

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

HOWARD COOPER

Appellant

No. 2986 EDA 2012

Appeal from the PCRA Order October 11, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007279-2009

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY JENKINS, J.:

FILED JULY 22, 2014

Appellant Howard Cooper appeals from the order of the court of common pleas of Philadelphia County dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.* We affirm.

The trial court summarized the factual history as follows:

On February 14, 2009, approximately 2:45 PM, Philadelphia Police Officer Jason Sommerville was driving his personal car in the 2600 block of North Broad Street, Philadelphia, PA when he observed Decedent, Mathew Bullock, run in front of his vehicle being chased by [Cooper]. [Cooper], who was holding a silver knife, grabbed Decedent, and punched Decedent in the face with the knife several times. Decedent fell to the ground and [Cooper]

* Former Justice specially assigned to the Superior Court.

continued stabbing Decedent in the face and chest as he lay in the center of Broad Street. Officer Sommerville exited his vehicle, identified himself, and ordered [Cooper] to drop the knife. [Cooper] fled and Sommerville pursued him. Sommerville apprehended [Cooper] who had discarded the knife into an empty lot. Sommerville contacted police radio and relayed what had occurred at which point [Cooper] got up and engaged in a struggle with Sommerville threatening to kill him. [Cooper] continued to make threats towards other police officers who arrived on the scene and he stated that it was [his] intention to kill the decedent. An autopsy was performed on Decedent's remains which revealed eight stab wounds to the face, chest, abdomen, back, buttock and knee, and several slash wounds.

Trial Court 1925(a) Opinion, 7/16/2013, at 2-3 (internal footnotes deleted).

On February 14, 2009 Cooper was arrested and charged with murder of the third degree and related offenses. On October 13, 2010, he entered a negotiated guilty plea to murder of the third degree,¹ aggravated assault,² and possessing an instrument of crime.³

At the guilty plea hearing, Cooper stated he was entering into a negotiated plea agreement of his own free will and no one forced or threatened him to plead guilty. N.T. 10/13/2010, at 3 [hereinafter "N.T."]. Regarding the aggravated assault charge, the following exchange occurred:

THE COURT: Are you [pleading guilty] because you are in fact guilty of these offenses?

¹ 18 Pa.C.S. § 2502.

² 18 Pa.C.S. § 2702(a).

³ 18 Pa.C.S. § 907(a).

THE DEFENDANT: I am in fact guilty of murder but I don't know about the aggravated assault on a police officer.

THE COURT: Do you wish to speak further with your attorney?

[DEFENSE COUNSEL]: I think what I can say to the court, we did speak a little bit. Given the actual facts, I think there are some facts that he disagrees with; but in terms of making out a factual basis for the crime, considering what the relatively low level of some sort of struggle or anything with the police officer is, that it can rise to the level of a felony of the second degree, I think Mr. Cooper understands that they can make out those charges. That is in that sense I think he would --

THE COURT: Is that your understanding, sir?

THE DEFENDANT: I guess so.

THE COURT: All right, and you are pleading guilty to murder in the third degree, one count. One count of aggravated assault as a felony two offense. One count of possessing an instrument of crime, a misdemeanor one offense. Is that your understanding?

THE DEFENDANT: Yes, your honor.

. . .

THE COURT: Are you satisfied with your attorney?

THE DEFENDANT: I guess so.

THE COURT: Have your attorneys explained to you the charges to which you are pleading guilty today, along with the elements of those offenses and the maximum penalties that you face?

THE DEFENDANT: Well, yes, he did in the back. But I didn't know I was pleading guilty to aggravated assault on a police officer because I didn't assault a police officer.

[DEFENSE COUNSEL]: Could I have a moment, your honor?

THE COURT: Yes.

. . .

THE COURT: Did you have an opportunity again to speak with your attorney privately, did he answer any questions or concerns that you have?

DEFENDANT: Yes.

THE COURT: So once again you have been advised by your attorney as to the elements of the offenses that you are pleading guilty to, as well as the maximum penalties that you face; is that correct?

THE DEFENDANT: Yes.

THE COURT: Counsel, do you agree that you have had that discussion?

[DEFENSE COUNSEL]: Yes.

THE COURT: Before we proceed, do you wish to speak any further with your attorneys in private?

THE DEFENDANT: No.

. . .

[DEFENSE COUNSEL]: I just want to say on behalf of Mr. Cooper, as the court knows, we are only addressing that aggravated assault charge. First of all, a lot of that information doesn't necessarily go to the charge. Secondly, we don't argue that there is a factual basis. I don't think Mr. Cooper fully understands that the aggravated assault on a police officer really equates to a simple assault, that because it's a police officer the status is raised because of the arrest, and the facts that occurred more than make out a factual basis for that charge, even though he very much disagrees with a lot of what happened between him and the officer.

THE COURT: Sir, you heard a factual summary of what the Commonwealth would try to prove should you have proceeded to trial in this matter. Do you still wish to plead guilty?

THE DEFENDANT: Yes, I am still pleading guilty, but . . .

(Discussion was held off the record at this time.)

THE DEFENDANT: Yes.

N.T. at 4-5, 8-9.

The court also inquired into Cooper's competence to plead guilty.

THE COURT: Now, you are 49 years old; is that correct?

THE DEFENDANT: Yes.

THE COURT: At the present time are you under the influence of any drugs, alcohol, or medication?

THE DEFENDANT: I take medication, psychotropic meds.

THE COURT: So you are receiving psychiatric treatment?

THE DEFENDANT: Yes.

THE COURT: Are you fully aware today of what is happening here, are you able to discuss this case with your attorney and make decisions about how to proceed?

THE DEFENDANT: I guess, I guess.

THE COURT: All right. Counsel, are you aware of anything that would preclude us from going forward with this guilty plea?

[DEFENSE COUNSEL]: No, your honor.

N.T., at 6-7.

The court ensured Cooper knew his right to have a jury trial and that, by pleading guilty, he was giving up his appellate rights. N.T., at 7-8. The Commonwealth summarized the factual basis of the plea. ***Id.*** at 9-15. Cooper also confirmed he signed a written guilty plea colloquy form of his own free will. The form, which outlined Cooper's rights and detailed that the Commonwealth had the burden of proof, was incorporated into the record. ***Id.***, at 16.

The court sentenced Cooper to an aggregated term of imprisonment of not less than twenty (20) years nor more than fifty (50) years. Cooper then filed a motion to vacate sentence and to withdraw his plea of guilty. The trial court denied the motion. Cooper did not appeal.

On December 23, 2010, Cooper filed a *pro se* PCRA petition. On June 30, 2011, Cooper filed a motion for appointment of PCRA counsel. The trial court appointed counsel and, on August 30, 2012, PCRA counsel filed a no-merit letter pursuant to ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988), and a motion to withdraw as counsel. On October 11, 2012, following a notice of intent to dismiss the PCRA Petition pursuant to Pennsylvania Rule of Criminal Procedure 907, the trial court dismissed the petition and granted PCRA counsel's motion to withdraw.

On October 15, 2012, Cooper filed a timely *pro se* notice of appeal.⁴ The trial court issued an order pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) directing Cooper to file a statement of errors complained of on appeal. Cooper failed to file a 1925(b) statement and the trial Court issued a 1925(a) opinion finding all issues waived. This Court granted Cooper permission to file a 1925(b) statement *nunc pro tunc* and remanded

⁴ Pursuant to Pennsylvania Rule of Appellate Procedure 903, a notice of appeal must be filed within 30 days of entry of the order from which appeal is taken. Cooper filed his notice of appeal on October 15, 2012, which was within 30 days of the entry of the October 11, 2012 order.

the case. Cooper filed a timely 1925(b) statement and the court filed a 1925(a) opinion.

Cooper raises the following issues on appeal:

1. Whether PCRA trial court abused its discretion where it granted PCRA counsel's Motion To Withdraw As Counsel based on **Com. V. Finley**, 550 A.2d 213 (Pa.Super.1988)[,] notwithstanding appellant having a non-frivolous IAC claim based on plea counsel having erroneously advised him to enter into a negotiated plea agreement despite not engaging in any discussion related to the essential elements required to be proven beyond a reasonable doubt by the Commonwealth to substantiate a conviction for the charges filed against him, the potential defenses to be made against the charge(s) filed against him, and the potential maximum sentences that could be imposed for both the individual and the aggregation of the charges filed against him?

2. Whether PCRA trial court abused its discretion where it granted PCRA counsel's Motion To Withdraw As Counsel based on **Com. V. Finley**, supra[,], notwithstanding appellant having a non-frivolous IAC claim based on plea counsel having erroneously allowed him to enter a plea of guilty to the charge(s) of third degree murder, aggravated assault, and PIC despite not conducting a proper examination of him during his guilty plea hearing to determine his competence to enter the aforementioned plea(s) of guilty?

3. Whether PCRA trial court abused its discretion where it granted PCRA counsel's Motion To Withdraw As Counsel based on **Com. V. Finley**, supra[,], notwithstanding appellant having a non-frivolous IAC claim based on plea counsel having erroneously allowed him to enter a plea of guilty to the charge(s) of third degree murder, aggravated assault, and PIC despite not objecting during his guilty plea hearing to the plea court's failure to properly advise him of the essential elements required to be proven beyond

a reasonable doubt by the Commonwealth to substantiate a conviction for the charge(s) of third degree murder, aggravated assault, and PIC, the prosecution being required to introduce evidence on the record to support the charge(s) of third degree murder, aggravated assault, and PIC, and the potential maximum sentences that could be imposed for the charges of third degree murder, aggravated assault, and PIC?

4. Whether PCRA trial court abused its discretion where it granted PCRA counsel's Motion To Withdraw As Counsel based on **Com. V. Finley**, supra[,], notwithstanding appellant having a non-frivolous violation of due process claim based on plea court having erroneously accepted his plea of guilty to the charge(s) of third degree murder, aggravated assault, and PIC, despite not conducting a proper examination of him during his guilty plea hearing to determine his competence to enter the aforementioned plea(s) of guilty?

5. Whether PCRA trial court abused its discretion where it granted PCRA counsel's Motion To Withdraw As Counsel based on **Com. V. Finley**, supra[,], notwithstanding appellant having a non-frivolous violation of due process claim based on plea court having erroneously accepted his plea of guilty to the charge(s) of third degree murder, aggravated assault, and PIC, despite not properly advising him during his guilty plea hearing of the essential elements required to be proven beyond a reasonable doubt by the Commonwealth to substantiate a conviction for the charge(s) if third degree murder, aggravated assault, and PIC, and the potential maximum sentences that could be imposed for the charges of third degree murder, aggravated assault, and PIC?

6. Whether PCRA trial court abused its discretion where it granted PCRA counsel's Motion To Withdraw As Counsel based on **Com. V. Finley**, supra[,], notwithstanding appellant having a non-frivolous violation of due process claim based on the plea

court having erroneously accepted his plea of guilty to the charge of aggravated assault, despite the Commonwealth not establishing during his guilty plea hearing a factual basis to support the charge of aggravated assault pursuant to 18 Pa.C.S.A. § 2702(a)(3)?

7. Whether PCRA trial court abused its discretion where it granted PCRA counsel's Motion To Withdraw As Counsel based on **Com. V. Finley**, supra[,], notwithstanding appellant having a non-frivolous IAC claim based on plea counsel having failed to file a timely Motion to Withdraw Guilty Plea on his behalf?

8. Whether PCRA trial court abused its discretion where it granted PCRA counsel's Motion To Withdraw As Counsel based on **Com. V. Finley**, supra[,], and denied and dismissed appellant's pro se PCRA petition without a hearing notwithstanding appellant's case file and pro se PCRA petition containing evidence to support several different non-frivolous IAC and violation of due process claims?

Appellant's Brief at 4-5.

Cooper essentially argues: (1) his trial counsel was ineffective for failing to advise him of his rights, for failing to request a competency hearing, and for failing to file a motion to withdraw his guilty plea; (2) the trial court violated his due process rights by failing to advise him of his rights and failing to conduct a competency hearing; and (3) PCRA counsel was ineffective for failing to raise his ineffective assistance of counsel and due process claims. Cooper's claims are meritless.

Our standard of review from the denial of post-conviction relief "is limited to examining whether the court's determination is supported by the evidence of record and whether it is free of legal error." **Commonwealth v.**

Ousley, 21 A.3d 1238 (Pa.Super.2011) (citing **Commonwealth v. Morales**, 549 Pa. 400, 701 A.2d 516, 520 (1997)).

For ineffective assistance of counsel claims, the petitioner must establish: “(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 reasonable probability that the outcome of the proceedings would have been different.” **Ousley**, 21 A.3d at 1244 (quoting **Commonwealth v. Rivera**, 10 A.3d 1276, 1279 (Pa.Super.2010)). “[C]ounsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant.” **Id.** “The failure to prove any one of the three [ineffectiveness] prongs results in the failure of petitioner's claim.” **Id.** (quoting **Rivera**, 10 A.3d at 1279).

“Allegations 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.” **Commonwealth v. Hickman**, 799 A.2d 136, 141 (Pa.Super.2002) (citing **Commonwealth v. Allen**, 557 Pa. 135, 732 A.2d 582 (1999)). Whether a plea was voluntary “depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.” **Commonwealth v. Lynch**, 820 A.2d 728, 733 (Pa.Super.2003) (quoting **Hickman**, 799 A.2d at 141).

“[T]he law does not require that [the defendant] be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [his] decision to plead guilty be knowingly, voluntarily, and intelligently

made.” **Commonwealth v. Willis**, 68 A.3d 997, 1001 (Pa.Super.2013) (quoting **Commonwealth v. Anderson**, 995 A.2d 1184, 1192 (Pa.Super. 2010) (alterations in original)). A guilty plea colloquy must “affirmatively demonstrate the defendant understood what the plea connoted and its consequences.” **Id.** at 1002 (quoting **Commonwealth v. Lewis**, 708 A.2d 497, 501 (Pa.Super.1998)). After a defendant enters a guilty plea, “it is presumed that he was aware of what he was doing, and the burden of proving involuntariness is upon him.” **Id.** (quoting **Commonwealth v. Bedell**, 954 A.2d 1209, 1212 (Pa.Super.2008)). Further, “where the totality of the circumstances establishes that a defendant was aware of the nature of the charges, the plea court's failure to delineate the elements of the crimes at the oral colloquy, standing alone, will not invalidate an otherwise knowing and voluntary guilty plea.” **Commonwealth v. Morrison**, 878 A.2d 102, 107 (Pa.Super.2005) (citing **Commonwealth v. Schultz**, 505 Pa. 188, 477 A.2d 1328 (1984)).

Whether a defendant is competent to plead guilty “requires a finding that the defendant comprehends the crime for which he stands accused, is able to cooperate with his counsel in forming a rational defense, and has a rational and factual understanding of the proceedings against him.” **Willis**, 68 A.3d at 1002 (citing **Commonwealth v. Turetsky**, 925 A.2d 876 (Pa.Super.2007)). “[T]he mere fact [a defendant] was taking prescribed psychotropic medication at the time of [a] plea does not, of itself, result in

the conclusion he was unable to enter a knowing, voluntary, and intelligent guilty plea.” *Id.*, at 1009.

The trial court acted within its discretion when it found Cooper’s guilty plea was knowingly, voluntarily, and intelligently entered. The court noted it conducted an extensive colloquy prior to accepting Cooper’s guilty plea. *Opinion*, at 5. It ensured Cooper understood the nature of the plea, the nature of the charges to which he pled, and the agreement negotiated with the Commonwealth in exchange for the guilty plea. *Id.* When asked if Cooper had the opportunity to discuss the charges with his attorney and if he was satisfied with his attorney’s representations, Cooper responded in the affirmative. *Id.*; *N.T.*, at 4-16. The court provided additional time during the colloquy for Cooper to consult with his attorney. *Id.* The court asked if Cooper understood and signed the written guilty plea colloquy and if he signed the form of his own free will, to which Cooper again responded in the affirmative. *Id.* Although Cooper initially expressed some doubt regarding the aggravated assault charge, his attorney explained that the factual basis need not be strong and Cooper agreed that he understood the elements of the crimes to which he was pleading guilty and the maximum sentences. Further, the guilty plea colloquy and the written plea agreement established Cooper knew the nature of the offenses, the Commonwealth’s burden of

proof, and the maximum sentences. Considering the totality of the circumstances, Cooper knowingly and voluntarily entered his guilty plea.⁵

Further, the trial court did not err in finding Cooper competent to plead guilty. Cooper informed the court, both in the written plea agreement and at the guilty plea colloquy, that he was taking prescription medication. N.T., at 8-9. He stated was aware of what was happening, was able to discuss the case with his attorney, and was able to make decisions. Merely taking a prescription medication does not render a defendant incapable of knowingly and voluntarily entering a guilty plea. **Willis**, 68 A.3d at 1002. The guilty plea colloquy and written guilty plea agreement establish Cooper comprehended the crime for which he stood accused, was able to cooperate with counsel, and had a rational and factual understanding of the proceedings. **Id.** (citing **Turetsky**, 925 A.2d 876).

Because he knowingly, voluntarily, and intelligently entered his guilty plea, Cooper's ineffective assistance of counsel claims and due process claims based on an alleged defect in his guilty plea colloquy are meritless. **See Ousley**, 21 A.3d at 1244 (to establish ineffectiveness of counsel, defendant must prove the underlying claim had arguable merit); **Willis**, 68 A.3d at 1001 (all the law requires is that the plea be knowing and voluntary).

⁵ Further, Cooper is bound by his statements from the guilty plea colloquy. **Commonwealth v. McCauley**, 797 A.2d 920, 2001 (Pa.Super.2001).

Cooper also maintains his counsel should have filed a motion to withdraw the guilty plea. This claim is meritless. Counsel did file a motion to withdraw the guilty plea,⁶ which the trial court denied. Further, as discussed above, Cooper entered a knowing and voluntary plea. Accordingly, any motion to withdraw the guilty plea would have been meritless, and counsel cannot be found ineffective for failing to file a meritless motion. ***Commonwealth v. Keaton***, 82 A.3d 419, 426 (Pa.2013) (“[I]t is axiomatic that [trial] counsel will not be considered ineffective for failing to pursue meritless claims.” (quoting ***Commonwealth v. Pursell***, 555 Pa. 233, 724 A.2d 293, 304 (1999))).

Because Cooper’s alleged claims are meritless, his claim of ineffective assistance of PCRA counsel also fails. PCRA counsel cannot be found ineffective for failing to raise a meritless claim. ***Keaton***, 82 A.3d at 426.

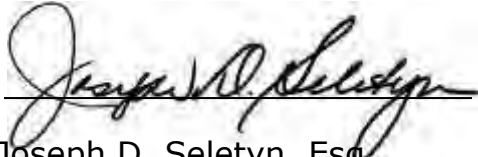
Order affirmed. Cooper’s motion of default is denied.⁷

⁶ Counsel filed a petition to vacate sentence and to withdraw plea of guilty stating Cooper now claimed “his innocence as to the aggravated assault charge only” and requesting the appointment of new counsel due to “the inherent conflict between counsel and [Cooper].” Petition to Vacate Sentence and Withdraw Plea of Guilty, 1/25/2011, ¶¶ 1-2.

⁷ Cooper’s motion of default, seeking relief because the Commonwealth did not file a timely brief, is denied.

J-S36026-14

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: 7/22/2014