NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CHRISTINA M. GARNETT Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 889 MDA 2013

Appeal from the PCRA Order April 16, 2013
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0000146-2011

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

MEMORANDUM BY LAZARUS, J. **FILED JANUARY 24, 2014**

Christina M. Garnett appeals *pro se* from the order of the Court of Common Pleas of Berks County dismissing her petition filed under the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"). Upon review, we affirm.

On January 5, 2011, Garnett stabbed Charles Simmons, her paramour, multiple times with a kitchen knife, causing his death. On February 28, 2011, Garnett entered a negotiated plea of guilty to the charge of third-degree murder and was sentenced by the court to an agreed-upon term of fifteen to thirty years' incarceration. Garnett filed neither post-sentence motions nor a direct appeal.

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* Former Justice specially assigned to the Superior Court.

On February 16, 2012, Garnett filed a *pro se* PCRA petition. The PCRA court appointed counsel, who ultimately filed a "no-merit" letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988).[1] The PCRA court filed its Pa.R.Crim.P. 907 notice of intent to dismiss on March 11, 2013, along with an order granting counsel leave to withdraw. Garnett filed a *pro se* response to the Rule 907 notice on April 1, 2013 and, on April 16, 2013, the PCRA court dismissed her petition.

This timely *pro se* appeal followed, in which Garnett raises the following issues for our review:

> 1. Did the [PCRA] court err in ruling that the IQ report from the Department of Corrections was not newly discovered evidence and therefore did the [PCRA] court err in ruling [Garnett's] PCRA [petition] as having no meritorious issues entitling her to post-conviction relief?
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> 2. Did the [PCRA] court err in ruling that [Garnett's] plea was voluntarily, knowingly and intelligently entered and therefore did the [PCRA] court err in ruling [Garnett's] PCRA [petition] as having no meritorious issues entitling her to post-conviction relief?
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> 3. Did the [PCRA] court err in ruling that [Garnett] was competent to enter a plea and therefore did the [PCRA] court err in ruling [Garnett's] PCRA [petition] as having no meritorious issues entitling her to post-conviction relief?
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> 4. Was [Garnett's plea] counsel ineffective and therefore did the [PCRA] court err in ruling [Garnett's] PCRA [petition] as having no meritorious issues entitling her to post-conviction relief?

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[1] Counsel's no-merit letter satisfies all the ***Turner***/***Finley*** requirements.

Brief of Appellant, at 4.

In PCRA cases, our scope and standard of review are well-settled. We are limited to examining whether the PCRA court's findings of fact are supported by the record and whether its legal conclusions are free of error. ***Commonwealth v. Haskins***, 60 A.3d 538, 546 (Pa. Super. 2012).

Garnett's first three appellate claims relate to her contention that her guilty plea was not entered voluntarily, knowingly, and intelligently. Garnett claims that: she was "mentally and intellectually incapable" of understanding the plea agreement based upon an IQ test administered in April 2011 showing she possesses an IQ of 78; her attorney failed to adequately explain the ramifications of the plea; the trial court did not properly colloquy her; and her lawyer pressured her into agreeing to a plea bargain. For the following reasons, Garnett's claims are meritless.

Section 9543(a)(2) of the PCRA sets forth the circumstances under which a petitioner may be eligible for relief. A petitioner must plead and prove that his conviction or sentence resulted from:

> (ii) Ineffective 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.
>
> (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

42 Pa.C.S.A. § 9543(a)(2).

Garnett challenges the validity of her guilty plea for the first time, having failed to do so either prior to sentencing, in post-sentence motions or on direct appeal. An attempt to withdraw a plea of guilty after sentencing will only be granted where the defendant is able to show that her plea was the result of manifest injustice. ***Commonwealth v. Blackwell***, 647 A.2d 915, 921 (Pa. Super. 1994). To establish such manifest injustice, a petitioner must show that her plea was involuntary or was given without knowledge of the charge. ***Commonwealth v. Rachak***, 62 A.3d 389, 394 (Pa. Super. 2012).

The Pennsylvania Rules of Criminal Procedure mandate that a guilty plea be offered in open court and advise that the trial court should inquire into at least six areas in order to show that the plea was voluntarily, knowingly, and intelligently entered. ***Id.*** Those six areas include:

> (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
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> (2) Is there a factual basis for the plea?
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> (3) Does the defendant understand that he has the right to trial by jury?
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> (4) Does the defendant understand that he is presumed innocent until he is found guilty?
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> (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
>
> (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Pa.R.Crim.P. 590, comment.

Here, at the behest of the trial court, the district attorney engaged in a colloquy with Garrett. During that colloquy, Garrett acknowledged that she understood the charge against her, the presumption of innocence, her right to a jury trial, the waiver of enumerated pre- and post-trial rights, the fact that the court would not be bound by the terms of her plea agreement, and the permissible range of sentences. N.T. Guilty Plea, 2/28/11, at 3-6. Garrett also affirmed that she was satisfied with the services of her attorney and that she had truthfully answered the questions contained in the extensive written colloquy. ***Id.*** at 4-5. Finally, the district attorney recited the factual basis for Garrett's plea, and Garrett affirmed her understanding that her plea was an admission of those facts. ***Id.*** at 5-6. After counsel completed the colloquy, Garrett stated that she had no questions and did not wish to add anything. ***Id.*** at 6.

An appellant is bound by statements made at the time her plea is entered, and she may not, on appeal, assert grounds for withdrawing the plea which contradict those statements. ***Commonwealth v. Timchak***, 69 A.3d 765, 774 (Pa. Super. 2013). Here, the oral and written colloquies were thorough and addressed all the necessary areas under Rule 590. Garnett cannot now assert that her answers given under oath were false.

Garnett's claim that her alleged low IQ rendered her unable to intelligently enter her plea is similarly meritless. "The test to be applied in determining the legal sufficiency of [a defendant's] mental capacity to stand trial, or enter a plea at the time involved, is . . . [her] ability to comprehend

[her] position as one accused of murder and to cooperate with [her] counsel in making a rational defense." ***Commonwealth v. Melton***, 351 A.2d 221, 224 (Pa. 1976) (affirming validity of guilty plea entered by individual with IQ of 69). Low intelligence alone is not sufficient to establish an unintelligent guilty plea. ***Commonwealth v. Miller***, 309 A.2d 705, 708 (Pa. 1973).

Here, the report submitted by Jerome Gottlieb, M.D., prior to Garnett's plea hearing, advised plea counsel that she was both competent to stand trial and "substantially under[stood] the nature of the charges and proceedings pending against her and [was] substantially able to participate with her attorney in her own defense." Report of Dr. Jerome Gottlieb, 1/24/11, at 7. Moreover, Garnett was able to intelligently respond to the questions posed to her during her plea colloquy, and the court was satisfied that she understood the proceedings. ***See*** N.T. Plea Hearing, 2/28/11, at 7. Garnett has not demonstrated that her IQ – which she herself characterizes as being "very close to being intellectually disabled" but not actually intellectually disabled, ***see*** Brief of Appellant, at 10 – prevented her from entering a valid plea.[2]

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[2] Garnett also claims that the PCRA court erred in ruling that the IQ report was not newly-discovered evidence. In its Order and Notice of Intent to Dismiss, the PCRA court mistakenly characterizes the IQ test as having been part of Dr. Gottlieb's 2011 report submitted prior to her plea and sentencing. Because Dr. Gottlieb's report was submitted prior to the entry of her plea, the court found that it was not "newly discovered." However, the IQ test was, in fact, administered by the Department of Corrections on April 13, 2011, after Garnett was sentenced. Nevertheless, because IQ test results
(Footnote Continued Next Page)

Finally, Garnett alleges that her plea counsel was ineffective for: (1) failing to follow up with a forensic psychologist; (2) failing to explore Garnett's competency at the time of the crime; (3) claiming Garnett was competent to enter a plea without basis; (4) allowing Garnett to enter an involuntary, unknowing and unintelligent plea; and (5) abandoning Garnett after the entry of her plea. Brief of Appellant, at 15.

Our standard of review when faced with claims of ineffective assistance of counsel is well settled. First, we note that counsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant. ***Commonwealth v. Thomas***, 783 A.2d 328, 332 (Pa. Super. 2001) (citation omitted). In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show, by a preponderance of the evidence, ineffective 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. ***Commonwealth v. Turetsky,*** 925 A.2d 876, 880 (Pa. Super. 2007) (citation omitted). A petitioner must show: (1) that the underlying claim has merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors or omissions of counsel, there is a

(Footnote Continued) ———————————

are insufficient to establish an unintelligent plea, ***see Miller***, ***supra***, the PCRA court did not err in refusing to grant relief on the basis of this purported after-discovered evidence.

reasonable probability that the outcome of the proceedings would have been different. ***Id.*** (citation omitted). The failure to prove any one of the three prongs results in the failure of petitioner's claim. "The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1041-42 (Pa. Super. 2007), citing ***Commonwealth v. Pierce***, 645 A.2d 189, 194 (Pa. 1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Id.***, citing ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa. Super. 2004).

> It is clear that a criminal defendant's right to effective counsel extends to the plea process, as well as during trial. However, [a]llegations 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.

Commonwealth v. Timchak, 69 A.3d 765, 769 (Pa. Super. 2013), quoting ***Commonwealth v. Wah***, 42 A.3d 335, 338 (Pa. Super. 2012).

We begin by noting that Garnett's claim regarding plea counsel's alleged abandonment is waived, as she did not raise the issue in either her *pro se* PCRA petition or her response to the PCRA court's Rule 907 notice of intent to dismiss. ***Commonwealth v. Bedell***, 954 A.2d 1209, 1216 (Pa. Super. 2007) (claim not raised before PCRA court cannot be raised for first

time on appeal); Pa.R.A.P. 302(a) (stating that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Moreover, in her brief, Garnett cursorily addresses this issue in one paragraph, but does not aver that she either requested to file an appeal or that counsel failed to consult with her regarding her desire to do so in violation of ***Commonwealth v. Touw***, 781 A.2d 1250, 1254 (Pa. Super. 2001) and ***Roe v. Flores-Ortega***, 528 U.S. 470 (2000).[3] Garnett has not met her burden of demonstrating she was prejudiced by counsel's alleged failure to consult, as she has not raised any nonfrivolous grounds for appeal. ***See Commonwealth v. Ousley***, 21 A.3d 1238, 1245 (Pa. Super. 2011) (finding appellant did not meet burden under ***Flores-Ortega*** and ***Touw*** by demonstrating nonfrivolous ground for appeal). Accordingly, even if Garnett had not waived this issue, plea counsel cannot be deemed ineffective on these grounds.

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[3] Under ***Touw*** and ***Flores-Ortega***,

> [c]ounsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

Touw, 781 A.2d at 1254, quoting ***Flores-Ortega***, 528 U.S. at 480.

Garnett next asserts that plea counsel was ineffective for failing to follow up with Dr. Gottlieb by providing additional medical and discovery records. Her one paragraph argument on this issue states that her mental health issues "should have heightened the defense attorney's obligation because [an] Appellant with mental health problems may be less assured of receiving effective assistance." Brief of Appellant, at 15. This claim is meritless.

Our Supreme Court has noted that the reasonableness of a particular investigation depends upon evidence known to counsel, as well as evidence that would cause a reasonable attorney to conduct a further investigation. ***Commonwealth v. Hughes***, 865 A.2d 761 (Pa. 2004). Here, counsel obtained a forensic psychiatric evaluation of Garnett from Dr. Gottlieb. In his report, Dr. Gottlieb stated that he was unable to "reach an opinion as to whether [Garnett] meets the criteria for being [m]entally [i]ll as defined by the Pennsylvania Statutes." Report of Dr. Gottlieb, 1/24/11, at 8. He noted, however, that at the time of the crime she had been prescribed an antidepressant. Dr. Gottlieb was further unable to determine whether she suffered from diminished capacity due to intoxication at the time of the murder, although he stated it was "highly likely" that she did. ***Id.*** at 8. In order to render an opinion on those two issues, Dr. Gottlieb indicated it would be necessary to review medical records and discovery material. However, Dr. Gottlieb explicitly concluded that Garnett was competent to

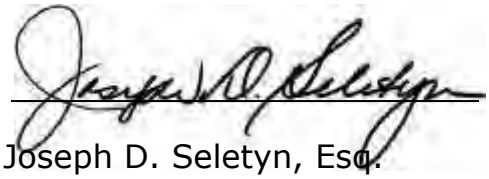
stand trial, that she understood the nature of the charges and proceedings against her, and that she was able to participate in her own defense. ***Id.*** at 7-8.

Even if Dr. Gottlieb had been able to review the relevant records and conclude that Garnett suffered from depression at the time she committed the crime, depression does not constitute a "mental disease" that would support a finding of either guilty but mentally ill or not guilty by reason of insanity. ***Commonwealth v. Sasse***, 921 A.2d 1229, 1235 (Pa. Super. 2007). As to any possible diminished capacity defense, even if counsel had pursued the issue, it would have merely reduced Garnett's criminal culpability from first-degree murder to third-degree murder, the crime to which she ultimately pled guilty. ***See Commonwealth v. Travaglia***, 661 A.2d 352, 359 n.10 (Pa. 1995). Under these circumstances, we cannot conclude that Garnett was prejudiced or that it was unreasonable for plea counsel to decline to pursue the issues further.

Garnett's final ineffectiveness claims involve whether her plea was entered voluntarily, knowingly and intelligently. We concluded, ***supra***, that the plea was valid based upon the oral and written colloquies. As counsel cannot be deemed ineffective based upon a meritless claim, ***Turetsky***, ***supra***, no relief is due.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/24/2014