

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

EUGENE HAROLD PARMENTER

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 538 MDA 2013

Appeal from the PCRA Order February 25, 2013
in the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0000786-2011

BEFORE: PANELLA, MUNDY, and PLATT*, J.J.

MEMORANDUM BY PANELLA, J.

FILED DECEMBER 20, 2013

Appellant, Eugene Harold Parmenter, appeals from the order entered on February 25, 2013 in the Court of Common Pleas of Lycoming County, which denied his petition filed pursuant to the Post Conviction Relief Act. After careful review, we affirm.

The relevant facts and procedural history are as follows. Appellant was represented during the guilty plea and sentencing proceedings by Attorney Robin Buzas. **See** N.T., 1/25/13, at 22. On July 5, 2011, Appellant pled guilty to one consolidated count of Involuntary Deviate Sexual Intercourse. **See** PCRA Court 1925(a) Opinion, 2/25/13, at 1. The standard range sentence Appellant faced was 48 to 66 months; however, he entered

* Retired Senior Judge assigned to the Superior Court.

into a plea agreement with the Commonwealth where he would be sentenced to a minimum incarceration period of seven and one-half years. **See id.** Appellant was sentenced on November 16, 2011, to serve a term of 7 ½ to 15 years in a State Correctional Institution. **See id.** Months later, Appellant filed a pro se petition for reconsideration of sentence, which the PCRA court dismissed as untimely. **See id.**

Appellant timely filed a pro se Post-Conviction Relief Act [“PCRA”] petition alleging that his guilty plea was coerced, and that Attorney Buzas refused to act on his requests to withdraw the guilty plea and to file a direct appeal on his behalf. **See id.** at 1-2. The PCRA court appointed Amy Boring, Esq. to represent Appellant with respect to his PCRA petition. **See id.** Appellant then filed an amended PCRA petition. **See id.** An initial PCRA conference was held and the PCRA court requested that Appellant file a second amended PCRA petition by December 21, 2012. **See id.** Appellant timely filed a second amended PCRA petition, and the PCRA court held an evidentiary hearing. **See id.**

The PCRA court subsequently issued an opinion and order denying the petition. **See id.** at 6. Appellant filed a timely notice of appeal on March 25, 2013. The PCRA court appointed Jerry Lynch, Esq. to replace Attorney Boring as Appellant’s counsel. The PCRA court subsequently issued a 1925(a) statement.

Appellant presents the following question for our review:

Did the lower court err when it denied Appellant's Post Conviction Relief Act Petition because the Appellant did not fail to meet his burden of proving ineffective assistance of counsel and a finding that Appellant's guilty plea was entered knowing [sic] voluntary [sic] and intelligently was not supported by the record, nor free from legal error?

Appellant's Brief at 10.

From reviewing the question presented, it appears Appellant is proposing two separate grounds for appeal. The first ground is ineffective assistance of counsel pursuant to 42 PA.CON.S.TAT.ANN. § 9543(a)(2)(ii) based on counsel's alleged failure to honor Appellant's request to withdraw his guilty plea after sentencing. The argument section in Appellant's brief only addresses this contention. **See** Appellant's Brief at 13-15. The second ground, which is raised in Appellant's 1925(b) statement and his question presented on appeal, claims that his plea was not knowing, voluntary, and intelligent pursuant to 42 PA.CON.S.TAT.ANN. § 9543(a)(2)(iii). However, Appellant fails to address or develop this argument. Therefore, we find the argument waived.¹ **See Commonwealth v. Hawkins**, 810 A.2d 668, 672

¹ Furthermore, to withdraw a guilty plea on the grounds that it was unlawfully induced, a defendant is required to plead his innocence, **see** PA.CON.S.TAT.ANN. § 9543(a)(2)(iii), unless Appellant alleges that counsel's ineffectiveness induced an involuntary or unknowing guilty plea. **See Commonwealth v. Hickman**, 799 A.2d 136, 141 (Pa. Super. 2002). Appellant's brief is devoid of both of these assertions.

(Pa. Super. 2002) (citations omitted); **see also** Pa.R.A.P. 2119. We proceed to the merits.

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 determination is free of legal error. **See Commonwealth v. Hall**, 867 A.2d 619, 628 (Pa. Super. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. **See Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001). Our scope of review is limited by the parameters of the PCRA. **See Commonwealth v. Heilman**, 867 A.2d 542, 544 (Pa. Super. 2005).

A claim that counsel's errors caused an involuntary guilty plea is considered under the ineffectiveness of counsel provision of the PCRA and not 42 PA.CON.S.TAT.ANN. § 9543(a)(2)(iii). **See Commonwealth v. Lynch**, 820 A.2d 728, 731-733 (Pa. Super. 2003). A defendant is eligible for post-conviction relief where his sentence is a result of "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 PA. CONS. STAT. ANN. § 9543(a)(2)(ii). Appellant bears the burden of establishing ineffectiveness because the law presumes that counsel provided effective representation. **See**

Commonwealth v. Faulk, 21 A.3d 1196, 1200 (Pa. Super. 2011) (citation omitted).

In order to establish a claim of ineffective assistance of counsel, Appellant must establish by a preponderance of the evidence that “(1) [the] 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 [client's] interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different.” ***Id.*** (citation omitted). “The standard for post-sentence withdrawal of guilty pleas dovetails with the arguable merit/prejudice requirements for relief based on a claim of ineffective assistance of plea counsel....” ***Commonwealth v. Flanagan***, 854 A.2d 489, 502 (Pa. 2004) (citations omitted).

Appellant alleges that Attorney Buzas refused his request to withdraw the guilty plea. He maintains that, both prior to and after sentencing, he expressed reluctance to pleading guilty and sought to withdraw the plea. ***See*** N.T., 1/25/13, at 6-9. Appellant’s wife and daughter testified to those same concerns. ***See id.*** at 11-12; 17-18. Appellant’s wife also testified that upon learning of Appellant’s concerns, Attorney Buzas provided them with examples of individuals that had withdrawn their plea only to receive a harsher sentence after trial. ***See id.*** at 12. There is a lack of evidence

suggesting that Appellant still expressed a desire to withdraw the plea after this consultation.

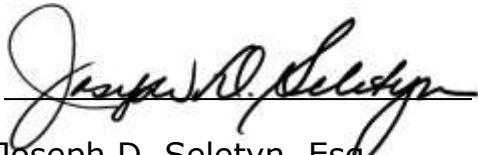
While Attorney Buzas could not specifically recall whether Appellant requested to withdraw his plea, she did provide insight regarding the procedure she regularly utilizes when a client expresses a desire to withdraw a plea. She indicated that she inquires about the clients' underlying rationale for withdrawing the plea, discusses the merits of the client's case with them, and advises the client about the consequences of withdrawing the plea. **See id.** at 25. While she would advise Appellant of the consequences of withdrawal, she stressed the final decision to withdraw lies with the client. **See id.** 25-26. Consequently, if Appellant did request to withdraw the plea, she would have filed a motion to withdraw the guilty plea, and that she had never refused to file such a motion. **See id.** at 26. She testified that she would never advise a client that he had no other choice but to plead guilty, and again stressed that the final decision regarding withdrawal lies with the client. **See id.**

We determine that the evidence supports the PCRA court's conclusion that Appellant did not establish ineffective assistance of counsel. While not explicitly stated, it is clear that the PCRA court did not find the testimony of Appellant, Appellant's wife, and Appellant's daughter to be credible. **See Commonwealth v. Johnson**, 51 A.3d 237, 242-243 (Pa. Super. 2012) (PCRA court's credibility determinations are binding on appeal when

supported by the record). Appellant may have exhibited hesitance both before and after tendering the guilty plea; however, Attorney Buzas appropriately inquired about his reasons for wanting to withdraw, discussed the merits of his case, and advised the client about the consequences of withdrawing the plea. The evidence does not suggest that, after this consultation, Appellant still indicated a desire to withdraw his plea. Based on these facts, the PCRA court was correct in finding that Attorney Buzas did not refuse Appellant his right to withdraw his guilty plea.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013