to an iron pin at lands of David H. Eberly and Frances M. Eberly, his wife; thence by said lands of David H. Eberly and Frances M. Eberly, his wife, the following courses and distances: South 61 degrees 50 minutes 59 seconds West 199.85 feet to a set iron pin; thence South 33 degrees 20 minutes 01 seconds East 435.00 feet to an iron pin at said Township Road 663; thence through the same, South 64 degrees 42 minutes 13 seconds West 122.28 feet to an iron pin; thence along the same, South 66 degrees 1 minute 57 seconds West 436.89 feet to an iron pin at the place of beginning. CONTAINING 28.18 acres, as shown on a draft made for David H. Eberly and Frances M. Eberly, his wife, by Carl D. Bert, R.S., dated March 1973, reviewed by Franklin County Planning Commission, and approved by the Borough of Shippensburg.

Included within the above described real estate but specifically excluded from therefrom are Lots Nos. 2, 27, 29, 31, 35, 36, 38, 40, 41, 42, 43, 44, 46, 48, 49, 50; and Lots Nos. P-1 through P-8, inclusive, as more fully shown and described on a Land Development Plan of Park Place South, recorded in Franklin County Plat Book 28BE, Page 171, Part II.

BEING, except for the aforementioned Lots which have been conveyed, the same real estate conveyed to Engay, Inc., by deed of Lloyd H. Herr and Rose M. Herr, his wife, and George W. Baker and Martha U. Baker, his wife, dated August 15, 1988, and recorded in Franklin County Deed Book 1028, Page 498.

Lot No. 32 is improved with a two-story vinyl siding and partially brick-faced single family residence and having a street address of 104 Logan Lane, Shippensburg, PA 17257.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN August 19, 1996 at 4:00 PM, prevailing time. Otherwise all money previously paid will be forefeited and the property will be resold on August 23, 1996, 1:00 PM, prevailing time, in the Franklin County Court House, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be the higher, shall be paid in full.

Robert B. Wollyung
Sheriff
Franklin County
Chambersburg, PA
7/19, 7/26, 8/02/96

Commonwealth of Pennsylvania, vs. Eric W. Gray, Defendant, Franklin County Branch, Criminal Action - Nos. 652, 653, 793 and 851 - 1994

Commonwealth v. Gray

Post Conviction Relief Act - waiver of Appeal - Effective Assistance of Counsel - Voluntariness and Effect of Plea - Sentencing in absentia

1. A defendant, who voluntarily and without cause flees the jurisdiction prior to sentencing, and who remains a fugitive during the entire appeal period, waives his right to appellate review.

2. An allegation of ineffective assistance of counsel will not constitute an exception to the waiver provision of the Post Conviction Relief Act when it is clear from the record that defendant caused his appeal rights to lapse through his own actions.

3. To maintain a claim of ineffective assistance of counsel when a defendant has pled guilty, the defendant must show that the alleged ineffectiveness caused an unknowing or involuntary plea in addition to the requirements of the *Maroney* test..

4. Where there is a clear split of authority in a jurisdiction as to the viability of a charge, an attorney who advises his client to plead guilty to that charge is reasonably acting in his client's best interest.

5. A defendant's signed plea colloquy will render meritless his claim that he was denied his right to a jury trial and that he objected to charges against him as a result of counsel's ineffectiveness because a defendant is deemed to have answered a signed plea colloquy truthfully.

6. When a defendant fails to appear for sentencing, his attorney does not have a duty to present evidence on his client's behalf when the client has neither enumerated such evidence to his attorney nor informed him that he would not appear to raise mitigating factors himself.

7. When no reasonable basis for an appeal exists and a defendant has not informed his attorney of his wish to appeal, an attorney will not be found ineffective for not bringing an appeal on his fugitive client's behalf.

8. A signed plea colloquy will render meritless a defendant's claim that he was unlawfully induced to plead guilty.

9. When a defendant fails to appear for sentencing, the court is not required to read into the record the appeal rights of the defendant and the reasons for the sentence imposed as this would serve no purpose in light of the defendant's absence.

10. A defendant's claim that there was insufficient evidence to convict him had he gone to trial is irrelevant when the defendant pleads guilty to that charge.

11. A defendant's right to be present at all stages of adjudication may be deemed waived by the defendant's words or actions.

12. Sentencing in *absentia* is proper where the defendant waives his right to be present by failing to appear without satisfactory explanation.

Franklin County District Attorney, Attorney for Commonwealth
Kimberly S. Gray, Esq., Attorney for Defendant

OPINION AND ORDER

OPINION SUR DEFENDANT'S PETITION FOR RELIEF UNDER THE POST CONVICTION RELIEF ACT

We have before us a petition seeking relief under the post Conviction Relief act, 42 Pa.C.S.A. §9541 et esq., ("PCRA") alleging ineffective counsel, unlawful inducement of a guilty plea, improper obstruction of appeal rights, insufficient evidence and improper sentencing. Counsel have submitted memoranda following a hearing held on the petition, and the matter is now ripe for disposition. The background of this case will hereafter be set forth.

Eric W. Gray ("defendant") was charged with Driving under the Influence on three separate occasions, the dates of these arrests being May 16, 1994, June 24, 1994, and July 5, 1994. The result of defendant's breathalyzer test on each occasion showed a blood alcohol content of .168%, .17% and .23%, respectively. Additionally, during these incidents defendant was charged with summary offenses which were later dismissed in accordance with his plea agreement.

On October 3, 1994, defendant was arrested and charged with Public Drunkenness, Criminal Mischief, and Resisting Arrest. Subsequently, defendant was provided with court-appointed counsel, Paul T. Dean, Assistant Public Defender of Franklin County.

On November 7, 1994, defendant entered into a plea agreement with respect to all three DUI charges against him. An additional term of the plea agreement dismissed all summary offenses connected with the DUI charges. Sentencing on these charges was scheduled for December 21, 1994.

Defendant entered into a plea agreement on November 23, 1994 with respect to the charge of Resisting Arrest. This agreement dismissed the charges of Criminal Mischief and Public Drunkenness after it became clear that defendant was on private property at the time of his arrest. Sentencing for this charge was

listed for January 4, 1995. However, by an order dated November 28, 1994, this Court changed this sentencing date to December 21, 1994. Defendant was advised of the sentencing date upon entry of his pleas.

On December 21, 1994, the scheduled sentencing date, defendant failed to appear. Neither defense counsel nor anyone else present had been contacted as to his whereabouts. The Court directed the issuance of a bench warrant for defendant and proceeded to impose a sentence upon him *in absentia* over defense counsel's objections. The Court further directed that is would reconsider the matter if defendant could provide an adequate explanation for his failure to appear. The sentence imposed on defendant for all charges was 18 to 72 months of incarceration, to be served in a state correctional facility.

On January 7, 1995, defendant was arrested in Maine pursuant the outstanding warrant, and he was subsequently extradited to Pennsylvania. Defendant asserted that prior to his sentencing, he contacted the Franklin County Clerk of Courts to request a postponement saying that he had reason to believe this his brother was seriously ill in Maine and he wished to be with him. The Clerk's office advised defendant that he should not leave. However, he left the jurisdiction and made no attempt to contact his lawyer to inform him of this development.

On June 26, 1995, while incarcerated at the state Correctional Institution at Somerset, defendant filed a Petition for post Conviction relief with this Court. Subsequently, Kimberly s. Gray Esquire, was appointed by the Court to represent him. A hearing on the Petition was held on April 25, 1996. Memoranda from the parties then followed.

In his PCRA Petition, defendant asserts that his first court-appointed counsel, Paul T. Dean, was ineffective for not advising him that he may wish to proceed to trial on the Resisting Arrest charge; for not trying to mitigate his sentence at the sentencing at the sentencing hearing; and for failing to preserve defendant's appeal rights. He further asserts that the Court improperly sentenced him, failed to read his post-sentence rights into the record, failed to state the reasons for the sentence imposed, and that sentencing *in absentia* was improper. Defendant also asserts

that there was insufficient evidence to convict him had he gone to trial.

Prior to addressing the issues not before this Court, it is important to note that at the time of defendant's sentencing, he was a fugitive from another jurisdiction. A bench warrant had been issued for his arrest by a Cumberland county Court for his failure to appear at a sentencing scheduled in that County on December 13, 1994.

There is no question in this case that defendant failed to make a timely appeal following his sentencing. Therefore, the issue to be decided is whether or not defendant's fugitive status during the appeal period constituted a complete waiver of his right to appellate review. We find that it does.

In the case of *Commonwealth v. Craddock,* 370 Pa.Super. 139, 535 A.2d 1189 (1988), *aff'd per curiam,* 522 Pa. 491, 565 A.2d 151 (1989), the Superior Court decided this issue on substantially similar facts. Mr. Craddock became a fugitive prior to trial and was found guilty *in absentia.* As in the instant case, he remained a fugitive and was sentenced *in absentia* as well. Nearly five years later, upon his return to Pennsylvania, he filed a PCRA[1] petition alleging that counsel was ineffective for not objecting to the sentencing procedure. The Court stated that:

> ...in spite of the fact that petitioner is within the control of the court at the time of his appeal, his voluntary fugitive status at the time for direct appeal acts as a knowing and understanding waiver of his appellate rights.
>
> *Id.* at 143, 535 A.2d at 1191.

The Supreme Court of the United States has held that escape "disentitles the defendant to call upon the resources of the Court for determination of his claims." *Molinaro v. New Jersey,* 396 U.S. 365, 366, 90 S.Ct. 498, 499, 24 L.Ed.2d 586, 588 (1970). Likewise, the Pennsylvania Supreme Court has determined that when a defendant deliberately foregoes that "orderly procedures

[1] The Post-Conviction Hearing Act ("PCHA") was modified, repealed in part, and re-named the Post-Conviction Relief Act ("PCRA") §§ 9541-9546 on April 13, 1988.

afforded one convicted of a crime for challenging his conviction", he must live with and be bound by the consequences of his actions. *Commonwealth v. Passaro,* 504 Pa. 611, 614, 476 A.2d 346, 348 (1984).

Defendant argues that he did not waive his right to appeal because he has alleged ineffective assistance of counsel. Relying, in part, on *Commonwealth v. Hanes,* 397 Pa.Super. 38, 579 A.2d 920 (1990), he asserts that this Court should apply the waiver exception in Section 9543 (a) (iii) of the PCRA, 42 Pa.C.S. §9541 et seq. While it is true that "a sufficient allegation of ineffectiveness of prior counsel will satisfy the requirements of Section 9543 (a) (iii)", *Hanes,* 397 Pa.Super. at 44, 579 A.2d at 922, the sufficiency of this defendant's allegation must be examined. as the *Craddock* court held,

> the petitioner's failure to establish, by a preponderance of the evidence, that his abstention was anything other than intentional and of his own free will renders meritless his allegations of trial court error and counsel's incompetence.
>
> *Craddock,* 370 Pa.Super. at 145, 535 A.2d at 1192.

Defendant's allegations of ineffective assistance of counsel are insufficient to amount to an exception to waiver since he was not shown that the lapse of his appeal rights was anything other than self-inflicted. Accordingly, this Court finds that defendant has waived his right to appellate review by knowingly and voluntarily remaining a fugitive from justice during the appeal process, and this should be dispositive.

Notwithstanding the foregoing, and in the interest of judicial economy, we will address the remaining issues seriatim:

I. Whether defendant was denied effective assistance of counsel.

Defendant has asserted that his first court-appointed counsel, Paul T. Dean, was ineffective for recommending that he plead guilty to Resisting Arrest when the underlying charge was not viable. While it is settled now that in order to be convicted of

Resisting Arrest, the arrest underlying that charge must be lawful, at the time of defendant's arrest in 1994 this issue had not been settled. See *Commonwealth v. Biagini,* 540 Pa. 22, 655 A.2d 494 (1995). Therefore, while there is merit to defendant's argument that the Resisting Arrest charge was unlawful, we must evaluate this claim in light of what the state of the law was at the time defendant counsel was advising his client.

Claims of ineffectiveness of counsel are evaluated according to the rule established in *Commonwealth ex re. Washington v. Maroney,* 427 Pa. 599, 235 A.2d 349 (1967): 1/ the underlying the claim of ineffectiveness of counsel is of arguable merit; 2/ whether the course chosen by counsel has a reasonable basis designed to serve [the accused's] interest; and 3/ whether resultant prejudice occurred. Additionally, in cases where the alleged ineffectiveness has to do with entry of a guilty plea, the defendant must show that the ineffectiveness caused an involuntary or unknowing plea. See *Commonwealth v. Flood,* 426 Pa.Super. 555, 627 A.2d 1193 (1993); *Commonwealth v. Chumley,* 482 Pa. 6226, 394 A.2d 497 (1978), *cert. dent.*, 449 U.S. 966, 99 S.Ct. 1515, L.Ed.2d 781 (1979).

Defendant asserts that defense counsel should not have advised him to plead guilty to the charge of Resisting Arrest because the law was unsettled as to whether or not the charge could stand since the underlying arrest was unlawful. We find that defendant has satisfied the first prong of the *Maroney* test. At the time defense counsel was advising his client, there would have been arguable merit in going to trial on this charge since there was some authority to support an acquittal. However, that is not the end of the inquiry.

Next, we must examine whether or not defense counsel's advice to plead guilty was reasonably designed to be his client's best interest. We find that it was. Because of the split of authority on this issue at the time, a conviction was just as likely as an acquittal if it proceeded to trial. In light of the fact that during the events leading to the Resisting Arrest charge defendant injured a police officer requiring him to receive medical attention, it is arguably more likely that he would have been convicted.

Therefore, entry of a guilty plea was reasonably designed to serve defendant's best interest.

Even if, arguendo, there was no reasonable basis designed to serve defendant's best interest and the necessary resulting prejudice occurred, this Court could not find that defendant was denied effective assistance of counsel because the alleged ineffectiveness did not result in an involuntary or unknowing plea. Defendant maintains in his brief that he objected to the Resisting Arrest charge and claims that he was denied his right to a jury trial on that charge. However, his signed plea colloquy contradicts his current assertions. A defendant's signed plea colloquy is binding upon the defendant since he has a duty to answer truthfully. *Commonwealth v. Miller,* 432 Pa.Super. 619, 639 A.2d 814 (1994); *Commonwealth v. Lewis,* 430 Pa. Super. 336, 634 A.2d 633 (1993). Therefore, this claim does not entitled defendant to relief.

Defendant's next allegation of ineffectiveness has to do with counsel's alleged failure to advocate his best interests at sentencing. This claim is also meritless.

While this Court recognizes that defendant had a right to be present at his sentencing, for reasons stated herein he forfeited that right. We also recognize counsel's duty to act in his client's best interest. However, the record simply does not support defendant's claim that defense counsel remained silent at the sentencing proceeding and did not act on behalf of his client.

Initially, defense counsel requested a continuance when defendant failed to appear and attempted to explain the absence by stating that "perhaps he's checked into a rehab". (Transcript of Sentencing Proceedings, December 21, 1995 at 5.). When the continuance was denied, defense counsel asked to put his objection to proceeding *in absentia* on the record, stating that his client had a right to be present. *Id.* at 6. This Court is at a loss to see how defendant could make the assertion that defense counsel remained silent during the sentencing proceeding. In fact, defense counsel did everything he could do on his client's behalf in light of the fact that he knew no more about why defendant was not present than this Court did.

Defendant would also have us find that defense counsel was ineffective for failing to raise mitigating factors on his behalf. However, defendant has not asserted, and there is nothing on the record to show, that he ever enumerated any mitigating factors to his defense counsel let alone even told him that he was not attending his sentencing. We refrain from imposing a duty on counsel to know what their fugitive clients are thinking. If there were mitigating factors that could have been presented to the Court at the time of sentencing, defendant should have presented them himself instead of waiving his right to allocution by fleeing the jurisdiction.

Finally, defendant claims that defense counsel was ineffective in failing to file an appeal within the statutory period. This contention is meritless for the following reasons.

In his brief in support of his petition, defendant asserts that statements that he made indicated that he "might" have wanted to withdraw his plea or that he "may" have wished to petition for modification of the sentence. Again, defendant has not set forth any evidence that would show that he communicated his wishes or reasons for wanting to appeal to defense counsel. As we previously noted, defense counsel is neither deemed to know nor obligated to act upon what their client may or may not be thinking when on reasonable basis for an appeal exists.

Defendant also makes the claim that defense counsel's "inaction allowed the defendant's post-sentence rights to lapse." (Defendant's Brief in Support of post Conviction Relief Act Petition at 11.). We reject this audacious allegation and state the obvious that it was defendant's own ill-advised flight from the jurisdiction that caused his appellate rights to lapse.

Further, it is evident that there were no reasonable appeals for defense counsel to make. Defendant has not set forth any grounds for a successful appeal. For the reasons stated herein, any appeal that defendant would have had his defense counsel bring is entirely without merit. "Counsel is not ineffective for failing to file a frivolous appeal which would have been dismissed by this court." *Lewis,* 430 Pa.Super. at 343; 634 A.2d at 637. see also *Commonwealth v. Iseley,* 419 Pa.Super. 364, 615 A.2d 408

(1992). Therefore, defense counsel was not ineffective for failing to file a meritless appeal.

Even if there were meritorious grounds for an appeal, defendant's fugitive status at the time that a direct appeal would have been made makes it likely that the appeal would have been quashed. as previously stated, a defendant who chooses to remain a fugitive at the time for direct appeal is making a knowing and understanding waiver of his appellate rights. *Craddock,* 379 Pa.Super. at 143, 535 A.2d at 1191. Accordingly, an attorney will not be judged ineffective for failing to bring an appeal that would be quashed because of the fugitive status of his client.

For the reasons set forth above, this Court finds that defendant's claims of ineffective assistance of counsel are entirely without merit.

II. Whether defendant was unlawfully induced to plead guilty.

Defendant asserts that he was unlawfully induced to enter a plea of guilty to the charge of Resisting Arrest. In support of this assertion, defendant points to the pre-sentence investigation report dated December 13, 1994 wherein he expressed his feelings that the legality of his arrest was questionable. In that report, he also asserted that he was not involved in the pleas agreement for that charge. However, defendant's own actions belie this contention.

In his plea colloquy dated November 23, 1994, defendant twice attested to the fact that no threats, promises or otherwise unlawful inducements had been utilized to persuade him to enter his guilty plea. He further agreed that his plea was voluntary and in his best interest and that he was satisfied with defense counsel's representation. Whether or not he was directly involved in negotiating the plea, he expressed his belief that it was in his best interest. As previously stated, a defendant is deemed to have answered the plea colloquy questions truthfully. "Where the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established." *Lewis,* 430 Pa.Super. at 341, 634 A.2d at 635. See also, *Commonwealth v. Ingram,* 455 Pa. 198, 316 A.2d 77 (1974).

Therefore, there being no evidence on the record to the contrary, this Court finds that defendant's plea was voluntary and not unlawfully induced.

III. Whether defendant's appeal rights were obstructed by failing to read into the record the appeal rights of the defendant and reasons for his sentence.

Defendant asserts that it was error for the court to fail to read his appeal rights into the record. While it is true that Pa.R.Crim.P. 1405 requires that a defendant be advised of his post-sentencing rights, including the right of appeal, defendant's inexplicable absence from sentencing rendered this an exercise in futility. At the sentencing proceedings, this Court expressed its view that in light of defendant's absence, no purpose would be served by reading post-sentencing rights to his defense counsel who by training and experience was well aware of those rights.

We think that the right to have post-sentencing rights read was clearly and unequivocally waived by defendant's voluntary absence at the sentencing proceeding and that it would have been a meaningless act to advise an absent person of his appellate rights.

Further, the record shows that during the sentencing proceeding, this Court engaged in a lengthy discussion with the attorneys involved about defendant's prior record and the contents of his pre-sentence investigation report dated December 13, 1994. Therefore, this Court finds that the record adequately sets forth the reasons for defendant's sentence which is within statutory guidelines.

IV. Whether there was insufficient evidence to convict defendant had he gone to trial.

Defendant also seeks relief on the basis that there was insufficient evidence to convict him had he gone to trial. We reject this as being irrelevant in light of the defendant's guilty plea. "[A} plea of guilty amounts to a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence and validity of the guilty plea."

Commonwealth v. Orrs, 433 Pa.Super. 260, 640 A.2d 911 (1994), *alloc. dn.* 540 Pa. 619, 657 A.2d 489 (1995).

The Guilty plea colloquies that defendant completed with respect to all charges against him indicated that he was aware of the consequences of his guilty plea. Specifically, question #8 of the extensive colloquy, which defendant indicated that he fully understood, advised him of the limited issues that could be raised on appeal following the entry of a guilty plea.

Therefore, defendant is not entitled to relief based on his challenge of the sufficiency of evidence against him since the Court finds that he knowingly and voluntarily entered a plea of guilty.

V. Whether it was error to impose a sentence in absentia.

In recent years it has been well settled by Pennsylvania appellate courts that although a defendant has a right to be present at all stages of adjudication, that right may be deemed waived by defendant's words or actions, specifically a deliberate and knowing absence without cause. See *Commonwealth v. Sullens*, 533 Pa. 99, 619 A.2d 811 (1992); See also *Commonwealth of Martinez*, 413 Pa.Super. 454, 605 A.2d 811 (1992).

We previously addressed the issue of propriety of sentencing an individual *in absentia*. In *Commonwealth v. Taylor*, Criminal Action No. 252 of 1993 (C.P., Franklin Co., April 13, 1994), aff'd. No. 154 Harrisburg 1994 (Pa.Super., October 13, 1994), we determined that a criminal defendant's right to be present at sentencing under Pa.R.Crim.P. 1117(a) is a waivable right, where the defendant fails to appear without satisfactory explanation. In the instant case, the defendant simply took it upon himself to leave Pennsylvania to attend to a private matter without as much as apprising his own attorney or the court, and thereby was not present for the scheduled sentencing hearing. Such is not an adequate explanation for his non-appearance, and does not provide a basis for relief in this proceeding.

In light of the precedent established by the aforementioned cases, we find that it was not error to sentence defendant *in*

absentia since he knowingly and voluntarily failed to exercise his rights to be present at his sentencing.

Conclusion

For the foregoing reasons, we find that defendant waived his right to appellate review and that notwithstanding the waiver, no error was made. Accordingly, defendant is not entitled to relief under the Post Conviction Relief Act and judgments of sentence should be affirmed.

ORDER OF COURT

NOW, June 17, 1996, the defendant's petition for relief under the provisions of the Post Conviction Act is DENIED.