

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

TROY DAVID CLARK,

Appellant

No. 494 WDA 2012

Appeal from the PCRA Order February 17, 2012
In the Court of Common Pleas of Clearfield County
Criminal Division at No(s): CP-17-CR-0000137-2009
CP-17-CR-0000726-2009

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.:

FILED MAY 30, 2013

Troy David Clark appeals from the order entered on February 17, 2012, denying his first petition filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546, following an evidentiary hearing. After a thorough review of the record, the parties' briefs, and applicable law, we affirm.

The parties are well acquainted with the facts and procedural history of his case, which the PCRA court has aptly summarized in its Pa.R.A.P. 1925(a) opinion. **See** PCRA Court Opinion, 7/3/2012, at 1-2. Therefore, we

* Retired Senior Judge assigned to the Superior Court.

simply state that on September 22, 2009, Clark entered an open plea of guilty to aggravated assault (assault with a deadly weapon), simple assault, and disorderly conduct at Criminal Docket No. CP-17-CR-137-2009.¹ He also entered an open plea of guilty to intimidation of a witness, terroristic threats, and simple assault at Criminal Docket No. CP-17-CR-726-2009.² On September 28, 2009, the trial court sentenced Clark on both cases to an aggregate term of ten months' to 15 years' incarceration.³

In this appeal, Clark asserts the PCRA court erred in dismissing his petition based on the following two arguments. First, he claims counsel was ineffective in failing to file a direct appeal because Clark asked counsel to file an appeal and no appeal was filed. Second, he argues counsel was ineffective in negotiating and recommending Clark plead guilty to aggravated assault (assault with a deadly weapon), where his plea was not knowingly, voluntarily, and intelligently made because he was not aware he was pleading to a charge that included a "weapons enhancement." **See** Clark's Brief at 7.

The PCRA court rejected these two claims as follows:

¹ 18 Pa.C.S. §§ 2702(a)(4), 2701(a)(1), and 5503(a)(1), respectively.

² 18 Pa.C.S. §§ 4952(a)(2), 2706(a)(1), and 2701(a)(1), respectively.

³ Clark did not file a direct appeal but did file a *pro se* PCRA petition on June 29, 2010. Appointed counsel filed an amended PCRA petition on March 29, 2011.

[Clark]'s first claim is that his Counsel failed to file an appeal on his behalf despite being requested to do so. Failing to file a requested direct appeal denies the accused the assistance of counsel and the right to a direct appeal, and the accused is entitled to reinstatement of his direct appeal rights. *Commonwealth v. Mikell*, 968 A.2d 779, 781 (Pa. Super. 2009); *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999).

Instantly, [Clark] claims he sent a letter to his counsel within days of being sentenced expressing doubts about his guilty plea and his desire to appeal. See [Clark]'s Exhibit 3. However, [Clark] could not provide the original, or copies of the original, or proof of mailing of the original, to this Court. What [Clark] did provide, was a supposed handwritten reproduction of the content of the letters to his Counsel. His Counsel said he recalled receiving numerous letters from [Clark], but could not specifically recall a letter requesting an appeal be filed. See PCRA Hearing Transcript, p. 26. The Court is of the opinion [Clark] has failed to convincingly support the contention that a request for an appeal was actually made in this case. Furthermore, if a request for an appeal was actually made, there would have likely been no difference in the outcome of the case. His Counsel testified he did not think there were any appealable issues in the case. Likewise, this Court's independent review of the record reveals no errors. Thus, had an appeal been filed, the probable outcome would have been the same as if no appeal [had] been filed. [Clark]'s first allegation is without merit.

[Clark] then claims his Counsel was ineffective to the extent that he was induced to plead guilty to a crime he did not commit.

A petitioner is eligible for relief under 42 Pa.C.S.A. § 9543(a)(2)(iii), if he or she pleads and proves, by a preponderance of the evidence that the petitioner's conviction resulted from a plea of guilty unlawfully induced where the inducement caused the petitioner to plead guilty and the petitioner is innocent. See *Commonwealth v. Stark*, 698 A.2d 1327 (Pa. Super. 1997). For this ground to apply: (1) there must have been an intent to unlawfully coerce the accused; and (2) it must have been a principal inducement for the guilty plea. *Commonwealth v. Dennis*, 282 A.2d 371 (Pa. 1971). In addition, a defendant's allegation that this plea was unlawfully induced is not cognizable under the PCRA where the defendant

does not include an allegation pertaining to his innocence. *Commonwealth v. Laszyczynski*, 715 A.2d 1185 (Pa. Super. 1998). The exception to this is when the petitioner claims ineffective assistance of counsel during the pleading process, an allegation that is cognizable under the PCRA even where the petitioner has pled guilty. *Commonwealth v. Hickman*, 799 A.2d 136 (Pa. Super. 2002); *Commonwealth, ex rel. Dadario v. Goldberg*, 773 A.2d 126 (Pa. 2001).

In the case at hand, the testimony at the PCRA Hearing revealed [Clark]'s Counsel endeavored to persuade the Commonwealth to allow [Clark] to plead to a less serious offense contained within the Aggravated Assault Statute. The Commonwealth agreed, and allowed [Clark] to plead guilty to [18 Pa.C.S.] § 2702(a)(4). The resulting lower offense gravity score of the second degree felony offense dropped [Clark]'s minimum sentence of incarceration to 9 months, instead of 22. However, the specific section [Clark] pled to is Aggravated Assault by Causing Bodily Injury with a Deadly Weapon. There is no indication in the record [Clark] used a weapon in the alleged commission of the crime.

. . .

In *Commonwealth v. Young*, 695 A.2d 414 (Pa. Super. 1997), the defendant pled guilty to indecent assault, and thereafter attempted to withdraw the plea through a PCRA petition by alleging the plea was involuntary/unknowing. The defendant had pled guilty to indecent assault. However, the specific subsection of indecent assault which the defendant pled to required him to have committed the assault by administering an intoxicating substance to the victim with the intent of preventing resistance. Both subsections of the offense implicated are graded as misdemeanors of the second degree. The facts of the case showed the defendant did not administer an intoxicating drug to the victim, but became involved in a physical altercation with the victim. During the altercation, the victim's shirt was ripped by the defendant, resulting in the indecent contact. *Id.* at 419. The trial court found this was reversible error, reasoning that the facts elicited during the plea colloquy did not match the crime to which appellant pleaded guilty, and, therefore, appellee entered an unknowing and involuntary plea. *Young*, 695 A.2d at 416. The Superior Court disagreed:

We do not believe that such an error is tantamount to manifest injustice. Appellee was charged in Count 2 with violating 18 Pa.C.S.A. § 3126(a)(1), and he voluntarily admitted to facts which constituted that charge. The fact that judgment of sentence indicates that appellee pleaded guilty and was sentenced on Count 3, 18 Pa.C.S.A. § 3126(a)(4), does not affect the voluntariness of appellee's plea where there was no confusion as to his commission of Count 2. Appellee intended to plead guilty to indecent assault as defined by 18 Pa.C.S.A. § 3126(a) (1), and we will not permit him to withdraw his plea simply because the trial court, his counsel and the prosecution failed to insure that appellee pleaded guilty to the correct count of the indictment.

Young, 695 A.2d at 419-420 [(footnote omitted)].

Instantly, [Clark] alleges his counsel was ineffective for persuading him to plead guilty to a subsection of Aggravated Assault that does not apply, and his conviction on that subsection is now delaying his parole. Upon review of the facts, it appears the focus of the plea negotiations was to achieve a lower minimum sentence of incarceration, and both parties overlooked the fact that [Clark] was pleading to an incorrect subsection. However, this is essentially what happened in *Young*. Even if there is an omission or defect in the guilty plea colloquy, the guilty plea will not be deemed invalid if the circumstance surrounding the entry of the plea reveal that the defendant fully understood the nature and consequences of his or her plea and that he or she knowingly and voluntarily decided to plead guilty. *Young*, 695 A.2d at 417. This Court conducted a thorough colloquy on the record regarding [Clark]'s understanding of the facts and the consequences of his guilty plea. The Court does not find [Clark] credible with respect to his assertion he was influenced by psychiatric medication to the extent that he could not understand his plea. [Clark] said nothing as to this fact during the colloquy. Furthermore, it was wholly unnecessary to advise [Clark] of his chances for parole. All that is required is to inform [Clark] of his minimum and maximum penalties, and that was done in this case. Finally, [Clark] has entered no reliable evidence that his parole is being delayed because of his conviction on Aggravated Assault with a

Deadly Weapon. [Clark] has only relayed secondhand assertions of a counselor within the prison. The Court gives little weight to this information.

Therefore, the Court finds [Clark]'s counsel had reasonable basis in negotiating for the guilty plea to the less serious offense. There was no intent to unlawfully induce [Clark] to plead guilty to a crime he did not commit, his Counsel negotiated with the aim of lowering his minimum sentence of incarceration; and he did so successfully. Thus, based on all of the above, [Clark]'s Counsel was not ineffective.

PCRA Court Opinion, 7/3/2012, 4-9.

Having carefully reviewed the record, and mindful of our standard of review,⁴ we conclude that the PCRA court has properly disposed of both issues raised in this appeal. We emphasize that with respect to Clark's

⁴ Our standard of review regarding an order denying PCRA relief is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. **Commonwealth v. Fowler**, 930 A.2d 586 (Pa. Super. 2007).

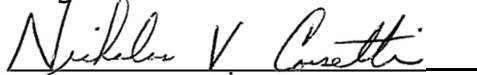
To prevail on a claim that counsel was constitutionally ineffective, the [petitioner] must overcome the presumption of competence by showing that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different. A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.

Commonwealth v. Hammond, 953 A.2d 544, 556 (Pa. Super. 2008) (citation omitted). "The findings of a post-conviction court, which hears evidence and passes on the credibility of witnesses, should be given great deference. We will not disturb the findings of the PCRA court if they are supported by the record, even where the record could support a contrary holding." **Commonwealth v. Jones**, 912 A.2d 268, 293 (Pa. 2006).

second issue regarding his guilty plea, he has not demonstrated a manifest injustice where it was the intent of counsel to negotiate a lower sentence for Clark, and which the trial court imposed at Clark's sentencing.⁵ Likewise, Clark was aware that he was pleading guilty to a second-degree felony as opposed to a first-degree felony, with which he was originally charged, to attain the lower sentence.⁶ Therefore, we affirm on the basis of the court's sound rationale set forth above.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/30/2013

⁵ We note the court did not impose the deadly weapon enhancement at the time of sentencing.

⁶ **See** N.T., 9/22/2009, at 7. The "law does not require that a defendant be totally pleased with the outcome of his decision to plead guilty, only that his decision be voluntary, knowing and intelligent." **Commonwealth v. Pollard**, 832 A.2d 517, 524 (Pa. Super. 2003), quoting **Commonwealth v. Baldwin**, 760 A.2d 883, 885 (Pa. Super. 2000), **appeal denied**, 781 A.2d 138 (2001).