[J-123-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 033 W.D. Appeal Docket 1997
Appellee	:	Appeal from the Order of Superior Court at No. 1972PGH95 entered December 16, 1996 affirming the Order of the Court
v.	:	of Common Pleas of Allegheny County, Criminal Division, entered October 16,
ORVILLE ALLEN,	:	1995 at Nos. CC 85-00182, CC 85-00183, CC 85-00184, CC 85-00185, CC
Appellant	:	85-00186, CC-85-00187, CC-85-00188, CC 85-00315.

SUBMITTED: September 8, 1997

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: MAY 25, 1999**

The trial court failed to inform Appellant during his guilty plea colloquy of either the nature of consecutive sentences or the possibility that the sentences that he received could be imposed consecutively. Appellant's counsel compounded the trial court's error by failing to move to withdraw his guilty plea based on the defect in the guilty plea colloquy. The Majority acknowledges the fact, as it must, that Appellant's guilty plea colloquy suffered from the same defect that was present in Commonwealth v. Persinger, 532 Pa. 317, 615 A.2d 1305 (1992).[1] Nevertheless, the Majority

[1] In the sixteenth footnote of its opinion the Majority attempts to distinguish Persinger by suggesting that while Appellant merely alleges that his plea counsel failed to inform him of the permissible range of sentences that could be imposed against him, the defendant in Persinger somehow proved to the Court that his plea counsel failed to inform him of the permissible range of sentences that could be imposed against him. However, in my view, the Persinger decision was based on the failure of the trial court to clearly inform the defendant, **on the record**, of the possibility that he could receive consecutive sentences. Therefore, whether or

concludes that Appellant is not entitled to relief based on ineffective assistance of counsel because his underlying claim of a violation of Persinger does not amount to a "miscarriage of justice" for purposes of a second Post Conviction Relief Act[2] ("PCRA") petition. Because I believe that a violation of Persinger does constitute a "miscarriage of justice", I respectfully dissent.

In Persinger, the defendant claimed that he was rendered ineffective assistance of counsel by virtue of counsel's failure to file a motion to withdraw his guilty plea after the trial court failed to inform him during his plea colloquy of the possibility that his sentences could be imposed consecutively. Id. at 320, 615 A.2d at 1306-07. In considering the merits of the claim, the Court noted that "[t]he goal sought to be attained by the guilty plea colloquy is assurance that a defendant's guilty plea is tendered knowingly, intelligently, voluntarily and understandingly." Id. at 323, 615 A.2d at 1308. The Court then reiterated its long-standing position that a trial court's failure

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not counsel informs a defendant, off the record, of the possibility that he could receive consecutive sentences is of no moment for purposes of a Persinger claim. Nevertheless, in Persinger, as in the instant case, there was no evidentiary hearing conducted at which the defendant's plea counsel would have testified as to what he told or failed to tell the defendant prior to the entry of his guilty plea. In addition, in Persinger, as in the instant case, the transcript offered no indication that either the court or the defendant's counsel had actually informed him of either the nature of consecutive sentences or of the possibility that his sentences could be imposed consecutively. Therefore, when the Court in Persinger noted that "defense counsel [had not] explained to appellant that the sentences could result in consecutive terms of imprisonment," I can only assume that it did so in reliance on the absence of any indication to the contrary on the record, and on the veracity of the defendant's allegations. Persinger, 532 Pa. at 322 n.4, 615 A.2d at 1307 n.4. Finally, since the Majority appears to conclude that Appellant is not entitled to relief because he has failed to prove that his prior counsel did not inform him of the possibility that he might receive consecutive sentences, then I would at least permit Appellant to question his prior counsel concerning that allegation at an evidentiary hearing.

[2] 42 Pa. C.S. § 9541-9551.

to fully colloquize a defendant concerning the permissible range of sentences for the offenses to which he is pleading guilty renders the colloquy defective and requires that the defendant be permitted to withdraw his guilty plea. Id. at 321, 615 A.2d at 1307 (citing Commonwealth v. Kulp, 476 Pa. 358, 382 A.2d 1209 (1978); Commonwealth v. Willis, 471 Pa. 50, 369 A.2d 1189 (1977); Commonwealth v. Dilbeck, 466 Pa. 543, 353 A.2d 824 (1976)). Because the defect in the defendant's plea colloquy provided ample grounds for a withdrawal of the plea, the Court found that the defendant's counsel could have had no reasonable basis for failing to move to withdraw the plea. Id. at 324, 615 A.2d at 1308. Therefore, the Court found that the defendant's counsel had been ineffective for failing to move to withdraw the guilty plea, and remanded the case for a new trial. Id.

Based on the language and the rationale of Persinger, I can not agree that Appellant has failed to make a prima facie showing that a miscarriage of justice occurred as a result of the trial court's failure to ensure that he was made aware of the permissible range of sentences which could be imposed upon him prior to the entry of his guilty plea. In Persinger, the Court held that the defendant had suffered a "manifest injustice" as a result of the trial court's failure to properly colloquize him before he entered his guilty plea. Persinger, 532 Pa. at 324, 615 A.2d at 1308. In addition, the Court in Persinger stated that "no civilized society could tolerate" accepting a guilty plea following a defective plea colloquy which failed to ensure that the defendant was aware of the permissible range of sentences that could be imposed against him. Id. at

322, 615 A.2d at 1307 (quoting Commonwealth v. Kulp, 476 Pa at 361, 382 A.2d at 1211). Similarly, the Lawson Court characterized the "miscarriage of justice" standard applicable to second and subsequent PCRA petitions as one "which no civilized society can tolerate." Lawson, 519 Pa. at 514, 549 A.2d at 112. Given this similarity in language, I can not agree that a violation of Persinger amounts to a "manifest injustice" but not a "miscarriage of justice." In my view, the standards enunciated by the Lawson and Persinger Courts are fundamentally the same, any difference in phraseology amounting only to a distinction without a difference.

In addition, the Court's decision in Persinger was based on the notion that a manifest injustice is committed whenever a trial court permits a defendant to enter a guilty plea without first ensuring that the defendant fully appreciates the significance and consequences of his guilty plea, including the potential consecutive sentences that he faces as a result of his decision to plead guilty to multiple offenses. Persinger, 532 Pa. at 324, 615 A.2d at 1308. Rule 319 of the Pennsylvania Rules of Criminal Procedure ("Pa.R.Crim.P. 319") was promulgated with the same notion in mind. The comments to Pa.R.Crim.P. 319 explain that a defendant should not be permitted to plead guilty to criminal charges leveled against him unless the trial court first ensures, through a full and fair colloquy, that he has been made aware of all of the potential consequences of his decision. Pa. R.Crim.P. 319 (comment). In effect, the Majority's decision today turns the focus from the responsibility of the trial court to ensure that defendants are fully colloquized on the record prior to accepting their guilty pleas, to

what those defendants might have known despite the trial courts' failure to conduct a complete colloquy before accepting their guilty pleas.

The courts clearly have a responsibility to ensure that the criminal defendants who appear before them know and understand their rights before they are permitted to abdicate them and plead guilty. By reaching the decision that it does today, the Majority minimizes the importance of that responsibility, and increases the risk that defendants will plead guilty without fully understanding the consequences of their actions. I respectfully dissent.

Mr. Chief Justice Flaherty joins in the dissenting opinion.