

<sup>3</sup> 18 Pa.C.S.A. § 2701(a).

arising from an incident in which Tinsley hit his victim, causing her to fall onto a bed, and forced her to perform oral sex on him. After an evaluation was performed pursuant to Megan's Law, Tinsley was classified as a "sexually violent predator" and, on January 4, 2008, was sentenced to 11½ to 23 months' imprisonment, followed by 8 years of probation.

The same day he was sentenced, Tinsley filed a *pro se* notice of appeal. His appeal was subsequently dismissed on April 29, 2008 for failure to file a docketing statement pursuant to Pa.R.A.P. 3517.

On October 11, 2008, Tinsley filed a *pro se* PCRA petition. Counsel was appointed to represent him and, on October 26, 2009, filed an amended PCRA petition, in which counsel requested the reinstatement of Tinsley's post-sentence and direct appellate rights. On January 11, 2010, the PCRA court issued an order that reinstated only Tinsley's appeal rights, *nunc pro tunc*.

Both Tinsley's appellate counsel and the Commonwealth note that Tinsley's post-sentence rights were not reinstated. As such, the Commonwealth argues that Tinsley's sole issue on appeal – the validity of his plea – is waived for failure to preserve it in the trial court. ***Commonwealth v. Tareila***, 895 A.2d 1266, 1270 n.3 (Pa. Super. 2005) (to preserve issue related to guilty plea, appellant must either object at sentencing colloquy, raise issue at sentencing, or raise through post-sentence motion). We would, under most other circumstances, concur with

the Commonwealth. However, the particular facts of this case compel us to overlook the technical waiver and address the merits of Tinsley's claim.

In his counseled amended PCRA petition, Tinsley specifically requested the reinstatement of both his post-sentence and direct appeal rights. However, the PCRA court's order reinstated only Tinsley's direct appeal rights. Accordingly, it appears to be only as a result of an omission on the part of the PCRA court, and through no fault of Tinsley or his PCRA counsel, that Tinsley's post-sentence motion rights were not reinstated. Accordingly, in the interest of judicial economy, we will address Tinsley's claim regarding the voluntariness of his plea.

In this *nunc pro tunc* appeal, Tinsley claims that he should be permitted to withdraw his *nolo contendere* plea, or that his case should be remanded for a hearing, because his plea was not entered knowingly, intelligently and voluntarily. Tinsley asserts that the trial court's plea colloquy was completely defective in that it omitted five of the six essential items set forth in the Comment to Pa.R.Crim.P. 590. Tinsley also argues that his plea was involuntary because "neither counsel nor the [c]ourt explained the [he] would be exposed to civil commitment" and "the full intrusion of Megan's Law was not explained" to him. Brief of Appellant, at 9.

When reviewing a claim related to the withdrawal of a guilty or *nolo contendere* plea, it is well-established that a showing of prejudice on the order of manifest injustice is required before withdrawal is properly justified. ***Commonwealth v. Gonzalez***, 840 A.2d 326, 329 (Pa. Super. 2003). "To

establish such manifest injustice, [appellant] must show that his plea was involuntary or was given without knowledge of the charge.”

***Commonwealth v. Rachak***, 62 A.3d 389, 394 (Pa. Super. 2012).

At a minimum, a plea colloquy must inform a defendant of: (1) the nature of the charges; (2) the factual basis for the plea; (3) the right to be tried by a jury; (4) the presumption of innocence; (5) the permissible range of sentences; and (6) the fact that the judge is not bound by the terms of any plea agreement. ***Commonwealth v. Bedell***, 954 A.2d 1209, 1212 (Pa. Super. 2008). ***See also*** Pa.R.Crim.P. 590, Comment.

To determine a defendant’s actual knowledge of the implications and rights associated with a guilty plea, a court is free to consider the totality of the circumstances surrounding the plea. The concept of examining the totality of the circumstances surrounding a plea in order to determine whether a plea was voluntarily, knowingly, and intelligently entered, is well established. Indeed, as the law makes clear, a trial court may consider a wide array of relevant evidence under this standard in order to determine the validity of a claim and plea agreement including, but not limited to, transcripts from other proceedings, off-the-record communications with counsel, and written plea agreements.

***Commonwealth v. Allen***, 732 A.2d 582, 588-89 (Pa. 1999) (citations omitted). “[N]othing in the rule precludes the supplementation of the oral colloquy by a written colloquy that is read, completed, and signed by the defendant and made a part of the plea proceedings.” ***Bedell***, 954 A.2d at 1212-13. Finally, during the course of a plea colloquy, a defendant has a

duty to answer questions truthfully and cannot later assert that he lied under oath. ***Commonwealth v. Turetsky***, 925 A.2d 876 (Pa. Super. 2007).

Here, we agree that the trial court's oral colloquy of Tinsley was, by itself, inadequate. As Tinsley correctly asserts, the trial court failed to advise him as to the nature of the charges, the right to be tried by a jury, the presumption of innocence, the permissible range of sentences and the fact that the judge is not bound by the terms of any plea agreement. However, Tinsley also signed a written plea colloquy form, in which he was advised of, *inter alia*, the nature of the charges against him, his right to a jury trial, the presumption of innocence, the permissible range of sentences, and the non-binding nature of his plea as to the judge. Tinsley affirmed on the record that he had reviewed the written plea form with his attorney, signed it and was "fully aware of the rights [he was] giving up by pleading no contest[.]" N.T. *Nolo Contendere* Plea, 9/25/07, at 5. We must presume that Tinsley's responses to the court were truthful and accurately reflected what transpired prior to the entry of his plea. ***Turetsky, supra***.

The oral colloquy given by the court, by itself, is insufficient to support a finding that Tinsley's plea was knowing and voluntary. However, we conclude that colloquy, in combination with Tinsley's review of the thorough written plea colloquy with his counsel, and the Commonwealth's recitation of the factual basis of his plea, renders his plea valid under the totality of the circumstances. ***See Allen, supra***.

Tinsley also disputes the validity of his plea on the basis that neither counsel nor the court advised him that he would be “exposed to civil commitment”<sup>4</sup> and he was unaware of the “full intrusion of Megan’s Law.” Brief of Appellant, at 9. This claim is patently without merit.

The distinction between a direct and collateral consequence of a guilty or *nolo contendere* plea has been defined by the Pennsylvania Supreme Court as the distinction between a criminal penalty and a civil requirement over which a sentencing judge has no control. ***Commonwealth v. Leidig***, 956 A.2d 399, 404 (Pa. 2008). Collateral consequences may include the loss of the right to vote, to enlist in the armed services, to inherit property, to own a firearm or fishing license, to practice certain professions, and to hold public office or public employment. ***Id.*** A defendant’s lack of knowledge of the collateral consequences of a plea does not undermine the validity of his plea. ***Commonwealth v. Duffey***, 639 A.2d 1174 (Pa. 1994).

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<sup>4</sup> Although not explained in Tinsley’s brief, the trial court notes in its Rule 1925(a) opinion that, at the time of his sentencing in this matter, Tinsley was subject to a New Jersey warrant for having failed to appear at a sentencing in Camden, NJ. After sentencing, Tinsley was transferred to New Jersey, where that state’s Attorney General apparently initiated civil commitment proceedings against him, due to his status as a convicted sexually violent predator. As of May 30, 2012, Tinsley remained committed in New Jersey. **See** Trial Court Opinion, 5/30/12, at 1-2. To the extent Tinsley attempts to raise a distinct argument relating to the New Jersey civil commitment, that argument is waived for failure to develop it in any meaningful way. ***Commonwealth v. Clayton***, 816 A.2d 217 (Pa. 2002) (“[I]t is a well settled principle of appellate jurisprudence that undeveloped claims are waived and unreviewable on appeal.”).

Our Supreme Court has held that Megan's Law registration requirements are collateral consequences of a plea. **Leidig**, 956 A.2d at 406. Accordingly, the trial court's failure to explain to Tinsley the Megan's Law-related consequences of his plea does not undermine the validity of the plea.

Judgment of sentence affirmed.

Olson, J., concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gambetta", written over a horizontal line.

Prothonotary

Date: 5/10/2013