

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

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 vs. : No. CR-859-2019  
 :  
 JOHN HENRY BOYD, :  
 Defendant :  
 :

Brian Gazo, Esquire                      Counsel for Commonwealth  
    Assistant District Attorney  
 Joseph Hudak, Esquire                  Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - November 15, 2022

On September 22, 2022, the Defendant, John Henry Boyd (hereinafter "the Defendant" or "Boyd") filed a Notice of Appeal from this Court's decision to deny a Post-Conviction Relief Act (hereinafter "PCRA") Petition in which he claimed his trial counsel, Edward Olexa, Esquire was ineffective. For the reasons stated herein, this Court would request that its decision be upheld and the Appeal denied.

FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

On May 7, 2021, the Defendant filed a pro se petition for relief pursuant to the PCRA.<sup>2</sup> At his request, this Court appointed counsel Michael Gough, Esquire to represent him. Shortly

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<sup>1</sup> This Court dispenses with the recitation of Facts and Procedural Background of this case here and direct the Appellate Court to the relevant section of its Memorandum Opinion of August 25, 2022 annexed hereto.

<sup>2</sup> 42 Pa.C.S.A. §9541 et. seq.

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thereafter, Boyd retained Joseph Hudak, Esquire who promptly filed a counselled petition for PCRA relief. A hearing occurred on March 31, 2022 a decision from which was rendered on August 25, 2022.

Thereafter, Boyd filed a timely appeal on September 22, 2022 with the Carbon County Clerk of Courts Office through the "PACFile" system of CPCMS.<sup>3</sup> Counsel claimed he also served a copy of this Appeal upon the undersigned and Court Administration, however, this was not possible as neither subscribe to the PACFile system for service purposes. It was only on October 5, 2022 by happenstance that the Court became aware of the filing of the appeal on September 22, 2022. As a result, on October 5, 2022, this Court issued an Order directing the Defendant to file a Concise Statement of Matters Complained of on Appeal. On October 24, 2022, Boyd filed that Concise Statement. While written in paragraph form as opposed to succinct and specific perceived errors, the Court was able to glean the following as those errors:

1. Counsel failed to fully advise the Defendant of the causation element as set forth in *Commonwealth v. Long*, 624 A.2d 200 (1993);
2. Counsel, at a minimum should have petitioned for habeas corpus relief as to the charge of 75 Pa.C.S. §3735.14; and
3. Counsel failed to advise the Defendant on the causation

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<sup>3</sup> Common Pleas Case Management System.

<sup>4</sup> This issue was not raised in the PCRA Petition.

element in a manner allowing the Defendant to enter a knowing, intelligent and voluntary plea of guilty.

### LEGAL DISCUSSION

#### I. Habeas Corpus Relief

Boyd raises this issue for the first time on Appeal. "Issues not raised in the trial court are waived and cannot be raised for the first time on appeal. Pa.R.A.P. Rule 302(a)." Thus, since neither the pro se nor the counselled PCRA Petitions raised this issue, it is waived for purposes of this Appeal.

#### II. Causation Element of 3735.1 Charge

This Court's review of the other perceived errors complained of dealing with the causation element of 3735.1, Attorney Olexa's review of the evidence of that causation element and the manner in which he explained it to Boyd to allow for Boyd to consider and enter a knowing, intellectual and voluntary plea to this charge is fully analyzed and explained in this Court's Memorandum Opinion dated August 25, 2022. For these reasons this Court refers the Superior Court to that Opinion.<sup>5</sup>

### CONCLUSION

For the reasons stated, this appeal should be denied.

BY THE COURT:

  
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Joseph J. Matika, J.

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<sup>5</sup> Specifically, this Court addressed this issue in that Opinion under "I" of Legal Discussion.

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

**ORIGINAL**

COMMONWEALTH OF PENNSYLVANIA :

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vs. :

No. CR-859-2019

:

JOHN HENRY BOYD,  
Defendant :

:

Brian Gazo, Esquire

Counsel for Commonwealth

Assistant District Attorney

Joseph Hudak, Esquire

Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - August 25, 2022

The Defendant, John Henry Boyd (hereinafter, "the Defendant" or "Boyd") has filed a Post-Conviction Relief Act ("PCRA") Petition claiming that his trial counsel, Edward Olexa, Esquire (hereinafter "Olexa") was ineffective in terms of his representation of Boyd. Based upon our review of the record in this matter, after hearing and considering the Post-Hearing Brief<sup>1</sup>, this Court will deny and dismiss this relief requested in the Petition finding no ineffectiveness on the part of counsel.

FACTUAL AND PROCEDURAL BACKGROUND

On April 7, 2019, the Defendant was travelling on Interchange Road in Franklin Township, Carbon County when he encountered two motorcycles driven by Robert Stewart and Heather White. .

<sup>1</sup> The Commonwealth failed to lodge a brief.

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(hereinafter "the Victims") both of which were slowing down to make a right hand turn onto Rock Street. Prior to being able to turn onto Rock Street, the victims were both struck from behind by the vehicle driven by the Defendant. Both of the victims sustained serious injuries as a result of being struck by Boyd. State Police responded and began an investigation. While interviewing Boyd, Trooper Inserra detected a very strong odor of an alcoholic beverage emanating from the Defendant's breath. He also observed that the Defendant's eyes were bloodshot and glassy and that his speech was slow and slurred. The defendant admitted to drinking at Ruby's Saloon prior to the accident. The Defendant was then requested to perform field sobriety tests which the Defendant agreed to perform but in the opinion of the Trooper, Boyd was unable to perform these tests as demonstrated. Boyd was placed under arrest and transported to a local hospital where he refused a blood test.<sup>2</sup>

Boyd was subsequently charged with two counts of Aggravated Assault by Vehicle While DUI [18 Pa.C.S.A. §3735.1(A)], Driving Under the Influence [75 Pa.C.S.A. §3.802(a)(1)] and several summary offenses. Pursuant to an amendment to the original information, one Count of Simple Assault [18 Pa.C.S.A. §2701(a)(2)] was added. Eventually, Boyd entered counselled guilty

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<sup>2</sup> Derived from the Affidavit of Probable Cause attached to the criminal complaint filed against the Defendant.

pleas to Aggravated Assault by Vehicle While DUI, DUI and Simple Assault, Counts 2, 3 and 7 respectively. Sentencing was deferred for purposes of the completion of a pre-sentence investigation and to determine restitution.

On August 21, 2020, Boyd was sentenced to a total aggregate sentence of not less than 24 months nor greater than 72 months in a State Correctional Institution. At the time of sentencing no request was made regarding a RRRI<sup>3</sup> (Recidivism Risk Reduction Incentive) sentence nor making the Defendant "not ineligible" for the State Drug Treatment Program (hereinafter "SDTP").<sup>4</sup>

On August 31, 2020, the Defendant filed a timely post-sentencing motion. The purpose of the motion was to modify the sentence and to reduce the amount of restitution ordered. A hearing was held on this motion on October 8, 2020 after which the matter was taken under advisement. Briefs were lodged shortly thereafter, however, prior to deciding the matter, Boyd filed a motion<sup>5</sup> to withdraw his post-sentence motion on December 1, 2020. A rule was then issued upon the Commonwealth to show cause why the relief should not be granted.<sup>6</sup> With no response from the Commonwealth,

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<sup>3</sup> 61 Pa.C.S.A. §4581 et.seq.

<sup>4</sup> 61 Pa.C.S.A. §4101 et.seq.

<sup>5</sup> The Motion to Withdraw the Post-Sentencing Motion requested the withdrawal of all issues raised in that post-sentencing motion except the issue of restitution which counsel represented had been resolved by agreement of the parties.

<sup>6</sup> In this Post-Sentencing Motion, Boyd was requesting the Court to resentence him to a term of not less than two (2) years nor more than four (4) years in a

this Court issued an order on January 4, 2021 granting Boyd's request to withdraw his post-sentence motion with the exception of the issue of restitution which had previously been resolved by agreement of the parties, the terms of which were outlined in paragraph 3 of the January 4, 2021 Order.

As a result of the issuance of this January 4, 2021 Order, Defendant's case had concluded at the trial level. No direct appeal was filed.

On May 7, 2021, Boyd, acting Pro Se, filed a PCRA Petition. In that Petition, he requested court appointed counsel. Attorney Michael Gough was appointed to represent Boyd. Thereafter and before any further proceedings could be held, Defendant's current counsel, Joseph Hudak, Esquire filed a PCRA Petition.<sup>7</sup> In this petition, Boyd claimed that his trial counsel was ineffective in four ways: .

- 1) Olexa should never have counselled Boyd into entering the guilty pleas because the evidence did not satisfy the Commonwealth's burden to establish the causation element of 75 Pa.C.S.A. §3735.1 nor the negligence element because the victims were contributorily negligent;
- 2) Olexa failed to pursue a Court sanctioned "not ineligible

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State Correctional Institution. Additionally, Boyd was requesting that he be made "not ineligible" for the State Drug Treatment Program. Lastly, Boyd was requesting a modification of restitution.

<sup>7</sup> While not labelled an Amended PCRA Petition, the Court treated it as such therefore supplanting rather than supplementing Boyd's original petition.

for State Drug Treatment Program" notation as part of Boyd's Sentences:

- 3) Olexa failed to request RRRI consideration for Boyd; and
- 4) Olexa failed to present evidence as a means of reducing the restitution amount.

A hearing was held on this petition on March 31, 2022. Olexa testified extensively on his review of the evidence that the Commonwealth possessed to support the charges against Boyd. Based upon his 16 years of experience as a criminal defense attorney, he believed that this evidence was sufficient to establish the element of causation of the crash and subsequent injuries to the victims and that Boyd could be criminally liable as a result. Olexa also testified that Boyd never provided him with any information suggesting that the victims were contributorily negligent. Olexa also testified that he counselled Boyd on the best possible outcome of these charges after various discussions with the Commonwealth vis-à-vis which charges the Defendant would plead to and what offense gravity scores would be attributable thereto. Olexa testified that the stipulation signed by Boyd was the culmination of his examination of the evidence and his plea negotiations with the Commonwealth.

On the issue of the SDTP, Olexa acknowledged that this was not brought up at the time of sentencing, thus the reason to seek the modification of the sentence by the inclusion of this request



in the post-sentencing motion. At the hearing on that motion, Olexa pursued this claim, however, while the matter was under advisement, he learned that Boyd had already been placed in SDTP by the Department of Corrections. Armed with this information along with knowledge that the victims were opposed to this request and knowing and advising Boyd of the risks of both pursuing and/or withdrawing this request, it was decided to withdraw the post-sentencing motion as it related to the SDTP request as Boyd was already in the program. They agreed that to pursue the issue any further would have been tantamount to "rocking the boat" which Olexa said Boyd was adamant he did not want to do. Olexa noted that Boyd would rather leave well enough alone and did not want to tip the Department of Corrections off that they may have placed him into SDTP erroneously.

Olexa, also testified that the stipulation reached on the issue of restitution was a significant reduction in the amount previously ordered by the Court.<sup>8</sup>

No testimony was ever elicited on the issue of RRRI eligibility at the PCRA hearing.

This PCRA is now ripe for disposition by the Court.

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<sup>8</sup> At the time of sentencing Boyd was ordered to pay restitution to the victims in a combined amount of \$557,687.75. The stipulation reached on October 8, 2020 resulted in this aggregate amount being reduced to a combined \$100,000.00 and limiting Boyd's monetary payment obligation on restitution to no more than \$500.00 per month.

## LEGAL DISCUSSION

In order to be successful on an ineffective assistance of counsel claim, a PCRA petitioner must plead and prove by a preponderance of the evidence that 1) the underlying legal claim has arguable merit; 2) trial counsel had no reasonable basis for acting or failing to act; and 3) the petitioner suffered resulting prejudice. *Commonwealth v. Baumhammers*, 92 A.3d 708, 719 (Pa. 2014). Should the petitioner fail in establishing any of these factors, his claims fail. *Id.*

[A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the ineffective 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. §9543(a)(2)(ii). Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him.

*Commonwealth v. Spatz*, 84 A.3d 294, 311-12 (Pa. 2014) (internal quotation marks and other punctuation omitted.)

To this must be added that

[g]enerally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. Where matters of strategy and tactics are concerned, a finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

*Spotz*, 84 A.3d at 311-12 (internal quotation marks and other punctuation omitted); *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983) ("Before a claim of ineffectiveness can be sustained, it must be determined that, in light of all the alternatives available to counsel, the strategy actually employed was so unreasonable that no competent lawyer would have chosen it.").

I. Causation and Negligence Elements Under 75 Pa.C.S.A. §3735.1

Boyd argues that Olexa was ineffective for counselling him into entering a guilty plea when the evidence possessed by the Commonwealth, he claimed could not establish beyond a reasonable doubt the causation and negligence elements of the charge of Aggravated Assault While DUI (75 Pa.C.S.A. §3735.1). This offense is defined as follows:

"Any person who negligently causes serious bodily injury to another person as the result of a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3802 commits a felony of the second degree when the violation is the cause of the injury."  
[75 Pa.C.S.A. §3735.1(a)]

Olexa testified that after a thorough examination of the evidence provided in discovery, in his mind it was not in dispute that the evidence established the causation and negligence of this

crime and that he was not aware of any contributory negligence on the part of the victims which would negate these elements.<sup>9</sup>

Even if what Boyd testified to is true, "[t]he law is clear that a victim's contributory negligence, if any, is not a defense . . . if the Defendant's conduct was a direct and substantial factor in causing the accident" *Comm. V. Nicotra*, 625 A.2d 1259, 1264 (Pa. Super. Ct. 1993). "Criminal Responsibility is properly assessed against one whose conduct was a direct and substantial factor in producing the [injury] even though other factors combined with the conduct to achieve the result." *Comm. V. Shoup*, 620 A.2d 15, 18 (Pa. Super. Ct. 1993). As long as the Defendant's conduct started the chain of causation which led to the victim's injuries, criminal responsibility may properly be found. *Nicotra*, *Supra* at 1264.

The evidence upon which Olexa counselled the Defendant into entering a guilty plea to this charge include: 1) Boyd was travelling behind and in the same direction as the victims who had slowed to make a right-hand turn; 2) Boyd collided with the motorcycles driven by the victims; 3) Boyd was driving under the influence of alcohol at the time of the collision with the

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<sup>9</sup> Boyd testified that as to the motorcycles he struck, one did not have an operable taillight and the other taillight was obscured by an article of clothing and that he did not see either of them. Olexa testified that Boyd never told him about these facts. Olexa was aware that one of the victims was also charged with DUI for his part of this incident.

victims<sup>10</sup>; and 4) both victims suffered severe physical injuries as a result of being struck from behind by Boyd.

This Court discerns no identifiable ineffectiveness on Attorney Olexa's part vis-à-vis his assessment of the evidence and the counsel and advice he gave to Boyd to allow Boyd to make an informed decision to plead guilty to the charge of Aggravated Assault by Vehicle While DUI, a violation of 75 Pa. C.S.A. §3735.1. This Court finds Boyd's conduct to be a direct and substantial factor in causing the accident and the injuries sustained by the victims.

## II. State Drug Treatment Program

Boyd next argues that Olexa was ineffective for the manner in which he approached the issue of Boyd's possible participation in the State Drug Treatment Program. Initially, the subject was not addressed at the Defendant's sentencing hearing on August 21, 2020. As a result, in his post-sentencing motion, Boyd requested that the Court modify the sentence and make him "not ineligible" for SDTP. After the hearing on this motion and before the Court had an opportunity to render a decision on it, Olexa, on behalf of Boyd, filed a motion to withdraw the post-sentencing motion. The end result of this request would be that the Court would not address Boyd's "ineligibility". At the PCRA hearing, Olexa

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<sup>10</sup> Boyd plead guilty to this offense and is not challenging the guilty plea as to this charge.

explained that he learned that Boyd was already placed into the SDTP by the Department of Corrections despite the Court never making him "not ineligible." Olexa further explained that after consulting with Boyd about this issue, it was felt that it would be best to "not rock the boat." In other words, Olexa noted that he did not want to reach out to the Department of Corrections to tell them that Boyd's placement in SDTP was done so without the Court not making him "not ineligible" nor did he want the Court to render a decision that would adversely impact his standing in SDTP.<sup>11</sup>

This Court finds that, while in the end, the issue of placement in the SDTP did not work in Boyd's favor, the decision to not pursue an official designation of "not ineligible" by the Court was equally as risky, if not more so, than not rocking the proverbial boat. Olexa's advice to let well enough alone was a strategic decision which, while ultimately unfavorable to Boyd, was not so unreasonable to render this choice ineffective.

### III. RRRI Eligibility

Boyd next argues that Olexa was ineffective for failing to request that the Court make the Defendant RRRI eligible at the time of sentencing. Such a designation would allow, under certain circumstances, for Boyd's sentence to be shortened.

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<sup>11</sup> Olexa alluded to the fact that the victims were adamantly opposed to the Defendant's SDTP placement, a position he felt would greatly decrease Boyd's chances of being declared "not ineligible."

A Court's failure to impose a RRRI sentence implicates the legality of the sentence. *Commonwealth v. Tubin*, 89 A.3d 663, 670 (Pa. Super. Ct. 2014). The legality of a sentence is always subject to review within the context of a PCRA Petition. *Commonwealth v. Beck*, 848 A.2d 987, 989 (Pa. Super. Ct. 2004) Conceivably therefore, Boyd would be otherwise correct in his assertion that Olexa was ineffective for not requesting that he be made RRRI eligible, however, Boyd is not statutorily eligible for RRRI considerations. Pursuant to 61 Pa.C.S.A. §4503, an eligible person is one who

"(3) Has not been found guilty of or previously convicted of or adjudicated delinquent for or criminal attempt, criminal solicitation or criminal conspiracy to commit murder, a crime of violence as defined in 42 Pa.C.S. § 9714(g) (relating to sentences for second and subsequent offenses) or a personal injury crime as defined under section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act, except for an offense under 18 Pa.C.S. §2701 (relating to simple assault) when the offense is a misdemeanor of the third degree, or an equivalent offense under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation." (emphasis ours).

Pursuant to the Crime Victims Act, 18 P.S. §11.103, the crimes identified as "personal injury crimes" includes Aggravated Assault by Vehicle While DUI [18 Pa.C.S.A. §3735.1]. Thus, the offense to which the Defendant pled guilty would preclude him from being

eligible for RRRI consideration. Consequently, even if Olexa had asked for such eligibility, Boyd was not entitled to the same.<sup>12</sup>

#### IV. Restitution

Lastly, Boyd argues that Olexa was ineffective insofar as he failed to produce evidence at the time of sentencing with regard to causation and contributory negligence to perhaps negate, resolve or otherwise eliminate. This Court agrees that no such testimony was produced, however, to do so would conceivably result in no guilty plea being entered in the first instance. In making such an argument, Boyd would suggest that the Commonwealth could not establish the elements of the offense of Aggravated Assault by Vehicle While DUI. Further, for reasons stated earlier in this opinion this Court found that there was sufficient evidence to establish the causation and negligence elements.

It should also be noted that Olexa was successful, via the post-sentencing motion, in reducing the amounts of restitution ordered at sentencing from a combined \$557,687.75 to \$100,000.00.

#### CONCLUSION

For all the reasons stated herein, this Court does not find that Boyd is entitled to any relief pursuant to the Post Conviction Collateral Relief Act, 42 Pa.C.S. §9541. Further, this Court does

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<sup>12</sup> It should also be noted that there was no evidence or testimony touching upon RRRI eligibility at the PCRA hearing. This Court addresses it here, however, due to RRRI eligibility impacting the legality of the sentence.



not find that Attorney Edward Olexa was ineffective in any way in his representation of John Boyd; quite the contrary actually.

BY THE COURT:

  
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Joseph J. Matika, J.