

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1053-2018
 :
 CORY STEPHON WILLIAMS, : Notice of Intent to Dismiss PCRA
 Defendant : Without Holding Evidentiary Hearing

OPINION AND ORDER

This case comes before the court on Petitioner’s pro se PCRA Petition filed on August 22, 2019. In that this is Petitioner’s first PCRA Petition and Petitioner is indigent, the court appointed counsel to represent Petitioner. On December 9, 2019 and March 3, 2020, counsel filed Amended Post-Conviction Relief Petitions. The court held a conference with counsel and the District Attorney on March 16, 2020.

Petitioner claims that his trial counsel was ineffective in advising Petitioner to plead guilty when trial counsel should have filed a motion for a line-up to determine whether the confidential informant (CI) could identify him. Petitioner asserts “challenging the identification testimony would likely have changed the outcome of the trial.”

By way of background, on May 1, 2019, following a hearing, the court accepted as knowing, intelligent and voluntary, Petitioner’s plea of guilty to Count 2, delivery of a controlled substance (heroin), an ungraded felony; Count 3, criminal use of a communications facility, a felony of the third degree; Count 5, delivery of a controlled substance, an ungraded felony; and Count 7, criminal use of a communications facility, a felony of the third degree. It was an open plea.

With respect to Count 2, delivery of a controlled substance and Count 3, criminal use of a communications facility, Petitioner admitted delivering and/or selling 40

bags of heroin for \$300.00 to a CI. This delivery occurred on May 7, 2018 and the arrangement was facilitated using a cell phone.

With respect to Counts 5 and 7, Petitioner admitted selling 40 bags of heroin to a CI for approximately \$300.00 on May 18, 2018. He also admitted that he used a cell phone to facilitate the transaction.

The court sentenced Petitioner on May 24, 2019. The court imposed consecutive sentences of two (2) to eight (8) years' incarceration for each delivery conviction. The court imposed concurrent sentences of one (1) to two (2) years for each conviction for criminal use of a communication facility. The aggregate sentence in this case was four (4) to sixteen (16) years incarceration. Petitioner filed a motion for reconsideration of sentence, which the court denied on June 6, 2019. Petitioner did not file an appeal.

Petitioner's claims challenge the effectiveness of counsel. To obtain relief on a claim challenging counsel's performance, a PCRA petitioner must plead and prove that (1) the underlying claim has arguable merit;(2) counsel lacked a reasonable basis for his actions or failure to act; and (3) the petitioner was prejudiced by counsel's deficient performance such that there was a reasonable probability that the result of the proceeding would have been different absent counsel's error or omission. *Commonwealth v. Montalvo*, 205 A.3d 274, 286 (Pa. 2019).

A petitioner's failure to satisfy any prong of the ineffectiveness test is fatal to the claim. *Commonwealth v. Wholaver*, 177 A.3d 136, 144 (Pa. 2018).

The right to an evidentiary hearing in connection with a petition brought under the Post-Conviction Relief Act, however, is not absolute. A hearing may be denied if a

petitioner's claim is patently frivolous and without trace of support either in the record or from other evidence. *Commonwealth v. White*, 674 A.2d 253, 256 (Pa. Super. 1996). The controlling factor in determining whether a post-conviction relief petition may be dismissed without a hearing is the status of substantive assertions in the petition. *Commonwealth v. Payne*, 794 A.2d 902, 906 (Pa. Super. 2002), *appeal denied*, 808 A.2d 571 (Pa. 2003).

The court does not need to conduct a hearing on all issues relating to counsel's ineffectiveness. *Commonwealth v. Santiago*, 855 A.2d 682, 691 (Pa. 2004). The court may properly dismiss a petition without an evidentiary hearing where there is no genuine issue of material fact concerning the issues raised in a petitioner's petition. *Payne, id.*

Petitioner pled guilty. "Upon the entry of a plea of guilty, a defendant generally waives all defects and defenses except those concerning the validity of the plea, the jurisdiction of the trial court, and the legality of the sentence imposed." *Commonwealth v. Boyd*, 835 A.2d 812, 816 (Pa. Super. 2003); *see also Commonwealth v. Chumley*, 394 A.2d 497, 640 (Pa. 1978). Allegations of ineffective assistance of counsel in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the petitioner to enter an involuntary or unknowing plea. *Chumley, id.* at 641 (citations omitted).

"A claim has arguable merit where the factual averments, if accurate, could establish cause for relief. Whether the facts rise to the level of arguable merit is a legal determination." *Commonwealth v. Stewart*, 84 A.3d 701, 707 (Pa. Super. 2013)(citations and internal quotation marks omitted).

Petitioner pled guilty to two (2) counts of possession with intent to deliver and two (2) counts of criminal use of a communications facility. (Amended petition, paragraph

2). Petitioner alleges that the confidential informant did not know [his] identity. (Amended petition, paragraph 15). Petitioner alleges as well that the affiant did not know him prior to the offenses and that he was identified through a photograph, apparently only after he was arrested in another case. (Amended petition, paragraphs 13, 14). Petitioner asserts that the lab report provided to him in discovery listed Petitioner as the “arrestee” and the lab report listed the suspect as “Leonard Dubose.” (Amended petition, paragraphs 17, 18).

Petitioner asserts that there was no line-up performed during which the CI or the affiant identified him as the suspect. (Amended petition, paragraph 16). Petitioner argues that his counsel should have filed a motion for a line-up prior to advising him to plead guilty. (Amended petition, paragraph 20).

While Petitioner argues that there is a significant question as to the identity of the perpetrator, he does not make any factual assertions whatsoever upon which the court can conclude that his claim is of arguable merit.

A petitioner must present the facts supporting each issue asserted in his PCRA petition, and if they do not appear in the record, a petitioner must identify affidavits, documents or other evidence proving the alleged facts. *Commonwealth v. Collins*, 687 A.2d 1112, 1112 (Pa. 1996).

As for the events of May 7, 2018 and May 18, 2018, forming the basis for the conviction under 1053-2018, the record indicates that Petitioner was known to the CI from previous contacts. The CI had Petitioner’s telephone number and made purchases of heroin from Petitioner several times in the past.

After arranging for a controlled purchase from Petitioner and while law

enforcement officers were surveilling the transaction, Trooper Dammer observed Petitioner approach the CI's parked vehicle. Trooper Dammer observed the transaction, which was soon concluded. The CI was released from further involvement until a later date.

On May 18, 2018, the CI again contacted Petitioner's telephone number and made an arrangement for another purchase of heroin. This transaction was also a controlled buy with the presence of law enforcement officers conducting surveillance. Trooper Dammer observed Petitioner as being the same individual from the earlier transaction from May 7, 2018. The transaction was completed and the CI was released from further involvement until a later date.

On June 10, 2018, while Petitioner was in custody, Trooper Dammer went to the police department headquarters. He identified Petitioner as the individual who he had observed selling controlled substances to the CI on both May 7, 2018 and May 18, 2018.

The record also established that Petitioner entered a knowing, intelligent and voluntary guilty plea. The court advised Petitioner of the nature of the charges to which he was pleading guilty, and the penalties for such offenses.¹ Transcript, May 1, 2019, at 2-3. The court also advised Petitioner that his plea was an open plea, which meant that the court would decide his sentence. Transcript, May 1, 2019, at 4. Petitioner indicated that he

¹ There was an error in the maximum penalties for the delivery charges at the guilty plea hearing. The penalties were noted as 20 years and \$250,000 fine. In actuality, the highest possible maximum penalties were 30 years and \$500,000 because the substance was heroin and Petitioner had prior drug trafficking convictions. 35 P.S. §§780-113(f)(1), 780-115. The correct maximum penalties were noted prior to the court imposing sentence. Transcript, May 24, 2019, at 12-13. Furthermore, the total sentence imposed was less than incorrect maximum stated as Petitioner's guilty plea hearing. Therefore, Petitioner was not prejudiced by this error. *Commonwealth v. Barbosa*, 819 A.2d 81, 82 (Pa. Super. 2003); *see also Commonwealth v. Carter*, 656 A.2d 463, 466 (Pa. 1995).

understood the rights he was giving up by pleading guilty, his counsel did not do anything which caused him to plead guilty, and Petitioner was not forced, pressured or otherwise induced to plead guilty. Transcript, May 1, 2019, at 5-7. There also was a factual basis for Petitioner's guilty plea. Transcript, May 1, 2019, at 9-11.

Furthermore, Petitioner specifically admitted at his guilty plea that he sold 40 bags of heroin to the CI for \$300 on May 7, 2018 and May 18, 2018. Transcript, May 1, 2019, at 9-11. A petitioner cannot challenge his guilty plea by asserting that he lied under oath, even if he avers that counsel induced the lies. *Commonwealth v. Pollard*, 832 A.2d 517, 523 (Pa. Super. 2003); *see also Commonwealth v. Pier*, 182 A.3d 476, 480 (Pa. Super. 2018).

Because Petitioner has neither pointed to any facts in the record nor provided any affidavits or documents that would support his argument that a line-up should have been conducted and the record reflects that Petitioner entered a knowing, intelligent and voluntary plea, the court will decline to hold a hearing on this issue.

ORDER

AND NOW, this ___ day of April 2020, upon review of Petitioner's Amended PCRA, the court gives notice to the parties that it intends to dismiss Petitioner's PCRA petition without holding an evidentiary hearing. Petitioner may respond to this proposed dismissal within twenty (20) days. If the court does not receive a timely response, the court will dismiss the petition.

By The Court,

Marc F. Lovecchio, Judge

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