

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
LEWIS BROWN,		No. 2864 EDA 2010
Appellant		

Appeal from the PCRA Order September 15, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0314261-2004.

BEFORE: OLSON, WECHT and COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: March 18, 2013

Appellant, Lewis Brown, appeals from an order entered on September 15, 2010 in the Criminal Division of the Court of Common Pleas of Philadelphia County that denied his petition for collateral relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court summarized the relevant facts and procedural history as follows:

On February 11, 2004, Philadelphia police officers were attempting to serve a warrant for [Appellant's] arrest on unrelated charges.¹ [Appellant] saw [the officers] at 49th and Paschall Avenue in Philadelphia. He fled in his car at a high rate of speed with police in pursuit. During the ensuing chase, [Appellant] disregarded red lights and stop signs. He raced through a red light at 52nd Street and [] drove into a Chevy Lumina driven by an elderly woman. [Appellant] [t]hen knocked over a telephone pole and crashed his car into a store front located at 52nd and Chester Avenue. The elderly woman

*Retired Senior Judge assigned to the Superior Court

sustained head injuries and was taken to the hospital. She was still undergoing treatment for her [injuries] at the time [Appellant] pled guilty[.]

* * *

¹ [Appellant] was wanted for shooting his brother in the back. [That] case was ultimately dismissed for lack of prosecution.

* * *

On July 28, 2004, [Appellant] pled guilty to aggravated assault, 18 Pa.C.S. §2702(a)(1), and fleeing or eluding a police officer, 75 Pa.C.S. §3733(a). In exchange for Appellant's guilty plea, the Commonwealth dropped charges of reckless endangerment and possession of an instrument of crime.] Prior to accepting the guilty plea the [trial] court conducted an on the record colloquy to ensure that the plea was knowing, intelligent and voluntary. Additionally, [Appellant] reviewed and signed a written guilty plea colloquy form with the aid of counsel.

Sentencing was deferred for the preparation of a pre-sentence investigation report (PSI). On September 21, 2004, the court sentenced appellant to 3 ½ to 7 years^[1] incarceration followed by a consecutive term of three (3) years^[1] probation. Trial counsel then filed a petition for reconsideration of sentence. On January 20, 2005, the court granted the petition and ordered [A]ppellant's minimum sentence reduced to 2½ years^[1] imprisonment. [Appellant] did not file a direct appeal. On June 21, 2005, [Appellant] filed a *pro se* PCRA petition claiming he had been denied his appellate rights.

New court-appointed counsel filed an amended PCRA petition on [A]ppellant's behalf on March 8, 2006. On August 30, 2006, the court granted [Appellant] the right to file an appeal *nunc pro tunc*.

[On appeal, Appellant] argued that his guilty plea was involuntary and that his sentence was excessive. [This Court] affirmed [Appellant's] judgment of sentence on August 31, 2007, stating that any issue of counsel's ineffectiveness must be taken up in a PCRA proceeding and that any challenge to the validity of his guilty plea was waived for failure to raise it at the trial court

level. A [p]etition for [a]llowance of [a]ppeal to the Supreme Court of Pennsylvania was denied on March 12, 2008.

[Appellant filed a *pro se* PCRA petition on April 4, 2008. New court-appointed counsel filed an amended PCRA petition on his behalf on February 11, 2009. The amended petition alleged that Appellant was entitled to collateral relief because Appellant's guilty plea was facially defective, the trial court erred in accepting the plea, and trial counsel was ineffective in failing to object to the plea and in failing or refusing to file a motion to withdraw Appellant's plea. Amended Post Conviction Relief Act Petition, 2/11/09, at 2 ¶ 9.]

[The PCRA court convened an evidentiary hearing on Appellant's petition in September 2010.] At the evidentiary hearing, [A]ppellant testified that he had requested that counsel file a motion to withdraw his guilty plea and claimed to have sent a letter to that effect to counsel. Appellant could not produce a copy of the letter however. Appellant also stated that he did not discover he was not guilty of aggravated assault due to the lack of serious bodily injury until he did legal research in prison after he was sentenced. On cross-examination however, [A]ppellant admitted he was aware prior to entering the guilty plea that a motion to quash the aggravated assault charge based upon the claim of lack of serious bodily injury had been filed by counsel and had been denied by the court. Appellant further admitted that he had answered all the questions posed to him at the guilty plea colloquy truthfully and signed the written colloquy which he reviewed with counsel.

Trial counsel [] testified that the Commonwealth agreed to drop the possessing instruments of crime [] and recklessly endangering another person [] charges in exchange for an open guilty plea to aggravated assault as a felony of the first degree and fleeing police. In [] discussions with [A]ppellant, [counsel] explained [to Appellant that] he could receive a much lengthier sentence if he went to trial and lost. [Counsel] further testified that the issue of whether the [68-year-old] victim had sustained serious bodily injury was a bone of contention in his plea discussions with [A]ppellant. Counsel felt it would be risky to go to trial on the aggravated assault charge after the denial of the motion to quash, particularly in view of the evidence of [A]ppellant's high speed flight from police. According to [counsel], [A]ppellant agreed to plead guilty despite his

awareness of counsel's disagreement with the Commonwealth concerning the existence of serious bodily injury. As to [A]ppellant's claim that he asked counsel to move to withdraw his guilty plea, counsel testified that he had no recollection of such a request and believed that [A]ppellant's plea had been entered knowingly, intelligently and voluntarily. [At the close of the evidentiary hearing on September 15, 2010, the court denied Appellant's petition for PCRA relief. Appellant filed a timely notice of appeal on October 14, 2010. After transcripts of the PCRA hearing were forwarded to the PCRA court, the court issued its opinion on July 5, 2012.]

PCRA Court Opinion, 7/5/12, 1-4.

In his brief, Appellant asks us to review the following question:

Did the PCRA Court err when it failed to grant relief on the [Appellant's] PCRA [p]etition even though the [Appellant] properly pled and proved that he was entitled to relief because the [g]uilty [p]lea [c]olloquy that he entered was defective on its face and the [c]ourt should not have accepted that [p]lea, and moreover where his counsel was ineffective for failing to object to the [p]lea?

Appellant's Brief at 3.

In the sole claim he raises on appeal, Appellant asserts that counsel was ineffective in failing to object to the plea colloquy and/or his guilty plea entered before the trial court.¹ Relying on the statutory definition of

¹ We need not address Appellant's free-standing claims that his plea colloquy was defective on its face or that the trial court erred in accepting a defective plea as a prior panel of this Court has held that Appellant waived those claims. ***Commonwealth v. Brown***, 935 A.2d 5 (Pa. Super. 2007) (unpublished memorandum); ***see also*** 42 Pa.C.S.A. § 9543(a)(3)(petitioner ineligible for relief where allegation of error has been previously litigated or waived).

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aggravated assault set forth at 18 Pa.C.S.A. § 2702(a)(1), as well as the definitions of “bodily injury” and “serious bodily injury” found at 18 Pa.C.S.A. § 2301, Appellant argues that because he recklessly collided with the vehicle occupied by the 68-year-old victim, the Commonwealth needed to establish that the victim **actually** sustained serious bodily injury as a result of the incident.² Appellant reasons that because he acted recklessly in

(Footnote Continued) _____

We also decline to address any claim that counsel disregarded Appellant’s request to file a motion to withdraw his plea. The PCRA court credited the testimony of counsel that Appellant never communicated a request to file a motion to withdraw his guilty plea. The record supports this determination and Appellant offers no facts or arguments that persuade us to disturb this finding.

² As it pertains to this case, the Crimes Code defines the offense of aggravated assault in the following manner:

§ 2702. Aggravated assault

(a) Offense defined.--A person is guilty of aggravated assault if he:

- (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life[.]

18 Pa.C.S.A. § 2702(a)(1). In addition, § 2301 of the Crimes Code defines bodily injury and serious bodily injury as:

§ 2301. Definitions

“Bodily injury.” Impairment of physical condition or substantial pain.

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colliding with the victim, and because the victim did not sustain serious bodily injury during the collision, the factual basis for the plea was deficient and trial counsel was ineffective in failing to object. Appellant's Brief at 13.

We recently summarized the principles guiding our resolution of this appeal as follows:

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. This Court treats the findings of the PCRA court with deference if the record supports those findings. It is an appellant's burden to persuade this Court that the PCRA court erred and that relief is due.

A PCRA petitioner may be entitled to relief if the petitioner effectively pleads and proves facts establishing ineffectiveness of prior counsel.

To establish ineffectiveness, a petitioner must plead and prove the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. Counsel's actions will not be found to have lacked a reasonable basis unless the petitioner establishes that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different.

The law does not require that an appellant be pleased with the

(Footnote Continued) _____

“Serious bodily injury.” Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

18 Pa.C.S.A. § 2301.

results of the decision to enter a guilty plea; rather all that is required is that appellant's decision to plead guilty be knowingly, voluntarily and intelligently made.

A defendant is bound by the statements made during the plea colloquy, and a defendant may not later offer reasons for withdrawing the plea that contradict statements made when he pled. Claims of counsel's ineffectiveness in connection with a guilty plea will provide a basis for relief only if the ineffectiveness actually caused an involuntary or unknowing plea.

Commonwealth v. Brown, 48 A.3d 1275, 1277-1278 (Pa. Super. 2012) (citations and quotations omitted).

The record in this case establishes that Appellant entered a valid guilty plea and that counsel was not ineffective in failing to object to the colloquy at Appellant's plea hearing. At the plea hearing, Appellant stated that it was his decision to plead guilty and that he entered his plea knowingly, intelligently, and voluntarily. In addition, Appellant, with the assistance of counsel, reviewed and executed a written colloquy that outlined the rights he was waiving, the sentence he faced, and the elements of the offenses to which he pled guilty. At the time Appellant entered his plea, he was aware that the trial court had previously denied a motion to quash the aggravated assault charge, which challenged the nature and extent of the injuries sustained by the victim. In discussing the benefits and drawbacks of entering a guilty plea, trial counsel explained to Appellant the risks of proceeding to trial, including the possibility of a much lengthier sentence if a fact-finder found Appellant guilty of aggravated assault as well as other charges. Counsel testified that Appellant elected to plead guilty despite the

defense's disagreement with the Commonwealth's characterization of the victim's injuries. Based on the record established at Appellant's PCRA hearing, we conclude that Appellant's plea was knowingly and voluntarily entered, notwithstanding any objection to the nature or extent of the victim's injuries. ***See Commonwealth v. Yeomans***, 24 A.3d 1044, 1047 (Pa. Super. 2011) ("Even though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.") (citation omitted). Because Appellant knowingly, intelligently, and voluntarily entered his guilty plea in this case, he cannot demonstrate that counsel was ineffective. Thus, he is not entitled to collateral relief.

Order affirmed.