IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**CR-1160-2014**
	:	
v.	:	
	:	**CRIMINAL DIVISION**
GARREN ROSS BIGELOW,	:	
Defendant	:	**PCRA**

OPINION AND ORDER

On August 14, 2015, the Defendant filed a timely and counseled petition for relief under the Post-Conviction Relief Act (PCRA).[1] A court conference to discuss the petition was held on October 23, 2015. A hearing was held on February 4, 2016.

I. Background

A. Charges, Plea, and Colloquy

The Defendant was charged with (1) first-degree felony Burglary, (2) second-degree felony Criminal Trespass, (3) first-degree misdemeanor Terroristic Threats, (4) first-degree misdemeanor Endangering Welfare of Children (EWOC), (5) second-degree misdemeanor Simple Assault, (6) summary Harassment, and (7) summary Criminal Mischief. On July 28, 2014, the Defendant pled guilty to (1) Burglary for 11.5 months to 23 months of incarceration, (2) EWOC for two years of probation consecutive to the incarceration, and (3) Criminal Mischief for a finding of guilt without further penalty. The remaining charges were dismissed upon motion of the Commonwealth. The following facts were established during the oral plea colloquy:

> **Court**: Back on July 3rd of this year, what did you do?
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> **Defendant**: I went to [the house of the mother of the Defendant's child], and she opened the door for me. And I went in there. And I went in there to ask her to use her phone. We began to fight, and I went outside. She locked me out. I went through the window

[1] 42 Pa.C.S. § 9541 *et seq.*

and took my kid, put her in the car seat, put her in the car and drove off in a storm and went to my house. And that's where I was detained.

Court: Okay. Any why do you think that although the child may have been in the car seat the car seat wasn't secured in the car?

Defendant: That's what [the testimony of the mother of the Defendant's child] was.

Court: Okay.

Defendant: Yeah.

Court: But that's what your [*sic*] pleading guilty to?

Defendant: Yeah.

Court: And you are agreeing that when you went back into the house through the window that you didn't have permission to go in?

Defendant: Correct.

Court: That you intended to commit a crime which would be taking your child without permission?

Defendant: Yeah.

Court: Did you damage property? Did you damage the window in order to be able to go in there?

Defendant: No. It was the air conditioner.

Court: So what property did you damage?

Defendant: None that I know of.

Court: Okay. Well, there's a criminal mischief charge.

Defendant: Or it was a phone. That was a while back.

Court: This would have been the same incident.

Defendant: What was it?

Court: Observed the air conditioner lying on the floor in front of the window, and the curtains were pushed in. There were objects strewn. She had physical injuries on her body. Why was the air conditioner pushed out?

Defendant: Because I went in through the air conditioner.

Court: Okay. So maybe it damaged the window frame or something like that.

Defendant: Did they specifically say what it was for?

Court: No, it doesn't.

Defendant: All right.

Court: I wasn't there, so I don't know. I am going to have to surmise that that's what it was.

Defendant: Okay.

Court: Is that alright with you?

Defendant: Yep.

N.T., 7/28/14, at 4-6.

B. Arguments Made in the PCRA Petition and During the Court Conference

The Defendant argued that he should be entitled to withdraw his plea because his plea counsel was ineffective. The Defendant argued that his plea counsel was ineffective "in failing to properly advise the Defendant as to the elements of the charge of Burglary and in failing to object to the Court accepting the plea because there was no factual basis for the charge of Burglary." The Defendant asserted that he did not commit a crime by taking custody of his natural child because "there was no court order regarding custody and/or visitation of the child." In addition, the Defendant argued that his plea counsel was ineffective "in failing to properly advise him as to the elements of the offense of Endangering the Welfare of a Child" and "in failing to object to the Court accepting the plea to that charge since there was no factual basis for said plea." In support of his argument, the Defendant cited 75 Pa.C.S. § 4581(f), which provides, "The requirements of [the restraint systems subchapter] or evidence of a violation of

[the restraint systems subchapter] are not admissible as evidence in a criminal proceeding except in a proceeding for a violation of [the restraint systems subchapter]." During the court conference, the Commonwealth did not present any argument in opposition of the Defendant's petition.

C. PCRA Hearing

The Court found that a hearing was necessary to determine whether the Defendant understood before he pled that evidence of the misuse of the car seat was not admissible in the criminal proceedings against him. During the hearing, the attorney who negotiated the Defendant's plea agreement testified that he did not believe that the misuse of a car seat was the factual basis for any crime to which the Defendant pled. Therefore, the Court allowed the parties to question the Defendant and his attorneys about the circumstances surrounding the plea.

1. Testimony of Defendant's Plea Negotiation Attorney

The attorney negotiated the plea agreement on the Defendant's behalf. He did not represent the Defendant during the plea hearing. Before the plea hearing, the attorney explained the elements of EWOC to the Defendant. He did not tell the Defendant that evidence of the misuse of the car seat was inadmissible in the criminal proceedings against him.

The Defendant admitted to the attorney that he came "[into a house] through where the air conditioner was, [threw] things around, and [took his biological daughter from the house]." The attorney explained a factual basis for EWOC to the Defendant. The factual basis was "the totality of the circumstances mainly about going through the air conditioner and taking the child from the mother." The attorney spoke with the Defendant "about how a jury could find him guilty [of EWOC] based on how nebulous the crime is." The attorney concluded that the

Defendant was guilty of EWOC because he admitted to "coming through where the air conditioner was, throwing things around, and taking the child." The factual basis for EWOC was neither the Defendant's alleged misuse of the car seat nor the Defendant's alleged assault of the mother of his child. The factual basis for Burglary was not interference with custody; the basis was the Defendant entering the house and throwing things.

2. Testimony of Defendant's Plea Hearing Attorney

The attorney represented the Defendant during the plea hearing. The plea hearing was the first time that she saw the Defendant. She did not tell him that evidence of the misuse of the car seat was inadmissible in the criminal proceedings against him.

3. Defendant's Testimony

The Defendant was in the house of his child's mother, and he was arguing with the mother about a cell phone. The mother would not let him use her cell phone. The Defendant grabbed the phone. The mother hit him, and he "was striking her in the leg to get her off [him]." The Defendant and the mother eventually went outside. The mother went back into the house and locked the Defendant out. The Defendant entered the house through the window. After he went through the window, he did not strike the mother or throw things. He grabbed[2] his child, put the child in the car seat, and then put the child in the car, which was ten feet away from the house. When the Defendant exited the house, it was raining heavily. The child was wearing a onesie and had a blanket. The Defendant pled guilty because "he was told if he fought it," he was going to get a lengthy state prison sentence. He was told about the maximum sentences for the charged crimes.

[2] The Defendant testified that to him "grabbing" means "picking up."

D. Arguments Made After the Hearing

The Commonwealth argued that there is an on-the-record factual basis for EWOC. It argued that the factual basis is the Defendant entering the house, grabbing the "extremely young" child, and taking the child out into a storm in an angry manner. The Defendant asserted that it is not a close case. He argued that the Defendant should be permitted to withdraw his plea because factual bases for Burglary and EWOC were not established during the plea colloquy.

II. Discussion

"A valid plea colloquy must delve into six areas: 1) the nature of the charges, 2) the factual basis for the plea, 3) the right to a jury trial, 4) the presumption of innocence, 5) the sentencing ranges, and 6) the plea court's power to deviate from any recommended sentence." Commonwealth v. Morrison, 878 A.2d 102, 107 (Pa. Super. 2005). "[T]he 'factual basis' requirement does not mean that the defendant must admit every element of the crime." Commonwealth v. Fluharty, 632 A.2d 312 (Pa. Super. 1993). The Supreme Court of the United States has held:

> [W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.
>
> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when . . . a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

Id. (quoting North Carolina v. Alford, 400 U.S. 25, 37, (1970)).

In order to prevail on an ineffectiveness claim, the Defendant must satisfy a three-factor test:

> [Courts] inquire first whether the underlying claim is of arguable merit; that is, whether the disputed action or omission by counsel was of questionable legal soundness. If so, [courts] ask whether counsel had any reasonable basis for the questionable action or omission which was designed to effectuate his client's interest. If he did, [the] inquiry ends. If not, [a [petitioner] may prevail on his ineffectiveness claim by demonstrating] that counsel's improper course of conduct worked to his prejudice, i.e., had an adverse effect upon the outcome of the proceedings.

Commonwealth v. Hickman, 799 A.2d 136, 140-41 (Pa. Super. 2002). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 690 (1984). "A criminal defendant has the right to effective counsel during a plea process . . . ." Hickman, 799 A.2d at 141. "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." Id.

"To determine a defendant's actual knowledge of the implications and rights associated with a guilty plea, a court is free to consider the totality of the circumstances surrounding the plea. The concept of examining the totality of the circumstances surrounding a plea in order to determine whether a plea was voluntarily, knowingly, and intelligently entered, is well established. Indeed, as the law makes clear, a trial court may consider a wide array of relevant evidence under this standard in order to determine the validity of a claim and plea agreement including, but not limited to, transcripts from other proceedings, off-the-record communications with counsel, and written plea agreements." Commonwealth v. Allen, 732 A.2d 582, 588-89 (Pa. 1997) (internal citation omitted). "A person who elects to plead guilty is bound by the statements he makes in open court while under oath and he may not later assert grounds for withdrawing the plea which contradict the statements he made at his plea colloquy." Commonwealth v. Turetsky, 925 A.2d 876, 881 (Pa. Super. 2007) (citations omitted).

Here, the Defendant has not proven that his attorneys were ineffective. The Defendant testified that he was arguing and had a physical altercation with his child's mother. He was locked out of the mother's house, and he entered the house through a window. The Court finds credible the plea negotiation attorney's testimony that the Defendant admitted to throwing things in the house. Given that the Defendant was arguing with the mother and threw things in the house, a jury could find that the Defendant entered the house with intent to commit a crime.

The Court finds credible the plea negotiation attorney's testimony that the Defendant admitted to "coming through where the air conditioner was, throwing things around, and taking the child." The Pennsylvania courts have established a three-part test that must be satisfied to prove EWOC:

> 1) [T]he accused [was] aware of his/her duty to protect the child;
>
> 2) [T]he accused [was] aware that the child [was] in circumstances that could threaten the child's physical or psychological welfare; and
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> 3) [T]he accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.

Commonwealth v. Bryant, 57 A.3d 191, 197 (Pa. Super. 2012). "In reviewing EWOC, Pennsylvania courts have long recognized that the legislature attempted to prohibit a broad range of conduct in order to safeguard the welfare and security of our children. Furthermore, the common sense of the community should be considered when interpreting the language of the statute." Id. at 198 (internal quotation marks and citations omitted).

The plea negotiation attorney was correct to advise the Defendant that he could be found guilty of EWOC based on him "coming through where the air conditioner was, throwing things around, and taking the child." EWOC prohibits a broad range of conduct. A jury could find that

the Defendant, who was in the midst of an argument, endangered the very young child through his conduct.

In addition, the totality of the circumstances shows that the Defendant knowingly and voluntarily entered the plea. During the plea colloquy, the Court stated the elements and the maximum sentences of each offense. N.T., 7/28/14, at 2-3. The Defendant said that he understood the elements and the maximum sentences. Id. at 3. Later in the colloquy, the Defendant said that he wished to plead guilty to the offenses. Id. at 4. He also said that he had enough time to speak with his lawyer about how he wanted to proceed. Id. at 8.

The Defendant filled out a guilty plea form. He wrote "yes" next to the question of whether his attorney explained to him all of the elements of the crimes. He wrote "yes" next to the question of whether he thoroughly discussed with his attorney all of the facts and the circumstances surrounding the charges against him. The Defendant wrote "I am" next to the question of why he wished to plead guilty. Because the circumstances show that the Defendant knowingly and voluntarily entered the plea, he is not entitled to relief on his ineffective assistance of counsel claim.

Even if the Court assumes that the Defendant's attorneys were ineffective, the Defendant has neither alleged nor proven that he was prejudiced. "[T]o succeed in showing prejudice, the defendant must show that it is reasonably probable that, but for counsel's errors, he would not have pleaded guilty and would have gone to trial. The 'reasonable probability' test is not a stringent one." Commonwealth v. Rathfon, 899 A.2d 365, 369-70 (Pa. Super. 2006). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 370.

Here, the Defendant was concerned about getting a lengthy state prison sentence. Under the plea agreement, he avoided a state sentence. His sentence of 11.5 to 23 months of imprisonment is well below the maximum for first-degree Burglary. See 18 Pa.C.S. § 1103(1) (providing that a person convicted of a first-degree felony may be sentenced to a term of imprisonment of not more than 20 years). In fact, the sentence is in the mitigating range of the sentencing guideline. Under the agreement, the Defendant serves only 11.5 to 23 months of imprisonment despite being charged with six other crimes and admitting to second-degree felony Criminal Trespass, which carries a maximum sentence of ten years. See 18 Pa.C.S. § 1103(2) (providing that a person convicted of a second-degree felony may be sentenced to a term of imprisonment of not more than ten years). Given that the plea agreement accomplished the Defendant's desire to avoid a lengthy state prison sentence, it is not reasonably probable that he would have gone to trial. Therefore, even if the Court assumes that counsel was ineffective, the Defendant has not proven that he was prejudiced, and he would not be entitled to relief on his claim.

III. Conclusion

The Defendant is not entitled to relief on his ineffective assistance of counsel claim because his attorneys were not ineffective, and the totality of the circumstances shows that his plea was knowing and voluntary.

ORDER

AND NOW, this _____ day of February, 2016, pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified that this Court intends to dismiss his PCRA petition filed on August 14, 2015 for the reasons discussed in the foregoing Opinion. The Defendant may respond to the proposed dismissal within 20 days of the date of the notice.

By the Court,

Nancy L. Butts, President Judge