

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

PHILIP SWEENEY

Appellant

No. 73 EDA 2013

Appeal from the PCRA Order November 27, 2012
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0004398-2009

BEFORE: ALLEN, J., MUNDY, J., and FITZGERALD, J.*

DISSENTING STATEMENT BY FITZGERALD, J. **FILED DECEMBER 20, 2013**

I respectfully dissent from the majority's conclusion that the PCRA court properly determined that Appellant was made aware, prior to tendering his guilty plea, of the maximum sentence that could be imposed upon him.

The comment to Pa.R.Crim.P. 590 provides the minimum questions the court should ask of a defendant in a guilty plea colloquy. Pa.R.Crim.P. 590, cmt. The court should ask, *inter alia*, "Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?" ***Id.***

This question was framed recognizing that the decision to plead guilty to a charge could not be accepted as being knowingly and intelligently entered without an assurance that the accused fully comprehended the maximum punishment that might be imposed for his conduct. This

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information is obviously an integral part of the knowledge that should be possessed by one who is called upon to make the difficult decision whether to surrender his right to trial and to place himself at the mercy of the sentencing court. No civilized society could tolerate the waiver of such basic rights from one who was unaware of or misinformed as to such a critical fact.

Commonwealth v. Kulp, 382 A.2d 1209, 1211 (Pa. 1978).

“[I]f a defendant who entered a negotiated guilty plea was either misinformed or not informed as to the maximum possible sentence he could receive if he went to trial, and the misinformation or lack of information was material to his decision to accept the negotiated plea, then manifest injustice is established and the plea may be withdrawn.” ***Commonwealth v. Barbosa***, 819 A.2d 81, 82 (Pa. Super. 2003). “This determination must be fact- and case-specific.” ***Id.*** at 83.

In ***Commonwealth v. Lincoln***, 72 A.3d 606 (Pa. Super. 2013), the defendant argued the trial court misinformed him of the potential maximum sentence for the first time on direct appeal. ***Id.*** at 609, 611. This Court reasoned that because the issue was not raised in the trial court, we would “express no opinion on the merit of [the defendant’s] maximum sentence claim. Instead, his contention must be tested under a materiality analysis, which [he] will have to present in a timely filed PCRA petition, under the rubric of ineffective assistance of counsel. ***See Barbosa, supra.***” ***Id.***

In the instant matter, Appellant contends “his attorney failed to ensure that he was properly apprised of the maximum sentences to which he was

liable because of his guilty plea when the Court incorrectly and unclearly set forth [his] maximum sentence" Appellant's Brief at 11. The court misinformed Appellant as to the maximum sentence: "And you understand that [voluntary manslaughter] is a felony of the first degree and could carry with it up to ten years in prison?", and counsel did not object. **See** N.T., 12/15/09, at 7. Accordingly, I would remand for the PCRA court to hold a hearing and review Appellant's claim under a materiality analysis. **See** *Barbosa, supra*.