COMMONWEALTH OF PENNSYLVANIA
V.
MARTIN SHAMLIAN

P.C.R.A.

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PA.,
CRIMINAL DIVISION. NO. 1950-2001

Order of Court entered dismissing the P.C.R.A. Petition filed on behalf of the Defendant.

Jay Jenkins, Esq. -for Commonwealth
Nuria Sjolund, Esq. -for Defendant

Order of Court entered on November 5, 2003 by Stephen G. Baratta, Judge

DESCRIPTION OF DECISION

The Court dismissed the instant PCRA Petition because the Court found, that totality of the circumstances indicated that Defendant understood the nature of the charges to which he plead guilty, that on numerous occasions he was apprized of the fact that the crime was rated as a misdemeanor of the second degree, and that he was aware of, but did not take advantage of, his right to withdraw his guilty plea prior to sentencing. Accordingly, the Court dismissed the Petition.

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	**NO. 1950-2001**
	)	
vs.	)	
	)	
MARTIN SHAMLIAN,	)	
	)	
Defendant.	)	

ORDER

AND NOW, this day of November, 2003, Defendant's Motion for Post-Conviction Relief is **DENIED**.

STATEMENT OF REASONS

Presently before the Court is Defendant's Motion for Post-Conviction Relief, filed pursuant to 42 Pa.C.S.A. § 9541 et seq. Defendant alleges (1) that trial counsel failed to properly explain the elements of the crime with which the Defendant was charged; (2) that trial counsel failed to correctly explain the severity of the crime with which the Defendant was charged; and (3) that the Defendant wanted to withdraw his guilty plea prior to sentencing but that trial counsel did not comply with his directive. As a result, the Defendant now argues that his guilty plea was involuntary and unknowing.

I. Facts and Procedural History

On April 9, 2002, the Defendant, Martin Shamlian ("Defendant"), entered a Guilty Plea to one count of Indecent Assault under Criminal Docket No. 1950-2001.

A pre-sentence investigation ("PSI"), was ordered. In addition, as a aid for sentencing,

the Court ordered a sexual offenders evaluation to be completed by the Reading Specialists.

Sentencing was held on July 1, 2002, where the Defendant was sentenced to 03-24 months on the Indecent Assault charge. The sentence was within the standard range. Guilty plea counsel timely filed a Motion to Reconsider the Sentence. The Court denied the Motion to Reconsider without a hearing.

On June 4, 2003, Defendant filed a Post-Conviction Relief Act ("PCRA") Petition alleging ineffective assistance of guilty plea counsel, Attorney David Joseph. Attorney Nuria Sjolund, from the Northampton County Public Defender's staff, was appointed to represent the Defendant.

The Court scheduled this matter for an issue-framing conference on July 7, 2003. The Court attempted to schedule a prompt hearing; however, due to vacation schedules, the unavailability of counsel involved and the Defendant's difficulty in scheduling and subpoenaing Attorney David Joseph, the hearing could not be completed until September 9, 2003.

After the completion of the hearing, counsel requested that the record be transcribed and that after receipt of the transcript, counsel requested the opportunity to supplement the record by filing written briefs. Defense counsel asked for an extension to file her brief. The Defendant's brief was received on October 20, 2003. The brief by the District Attorney's office was received on October 27, 2003. After review of the record and the briefs filed, we find as follows:

II. Legal Standard

Post-Conviction Relief Act

Under the Post Conviction Relief Act, a person convicted of a crime he or she did not commit or a person serving an illegal sentence may obtain collateral relief. 42 Pa.C.S.A. § 9542 (West 1998). In requesting post-conviction relief based on grounds that counsel was ineffective,

the petitioner must plead and prove that the conviction or sentence resulted from "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii) (West 1998); Commonwealth v. Thomas, 578 A.2d 422, 425 (Pa. Super. 1990). The petitioner must also prove "[t]hat the allegation of error has not been previously litigated or waived." 42 Pa.C.S.A. § 9543(a)(3) (West 1998). Proof must be by a preponderance of the evidence. 42 Pa.C.S.A. § 9543(a) (West 1998).

Ineffective Assistance of Counsel

Where an allegation of ineffective assistance of counsel is made in connection with the entry of a plea of guilty, such allegation "will serve as a basis for relief only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea." Commonwealth v. Chumley, 394 A.2d 497, 504 (Pa. 1978), cert. denied, 440 U.S. 966, 99 S. Ct. 1515, 59 L. Ed. 2d 781 (1979). A similar standard is applicable to all post-sentence attempts to withdraw a guilty plea, where the defendant must demonstrate a manifest injustice by showing that his plea was involuntary or was entered without knowledge of the charges. See Commonwealth v. McClendon, 589 A.2d 706, 607 (Pa. Super. 1991) (en banc).

Counsel will only be deemed ineffective where there is arguable merit to the underlying claim, the course counsel chose had no reasonable basis designed to effectuate the interest of the petitioner, and that the petitioner demonstrates he was prejudiced by counsel's acts or omissions. Com. v. Knighten, 742 A.2d 679, 682 (Pa. Super. 1999), appeal denied, 759 A.2d 383 (Pa. 2000). An attorney's provision of false information regarding sentencing can be considered ineffective assistance. Baker v. Barbo, 177 F.3d 149 (3rd Cir. 1999).

Unlawful Inducement to Plead Guilty

"It is a long established principle of constitutional due process that the decision to plead guilty must be personally and voluntarily made by the accused." Commonwealth v. Hines, 437 A.2d 1180, 1182 (Pa. 1981).

In requesting post-conviction relief based on grounds that the Defendant was unlawfully induced to plead guilty, the petitioner must plead and prove that the conviction or sentence resulted from "[a] plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent." 42 Pa.C.S.A. § 9543(a)(2)(iii) (West 1998). The petitioner must also prove "[t]hat the allegation of error has not been previously litigated or waived." 42 Pa.C.S.A. § 9543(a)(3) (West 1998). Proof must be by a preponderance of the evidence. 42 Pa.C.S.A. § 9543(a) (West 1998).

To succeed in demonstrating that counsel's advice induced Defendant to plead guilty where Defendant otherwise would not have, Defendant must show that **his plea was not free and voluntary.** Commonwealth v. Blackwell, 647 A.2d 915 (Pa.Super. 1994**). At a minimum, the following six elements must be present for a claim to be considered voluntary: (1) the defendant understands the nature of the charges to which he is pleading guilty; (2) there is a factual basis for the plea; (3) the defendant understands that he has the right to trial by jury; (4) the defendant understands that he is presumed innocent until he is found guilty; (5) the defendant is aware of the permissible range of sentences and/or fines for the offenses charged; (6) the defendant is aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement.** Commonwealth v. Fluharty, 632 A.2d 312 (Pa.Super. 1993).

III. Discussion

Of the six elements required for finding that a defendant's plea has been knowing and voluntarily entered, Mr. Shamlian apparently challenges three. The Defendant argues (1) that he did not understand the nature of the charge; (2) that he was unaware of the permissible range of the sentence for the charge; and (3) that he was denied the opportunity to proceed to trial by withdrawing his guilty plea.

Failure to advise of legal elements of the crime

Defendant claims that trial counsel was ineffective and illegally induced his guilty plea by failing to properly advise him of the required legal elements of the crime with which Defendant was charged. Specifically, Defendant alleges that trial counsel failed to explain to him that a requisite element in Indecent Assault is that the touching be for sexual gratification of either the Defendant or the victim. The Defendant also complains that the factual predicate presented to the Court in support of the guilty plea did not require the Defendant to acknowledge sexual gratification of either the Defendant or the victim.

The Court asked the Assistant District Attorney to provide a summary of the criminal episode. The Assistant District Attorney set forth the following:

> On February 2nd of 2001, the defendant, employed, as part of his craft business, a 13-year-old young man. They went on an overnight trip, as I understand, up to Marshalls Creek. They are both from Bucks County. They stopped off at the Best Western Hotel in Easton and spent the night. Apparently, there was only one bed, and according to the most relevant portions of the defendant's conviction, it indicates that he woke with his hand between the knee and buttocks of the young man. The young man's boxer shorts rode up and he dropped his hand from there to basically the area of his buttocks, he did that for a minute and withdrew his hand when the young man stirred.

(Notes of Guilty Plea, 4/9/02, p. 7).

After that recital, the Court asked the Defendant if it was an accurate statement of what happened. The Defendant agreed and stated: "Yes, your honor." (Notes of Guilty Plea, 4/9/02, p. 7).

Our Supreme Court has set the standard for review when determining if a plea is voluntary and knowing as an evaluation of the "totality of the circumstances." Under the standard, if the record indicates that the defendant understood the nature of the charges, then there is no manifest injustice requiring PCRA relief. See Commonwealth v. Shultz, 477 A.2d 1328 (Pa. 1984).

The Pennsylvania Superior Court set forth in more detail the evaluation process the Court must undertake regarding this issue in Commonwealth v. Fluharty, 632 A.2d 312, 314-15 (Pa. Super. 1993). In Fluharty, the court stated:

> "In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences." Commonwealth v. Broadwater, 330 Pa. Super. 234, 244, 479 A.2d 526, 532 (1984). This determination is to be made "by examining the totality of the circumstances surrounding the entry of the plea." Id. See Commonwealth v. Shaffer, 498 Pa. 342, 350-351, 446 A.2d 591, 595-596 (a982); Commonwealth v. Klinger, 323 Pa. Super. 181, 194-195, 470 A.2d 540, 547 (1983). Thus, 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. See Commonwealth v. Schultz, 505 Pa. 188, 477 A.2d 1328 (1984); Commonwealth v. Martinez, 499 Pa. 417, 453 A.2d 940 (1982). See also Commonwealth v. Iseley, 419 Pa. Super. 364, 377-378, 615 A.2d 408, 415 (1992).
> "It is clear that before accepting a plea of guilty, the trial court must satisfy itself that there is a factual basis for the plea." Commonwealth v. Maddox, 450 Pa. 406, 409-410, 300 A.2d 503, 505 (a973). *However, "**the 'factual basis' requirement does not mean that the defendant must admit every element of the crime.**"*

> Commonwealth v. Ingram, 455 Pa. 198, 202, 316 A.2d 77, 79-80 (1974). (Emphasis added).

Id. at 314-15.

In the Ingram case, the Supreme Court noted that a defendant may knowingly and voluntarily enter a guilty plea for strategic or expeditious reasons even though the defendant is unwilling to admit guilt. Id. 316 A.2d at 80.

In this case, the factual predicate described by the Assistant District Attorney discussed only the physical aspect of the assault, that is touching or fondling the buttocks of a sleeping adolescent boy, without addressing or discussing the Defendant's intention as it related to sexual gratification of either himself or the victim.

The Defendant would now have us believe that he was unaware that the charge of indecent assault includes the perpetrator's intention to touch the intimate parts of another person for the purposes of arousing or gratifying sexual desire in either the Defendant or the victim **and** that, if he had been aware of this element, he would not have pled guilty because he had no such intention to achieve the sexual gratification of either himself or the victim.

Well, let us take a closer look at the record in this matter.

We note that the Defendant claims to have an impressive educational background which includes a Bachelor of Arts Degree in pastoral counseling, a Master's Degree in counseling, a second Master's Degree in communications and a Doctorate in "physiobiochemistry." Further, the Defendant claims to have been a college professor at "The Academy of Health and Science, Fort Sam Houston. I was on the adjunct faculty of Baylor University" (P.C.R.A. Notes of Testimony, 9/8/2003, p. 42).

Guilty plea counsel testified that he explained to the Defendant that indecent assault involves touching that is "sexual in nature." (P.C.R.A. Notes of Testimony, 9/9/2003, p. 31).

During the guilty plea colloquy, the Court directed an offender evaluation to be conducted as part of the PSI. Susan Kraus, Ph D., of Reading Specialists, preformed a sexual offender's evaluation of the Defendant dated June 11, 2002. During the evaluation, Dr. Kraus inquired about past allegations of the molestation of adolescent males by the Defendant. Dr. Kraus also questioned the Defendant in detail regarding his sexual history and his attraction to adolescent males. The evaluation concluded that the Defendant is sexually attracted to adolescent males. Dr. Kraus recommended sexual offender treatment to prevent possible relapses. The Defendant was sent a copy of Dr. Kraus' evaluation prior to sentencing.

The PSI also discussed the Defendant's sexual attraction to adolescent boys, his risk to re-offend and need of offender treatment.

During the sentencing colloquy, we read into the record portions of a letter that the Defendant sent to the victim long before entering his guilty plea. In that letter, the Defendant discussed his "love" for the victim. In the letter, the Defendant stated:

> As a school boy, you only get detention hall for unlawfully touching your teachers. If they cannot break this behavior now, you'll be in my boots as an adult. Sometime during that first day of work, I also gave you the first of many, many hugs, you hugged me back. All of those hugs were without permission and therefore, wrong. The fact that you hugged me back has absolutely nothing to do with anything. And I know better as an adult that there could have been a number of reasons why you hugged me. . . . I was so selfishly enjoying hugging you and getting hugged back, I did not want to ask, and yet I never had to say sincerely I love you.

Later in the letter, the Defendant spoke about the actual criminal assault where the Defendant described that the victim was laying on his stomach and:

> my hand was resting on your leg and my fingers actually on your lower buttocks. If that was all that happened, Justin, a simple apology would have taken care of a coincidence. However, I did not take my hand away and instead of it becoming just an embarrassing wakening, it became premeditating and deliberate touching. I continued to rub my hand on that part of your upper leg and lower buttocks under your boxers.... I regret I violated you physically, and by law we will never get time together again for work or play. I'll never be permitted by law to get to see you grow up, graduate or raise a family. Actually, some day in the future, my one wish is that I'll receive a card or note from you that says, Martin, I made it through the experience and I forgive you. And my second wish will be a lesson for you from getting into petting or as your generation calls it, date rape or any kind of sex regardless of marriage or peer group pressure.

This letter sent by the Defendant to the victim acknowledges his "love" for the thirteen-year-old boy, his inappropriate sexual touching and sounds more like a valentine or love letter than a letter of apology.

Finally, during his sentencing, defense counsel, the Court and finally, Mr. Shamlian had the following exchange in which defense counsel acknowledged Mr. Shamlian's attraction to boys and that he recommended that Mr. Shamlian begin counseling to address his "sexual addiction":

> MR. JOSEPH: That's what I'm trying to get at, Your Honor. I'm just - - I mean, I'm focusing on the night in question and the advantage that Mr. Shamlian had over this boy and how worse it could be than what it is, the allegations here and what he pled to.
>
> THE COURT: What do you mean by worse? You mean the boy pulled away, according to the statement?
>
> MR. JOSEPH: The boy pulled away and Mr. Shamlian did not continue after that.
>
> THE COURT: He did not pursue him, that's true.
>
> MR. JOSEPH: So there is something that's saying to Mr. Shamlian, stop, there's a consequence. And

there is something that Mr. Shamlian has, since this time, has addressed. He went and saw a Dr. Charles Miller under my recommendation.

THE COURT: I haven't seen any - -

MR. JOSEPH: He's involved in the Calvary Chapel of Philadelphia, which treats sexual addiction along with other substance abuse, which Mr. Shamlian does not use any other substance.

THE COURT: There is no indication of any substance abuse.

MR. JOSEPH: There is no indication. And the question of all the past and putting himself in a position to be around younger men, and I know Your Honor is thinking how many times did this happen in the past. He places himself in a position - -

THE COURT: Apparently, at least one other time.

MR. JOSEPH: Apparently, at least one other time from his own admission, and that's another thing, he was forthcoming to these evaluators.

THE COURT: Well, not initially, he minimized and denied involvement, but after some prodding from a Reading Specialists, he admitted a prior experience himself when he was a juvenile. He indicated that he had prior charges against him and then indicated that he had a history of homosexual relationships - -

MR. JOSEPH: And home - -

THE COURT: - - and is attracted, I think, to adolescents as well, but I think that goes without saying.

MR. JOSEPH: I understand. I don't know the age group and I don't know the correlation between homosexuality and what's before us.

THE COURT: I don't know either. It's just an indication of his past involvement.

MR. JOSEPH: I think there is sexual needs and I think it goes beyond - - it transcends beyond age. It transcends gender. There is sexual needs that need to be addressed and adjusted. And, well, I just want, I would like to offer this up to the Court that he's involved in these counseling sessions. This is a letter. When did you start these counseling sessions at Calvary?

MR. SHAMLIAN: Three weeks ago.

(Notes of Sentencing, 7/1/02, pp. 14-16).

Upon a review of the entire record, we find unbelievable that the Defendant now believes that he can fool the Court by complaining that he did not know or understand that sexual gratification was considered an element of the crime of indecent assault and further asserts that there was no motivation for sexual gratification on his part.

Failure to Advise Defendant of the Severity of the Charge

Defendant also alleges that guilty plea counsel failed to properly advise him that the crime with which he was charged was considered a misdemeanor of the second degree, instead advising him that it was categorized as a misdemeanor of the third degree. A misdemeanor of the third degree carries a one year maximum jail term, whereas a misdemeanor of the second degree carries a maximum sentence of two years and possible state supervision. Defendant avers that, had he known that the charge to which he was pleading guilty carried a more severe sentence than likely probation, he would not have entered the guilty plea.

The guilty plea colloquy includes the following exchange between the Court and the Defendant as it related to the grading and penalty for indecent assault:

THE COURT: That's graded as a misdemeanor 2, carries with it a maximum possible sentence of two years in prison and a fine of $5,000. Do you understand that?

MR. SHAMLIAN: Yes, your Honor.

(Notes of Guilty Plea, 4/9/02, p. 2).

Thereafter, the presentence investigation was completed. On the face page of the presentence investigation, the Probation Officer recited the grading as a misdemeanor 2 with a maximum possible sentence of 2 years and a $5,000.00 fine. The presentence investigation also included the sentencing guideline form correctly filled out identifying the grading and the proper guidelines. At the sentencing, the Court reviewed the presentence investigation in its entirety and referred to the offense gravity score and the guideline ranges. (Notes of Sentencing, 7/1/02, p. 3). After hearing a plea from defense counsel that addressed the possibility of probation versus a jail sentence, the Court again indicated that the charge in front of the Court had a maximum possible sentence of 24 months. (Notes of Sentencing, 7/1/02, p. 24).

The record is rife with references to the grading and maximum possible penalty for the indecent assault charge. At no point in the record did anyone suggest that the grading for the indecent assault was anything but a misdemeanor 2 with a maximum possible sentence of 24 months.

We do not find the Defendant credible.

Desire by Defendant to Withdraw his Guilty Plea

The Defendant asserts that he wanted to withdraw his guilty plea prior to sentencing, however, he was confused about his right to do so. The Defendant also claims that he instructed his lawyer to withdraw his guilty plea and that, despite his instruction to withdraw his guilty plea, his counsel refused to do so.

A review of the guilty plea colloquy indicates that the Court informed the Defendant that he has a right to withdraw his guilty plea prior to sentencing. (Notes of Guilty Plea, 4/9/02, p.10). The Court further directed guilty plea counsel to explain the Defendant's regarding his guilty plea. Id. The Defendant acknowledges that the Court did inform him of his right to withdraw his guilty plea prior to sentencing. (P.C.R.A. Notes of Testimony, 9/8/03, pp. 28-29). In addition, the Defendant acknowledged in his testimony that he had discussions with his attorney about whether or not he should withdraw his guilty plea. (P.C.R.A. Notes of Testimony, 9/8/03, pp. 17, 22-23). At the PCRA hearing, the Defendant was asked why, if he wanted to withdraw his guilty plea, he did not do so when he was before the Court prior to sentencing. The Defendant testified that "I was afraid, I was nervous and I didn't know what was going on. And I was assuming whatever I was doing, I was doing in support of that withdrawal." (P.C.R.A. Notes of Testimony, 9/8/2003, p. 23).

Guilty plea counsel testified that the Defendant did not ask to withdraw his guilty plea before sentencing. (P.C.R.A. Notes of Testimony, 9/9/03, pp. 9, 21).

The Court has reviewed the entire sentencing colloquy and there is no indication at any point in time that this Defendant that he wanted to withdraw his guilty plea, that he was confused or that he indicated any reluctance to continue with sentencing and allow his guilty plea to stand. We find Mr. Joseph's testimony credible. We do not find the Defendant credible.

IV. Conclusion

We find that the Defendant's claim of ineffectiveness of trial counsel is without merit. There was nothing presented in either the PCRA Petition or at the hearing that establishes ineffective assistance of counsel, an unknowing or involuntary plea or a refusal to permit the Defendant to withdraw his guilty plea. Defendant's Petition for Post-Conviction Relief is denied.

BY THE COURT:

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STEPHEN G. BARATTA, J.