J-S64023-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JEREMY MILES,	:	
	:	
Appellant	:	No. 887 EDA 2013

Appeal from the PCRA Order February 20, 2013,
Court of Common Pleas, Chester County,
Criminal Division at No. CP-15-CR-0000137-2010

BEFORE: GANTMAN, DONOHUE and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED DECEMBER 13, 2013**

Appellant, Jeremy Miles ("Miles"), appeals from the February 20, 2013 order denying his timely first petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46. We affirm.

The trial court's Pa.R.A.P. 1925(a) opinion sets forth the underlying facts:

> On the night of December 16, 2009, Elizabeth Hoffmann[1] [('Hoffmann')] and Justin Kohuth [('Kohuth')] were celebrating the end of a semester of nursing school with their friends at a restaurant/pub called Kildare's in the center of the Borough of West Chester, Chester County, Pennsylvania. Unbeknownst to them, [Miles], a chronic alcoholic and drug addict, and a friend of his from work were drinking at the bar that night. [Miles] and his friend ran out of money. Spotting [Hoffmann's] purse on a chair, [Miles'] friend

[1] Hoffmann's name appears in the record alternately as Hoffmann and Hoffman.

suggested that [Miles] look inside for cash. [Miles] reached into [Hoffmann's] purse and, although there was cash inside [Hoffmann's] purse, he pulled out her cellphone instead. The two men left the bar.

At closing time, [Hoffmann] discovered that her cell phone was missing. She and [Kohuth] informed the bartender of the loss and they stayed at the bar for a little bit after it closed in order to search for [Hoffmann's] phone. Unsuccessful, they returned with two of their female friends to [Hoffman's] apartment, located approximately one block from the pub, and began dialing [Hoffmann's] cell phone number in an effort to locate the phone.

After numerous calls, a man's voice picked up on the other end. The man stated that he had picked up [Hoffmann's] cell phone by mistake. [Kohuth] started to make arrangements with the man to meet up at a location in town but the call was either dropped or ended by the man on the other end before their plans were solidified. [Hoffmann] dialed her cell phone number again and made arrangements with the man to meet up. The first place suggested was the corner of Church and Gay Streets in West Chester Borough; however, the parties ultimately settled on the corner of Gay and High Streets in the Borough of West Chester. Both locations are approximately a half block from Kildare's in either direction. [Hoffmann] testified that the chosen designation, the corner of Gay and High Street, was a relatively well-lit area for that time of night.

[Hoffmann] and her friends waited at the corner of Gay and High Streets in West Chester for five to ten minutes. No one showed up. [Kohuth] made another call to [Hoffmann's] cell phone. This time, a different male voice answered. This individual made arrangements with [Kohuth] to meet the foursome at the corner of High and Market Streets in the Borough of West Chester, approximately one block from their original meeting place. [Hoffmann], [Kohuth], and their two female

acquaintances walked to the corner of High and Market Streets and, once again, waited five to ten minutes. No one showed up.

[Hoffmann] and [Kohuth] saw a police car stationed at a nearby corner. They approached and informed the officer inside, Corporal Joshua Lee, of their situation. After speaking with Corporal Lee, [Kohuth] made another call to [Hoffmann's] cell phone and the first male voice answered once again. The man told [Kohuth] that he had 'just found' [Hoffmann's] phone lying on Matlack Street. [Kohuth] again requested that this individual meet with them to return the phone, and once again, the individual either hung up or lost the call. [Hoffmann] then made more calls to her cell phone in order to resume contact with the man. Finally, she was able to connect with him and they arranged to meet at the corner of Matlack and Market Streets, a couple blocks away from the victims' location at the time and not a well-lit area, according to [Hoffmann]. Ominously, the man demanded that [Hoffmann] bring a $30.00 'ransom' with her to exchange for her receipt of the phone and instructed her to come alone. [Miles] has never satisfactorily explained to this Court the logic behind his demand for money as a prerequisite to his return of a cell phone that did not belong to him in the first place.

In the interim, Corporal Lee had made contact with a backup, one Officer Viebahn, and advised him of the pending situation. As he was doing this, the four young people walked to the corner of Market and Matlack Streets. [Hoffmann] approached by herself on the south side of Market Street while [Kohuth] and the other two young women approached behind her on the north side. When [Hoffmann] reached the corner of Matlack and Market Streets, she saw [Miles] standing behind a building.

At this point, [Hoffmann's] friends were still on the north side of Market Street closer to the preceding intersection of Walnut and Market than to

the designated meeting area. They had an unobstructed view of [Hoffmann]. However, in order to reach [Miles], [Hoffmann] had to walk down Matlack Street and around the corner of the building behind which [Miles] was standing. This took her out of the view of her friends.

When [Hoffmann] met up with [Miles] behind the building, [Miles] said to her, 'Is it you?', to which she replied, 'Yes.' She asked him for her phone. He flashed it in front of her. Because it no longer had its pink cover on it, [Hoffmann] was unable to determine whether the phone was actually hers, so she asked him for it again. He flashed it to her once more, but still did not return it. Instead, he demanded that she come with him and made a movement towards her.

At this point, [Kohuth] rounded the corner of the building behind which [Miles] was standing on Matlack Street. [Kohuth] had quickened his pace behind [Hoffmann] when he lost sight of her as she reached [Miles'] location. [Hoffmann] heard [Kohuth's] footsteps before she saw him come around the corner. [Kohuth] demanded that [Miles] return [Hoffmann's] cell phone. However, according to [Kohuth], before he even got all the words out, [Miles] stabbed him in the eye with a steak knife. [Kohuth] testified he was assaulted as he rounded the corner of the building and that he experienced acute pain accompanied by the sensation that something inside his brain had burst like a water balloon. [Miles] on the other hand, claims he stabbed [Kohuth] with a deadly weapon only after first being tackled by [Kohuth]. [Kohuth] denies that he was the aggressor. In either event, there is no dispute that [Miles] used deadly force against [Kohuth] on a vital part of the latter's body or that the use of such force was unjustified. The two struggled on the ground with [Miles] quickly gaining the advantage over the now-disable [Kohuth].

At this point, Corporal Lee arrived on the scene. He had driven his patrol vehicle over to the

> location of [Hoffmann] and [Miles'] meeting place immediately upon observing [Kohuth] move from the north side of Market Street to the south side. The entire assaultive episode was over in a matter of seconds. However, [Miles] did not release [Kohuth] until Corporal Lee physically disengaged him. [Miles] attempted to run. Corporal Lee, as well as his backup, an Officer Viebahn, had to taser [Miles] in order to subdue him. After a violent struggle with [Miles], they were eventually able to handcuff him, although he remained physical with them throughout the process.

Trial Court Opinion, 1/7/11, at 1-5.

Police charged Miles with attempted homicide, aggravated assault, unlawful possession of a controlled substance, possessing an instrument of crime, recklessly endangering another person, theft by unlawful taking, receiving stolen property, theft of lost property, and resisting arrest.[2] On May 17, 2010, Miles entered an open plea of guilty to aggravated assault, possessing an instrument of crime, theft by unlawful taking, and resisting arrest, and he pled no contest to the drug possession charge. In exchange, the Commonwealth dropped the attempted homicide charge. On July 27, 2010, the trial court sentenced Miles to an aggregate 11 to 22 years of incarceration, which falls above the aggravated guideline range. Miles filed a timely post-sentence motion, which the trial court denied on October 6, 2010. Miles filed a timely notice of appeal on November 3, 2010, and this

[2] 18 Pa.C.S.A. §§ 901, 2501(a), 2702(a)(1), (4), 35 P.S. § 780-113(A)(32), 18 Pa.C.S.A. § 907(a), 2705, 3921(a), 3925(a), 3924, 5104.

Court affirmed the judgment of sentence on June 1, 2011. The Pennsylvania Supreme Court denied allowance of appeal on November 10, 2011.

On December 7, 2012, Miles filed a timely first PCRA petition. The PCRA court issued its notice of intent to dismiss without a hearing on January 28, 2013. Miles filed a response on February 19, 2013 and the trial court dismissed the petition without a hearing one day later. Miles filed this timely appeal, raising three assertions of error:

> I. Was defense counsel by reason of exposing [Miles] to the probability of unduly harsh penalties as handed down following an open guilty plea, and upon review of applicable case law, and all circumstances of fact and law in the instant matter, so ineffective as counsel throughout such as to warrant a new trial?
>
> II. Did defense counsel, in choosing to advise defendant to plead guilty, so neglect the facts, law, and defenses available to [Miles] such as to be ineffective and, in that, cause [Miles] to make an unintelligent plea; thereby warranting a new trial?
>
> III. Was the sentencing court, given the private nature of the attorney/client privilege and communications unknown to the court in influencing [Miles'] open guilty plea, in error in denying [Miles] the right to testify at a hearing on the merits of his PCRA petition?

Miles' Brief at 6.

Miles' first two arguments assert his counsel was ineffective in advising Miles to enter an open guilty plea. We will consider these two arguments together.

> [A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the '[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.C.S.A. § 9543(a)(2)(ii). As our supreme court has stated: It is well-established that counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error.

Commonwealth v. Franklin, 990 A.2d 795, 797 (Pa. Super. 2010). Counsel's ineffectiveness in connection with a plea bargain is cognizable under the PCRA. ***Commonwealth ex rel. Dadario v. Goldberg***, 565 Pa. 280, 285-88, 773 A.2d 126, 130-31 (2001).

Miles argues that, had counsel taken his case to trial, he could have developed the facts in a light more favorable than was evident in the trial court's opinion in support of its judgment of sentence. Specifically, Miles argues that he received an overly harsh sentence for what was a "single, freakishly misplaced stab" and that counsel should have perceived that the trial court was intent on imposing a harsh sentence. Miles' Brief at 15. Miles

further argues that he made no effort to contact Hoffmann or the victim after he stole the phone, and that the incident never would have occurred had Hoffmann simply filed a police report for her stolen phone and dropped the matter. ***Id.*** at 19-20. On this basis, Miles speculates that "a jury would not find the enormous sympathy and sense of retribution for the victim which impelled the lower court to sentence [Miles] to a minimum of 11 years in jail." ***Id.*** at 21.

Miles argues that plea counsel's purported failure to perceive and communicate these issues to him rendered his plea involuntary. The applicable law is well-settled:

> Basic tenets of guilty plea proceedings include the following. The law does not require that appellant be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [appellant's] decision to plead guilty be knowingly, voluntarily and intelligently made. Once a defendant has entered a plea of guilty, it is presumed that he was aware of what he was doing, and the burden of proving involuntariness is upon him. Therefore, where the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established. Determining whether a defendant understood the connotations of his plea and its consequences requires an examination of the totality of the circumstances surrounding the plea.

Commonwealth v. Moser, 921 A.2d 526, 528-529 (Pa. Super. 2007) (internal citations and quotation marks omitted).

Miles makes no argument that his plea colloquy was insufficient, and our review of the record confirms that it was thorough and proceeded in accordance with Pa.R.Crim.P. 590. N.T., 5/17/10, at 3-23. In particular, the trial court advised Miles of the sentences applicable to each of his crimes. ***Id.*** at 17-20. Miles acknowledged at sentencing his understanding that the maximum penalty for his offenses was an aggregate 15-30 years of incarceration. ***Id.*** at 20. Miles further acknowledged that he discussed the facts, law, and possible defenses with his attorney, and that he was satisfied with the attorney's services. ***Id.*** at 20. The record reveals no deficiency in Miles' plea colloquy.

Unable to assail the plea colloquy, Miles argues that his plea counsel's assessment of the facts was woefully deficient. The record, however, fails to support Miles' assertion. Miles admitted at sentencing that he stole Hoffmann's cell phone and deliberately led her on a wild goose chase when she attempted to get it back. ***Id.*** at 6-7. Ultimately, Miles demanded payment for return of the phone, and demanded that Hoffmann meet him alone. ***Id.*** at 7. When Kohuth arrived at the scene of the exchange, an altercation ensued wherein Miles used a seven inch knife to stab Kohuth in the eye socket. ***Id.*** at 8-9. Kohuth lost his eye and he has lost sensation in part of his face. ***Id.*** at 9-10. Miles then engaged the police in a violent altercation and two officers tasered Miles twice before they finally subdued him. ***Id.*** at 8-9. In summary, the record reflects that Miles initiated the

event by stealing the cell phone; that he prolonged it by repeatedly arranging and rearranging meeting points at which he would purportedly return it; that he stabbed Kohuth in the head; and that he fought with police prior to his apprehension. While Hoffmann and Kohuth might have been wiser not to pursue the lost cell phone, their mistakes do not excuse Miles' criminal conduct. Nor do we perceive how plea counsel could have used a trial to portray Miles as a sympathetic figure in these events.

Miles also argues that the Commonwealth's agreement to drop the attempted homicide charge did not justify counsel's advice to enter the open guilty plea. Miles argues that the facts would not have supported an attempted homicide conviction. "To prove a charge of Attempted Homicide, the Commonwealth must establish that the accused took a substantial step toward committing homicide, with the specific intent to kill." ***Commonwealth v. Packard***, 767 A.2d 1068, 1071 (Pa. Super. 2001), *appeal denied*, 566 Pa. 660, 782 A.2d 544 (2001). "[S]pecific intent may reasonably be inferred from an accused's use of a deadly weapon on a vital part of the victim's body." ***Id.*** Miles asserts that the record would not support a finding that he acted with the specific intent to kill, and that plea counsel rendered ineffective assistance in advising him to plead guilty in exchange for dropping the homicide charge. While Miles would characterize the stab as "freakishly misplaced," we discern no reason to assume that a jury would have done the same had Miles gone to trial. The unadorned facts

of record indicate that Miles stabbed Kohuth through the eye socket with a seven-inch knife. These facts are clearly sufficient to support a finding that Miles used a deadly weapon on a vital part of Kohuth's body and therefore acted with specific intent to kill.

In summary, we find no arguable merit to Miles' assertion that plea counsel rendered ineffective assistance in advising Miles to plead guilty rather than attempting to develop a sympathetic factual record at trial. Furthermore, the Commonwealth's agreement to drop the most serious charge against Miles provided a reasonable strategic basis for counsel's advice to plead guilty. Finally, Miles' assertion that he could have received a lesser sentence by proceeding to trial is supported by nothing other than Miles' own speculation and self-serving interpretation of the facts. For all of the foregoing reasons, we conclude that Miles first two arguments lack merit.

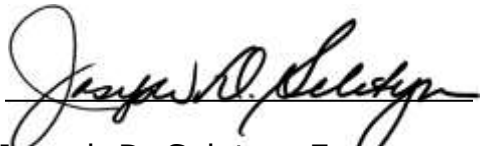
Miles' third argument is that the PCRA court erred in dismissing his petition without holding a hearing. The PCRA court may deny a petition without a hearing where the court "is satisfied […] that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings." Pa.R.Crim.P. 907(1). Miles argues that a hearing would have been useful in order to learn plea counsel's explanations for advising Miles to plead guilty. As explained above, however, Miles'

assertions of plea counsel's ineffectiveness are based on Miles' self-serving and unrealistic interpretation of the facts of record, and his speculation that a jury would have found him a more sympathetic figure than did the sentencing court. For reasons we have already discussed in disposing of Miles' first two arguments, we agree with the PCRA court that no hearing was necessary. Miles' third argument lacks merit.

Since we have considered and rejected each of Miles' assertions of error, we affirm the PCRA court's order.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013