NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LAVELLE GAINES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 490 WDA 2012

Appeal from the PCRA Order February 15, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0014015-2009, CP-02-CR-0014033-2009

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.: Filed: February 19, 2013

Lavelle Gaines appeals from the February 15, 2012 order denying her petition for PCRA relief. We affirm.

Appellant was charged at two separate criminal actions based on two incidents. The criminal complaint in action number 2009-14033 alleged the following. On August 1, 2009, Appellant went to the residence of her two children's father, Jabar James, to drop off the children. The children exited the car when Appellant arrived at the residence. Mr. James and his girlfriend, Juana Saunders, verbally informed Appellant that they did not want the children at their home. In response, Appellant retrieved a handgun from her car, waved it around, pointed it at Ms. Saunders and Mr. James, and drove away. The victims called police, who arrested Appellant at a bar

located one-half block away. She had a weapon in her purse. In connection with this episode, Appellant was charged with two counts of endangering the welfare of a child, two counts of reckless endangerment, and one count of simple assault.

On September 9, 2009, Appellant and Ms. Saunders encountered each other in family court. Appellant accused Ms. Saunders of being a police informant and assaulted her. For this incident, Appellant was charged at criminal action number 2009-14015 with one count each of simple assault and intimidation of a witness.

On May 19, 2010, Appellant entered a negotiated guilty plea at both actions before the Honorable Robert C. Reed to one count of simple assault in connection with the gun incident and one count of intimidation of a witness for the courthouse assault. In exchange, she received the negotiated sentence of a total of four years probation and was ordered to undergo anger management therapy, to have no contact with Ms. Saunders, and to destroy the firearm involved in the August 1, 2009 episode.

On June 1, 2010, Appellant filed a motion to withdraw her guilty plea, which initially was granted by the plea court. Upon motion by the Commonwealth and following a hearing, the plea court elected to reverse its earlier decision and deny withdrawal. Appellant thereafter filed a timely PCRA petition, which was assigned to the Honorable Donald E. Machen as Judge Reed was no longer sitting. The PCRA court conducted an evidentiary

hearing on Appellant's request and thereafter denied PCRA relief. In this timely appeal, Appellant raises these issues for our consideration:

> I. Was the evidence insufficient to deny the motion to withdraw the guilty plea, under 42 Pa.C.S.A. 9543 (2)(iii)? Specifically, did the evidence support a finding that the plea was forced and not knowingly entered?
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> II. Was the evidence sufficient to find that trial counsel was ineffective under 42 Pa.C.S.A. 9543 (2)(ii)? Specifically, did Appellant's trial counsel force Appellant to enter the plea of guilty by telling her it was her only option and she did not have the right to a trial?
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> III. Was the evidence sufficient to find that trial counsel was ineffective under 42 Pa.C.S.A. 9543 (2)(ii)? Specifically, did Appellant's trial counsel fail to properly inform Appellant of the consequences her plea would have on her career?
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> IV. Should the court have recused itself after having Appellant and her family removed from the courtroom prior to the hearing and was the court's failure to do so an error that tainted the ruling against Appellant by undue prejudice?

Appellant's brief at 3.[1]

With respect to a PCRA court's decision, "Our standard of review is limited to 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.

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[1] On page thirteen of her brief, Appellant also maintains that her plea is infirm, even though she was told in the written plea colloquy that she had the right to a jury trial, because the plea court did not delve into this matter at the oral colloquy. As this contention was neither raised before the PCRA court nor contained in her Pa.R.A.P. 1925(b) statement, it is waived. ***Commonwealth v. Pitts***, 981 A.2d 875 880 n.4 (Pa. 2009); ***Commonwealth v. Potter***, _____ A.3d, ____, 2012 WL 6720536 (filed December 27, 2012); Pa.R.A.P. 1925 (b)(4)(vii).

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." ***Commonwealth v. Busanet***, 54 A.3d 35, 45 (Pa. 2012) (citation omitted). Appellant's first two positions are essentially identical. She maintains that her guilty plea was coerced by representations from her two attorneys in the two matters that Appellant had to enter the guilty plea and could not go to trial. We observe that a "defendant who attempts to withdraw a guilty plea after sentencing must demonstrate prejudice on the order of manifest injustice before withdrawal is justified. A showing of manifest injustice may be established if the plea was entered into involuntarily, unknowingly, or unintelligently." ***Commonwealth v. Yeomans***, 24 A.3d 1044, 1046 (Pa.Super. 2011) (citation omitted). Furthermore, the defendant has the burden of proving that the guilty plea was infirm. ***Id***.

Appellant's position is that her guilty plea was involuntary in that her plea counsel represented that Appellant had to enter the plea and that trial was not an option. In connection with this assertion, Appellant relies both upon her own testimony to that effect and upon the fact that, in her written guilty plea colloquy, Appellant originally answered affirmatively to the question of whether she had been forced into entering the plea, and then she altered the form to answer that inquiry in the negative. At the PCRA hearing, both of Appellant's plea counsel denied telling Appellant either that

she could not proceed to trial or that she had no choice but to plead guilty. Rather, they had investigated the proof against Appellant, and, based on the evidence, advised her that a plea involving a probationary sentence would be to her advantage. They were both prepared to proceed to trial, if necessary.

In light of this conflicting testimony, to resolve Appellant's allegation, we apply the following legal maxim. "It is well settled that PCRA courts make credibility determinations." ***Commonwealth v. Philistin***, 53 A.3d 1, 25 n.17 (Pa. 2012); ***see also***, ***e.g.***, ***Commonwealth v. Dennis***, 17 A.3d 297, 305 (Pa. 2011) (the appellate courts are required to give great deference to a PCRA court's credibility determinations and, if supported by the record, the determinations are binding on a reviewing court). In this case, the PCRA court specifically determined that Appellant's testimony that plea counsel informed her that she had no choice but to enter the guilty plea was incredible. Order of Court, 3/7/12, at 1; Trial Court Opinion, 6/15/12, at 5 ("Defendant was not credible in her testimony that she was forced to plead guilty and was told she had no choice."). Concomitantly, the PCRA court concluded that the two attorneys representing Appellant in connection with the guilty plea, Nicole Wilson and Melissa John, were credible. Order of Court, 3/7/12, at 1. In this connection, the PCRA court elaborated:

> Both attorneys who represented defendant on the day the Plea was entered testified as to their recollection of the events surrounding this claim. Ms. Wilson Jackson (formerly Wilson) credibly testified that she had read each question to the

defendant and was with her the whole time (PCRA, p. 30). She further testified credibly that she had met with the defendant prior to the trial date and was prepared for trial as she believed the case would go to trial and, that she had experience conducting trials both in front of a Judge and a Jury (PCRA, p. 30, 35-36). Ms. Wilson Jackson credibly testified that she told the defendant that she believed the Commonwealth could prove the simple assault charge and that there was an offer that Ms. Wilson Jackson believed that the defendant should take and advised defendant as such based on her expertise (PCRA, p. 31). Ms. Wilson Jackson credibly testified that she asked defendant if defendant had any questions or concerns defendant wanted to address (PCRA, p. 31). Upon cross examination, Ms. Wilson Jackson, credibly testified that she did not tell defendant that defendant had to plead guilty and was prepared to go to trial that day (PCRA, p. 33). Upon questioning from the Court for clarification, Ms. Wilson Jackson credibly testified that at the time defendant was completing the Explanation of Defendant's Rights Form, she was reading the questions to the defendant and the defendant was checking them off (PCRA, p. 34). Ms. Wilson Jackson credibly testified that initially the defendant did check "yes" that she had been forced to enter the plea. (PCRA, p. 34). When questioned further by the court, Ms. Wilson Jackson credibly testified as follows:

> Ms. Jackson: I vaguely remember I asked her why she felt that way. I told her if it was her answer that was fine, but the judge would reject her plea and we would have to proceed to trial. I told her – I repeated that day I had no problem taking the case to trial. So she then did scratch off the answer and checked no. I believe I told her to initial it, but I don't remember, because I have not seen the colloquy since that date.

(PCRA, pp. 34-35).

Ms. Wilson Jackson credibly testified that at the time of the Plea, it was Ms. Wilson Jackson's understanding that defendant "absolutely" understood her rights. (PCRA, p. 39).

Defendant's other Plea counsel, Ms. John credibly testified that she met with the defendant approximately two times in counsel's office regarding some evidence that defendant believed existed. (PCRA, pp. 43-44). She further credibly testified, that

> after investigation of the incident's underlying the charges and the witnesses that would be available (including a Sheriff from Family Division), she thought that the plea offer was a "favorable plea offer" and advised defendant that defendant should accept the Commonwealth's plea offer (PCRA, p. 45). Ms. John credibly testified that she did not force or coerce defendant into accepting the plea and was not in a habit or position to do that to clients (PCRA, p. 46). She further credibly testified that she was available to the defendant at the time defendant was completing the form and that the writing at the top of the form looked like Ms. John's handwriting "on top with the numbers" (PCRA, p. 46). Ms. John credibly testified that she was prepared to go to trial, had investigated the incident, had several reports, etc. that she intended to use and was experienced in trying both jury and non-jury cases (PCRA, pp. 47-49).

Trial Court Opinion, 6/15/12, at 5-7.

These credibility determinations are amply supported by the record, and we must accept them. Hence, no finding of coercion in connection with entry of the guilty plea can be made by this Court.

Appellant's second position in support of her request to withdraw her guilty plea is that plea counsel were ineffective when they failed to advise her that entry of her guilty plea to simple assault, a misdemeanor, would have a negative effect on her potential career opportunities. Specifically, Appellant maintains that when she entered her guilty plea, she was "in school, working towards a future career in law enforcement." Appellant's brief at 12. She continues that, due to entry of the plea in question, she became ineligible for that position under 53 P.S. § 752.3 (1) ("A Commonwealth agency, State-related institution, political subdivision, municipal authority, local, regional or metropolitan transportation authority

or any other person shall not employ or continue to employ an individual as a law enforcement officer when the individual has been convicted of . . . [a]n offense graded a felony or a serious misdemeanor."). Appellant charges plea counsel with ineffectiveness for failing to inform her that her plea would have an adverse effect on her future employment options.

> To prevail on a claim alleging counsel's ineffectiveness under the PCRA, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, *i.e.* there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different.

Commonwealth v. Wah, 42 A.3d 335, 338 (Pa.Super. 2012) (citations omitted). Additionally,

> allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea. Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases."

Id. at 338-39 (citation omitted).

In leveling this assertion, Appellant relies upon the United States Supreme Court's pronouncement in ***Padilla v. Kentucky***, 130 S.Ct. 1473 (2010), and our decision in ***Commonwealth v. Abraham***, 966 A.2d 1090 (Pa.Super. 2010). In the former case, the United States Supreme Court concluded that plea counsel must inform a defendant of the deportation consequences of entry of a guilty plea. In so doing, it examined evolving

standards concerning effective representation of a defendant during the course of entering a guilty plea, as well as the fact that deportation is a direct and automatic consequence of entry of a plea, deportation is intimately connected with the criminal proceedings, and deportation can be a severe penalty, even though civil in nature, for a person who is living in the United States.

In ***Abraham***, we applied ***Padilla*** and accepted the position of a defendant who was a public employee that plea counsel rendered ineffective assistance when counsel neglected to inform the defendant that entry of a guilty plea to the charge in question would result in automatic pension forfeiture under a statute applicable to public-employee pensions. In that case, the defendant lost a significant pension benefit that he already had earned due to entry of the plea.

Appellant's position is that her speculative loss of employment as a police officer is analogous to deportation since it was "triggered by criminal behavior." Appellant's brief at 12. For resolution of Appellant's position, we turn to our Supreme Court's recent decision in ***Commonwealth v. Abraham***, __ A.3d __, 2012 WL 6097088 (filed December 7, 2012), wherein our decision in that matter was reversed. In that decision, our Supreme Court specifically ruled that the loss of money due to the pension forfeiture provision at issue was not so intertwined with the criminal process as to be analogous to deportation. The Court held that such a loss of a vested

monetary benefit was a collateral, civil consequence of entry of a guilty plea. The ***Abraham*** Court reaffirmed that plea counsel is not required to inform a defendant of collateral consequences of entry of a guilty plea.

In so doing, the Court analyzed whether the statute providing for forfeiture of a public employee's pension for certain crimes was punitive or civil in nature. If civil, it was to be labeled a collateral consequence flowing from entry of a plea. To assess if a statute is punitive, we look at whether the legislature's intent in enacting the provision is punitive in either purpose or effect. ***Id***.

In the present case, the legislature's intent in enacting the statute was designed to ensure that police comply with the laws that they are supposed to uphold. Thus, its purpose is not to punish but to promote the public's confidence in officials who enforce the law, which is similar to the purpose of the statute examined in ***Abraham***. To determine if § 752.3's outcome is punitive, even if its intent is not, we apply these factors:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Abraham at * *7;* ***see Kennedy v. Mendoza–Martinez****,* 372 U.S. 144, 168–69 (1963).

The enactment in question is not an affirmative restraint similar to probation or jail; it merely prohibits a form of employment. The inability to pursue a profession is not a traditional form of punishment. Section 752.3 applies without the existence of *scienter*, it does not involve deterrence or retribution but inspiration of public trust, and it does not outline a crime. Finally, the statute has been assigned an alternative purpose that it rationally supports. Specifically, the enactment in question is designed to promote honesty among police officers and bolster the public's trust in the police, and it is not excessive in relation to its purpose. Thus, § 752.3 is civil in nature and a collateral consequence of Appellant's entry of the plea. Accordingly, Appellant's plea counsel had no obligation to inform Appellant of its impact on her life. Indeed, ***Abraham*** held that the actual loss of vested right to money due to a statute applicable to public employee pensions is a collateral civil consequence of entry of a guilty plea. At issue herein is a significantly more attenuated monetary effect of entry of guilty plea: the potential loss of an employment opportunity as a police officer that may never have matured. Hence, we reject Appellant's second challenge to her guilty plea.

Appellant's final issue relates to the following. At the beginning of the PCRA hearing, Appellant asked the PCRA court to recuse itself since it had

removed Appellant from the courtroom earlier that day. ***See*** N.T. PCRA Hearing, 2/15/12, at 3 ("[Appellant] had asked me to make a motion to the Court requesting that the court consider recusal on this case due to the event that occurred this morning with [Appellant] being removed from the courtroom."). The PCRA court declined to recuse itself, stating that Appellant "was removed from the courtroom because she couldn't conduct herself properly. If she can conduct herself properly, she will be fine." ***Id***.

A motion for recusal and our standard of review in connection with such a ruling were enunciated by our Supreme Court in ***Commonwealth v. Thomas***, 44 A.3d 12, 24 (Pa. 2012) (citation and quotation marks omitted):

> [When faced with a recusal motion,] the judge makes an independent, self-analysis of the ability to be impartial. If content with that inner examination, the judge must then decide whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This assessment is a personal and unreviewable decision that only the jurist can make. Once the decision is made, it is final.
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> This Court presumes judges of this Commonwealth are honorable, fair and competent, and, when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice. The party who asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the decision by a judge against whom a plea of prejudice is made will not be disturbed except for an abuse of discretion.

In this case, Appellant suggests that the PCRA court "labeled [her] as a troublemaker in need of discipline" and conveyed the impression that it was biased. Appellant's brief at 15. We disagree with Appellant's

characterization of the court's ruling. As the PCRA court explained, earlier in the day, Appellant and her family were present during another matter but created a disturbance and were asked to leave. She was not labeled as a troublemaker and was not informed that she was in need of discipline because being asked to leave a courtroom is not a form of discipline.

The PCRA court also observed, "This is not an uncommon occurrence. Many people come to the courtroom awaiting their case and often talk, argue, get loud, and otherwise attempt to interfere with the court's ability to conduct its business[.]" Trial Court Opinion, 6/15/12, at 9. The court continued that the incident in question did not impact upon its ability to hear and dispose of the case fairly, and it observed that it presided over the PCRA hearing without any display of bias or prejudice. In light of the facts and based upon our review of the PCRA court's conduct at the PCRA hearing, we conclude that Appellant failed to carry her burden of proof and discern no abuse of discretion by the PCRA court. Hence, we reject Appellant's position that recusal was necessary.

Order affirmed.