

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ANDREW JACKSON MILLER,	:	
	:	
Appellant	:	No. 577 MDA 2015

Appeal from the PCRA Order Entered March 13, 2015,
in the Court of Common Pleas of Lancaster County,
Criminal Division, at No(s): CP-36-CR-0004780-2012

BEFORE: ALLEN, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED JULY 31, 2015**

Andrew Jackson Miller (Appellant) appeals from an order which denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. In addition, Appellant’s counsel seeks to withdraw his representation of Appellant pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). We affirm the order and grant counsel’s application to withdraw.

The PCRA court summarized the background underlying this matter as follows.

On August 23, 2012, [Appellant] was charged with rape of a child and other related offenses for molesting his step-daughter (“B.C.”) from 2001 through 2005, when the child was between four and eight years of age....

*Retired Senior Judge assigned to the Superior Court.

On July 29, 2013, [Appellant] appeared before the Honorable Judge Louis J. Farina and entered a nolo contendere plea to one count of statutory sexual assault (F2), which was reduced from rape of a child (F1); one count of aggravated indecent assault involving a child less than 13 years of age (F2); one count of indecent assault for a victim less than 13 years of age (F3); and one count of corruption of minors (M1)[.] Pursuant to a negotiated plea agreement, [Appellant] received a sentence of three to six years [of] incarceration in the state correctional institution on count 1, ten years of consecutive probation on count 2, seven years of concurrent probation on count 3, and five years of concurrent probation on count 4. The aggregate sentence was three to six years of incarceration followed by ten years of probation. [In addition, Appellant was determined to be a sexually violent predator.]

On July 21, 2014, [Appellant filed a *pro se* petition for writ of *habeas corpus*, which the court treated as a timely-filed petition pursuant to the PCRA. Thereafter, the court appointed counsel to represent Appellant].

On October 6, 2014, PCRA counsel filed an amended petition for post-conviction relief, requesting a hearing to address allegations that [plea counsel rendered ineffective assistance of counsel]. More specifically, [] counsel failed "to prepare a defense or to investigate exculpatory witnesses."

Consequently, on December 22, 2014, the court conducted an evidentiary hearing to address [Appellant's] amended PCRA petition. Thereafter, on March 13, 2015, the court entered an order denying [Appellant's] petition. [Appellant timely filed a notice of appeal. The PCRA court directed Appellant to file a Pa.R.A.P. 1925(b) statement, and Appellant subsequently filed such a statement. The court later issued an opinion consistent with Pa.R.A.P. 1925(a).]

PCRA Court Opinion, 4/13/2015, at 1-3 (citations, footnotes, and unnecessary capitalization omitted). Thereafter, PCRA counsel sought from this Court leave to withdraw his representation of Appellant pursuant to ***Turner/Finley***.

We review such matters as follows.

... **Turner/Finley** counsel must review the case zealously. **Turner/Finley** counsel must then submit a “no-merit” letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel’s diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Counsel must also send to the petitioner: (1) a copy of the “no-merit” letter/brief; (2) a copy of counsel’s petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.

If counsel fails to satisfy the foregoing technical prerequisites of **Turner/Finley**, the court will not reach the merits of the underlying claims but, rather, will merely deny counsel’s request to withdraw. Upon doing so, the court will then take appropriate steps, such as directing counsel to file a proper **Turner/Finley** request or an advocate’s brief.

However, where counsel submits a petition and no-merit letter that do satisfy the technical demands of **Turner/Finley**, the court—trial court or this Court—must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief. By contrast, if the claims appear to have merit, the court will deny counsel’s request and grant relief, or at least instruct counsel to file an advocate’s brief.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa. Super. 2007)
(citations omitted).

We are satisfied that counsel has complied with the technical requirements of **Turner/Finley**. Therefore, we will consider the one issue Appellant wishes to raise on appeal, namely, “Whether the [PCRA] court erred when it denied post-conviction relief on Appellant’s claim that [plea]

counsel was ineffective for failing to pursue a viable defense and, instead, urged Appellant to tender a nolo contendere plea?" **Turner/Finley** Brief at 2.

Our standard of review of the denial of a PCRA petition is limited to examining whether the court's rulings are supported by the evidence of record and free of legal error. **Commonwealth v. Anderson**, 995 A.2d 1184, 1189 (Pa. Super. 2010). Moreover, "[t]he PCRA court's credibility determinations, when supported by the record, are binding on this Court." **Commonwealth v. Medina**, 92 A.3d 1210, 1214 (Pa. Super. 2014) (*en banc*) (citation omitted).

The PCRA court's Pa.R.A.P. 1925(a) opinion thoroughly addresses Appellant's issue and ultimately rejects his arguments in support of that issue. After a review of the certified record, we conclude that the court's reasoning, including its credibility determinations, are supported by the record and are free of legal error. We rely on and adopt the court's opinion in agreeing with PCRA counsel that this appeal is meritless and in affirming the PCRA court's order. PCRA Court Opinion, 4/13/2015. The parties shall attach a copy of the PCRA court's April 13, 2015 opinion to this memorandum in the event of further proceedings.

Order affirmed. Application to withdraw as counsel granted.

J-S47033-15

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

vs.

ANDREW JACKSON MILLER

:
:
:
:
:

577 MDA 2015
(No. 4780-2012)

CLERK OF COURTS
2015 APR 13 PM 1:20
LANCASTER COUNTY, PA

OPINION

BY TOTARO, J.

Presently before the Superior Court of Pennsylvania is an appeal from an Order dismissing the counseled Motion for Post Conviction Collateral Relief (“PCRA”) filed by Andrew Jackson Miller (“Defendant”). Pursuant to Pa. R. Crim. P. 908, this Court issued an Order dismissing Defendant’s PCRA Motion following an evidentiary hearing, after finding that Defendant had failed to raise an issue of arguable merit. On March 30, 2015, Defendant filed a Notice of Appeal. For the reasons that follow, Defendant’s appeal should be denied.

PROCEDURAL AND FACTUAL BACKGROUND

On August 23, 2012, Defendant was charged with Rape of a Child and other related offenses for molesting his step-daughter (“B.C.”) from 2001 through 2005, when the child was between four and eight years of age. See Police Criminal Complaint and Affidavit of Probable Cause. According to the Affidavit, the child disclosed to Lancaster County Children’s Alliance that Defendant touched her vagina, put his penis against her vagina on multiple occasions, and had the child touch his penis with her hands. *Id.* Judy Miller (“Miller”), the child’s mother and Defendant’s wife, also reported to police that she confronted Defendant about the assaults and Defendant admitted he “used his fingers” because B.C. “wanted it.” *Id.*

On July 29, 2013, Defendant appeared before the Honorable Judge Louis J. Farina and entered a nolo contendere plea to one count of Statutory Sexual Assault (F2), which was reduced from Rape of a Child (F1); one count of Aggravated Indecent Assault involving a child less than 13 years of age (F2); one count of Indecent Assault for a victim less than 13 years of age (F3); and one count of Corruption of Minors (M1), at Information Number 4780-2012.¹ Pursuant to a negotiated plea agreement, Defendant received a sentence of three to six years incarceration in the State Correctional Institution on Count 1, ten years of consecutive probation on Count 2, seven years of concurrent probation on Count 3, and five years of concurrent probation on Count 4. (Notes of Testimony, 7/29/13 at 2, 17) (hereinafter "N.T."). The aggregate sentence was three to six years of incarceration followed by ten years of probation. *Id.*

On July 21, 2014, Defendant filed a *pro se* Petition for a Writ of Habeas Corpus,² which this Court treated as a Motion for Post Conviction Collateral Relief (PCRA).³ Thereafter, on August 7, 2014, the Court appointed R. Russell Pugh, Esquire, as counsel to represent Defendant in his PCRA motion. Counsel was granted sixty days to file an amended petition.

¹ 18 Pa. C.S.A. §§ 3122.1, 3125(A)(8), 3126(A)(7), and 6301 respectively.

² In his Writ of Habeas Corpus, Defendant argued his sentence was illegally induced because it was entered upon a threat of mandatory minimum sentences that have since been deemed unconstitutional. However, in *Commonwealth v. Matteson*, the Superior Court held that in cases where the child's age is the basis for a mandatory sentence, and the jury finds beyond a reasonable doubt the age of a child, *Alleynes* and its progeny are not implicated. 96 A.3d 1064, 1066-67 (Pa. Super. 2014); *but see Commonwealth v. Wolfe*, 106 A.3d 800 (Pa. Super. 2014) (where another panel of the Superior Court struck down the mandatory minimum sentencing scheme for those convicted of crimes against a victim younger than 16 years of age).

³ Any motion raising a cognizable issue under the Post-Conviction Relief Act ("PCRA"), filed after the finality of a sentence, is to be treated as a PCRA Petition. *Commonwealth v. Taylor*, 65 A.3d 462, 466 (Pa. Super. 2013); *see also* 42 Pa. C.S.A. § 9542; 42 Pa. C.S.A. § 6503. Because Defendant's Petition for a Writ of Habeas Corpus sought the correction of an allegedly illegal sentence, which is a cognizable claim under 42 Pa. C.S.A. § 9543(a)(2)(vii), the Court treated Defendant's Petition as a PCRA Motion.

On October 6, 2014, PCRA counsel filed an Amended Petition For Post-Conviction Relief, requesting a hearing to address allegations that trial counsel rendered ineffective assistance of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. *See* Amended Petition For Post-Conviction Relief at ¶ 8. More specifically, trial counsel failed “to prepare a defense or to investigate and interview exculpatory witnesses.” *Id.*

Consequently, on December 22, 2014, the Court conducted an evidentiary hearing to address Defendant’s Amended PCRA Petition. Thereafter, on March 13, 2015 the Court entered an Order denying Defendant’s Petition. Defendant filed his Notice of Appeal on March 30, 2015. On April 10, 2015 Defendant filed a Concise Statement of Issue Raised on Appeal, alleging that “The Court erred in denying post-conviction relief where trial counsel failed to adequately prepare a defense, and, instead, advised his client to plead nolo contendere. Counsel unreasonably failed to pursue a defense of substantial merit and his failure induced his client to accept the negotiated plea.” *See* Concise Statement of Issue Raised on Appeal.⁴ This opinion is written pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.⁵

DISCUSSION

A defendant seeking PCRA relief is eligible only if he shows by a preponderance of the evidence that: (1) he has been convicted of a crime under the laws of the Commonwealth of

⁴ A defendant’s claim that his guilty plea was unlawfully induced is deemed waived under the PCRA when the issue is not raised in the trial court or on direct appeal. *Commonwealth v. McGriff*, 638 A.2d 1032, 1035-36 (Pa. Super. 1994). An exception to this general waiver rule exists when the allegation involves an unlawfully induced plea due to the ineffectiveness of counsel. *Commonwealth v. Scott*, 465 A.2d 678, 679 (Pa. Super. 1983).

⁵ This case was reassigned to Judge Donald R. Totaro following the retirement of Judge Farina.

Pennsylvania and is currently serving a sentence of imprisonment, probation, or parole for the crime; (2) his conviction has resulted from one of the enumerated errors listed in § 9543(a)(2); (3) he has not waived or previously litigated the issues he raises; and (4) the failure to litigate the issue prior to and during trial, or on direct appeal, could not have been the result of any strategic decision by counsel. 42 Pa. C.S.A. § 9543(a)(1)-(4).

In the present case, PCRA counsel filed an Amended PCRA Petition claiming that by failing to prepare a defense or investigate and interview exculpatory witnesses, “trial counsel rendered ineffective assistance which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place . . .” See Amended PCRA Petition ¶ 8. In his Brief, PCRA counsel further asserted that because trial counsel’s ineffectiveness induced Defendant into entering a negotiated plea, Defendant’s plea is rendered involuntary and may be withdrawn. Defendant’s Brief at 3-4. According to Defendant, no reasonable attorney could have concluded from the evidence available that Defendant would have been convicted. *Id.* at 4. However, because trial counsel told him he would be convicted and sentenced to 30 years in jail, Defendant elected to plead nolo contendere. *Id.*

To prevail on a claim of ineffective assistance of counsel, Petitioner must prove: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and (3) but for the omission of counsel there is a reasonable probability the outcome of the proceeding would have been different. *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999). Petitioner has the burden of establishing that counsel did not act in his best interests. *Commonwealth v. Cook*, 676 A.2d 639, 647 (Pa. 1996). Failure to address any prong will defeat an ineffectiveness claim. *Commonwealth v. Basemore*, 744 A.2d 717, 738 n. 23 (Pa. 2000).

“Counsel is presumed effective, and [Petitioner] bears the burden of proving otherwise.” *Commonwealth v. Fears*, 86 A.3d 795, 804 (Pa. 2014) (quoting *Commonwealth v. Steele*, 961 A.2d 786, 796 (Pa. 2008)) (internal quotation marks omitted). Counsel is given broad discretion in determining trial tactics and strategy. *Commonwealth v. Fowler*, 703 A.2d 1027, 1029 (Pa. 1997). The applicable test is not whether alternative strategies were more reasonable employing a hindsight evaluation of the record, but whether counsel’s decision had any reasonable basis to advance the interests of a defendant. *Commonwealth v. Speight*, 677 A.2d 317, 322 (Pa. 1996).

A claim that trial counsel was ineffective for failing to pursue a potential defense “is cognizable in a PCRA petition because such a claim goes to the innocence of the defendant and calls into question the truth determining process.” *Commonwealth v. Jones*, 640 A.2d 1330, 1336 (Pa. Super. 1994). However, to state such a claim under 42 Pa. C.S.A. § 9543 (a)(2)(ii), there must be a nexus between counsel’s ineffective act or omission and a defendant’s decision to plead guilty. *Commonwealth v. Flood*, 627 A.2d 1193, 1199 (Pa. Super. 1993).

Even if an underlying claim of ineffective assistance of counsel is of arguable merit, that claim will fail if the defendant does not establish resulting prejudice. *Commonwealth v. Neal*, 713 A.2d 657, 662 (Pa. Super. 1998). The defendant must show that ineffective assistance of counsel so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. *Commonwealth v. Whitney*, 708 A.2d 472, 475 (Pa. 1998).

In the case *sub judice*, Defendant must first prove that the underlying claim is of arguable merit. To that end, PCRA counsel asserts trial counsel was ineffective because Miller recanted within five days of making the complaint, informing authorities and trial counsel that she had lied about the molestation. Defendant’s Brief at 1-2. Moreover, these offenses occurred between

8 and 12 years before the filing of charges, with no physical evidence connecting Defendant to the crimes. *Id.* at 2. Furthermore, trial counsel incorrectly informed Defendant that two other females would testify against him at trial regarding previous inappropriate sexual contact involving Defendant and the two females. *Id.* According to PCRA counsel, no reasonable attorney could have concluded from the evidence that Defendant would be convicted if the case proceeded to trial. *Id.* at 4. Because trial counsel recommended that Defendant accept the plea offer, and Defendant relied on counsel's advice, Defendant's plea is rendered involuntary. *Id.*

In response to Defendant's argument regarding Miller's recantation testimony, the Court would note that Miller initially reported to police she had confronted Defendant about sexually assaulting her daughter, at which time Defendant admitted to engaging in sexual activity with B.C. *See* Police Criminal Complaint and Affidavit of Probable Cause. Furthermore, at the PCRA Hearing, Miller acknowledged she called the police on July 2, 2011 to report that Defendant had molested B.C. (N.T. PCRA at 65, 69) (hereinafter "N.T. PCRA"). More specifically, Miller informed police that Defendant's penis penetrated B.C.'s vagina and Defendant had openly admitted to using his fingers on the victim's genitals. *Id.* at 72-73.

At the PCRA Hearing, Miller testified that her report to police was not true. (N.T. PCRA at 65). Miller lied to police because she thought Defendant was cheating on her, and she was mad at him. *Id.* at 66, 71. Five days later, after she discovered Defendant was not cheating on her, Miller recanted by contacting Children and Youth Agency ("CYA"). *Id.* at 70-71, 82.⁶

⁶ Miller acknowledged during the PCRA Hearing that she had previously been involved with CYA, and she was familiar with their procedures. (N.T. PCRA at 90). When she called to recant, Miller was concerned that CYA might remove B.C. from her residence because of these allegations. *Id.* at 89. In fact, B.C. was still residing with Miller's sister at the time of the PCRA Hearing. *Id.*

While Miller later called Detective Edgell by telephone to report she had lied, Miller refused to meet with Edgell in person. *Id.* at 70-71. Miller also advised trial counsel that Defendant did not commit these acts, and she was available to testify on his behalf at trial. *Id.* at 67, 80-81.

Trial counsel acknowledged at the PCRA Hearing that prior to the nolo contendere plea he was aware Miller had recanted her allegations, because counsel spoke to Miller on a weekly basis about Defendant's case. (N.T. PCRA at 7-9, 29, 38).⁷ However, Defendant advised trial counsel to watch out for Miller, because she was "not very bright" and he had no idea "what was going to come out of her mouth." *Id.* at 30. Trial counsel also believed there would have been too much risk putting Miller on the witness stand at trial because the prosecutor would exploit her recantation and suggest it may have been made to protect her husband. *Id.* at 29-30.

When evaluating Miller's recantation testimony, the "PCRA court must, in the first instance, assess the credibility and significance of the recantation in light of the evidence as a whole." *Commonwealth v. D'Amato*, 856 A.2d 806, 825 (Pa. 2004). It is well established that recantation testimony is exceedingly unreliable. *Id.* (remand where PCRA court failed to assess credibility of recanted testimony and its significance in light of the trial record); *see also Commonwealth v. Williams*, 732 A.2d 1167, 1180-81 (Pa. 1999). "Since the affidavit of a Commonwealth witness who recants his testimony is extremely unreliable, the hearing court

⁷ In his Amended PCRA Petition, Defendant claims trial counsel rendered ineffective assistance based in part on his failure to interview exculpatory witnesses. *See* Amended PCRA Petition ¶ 8. Counsel is presumably referring to Miller because she is the only witness identified by Defendant who could offer potentially exculpatory evidence through recantation testimony. However, as noted, trial counsel spoke to Miller on a weekly basis prior to the negotiated plea, at a time when Miller was providing Defendant with updates on his case. (N.T. PCRA at 8, 29, 38). Additionally, Miller acknowledged she met with trial counsel on a weekly bases to discuss her recantation and what she knew about the case. *Id.* at 80. Miller also spoke to Defendant about whether to go to trial or take a plea, at which time Defendant advised Miller it was his choice to plead nolo contendere. *Id.* at 81.

must deny relief where it is not satisfied that a recantation is true.” *Commonwealth v. Osborn*, 302 A.2d 395, 396 (Pa. Super. 1973).

In the present case, this Court conducted a thorough review of the record as a whole, finding that Miller’s recantation testimony was not reliable, she was not a credible witness at the PCRA Hearing, and there is no reasonable probability that a jury at trial would credit her testimony and render a favorable verdict for Defendant. As noted, Miller implicated Defendant in the sexual assault of her child. Although she recanted, she did so only after recognizing CYA would likely remove her daughter from her home due to these allegations. Thus, before even contacting the police, Miller contacted CYA. While Miller claimed she recanted to exonerate Defendant, this Court concluded, and a jury could certainly infer, that Miller did so to avoid losing her child. Furthermore, Defendant himself informed trial counsel to watch out for Miller because she was not very bright and he had no idea what she might say. Finally, as the Court discusses in greater detail, the victim in this case consistently implicated Defendant in the sexual assaults, at no time recanting her statement to police.⁸

The Court next addresses Defendant’s claim that counsel was ineffective for recommending a negotiated plea where the offenses occurred between 8 and 12 years before the filing of charges and there was no physical evidence connecting Defendant to the crimes.

At the PCRA Hearing, trial counsel testified he received discovery from the Commonwealth. (N.T. PCRA at 9). Trial counsel further testified he sat down with Defendant

⁸ When supported by the record, a PCRA court’s credibility determination is binding on the appellate courts. *Commonwealth v. Medina*, 92 A.3d 1210, 1214 (Pa. Super. 2014). Further, deference normally due to the findings of the PCRA court is accentuated when it involves recantation testimony of a witness. *Id.* at 1219. Where a trial court denies a new trial and the sole ground is the alleged recantation of a state witness, the decision will not be reversed on appeal absent a clear abuse of discretion. *Id.*

and reviewed the nature of the charges, while going over the strengths and weaknesses of the case. *Id.* at 21. Furthermore, trial counsel discussed with Defendant possible defenses and strategies if the case proceeded to trial. *Id.* at 34.⁹

Of significance, a more mature victim was willing to testify to the sexual assaults if the case proceeded to trial. (N.T. PCRA at 23). Although Miller had recanted, the victim was consistent throughout in stating that Defendant committed these crimes. *Id.* at 23, 46.¹⁰ In fact, the victim testified at a preliminary hearing and was subject to cross-examination, allowing counsel to observe her demeanor. *Id.* at 25, 46. At the preliminary hearing, the victim's testimony was consistent with the statement she provided to police when charges were filed. *Id.* Counsel informed Defendant that if the child came across well, if she was consistent in her testimony, and she was believable, Defendant could be convicted on that testimony alone. *Id.* at 21, 24. Defendant did not want to take that chance at trial. *Id.* at 48.

Counsel also informed Defendant that if the case went to trial and the victim had to testify, the Commonwealth would not withdraw the Rape charge and Defendant would be facing a ten year mandatory minimum sentence if convicted. (N.T. PCRA at 21). However, if he pled nolo contendere, the Rape charge would be withdrawn, Defendant was offered a sentence of three to six years incarceration, and Defendant would receive credit for time served of one year.

⁹ During the nolo contendere hearing, trial counsel advised Judge Farina that he provided Defendant with a copy of the discovery materials, such that Defendant was "very well aware of what the Commonwealth would have been presenting during a trial." (N.T. at 14-15).

¹⁰ At the PCRA Hearing, although claiming she had convinced B.C. to lie, Miller acknowledged that B.C. gave a statement to police identifying Defendant as the person who had sexually assaulted her. (N.T. PCRA at 70, 72). Furthermore, to Miller's knowledge, B.C. had not at any time recanted her initial statement implicating Defendant in the sexual assaults. *Id.* at 76-77.

Id. at 21-22. Counsel reviewed with Defendant the probable outcome of trial and recommended that Defendant take the deal. *Id.* at 23-24.¹¹

In explaining how Defendant reached a decision to enter a nolo contendere plea, trial counsel stated as follows at the PCRA Hearing:

Three years sounded, to this gentleman, who was older at that time, and to me, to get out earlier so he could live life as opposed to potentially dying in prison. He agreed with me that he doesn't want to die in prison if he did get a mandatory minimum. He wanted the possibility of getting out after three years, and he knowingly, voluntarily, intelligently pled guilty.

(N.T. PCRA at 22). According to trial counsel, Defendant did not want to go to trial after reviewing all options, he knew what he was doing, he believed he was getting a good deal, and Defendant was pleading for the benefit of the bargain. *Id.* at 22, 34-35, 47. At no time did counsel threaten Defendant or force him to enter a plea. *Id.* at 45. As noted by counsel, the plea was completely voluntary on Defendant's behalf, and if Defendant wanted to proceed to trial they would have gone to trial. *Id.* at 45-46. Thus, Defendant's claim in this regard must fail.

The Court next addresses Defendant's assertion that trial counsel incorrectly informed him two other females, who both made claims of inappropriate sexual contact involving Defendant, would testify against him if the case proceeded to trial.

¹¹ Trial counsel testified at the PCRA Hearing that he reviewed the Sentencing Guidelines Worksheet with Defendant prior to the nolo contendere plea. (N.T. PCRA at 43-44). According to the Worksheet, the recommended standard range minimum sentence for each offense was as follows: Statutory Sexual Assault (36-54 months); Aggravated Indecent Assault (22-36 months); Indecent Assault (3-12 months); and Corruption of Minor (RS-9 months). Defendant entered a negotiated plea whereby the minimum sentence of 36 months for Statutory Sexual Assault was at the bottom of the standard range; probation was below the mitigated range for Aggravated Indecent Assault; and probation was below the standard range for the Indecent Assault charge. *See* Sentencing Guideline Worksheet; (N.T. at 2, 17). Moreover, by reducing the charge of Rape of a Child to Statutory Sexual Assault, Defendant was no longer exposed to a mandatory minimum sentence of ten years incarceration. *Id.* Additionally, as part of the negotiated plea, the Commonwealth amended the charge of Aggravated Indecent Assault from 18 Pa. C.S.A. § 3125 (a)(7) to subsection (a)(8), thus no longer exposing Defendant to the five year mandatory minimum sentence which would have otherwise been applicable pursuant to 18 Pa. C.S.A. § 9718 (a)(3). *Id.*

At the PCRA Hearing, trial counsel testified he was aware of a 404(b) filing by the Commonwealth which sought to produce testimony of two daughters who claimed Defendant had sexual relations with them. (N.T. PCRA at 10, 19).¹² However, in reviewing this matter with Defendant, counsel did not believe the prior bad acts would be admissible at trial. *Id.* at 10-11, 19. Conversely, Defendant testified at the PCRA Hearing that he chose to enter a negotiated plea because trial counsel told him both women would testify against him at trial. *Id.* at 51.

As fact-finder in a proceeding for post-conviction relief based on a claim of ineffective assistance of counsel, the credibility of witnesses remains exclusively within the province of the court. *Commonwealth v. Pate*, 617 A.2d 754, 760 (Pa. Super. 1992) (citing *Commonwealth v. Moore*, 468 A.2d 791, 795 (Pa. Super. 1983)). A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts. *Commonwealth v. Johnson*, 966 A.2d 523, 539; *see also Commonwealth v. Medina*, 92 A.3d 1210, 1214 (Pa. Super. 2014) (appellate court must give great weight to the findings of a lower court concerning the credibility of witnesses in a post-conviction proceeding). For the reasons that follow, this Court did not find Defendant to be a credible witness.

During the nolo contendere hearing, Defendant acknowledged to the Court that prior to the hearing he had fully reviewed the colloquy explaining his rights with counsel:

¹² Trial counsel testified at the PCRA Hearing that the first child was B.M. (N.T. PCRA at 10-11). On April 14, 1987, B.M. made allegations that Defendant engaged in inappropriate conduct during the summer of 1980. *Id.* at 13-14. Because B.M. became upset and refused to speak to police, the case was closed. *Id.* at 14. In 2012, after learning of Defendant's arrest on the present charges, B.M. contacted the prosecutor to advise him she was previously raped by Defendant. *Id.* at 17. At the time B.M. contacted the prosecutor, she was incarcerated in state prison on a theft charge that would have been admissible against her as *crimen falsi* if she testified at trial. *Id.* The other daughter was A.S., who also claimed she was sexually abused by Defendant. *Id.* at 18. No charges were ever filed in that case. *Id.* at 18-19.

THE COURT: So you are pleading nolo to every one of those charges?
 DEFENDANT: Yes, Your Honor.
 THE COURT: Did you sign this guilty plea colloquy?¹³
 DEFENDANT: Yes, I did, Your Honor.
 THE COURT: Did you review it with Mr. Marinaro?
 DEFENDANT: Yes, I did.
 THE COURT: Did you understand it?
 DEFENDANT: Yes, I did, Your Honor.
 THE COURT: Do you have any questions at all about your rights?
 DEFENDANT: No, I don't.
 THE COURT: Do you have any question at all about the sentence; that you're going to go to State Prison for three to six years plus be on probation for another 10? Do you understand all that?
 DEFENDANT: I understand that, Your Honor.
 THE COURT: Whose decision was it to plead guilty?
 DEFENDANT: It was mine.
 THE COURT: Were you forced or threatened in any way?
 DEFENDANT: No, sir.

(N.T. at 9-10).

Nevertheless, at the PCRA Hearing, when confronted with the nolo contendere colloquy that contained his signature, Defendant denied recollection or knowledge by initially claiming “[b]ut I never seen this before. I never dealt with that.” (N.T. PCRA at 54, 58-59).¹⁴

Additionally, Defendant testified at the PCRA Hearing that he was never told at the nolo contendere proceeding he would be receiving consecutive probation. (N.T. PCRA at 56-57).

¹³ In his signed seven page Colloquy, Defendant acknowledged he understood he did not have to plead nolo contendere, he had the right to trial, the Commonwealth would be required to prove his guilt beyond a reasonable doubt, he would be presumed innocent, he reviewed sentencing guidelines and maximum sentences with his attorney, he was giving up the right to a trial, he was entering into a negotiated plea agreement with the District Attorney, it was his decision to plead nolo contendere, he was not threatened or forced to enter a plea, he was making this decision of his own free will, and he understood his nolo contendere plea would have the same effect as a conviction. *See* Nolo Contendere Colloquy and Post-Sentence Rights Form. Defendant also confirmed he had sufficient time to review all information in the colloquy with his attorney and he was voluntarily pleading with a full understanding of his rights. *Id.*

¹⁴ In addition to the Court's colloquy with Defendant at the nolo contendere hearing, trial counsel testified at the PCRA Hearing that prior to the nolo contendere plea he reviewed with Defendant the seven page colloquy, and Defendant understood all of his rights. (N.T. PCRA at 33).

Defendant claimed he signed up for three to six years, and “not all that probation,” only learning of the additional probation when he got to state prison. *Id.* at 57. However, during the nolo contendere hearing the prosecutor clearly stated that Defendant was to receive ten years of consecutive probation on Count 2. (N.T. at 2). Furthermore, when asked by Judge Farina whether he understood he was going to state prison for three to six years, “plus be on probation for another 10,” Defendant stated “I understand that, Your Honor.” *Id.* at 10.

Defendant further claimed at the PCRA Hearing he was told by counsel that Megan’s law would apply for only two years, and he later found out it was for life. (N.T. PCRA at 56). However, during the nolo contendere hearing the prosecutor clearly stated that as part of the agreement Defendant would have to register for life. (N.T. at 2-3). Furthermore, when asked by Judge Farina whether he understood he was going to have to register for the rest of his life, Defendant stated “Yes, Your Honor.” *Id.* at 18. Defendant also signed a notification form acknowledging he would be required to register with Pennsylvania State Police for the remainder of his lifetime because he was classified as a Tier III offender.

In the present case, after careful review of the record, this Court found that trial counsel was credible in describing the process he took to thoroughly advise Defendant of all trial rights, as well as his assessment that Defendant was entering into a knowing, intelligent, and voluntary plea of nolo contendere. Defendant had a full understanding of discovery, all of his legal rights, the charges against him, and the sentence to which he was pleading. Defendant entered into a knowing, voluntary, and intelligent plea of nolo contendere.¹⁵

¹⁵ Once a defendant has entered a plea it is presumed that he was aware of his actions, and the burden of demonstrating involuntariness is upon him. *Commonwealth v. McCauley*, 797 A.2d 920, 922 (Pa. Super. 2001). When determining whether a defendant has entered into a plea knowingly, voluntarily and

Conversely, Defendant's testimony at the PCRA Hearing was significantly contradicted by the record, including his assertions that he was never told about consecutive probation, he was told by counsel Megan's law would apply for only two years, he had no recollection of the rights listed on the colloquy form he had signed, that two other women would be permitted to testify against him about prior bad acts, or that he was told by trial counsel he had to plead *nolo contendere* rather than go to trial.¹⁶

For these reasons, Defendant has failed to prove that the underlying claim of ineffective assistance of counsel is of arguable merit. Trial counsel considered Miller's recantation but concluded she would not be a good witness. Trial counsel informed Defendant of two other females who made claims of inappropriate sexual contact against him, but stated they would likely not be permitted to testify at trial. Trial counsel recognized these offenses occurred 8 to 12 years before the filing of charges, with no physical evidence connecting Defendant to the crimes, but was aware that the victim who had testified against Defendant at the preliminary hearing was now more mature and was available to testify. Contrary to Defendant's assertion, a reasonable attorney could conclude from this evidence that Defendant would be convicted at trial.

Assuming, *arguendo*, Defendant has established that his claim of ineffectiveness has arguable merit, Defendant must also prove trial counsel had no reasonable strategic basis for his

intelligently, a Court should consider oral and written plea colloquies and off-the-record communications between a defendant and counsel. *Commonwealth v. Allen*, 732 A.2d 582, 588-89 (Pa. 1999).

¹⁶ While Defendant claimed at the PCRA Hearing that trial counsel told him what to do, Defendant did admit he was not forced or threatened in any way to plead *nolo contendere*. (N.T. PCRA at 51, 57). Defendant further acknowledged he did discuss trial strategies and the potential for conviction with counsel. *Id.* at 55. Moreover, although trial counsel recommended that Defendant take the negotiated plea, Defendant stated he ultimately made the decision to plead *nolo contendere* because of the potential for conviction. *Id.* at 55-56.

action or inaction. In the present case, the record clearly shows trial counsel had a strategic basis for recommending that Defendant enter into a negotiated plea. As previously stated, the victim never recanted, and she was prepared to testify against Defendant if the case proceeded to trial. Furthermore, trial counsel had a legitimate concern about putting Miller on the witness stand to offer recantation testimony, in large part based upon comments made by Defendant questioning her intelligence. As such, Defendant faced the very real possibility of being convicted at trial and sentenced to a mandatory minimum of at least ten years in prison.

By pleading nolo contendere, the Rape charge was withdrawn and Defendant was no longer exposed to a mandatory minimum jail sentence of ten years. Defendant was offered a minimum sentence on the very low end of the standard range of the sentencing guidelines for Statutory Sexual Assault. Moreover, the Commonwealth did not invoke the mandatory minimum sentence of five years incarceration on the Aggravated Indecent Assault, offering probation that was well below the mitigated range of the sentencing guidelines. As trial counsel noted during the nolo contendere hearing held on July 29, 2013:

Your Honor, my client is very well aware of the fact that if he did go to trial and was found guilty, he would be spending possibly the - - his entire life in jail. He's taking the benefit of the bargain here. And since he doesn't have a prior record, he's hoping to be released in three years. He has spent the better part of one year in jail, and we'd ask, of course, that he gets credit for that - - that year; good time, that's correct.

(N.T. at 15).

Finally, Defendant must demonstrate it is reasonably probable that, but for trial counsel's alleged ineffectiveness, he would have proceeded to trial and achieved a better outcome. Defendant has failed to meet that burden. As previously discussed, Defendant and Miller were not credible witnesses during the PCRA Hearing, and likely would not have been credible

witnesses at trial. Conversely, the victim, who testified at the preliminary hearing against Defendant and was consistent throughout in stating that Defendant had committed these sexual assaults, was prepared to testify.

Pursuant to Pa.R.Crim.P. 908, this Court found that Defendant's claim of ineffective assistance of counsel resulting in an unknowing or involuntary plea must fail. Therefore, Defendant was not entitled to post-conviction relief and no purpose would be served by any further proceedings. According to *Commonwealth v. Lawson*, 90 A.3d 1, 4 (Pa. Super. 2014), the PCRA court's findings in a proceeding under the Post-Conviction Relief Act "will not be disturbed unless there is no support for the findings in the certified record." *Id.* (citing *Commonwealth v. Carr*, 768 A.2d 1164, 1166 (Pa. Super. 2001)). In the present case, the record clearly supports the findings of the PCRA court. Consequently, Defendant's appeal should be denied.

BY THE COURT:

Date: April 13, 2015

Donald R. Totaro
DONALD R. TOTARO, JUDGE

ATTEST:

COPIES TO:

Janie Swinehart, Esquire, Assistant District Attorney
R. Russell Pugh, Esquire, Attorney for Defendant

I certify this document to be filed
in the Lancaster County Office of
the Clerk of the Courts.



Joshua G. Parsons
Joshua G. Parsons
Clerk of the Courts

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