NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DEAN KEVIN ZIEGLER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 598 EDA 2013

Appeal from the PCRA Order January 22, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0000680-2011

BEFORE: FORD ELLIOTT, P.J.E., BOWES, and OTT, JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 17, 2013**

Dean Kevin Ziegler appeals from the January 22, 2013 order denying his first PCRA petition. We affirm.

On December 14, 2011, Appellant, who was a chiropractor, pled guilty to insurance fraud[1] graded as a third degree felony at this criminal at this criminal action number and to simple assault at an unrelated action number. Appellant does not challenge the guilty plea for simple assault that was

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[1] Appellant pled guilty to insurance fraud pursuant to 18 Pa.C.S. § 4117(a)(2). In ***Commonwealth v. Stern***, 701 A.2d 568 (Pa. 1997), our Supreme Court held that a related subsection, 18 Pa.C.S. § 4117(b)(1), which criminalized the payment of referral fees to non-lawyers, to be an unconstitutional encroachment upon the High Court's exclusive authority to supervise the conduct of attorneys in Pennsylvania. However, that holding did not implicate the remainder of the section insofar as it does not involve the Supreme Court's authority to govern the practice of law.

instituted after he punched his girlfriend in the face. The Commonwealth outlined the factual basis for the pertinent guilty plea as follows:

> The affiant[s are] Detective Peter McAfee and Detective Barry McCooley of the Insurance Fraud Task Force. They report that they received an anonymous tip from an individual indicating that the defendant in this case, Mr. Ziegler, had been submitting bills for services that were not performed.
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> The caller also reported that at one point the defendant was in jail and the practice continued running without his supervision.
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> Based on that an investigation was initiated, You[r] Honor, on August 5th of 2008. The Detectives determined that the defendant was arrested for reckless endangerment and as a result of that he spent some time in Lehigh County Prison.
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> The investigation further determined that while the defendant was incarcerated, particularly in the dates of January 23rd, January 27th, January 29th of 2009, as well as January 31st of 2009, the defendant had submitted bills or had his practice submit bills for doctor examinations that had occurred on those dates.
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> Because he was incarcerated it was determined that doctor exams could not have been performed, based on his location at that point in time. Detectives further conducted an undercover operation where 13 appointments were made for treatment at Ziegler Chiropractic.
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> Detectives working in an undercover capacity and audiotaping the interactions that occurred at the Ziegler Chiropractic Clinic determined that doctor's exams were billed for approximately — well, actually ten of the visits made by the undercover officers when, in fact, doctor's exams were not performed and compensation for that activity was submitted to State Farm Insurance, Infinity Insurance, Nationwide, [and] Titan AIG for those services that were in fact not rendered.
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> Total services billed were slightly over $2,000.

N.T., 12/14/11, 5-8.

Appellant retained Glenn McGogney, Esquire, to negotiate the plea agreement. In exchange for Appellant's guilty plea to one count of insurance fraud in this case, the Commonwealth agreed to limit Appellant's minimum sentence exposure to four month's imprisonment and to withdraw the remaining charges. Following an oral guilty plea colloquy and confirmation of Appellant's execution of a written plea colloquy, the trial court accepted Appellant's guilty plea. On January 28, 2012, the trial court imposed four to twelve month's imprisonment. Additionally, the same day, the trial court imposed a consecutive sentence of one to eleven months imprisonment for the simple assault. Thus, Appellant's aggregate term of imprisonment was five months to twenty three months imprisonment.

Appellant failed to file a direct appeal. Instead, on October 9, 2012, Appellant timely filed a *pro se* PCRA petition. Counsel was appointed and filed an amended PCRA petition challenging Attorney McGogney's effectiveness for incorrectly advising him of the collateral consequences of his guilty plea to insurance fraud and in failing to request certain discovery from the Commonwealth prior to negotiating the plea agreement. Following an evidentiary hearing, the PCRA court denied the amended petition and penned a comprehensive opinion outlining the reasons for its decision to deny relief. This timely appeal followed. Appellant complied with the PCRA court's order to file a concise statement of errors complained of on appeal

and the trial court issued a Rule 1925(a) opinion that relied upon its prior expression of rationale.

Appellant raises a single two-part question for our review:

> Whether the lower court erred by denying the defendant's P.C.R.A. petition which was based upon the defendant's belief that trial counsel was ineffective for incorrectly advising the defendant as to the repercussions that would occur regarding his business license and couns[e]l's failure to properly obtain all discovery in this case which resulted in defendant's entry of a guilty plea when the defendant believed he was innocent?

Appellant's brief at 7.

"Our standard of review in an appeal from the grant or denial of PCRA relief requires us to determine whether the ruling of the PCRA court is supported by the record and is free from legal error." ***Commonwealth v. Lesko***, 15 A.3d 345, 358 (Pa. 2011).

> This review is limited to the findings of the PCRA court and the evidence of record. ***Id.*** We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. ***Id.*** This Court may affirm a PCRA court's decision on any grounds if the record supports it. ***Id.*** Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. ***Commonwealth v. Carter,*** 21 A.3d 680, 682 (Pa.Super. 2011). However, we afford no such deference to its legal conclusions. ***Commonwealth v. Paddy,*** 609 Pa. 272, 15 A.3d 431, 442 (2011); ***Commonwealth v. Reaves,*** 592 Pa. 134, 923 A.2d 1119, 1124 (2007). Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary. ***Commonwealth v. Colavita,*** 606 Pa. 1, 993 A.2d 874, 886 (2010).

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa.Super. 2012).

Herein, Appellant contends that his guilty plea was induced by plea counsel's ineffectiveness. Our Supreme Court recently reiterated the applicable legal principles relating to the right to constitutionally effective counsel as follows:

> Appellant may only obtain relief if [he] pleads and proves by a preponderance of the evidence that [his] conviction resulted from ineffective assistance of counsel that, under the circumstances, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. ***See*** 42 Pa.C.S. § 9543(a)(2)(ii). The Pennsylvania test for ineffectiveness is, in substance, the same as the two-part performance-and-prejudice standard set forth by the United States Supreme Court, ***see Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), although this Court has divided the performance element into two sub-parts dealing with arguable merit and reasonable strategy. Thus, to succeed on an ineffectiveness claim, a petitioner must establish that: the underlying legal claim has arguable merit; counsel had no reasonable basis for her action or inaction; and the petitioner suffered prejudice as a result. ***See Commonwealth v. Pierce***, 515 Pa. 153, 158–60, 527 A.2d 973, 975–76 (1987). To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694, 104 S.Ct. at 2068; ***accord Commonwealth v. Cox***, 603 Pa. 223, 243, 983 A.2d 666, 678 (2009). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. ***See Commonwealth v. Ali***, 608 Pa. 71, 86–87, 10 A.3d 282, 291 (2010). No relief is due, however, on any claim that has been waived or previously litigated, as those terms have been construed in the decisions of this Court. ***See*** 42 Pa.C.S. § 9543(a)(3).

Commonwealth v. King, 57 A.3d 607, 613 (Pa. 2012).

As it relates to the entry of a guilty plea, allegations of plea counsel's ineffectiveness will not form a basis for relief unless the alleged

ineffectiveness caused the defendant to enter the plea involuntarily or unknowingly. ***See Commonwealth v. Anderson***, 995 A.2d 1184, 1192 (Pa.Super. 2010). Voluntariness is gauged in terms of "whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." ***Id***. (quoting ***Commonwealth v. Moser***, 921 A.2d 526, 531 (Pa.Super. 2007)). In assessing the sufficiency of a guilty plea colloquy, we review the totality of the circumstances and the entire record, including plea counsel's testimony during the PCRA hearing. ***Commonwealth v. Morrison***, 878 A.2d 102, 107 (Pa.Super. 2005) (*en banc*).

In order to ensure a voluntary, knowing, and intelligent plea, the trial court is required to make the following inquiries:

> 1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or *nolo contendere*?
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> 2) Is there a factual basis for the plea?
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> 3) Does the defendant understand that he or she has the right to a trial by jury?
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> 4) Does the defendant understand that he or she is presumed innocent until found guilty?
>
> 5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged?
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> 6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Pollard, 832 A.2d 517, 522-523 (Pa.Super. 2003); Comment to Pa.R.Crim.P. 590(A)(2).

Herein, Appellant does not specifically challenge any of the foregoing factors. Instead, the crux of Appellant's ineffective assistance claim is that Attorney McGogney was ineffective in advising him of the consequences that his guilty plea would have upon his chiropractic practice. Significantly, however, Appellant does not assert that counsel failed to inform him that he would likely lose his license to practice chiropractic medicine following his conviction. Instead, conceding that the pertinent advice was, in fact, proffered, Appellant contends that counsel mislead him to believe that he could continue his professional practice without a license by forming a professional corporation. Appellant maintains that had Attorney McGogney given him correct advice, he would not have pled guilty.

The certified record belies Appellant's contention that his plea was induced by counsel's ineffectiveness. First, it is well settled that plea counsel need not advise a defendant client of collateral consequences of a conviction. ***See Commonwealth v. Abraham***, 62 A.3d 343, 350 (Pa. 2012) ("[***Commonwealth v. Frometa***, 555 A.2d 92, 93 (1989)] general holding remains: a defendant's lack of knowledge of collateral consequences of the entry of a guilty plea does not undermine the validity of the plea, and counsel is therefore not constitutionally ineffective for failure to advise a defendant of the collateral consequences of a guilty plea."). The High Court further explained, "[t]he distinction between a direct and collateral consequence of a guilty plea has been effectively defined by this Court as

the distinction between a criminal penalty and a civil requirement over which a sentencing judge has no control."[2] ***Id***. (citation omitted). Instantly, it is beyond cavil that the judge presiding over the fraud trial lacked any control over the State Board of Chiropractic's decision to prohibit Appellant from practicing chiropractic medicine much less the authority to address the propriety of the corporate structure of Appellant's practice.[3] Hence, losing

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[2] While it is not pertinent to our review in the case at bar, the Supreme Court in ***Commonwealth v. Abraham***, 62 A.3d 343, 350 (Pa. 2012) adopted the two-step analysis the United States Supreme Court employed in ***Smith v. Doe***, 538 U.S. 84 (2003), to assess whether a statute is punitive. That analysis, which is not relevant herein, first considers whether the legislature intended the provision to be punitive. Thereafter, "[i]f the intent is found to be nonpunitive and therefore civil, the second inquiry is whether, despite this intent, the statute is so punitive either in purpose or effect as to negate the intention to deem it civil. ***Id***. (citations and original brackets and quotations omitted). The latter analysis entails a review of "seven factors as 'useful guideposts' for determining whether the statute imposes criminal punishment." ***Id***. at 351. Those factors are as follows:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id. (quoting ***Commonwealth v. Williams***, 832 A.2d 962, 973) (Pa. 2003)).

[3] In Pennsylvania, the State Board of Chiropractic regulates the licensure of chiropractors. ***See*** Chiropractic Practice Act, 63 P.S. §§ 625.101 - 625.1106. As of the date of the PCRA hearing, Appellant maintained his chiropractic license.

his chiropractic license was not only an expected collateral consequence of his fraud conviction, to the extent that he believed he could circumvent the State Board of Chiropractic's imminent determination and continue operating a clinic, that misapprehension of the law did not undermine the validity of the plea agreement.

During the evidentiary hearing, Attorney McGogney testified that he represented Appellant in the underlying criminal matters and in several civil matters. N.T., 1/2/13, at 33. He confirmed that he had at least twelve discussions with Appellant at his law office and estimated twenty to fifty telephone conferences. ***Id***. at 34. Counsel testified that Appellant called him two to three times on certain days. ***Id***.

The two discussed at length the probability that Appellant would lose his chiropractic license, and Appellant suggested relocating the practice to the Caribbean or seeking licensure in Texas. ***Id***. at 36-37. In fact, in light of the strength of the Commonwealth's insurance fraud case and Appellant's inability to afford an expert to present a positive interpretation of his billing scheme, the reality of Appellant losing his license following his conviction was so obvious, the chosen trial strategy was to delay the case and thereby extend Appellant's ability to continue to practice as long as possible.[4] ***Id***. at

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[4] Appellant proposed the expert testify about the latitude chiropractors have in medical coding that would explain why it appeared he billed a patient for
(Footnote Continued Next Page)

36-37, 39. Indeed, Appellant successfully obtained several continuances. ***Id***. at 36-37, 39, 40. Attorney McGogney further explained that the Commonwealth had overwhelming evidence of the fraudulent billing, including the testimony of undercover investigators who were examined at Appellant's office on one occasion but were charged for multiple procedures and examinations that were not performed. ***Id***. at 37. Thus, in anticipation of what counsel and Appellant both believed to be inevitable, Attorney McGogney attempted to fashion a corporate structure that would permit Appellant to continue to operate the chiropractic clinic if and when Appellant lost his license to practice. ***Id***. at 47.

Based upon Attorney McGogney's explanation that he advised Appellant of the probable collateral consequence of his plea, the PCRA court found that Appellant's ineffective assistance claim was untenable. The court announced, "Whatever little machinations were going on with you trying to still continue to practice, when you have an insurance fraud conviction against you, is not relevant to whether or not the plea was knowing, intelligent and voluntary. It's just not. And until I see some case law that says otherwise, this [argument] is approaching ridiculous." ***Id***. at 48. We agree with the PCRA court's perspective. Herein, Appellant was not only aware of the collateral consequence that his guilty plea would have on his

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an office visit even if he did not examine the patient personally. N.T., 1/2/13, at 41.

license to practice chiropractic medicine, he reorganized the corporate structure of his chiropractic clinic in a futile attempt to circumvent the specific consequence that he anticipated. The fact that Appellant's supposed remedy to the expected collateral consequence of his guilty plea was flawed did not render his plea unknowing.[5] Thus, no relief is due.

The second component of Appellant's ineffective assistance claim assails Attorney McGogney's decision to forgo requesting discovery of an audiotaped conversation between Appellant and his officer manager, Selinas Rivera that was recorded while Appellant was in prison for a parole violation. While the audiotape was believed to contain incriminating evidence of the insurance fraud scheme, Appellant claims the audiotape, in fact, recorded a benign conversation where he and Ms. Rivera deciphered his handwriting on office documents. ***Id***. at 26-27. Appellant now asserts that, had he known the contents of the audiotape, he would not have pled guilty. Thus, he

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[5] Although not cited by Appellant, we observe that this Court recently held in ***Commonwealth v. Brandt***, 74 A.3d 185 (Pa.Super. 2013) that, regardless of whether the consequences are direct or collateral, it is constitutionally ineffective assistance for counsel to misapprehend the consequences of a plea and mislead the client regarding those consequences. That holding is completely inapplicable, however, where, as here, counsel correctly anticipated the collateral consequence of the guilty plea and advised his client accordingly. Undeniably, Attorney McGogney advised Appellant that he would likely lose his chiropractic license as a collateral consequence of the plea and Appellant still expects this consequence to occur. To the extent that counsel provided defective advice in an attempt to circumvent the inevitable consequence of the plea, that defect is too remote to affect Appellant's constitutionally protected right to effective counsel during the criminal proceedings or invalidate the plea.

posits that plea counsel rendered ineffective assistance in failing to procure the audiotape from the Commonwealth.

In rejecting this argument, the PCRA found that Attorney McGogney made a strategic decision to forgo the audiotape because it was a minor part of the Commonwealth's case and requesting it might annoy the prosecution and derail the ongoing plea negotiations. Trial Court Opinion, 1/22/13, at 6-7. As the record supports the PCRA court's determination, we will not disturb it.

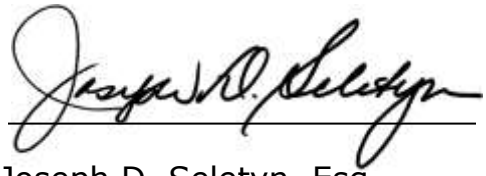
Trial counsel has broad discretion to employ trial tactics and strategies and counsel's decision is not tantamount to ineffective assistance unless counsel had no reasonable basis for the action or inaction. ***See King supra*** 619. Herein, Attorney McGogney proffered a reasonable basis for declining to pursue the audiotape.

Attorney McGogney explained that he requested several items from the Commonwealth, including witness statements and police reports. N.T., 1/2/13, at 41. However, he declined to pursue the audiotape because it was a minor component of the Commonwealth's case, and he was more concerned with the witnesses who actually went to the clinic and were billed incorrectly. ***Id***. at 41, 44. Attorney McGogney believed that the testimony presented by those witnesses would be sufficient to convict Appellant, particularly when Appellant was unable to present an expert to dispute the Commonwealth's expert testimony regarding the billing codes. ***Id***. at 41-42.

Moreover, Attorney McGogney met with the insurance fraud investigators and learned that the Commonwealth was considering amending the criminal complaint to level several additional charges stemming from its investigation of Appellant's billing practices. ***Id***. at 35-36. Attorney McGogney believed that the plea agreement was the best that Appellant could attain under the circumstances and he did not want to needlessly annoy the prosecution to obtain an inconsequential piece of evidence. ***Id***. at 38-39. As Attorney McGogney provided a competent rationale for his decision to forgo requesting the audiotape, Appellant cannot demonstrate that counsel had no reasonable basis for his action. ***See Commonwealth v. Timchack***, 69 A.3d 765, 773-74 (Pa.Super. 2013) ("plea counsel set forth to engage in favorable plea negotiations, and therefore, he had a reasonable basis for not undertaking additional investigation and discovery"). As Appellant is not able to establish the second prong of the test to determine ineffective assistance, the claim fails. ***Commonwealth v. Philistin***, 53 A.3d 1, 10 (Pa. 2012) (failure to prove any prong of three-part test governing claim of ineffective assistance of counsel will defeat claim).

Order affirmed

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013