In the
SUPERIOR COURT OF PENNSYLVANIA
Docket No. 97 MDA 2021

COMMONWEALTH OF PENNSYLVANIA,
Appellee
v.
RICK LAVAR CANNON,
Appellant

PETITION FOR PANEL RECONSIDERATION OR EN BANC REVIEW

Petition for Panel Reconsideration or En Banc Review from the August 13, 2o21 Superior Court Order Affirming the January 13, 2021 PCRA Order of the Court of Common Pleas of Lebanon County at CP-38-C4-559-2014

HEATHER A. EGGERT, ESQ.
ID# 314064
HENRY & BEAVER, LLP
937 Willow Street
P.O. Box 1140
Lebanon, PA 17042-1140
(717) 274-3644
Attorney for Appellant

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I. ORDER IN QUESTION

Appellant respectfully seeks panel reconsideration or *en banc* review of the Opinion, entered August 13, 2021, affirming the imposition of $5,000 in fines as part of the sentence from the Court of Common Pleas of Lebanon County in CP-38-CR-0000559-2014. A copy of this Court's Opinion is attached as Exhibit A. In relevant part, the order reads: "Order affirmed. Judgment Entered." Mem. Op. at 12.

II. POINTS OF FACT AND LAW JUSTIFYING RECONSIDERATION

1. The Court affirmed the imposition of a $5,000 fine even though the trial court never made any "determination" or "specific findings" on the record that Appellant could afford to pay $5,000, inconsistent with prior precedent from this Court holding that a trial court imposes an illegal sentence if it fails to make such a finding on the record.
2. The Court's holding does not address that the trial court failed to mention the restitution award and whether the payment of the fine will impact the restitution payment, in

violation of 42 Pa.C.S. § 9726(c), inconsistent with a prior decision from this Court.

3. The Court's holding conflicts with 42 Pa.C.S. § 9726(c) and the Supreme Court's decision in *Commonwealth v. Ford*, 217 A.3d 824, 829 (Pa. 2019), because the presence of a presentence investigative report, which here explained *only* that Appellant had previously been employed without any further financial information, is not sufficient to satisfy the record requirements of 42 Pa.C.S. § 9726(c) and *Ford*, as there must be "record evidence that the defendant is or will be able to pay" the fine—not merely evidence concerning defendant's finances—or the sentence is illegal.
4. The Court ruled that Appellant waived the issue of whether trial counsel coerced and unduly pressured him into pleading guilty because he "did not include in his petition his allegation that trial counsel told him he would face the death penalty if he did not plead guilty." However, in his Second Amended PCRA Petition, Appellant alleged that trial counsel was ineffective for coercing and unduly pressuring him into

pleading guilty. Similarly, in his Statement of Errors Complained of on Appeal, Appellant alleged that the trial court erred in ruling that trial counsel was not ineffective for coercing and unduly pressuring Defendant into pleading guilty. Appellant did not list all of the reasons he believed trial counsel had coerced and unduly pressured him, as he intended to testify to those facts at the hearing and to elaborate upon in a brief.

III. PROCEDURAL BACKGROUND

This Application for Reconsideration asks that the Court reconsider its decision with respect to the imposition of the $5,000 fine on Appellant and with respect to finding that Appellant had waived the issue of whether trial counsel coerced and unduly pressured him into pleading guilty.

At the August 26, 2015 sentencing, the trial court sentenced Appellant to imprisonment and fines totaling $5,000. Mem. Op. at 2. At no point during sentencing did the trial court address Appellant's ability to pay that fine, make any findings on the record that he could pay, or otherwise discuss his financial

circumstances; instead, the fines were mentioned only when the trial court announced that for each count, Appellant must pay a fine. (N.T. August 26, 2015 at 10-14). The trial court also imposed restitution in the amount of $1,112.62. (N.T. August 26, 2015 at 14).

The record contains a presentence investigation (PSI) report. The only relevant information in the PSI regarding Appellant's finances is that he: 1) has seven minor children; 2) graduated from high school but had no "special training skills" or post-secondary education; 3) and had previously been employed for four months as a housekeeper and eight months as a stocker making $10/hour —dates unknown—prior to one of the times he was incarcerated. PSI report, 7/16/15 at 4-5.

The trial court never made a finding on the record that Appellant could afford to pay the $5,000 fine it imposed or how it would impact his ability to pay restitution. In its 1925 Opinion, the Court stated only that "this Court imposed a lawful sentence that was within the guidelines" without any discussion of the fine. 1925 Op. at 7.

The present appeal followed. As to the fine issue, this Court held that because no challenge to the discretionary aspects of the sentence were preserved, the only challenge to the fine is whether it constituted a legal sentence. Mem. Op. at 9. Accordingly, the Court concluded that because the trial court had "the benefit of a PSI, which evaluated Appellant's educational history, employment history, and existing assets," it provided the necessary evidentiary basis to impose a fine. Mem. Op. at 11.

As to the issue of waiver, this Court held that because "Appellant did not include in his petition his allegation that trial counsel told him he would face the death penalty if he did not plead guilty," that issue was waived on appeal. Mem. Op. at 6.

IV. REASONS FOR GRANTING THIS PETITION

This Court should grant reconsideration for four reasons. First, precedent requires that the trial court make specific findings on the record that Appellant could afford to pay the $5,000 fine. The absence of that finding rendered the sentence illegal, and this Court's conclusion to the contrary is inconsistent both with

precedent and overlooked the fact that no finding was made. *See* Pa. Super. Ct. IOP § 65.38(D)(1) and (3).

Second, when, as here, the trial court imposes both a fine and restitution, 42 Pa.C.S. § 9726(c) places a requirement on trial courts to ensure the record shows that the "fine will not prevent the defendant from making restitution or reparation to the victim of the crime." This Court ruled that a trial court violated this provision when it imposed a fine and made "no mention of the restitution award and whether the payment of the fine will impact the restitution payments to the victim," and the implicit conclusion to the contrary in this Opinion is inconsistent with that decision. *Commonwealth v. White*, 1283 MDA 2020, 2021 WL 2769834 at *4 (Pa. Super. Ct. July 1, 2021) (unpublished). *See* Pa. Super. Ct. IOP § 65.38(D)(1), (2), and (3).

Third, this Court correctly noted that the PSI report does not render the record completely silent with respect to Appellant's financial circumstances, but that is not sufficient to render the sentence legal under the plain text of the statute, as well as

precedent from this Court and the Pennsylvania Supreme Court. As the Supreme Court explained, in *Ford*, while a "silent" record is plainly illegal, so too is a record that does not actually contain evidence that the defendant is able to pay. It explained, "the plain language of the statute is clear: Trial courts are without authority to impose non-mandatory fines absent record evidence that the defendant is or will be able to pay them." *Ford*, supra at 829. To constitute a legal sentence, the fine must be accompanied by evidence showing that Appellant can or will be able to pay. In *Ford*, this meant that the defendant's plea agreement to pay the fine was not sufficient. The same is true here: the record contains no evidence that Appellant can actually pay the $5,000 fine; it contains evidence only that he was once employed without any further details about his present or likely future financial circumstances. The lack of any sufficient record renders the Court's decision inconsistent with the relevant legal standards. *See* Pa. Super. Ct. IOP § 65.38(D)(1), (2), and (3).

Fourth, although Appellant did not specifically mention, at sentencing, that he felt coerced and unduly pressured to plead

guilty because trial counsel told him he would face the death penalty if he did not plead guilty, trial counsel did inform the Court that Appellant "felt as if [trial counsel] had coerced him into pleading guilty and that was not really the decision he wanted to make, but he was influenced by the things that [trial counsel] had said to him." (N.T. August 26, 2015 at 2).

A. The trial court imposed an illegal sentence by failing to make any determination and specific findings on the record that Appellant can or will be able to pay the fine.

As Appellant mentioned in his brief, nothing in the record shows that the trial court "consider[ed] whether Defendant was or would be able to pay the fines"; in other words, the trial court made no findings on the record. Appellant Br. at 33. This Court's precedents have been unequivocal that compliance with Section 9726(c) requires a trial court "must make an on-the-record determination regarding appellant's financial resources and his ability to pay the imposed fine." *Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. Ct. 1997). The Court made the same point in *Commonwealth v. Allshouse*, 924 A.2d 1215, 1228 (Pa. Super. Ct. 2007), where it remanded "for **specific findings**

in accordance with section 9726(c) to determine an appropriate fine" (emphasis added). *See also Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. Ct. 2005) ("In the present case, the trial court did not make specific findings of appellant's ability to pay the fine imposed."); *Commonwealth v. Samuels*, 1422 MDA 2018, 2019 WL 3231245 at *3 (Pa. Super. Ct. July 17, 2019) (unpublished) (where there were not "specific findings of Appellant's ability to pay the fine imposed," then "consistent with § 9726(c)(1) and *Thomas*, *supra*, we remand the case to the trial court for resentencing after a determination of Appellant's ability to pay a fine."); *White*, supra at *4 (same). *George v. Beard*, 824 A.2d 393, 395 (Pa. Commw. Ct. 2003) ("Before imposing a fine, the sentencing court must make findings on a defendant's financial ability to pay" pursuant to § 9726(d)).

The trial court's failure to make specific findings regarding Appellant's ability to pay the fine goes to the legality of that sentence. This Court resolved that question in *Allshouse*, explaining that the lack of findings meant that it "is a challenge to the legality of the sentence (i.e., the fine was imposed

unlawfully)," and such a "challenge is brought as of right." 924 A.2d at 1227. *See also*, *e.g.*, *Thomas*, 879 A.2d at 262 (vacating fine for lack of specific findings where "Appellant presents two challenges to the legality of his sentence: . . . the second concerns imposition of fines without consideration of ability to pay"); *White*, supra at *4 (holding that defendant prevails on a legality of the sentencing claim where there was no "determination" or "specific findings" that the defendant could pay a fine). Yet here the trial court never made any "on-the-record determination" of Appellant's ability to pay the fine that *Heggenstaller* requires, nor did it make any "specific findings" of his ability to pay that *Thomas* requires. 879 A.2d at 264. Even in its 1925 Opinion, the trial court makes no attempt to justify the imposition of the fine, concluding only that it was "within the guidelines." 1925 Op. at 7. In the absence of those specific findings required by Section 9726, this Court in *Allshouse* rejected a claim that the trial court had considered information in the PSI report and thus satisfied the statutory requirements. 924 A.2d at 1228. Accordingly, the presence of a PSI report is

insufficient to sustain the imposition of a legal fine absent specific findings on the record.

The trial court's actions run afoul of the requirements because the record lacks any sort of finding that Appellant is or will be able to pay the fine. Consequently, the sentence is illegal, and this Court should grant reconsideration.

B. The absence of record evidence that payment of the fine will not interfere with Appellant's ability to pay restitution renders the fine an illegal sentence.

The trial court imposed restitution in the amount of $1,112.62 but never made any finding and the record is bereft of any information showing that the $5,000 will not interfere with Appellant's ability to pay restitution. 42 Pa.C.S. § 9726(c) requires trial courts to ensure the record shows that the "fine will not prevent the defendant from making restitution or reparation to the victim of the crime." That statutory instruction is straightforward, requiring actual evidence and—consistent with the cases discussed in the preceding section—a finding by the trial court regarding defendant's ability to pay both the fine *and* restitution. Consistent with that instruction, this Court ruled that

a trial court violated Section 9726(c) when it imposed a fine and made "no mention of the restitution award and whether the payment of the fine will impact the restitution payments to the victim"; the implicit conclusion to the contrary in this Opinion is inconsistent with that decision. *White*, supra at *4. In *White*, the Court correctly noted that such a failure by the trial court "challenges the legality of the sentence," as it does here. *Id.* Accordingly, the fine imposed on Appellant is illegal, and this Court should grant reconsideration.

C. The absence of record evidence that Appellant can or will be able to pay the fine renders the fine an illegal sentence.

The record in this case was insufficient for the trial court to consider Appellant's ability to pay without additional evidence. The Opinion, in emphasizing that the record contains "some evidence of record regarding the defendant's ability to pay," misapplies the relevant legal standard as set forth in decisions from the Supreme Court and this Court. Section 9726(c) prohibits a fine "unless it appears of record that the defendant is or will be able to pay the fine." A PSI *can* provide that record

evidence, but what this statute requires and what the Supreme Court articulated in *Ford* is not that it is sufficient for the record to contain information about the defendant's finances *regardless of whether* that record shows the person is or will be able to pay and regardless of how destitute the record shows the person to be. Instead, *Ford* explains that "trial courts are without authority to impose non-mandatory fines absent record evidence that the defendant **is or will be able to pay** them." *Ford*, 217 A.3d at 829 (emphasis added). Thus, while the *Ford* Court acknowledged that a silent record was plainly illegal, it went beyond that narrow construction of Section 9726 because the record in that case was *not* silent and instead contained evidence that the defendant had agreed to pay the $25; it is simply that the record was insufficient to show he would be able to pay. Quoting that same language, this Court has explained that "the import of this holding is quite clear." *Commonwealth v. Snyder*, 251 A.3d 782, 797 (Pa. Super. Ct. 2021). That is, the evidence has to *actually show* that the defendant is or will be able to pay. Here, there is

nothing in the record whatsoever to show that Appellant "is or will be able to pay" the fine, and the fine thus violates *Ford*.

Ford and *Snyder* are among the cases about the legality of the sentence, not the sentencing court's discretion. *See Snyder*, 251 A.3d at 796 ("We note that Appellant did not raise any claim challenging the assignment of fines in the trial court."). If the record does not provide an evidentiary basis for the trial court to make a finding that the defendant is or will be able to pay, the sentence is illegal. This Court's decision in *Boyd* is entirely consistent with this framework (although to the extent it is not, the Supreme Court's ruling in *Ford* controls). The Opinion looked at *Commonwealth v. Boyd*, 73 A.3d 1269, 1273-74 (Pa. Super. Ct. 2013) (en banc) and concluded that here there is *some* evidence about Appellant's finances contained in the PSI report. But *Ford*, consistent with Section 9726, clarifies that evidence must be "that the defendant is or will be able to pay" the fine. *Ford*, 217 A.3d at 829. Otherwise, if the evidence shows a person *cannot* pay, the trial court is "without authority to impose non-mandatory fines" and the fine is an illegal sentence. *Id*. Since the

record in *Ford* was not silent about the defendant's ability to pay, the Court had to go beyond that floor.

Here, Appellant is not arguing the trial court's failure to consider the evidence; he is arguing that there is *no record* showing that he can pay, which is a legality of sentence issue. The entirety of the PSI shows that Appellant 1) has seven minor children; 2) graduated from high school but had no "special training skills" or post-secondary education; 3) and had previously been employed for four months as a housekeeper and eight months as a stocker making $10/hour —dates unknown— prior to one of the times he was incarcerated. PSI report, 7/16/15 at 4-5.[1] This is the type of record that this Court has explicitly and consistently rejected as sufficient to impose a legal fine. *See, e.g., Commonwealth v. Mead,* 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (presentence report addressing "sporadic employment history, but [that] does not disclose his current income," was insufficient, particularly where "there is no indication in the record

[1] The Memorandum Opinion is mistaken that the PSI report contains information about Appellant's "existing assets." Mem. Op. at 11. It also does not contain an evaluation of his employment history beyond the two jobs noted.

that the sentencing court considered appellant's indebtedness ..."). Here, the failure of the record to show that Appellant can or will be able to pay the $5,000 fine renders it an illegal sentence that this Court should vacate.

VIII. CONCLUSION

The trial court imposed a $5,000 fine on Appellant when nothing in the record suggested he would be able to pay it, and the court failed to make any specific findings on the record that he would be able to pay. Additionally, although Appellant did not elaborate on every way trial counsel coerced and unduly pressured him into pleading guilty, he did previously raise this issue before the trial court. Accordingly, this Court should grant Appellant's Petition for Reconsideration.

Respectfully Submitted,

HENRY & BEAVER LLP

By: Heather A. Eggert

Heather A. Eggert, Esquire
ID# 314064
937 Willow Street
P.O. Box 1140
Lebanon, PA 17042-1140
(717) 274-3644
Attorney for Appellant

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RICK LAVAR CANNON	:	
Appellant	:	No. 97 MDA 2021

Appeal from the PCRA Order Entered January 13, 2021
In the Court of Common Pleas of Lebanon County Criminal Division at
No(s): CP-38-CR-0000559-2014

BEFORE: KUNSELMAN, J., McCAFFERY, J., and STEVENS, P.J.E.*

MEMORANDUM BY STEVENS, P.J.E.: **FILED: August 13, 2021**

Appellant Rick Lavar Cannon appeals from the order entered by the Court of Common Pleas of Lebanon County denying Appellant's petition pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. Appellant claims his trial counsel was ineffective in advising him to enter a nonrevocable guilty plea and failing to present Appellant's polygraph results to the prosecutor and the lower court. In addition, Appellant argues that the lower court erred in allowing him to enter his guilty plea and in imposing fines without considering his financial resources. We affirm.

This Court previously summarized the factual background and procedural history of this case as follows:

> On March 14, 2014, Appellant and two co-conspirators robbed and shot two victims,[FN1] fled from police, and, after a high-speed

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* Former Justice specially assigned to the Superior Court.

> chase, were apprehended in unlawful possession of cocaine and firearms. Appellant was charged with numerous crimes, including homicide. On July 2, 2015, Appellant entered into the following negotiated guilty plea: "The plea deal is for 50 to 100 years and he must cooperate as necessary with the District Attorney's Office regarding the two codefendants...."[FN2] N.T., 7/2/2015, at 3. Furthermore, Appellant agreed that the plea was irrevocable. ***Id.*** at 12.
>
> FN1: One of the victims, Marcus Antonio Ortiz, died as a result of his wounds; the other, Keith Crawford, survived.
>
> FN2: In its opinion, the trial court indicated that Appellant's coconspirators were convicted of 1st and 2nd degree murder in October 2015. It does not mention whether Appellant was called to testify in that trial.

Commonwealth v. Cannon, 1680 MDA 2015, 2017 WL 2423120, at *1 (Pa. Super. June 5, 2017) (unpublished memorandum).

At Appellant's sentencing hearing on August 26, 2015, Appellant made an oral motion to withdraw his guilty plea, asserting that trial counsel had coerced him into entering his irrevocable guilty plea. The trial court denied the motion and sentenced Appellant to 50 – 100 years' imprisonment pursuant to the terms of the plea agreement. N.T., 8/26/2015, at 5. In addition, the trial court imposed multiple fines on Appellant's convictions, leading to an aggregate fine of $5,000. Sentencing order, 8/26/15, at i-iii.

On September 21, 2015, Appellant filed a timely appeal, claiming the trial court erred in denying his motion to withdraw his guilty plea before sentencing. On June 5, 2017, this Court affirmed the judgment of sentence and concluded that the trial court did not abuse its discretion in refusing to allow Appellant to withdraw his guilty plea. Specifically, this Court found the

evidence before the trial court did not support the reasons offered by Appellant to withdraw his plea:

> [o]ur review of the record shows that Appellant repeatedly acknowledged that the agreement included the term that he could not revoke his plea for any reason. N.T., 7/2/2015, at 4–5, 11–12. Moreover, the transcript confirms that, before Appellant entered his plea, he stated under oath that he was satisfied with Attorney Judd and her representation, and answered in the negative when the court asked him if he had any questions. ***Id.*** at 13. Appellant then indicated that he wished to plead guilty, and the trial court found that Appellant's decision was "freely, voluntarily, and intelligently made, and that [he] had the advice of a competent attorney with whom [he was] satisfied." ***Id.*** at 14.
>
> Under these circumstances, the trial court acted within its discretion in rejecting Appellant's implausible claim of coercion and denying his motion to withdraw the guilty plea. ***See***, ***e.g.***, ***Commonwealth v. Carrasquillo***, 115 A.3d 1284, 1293 (Pa. 2015) (holding trial court acted within its discretion to deny an implausible claim of innocence raised for the first time at the sentencing hearing).

Cannon, No. 1680 MDA 2015, 2017 WL 2423120, at *3. On May 30, 2018, the Supreme Court denied Appellant's petition for allowance of appeal.

On July 27, 2018, Appellant filed a *pro se* PCRA petition. After counsel was appointed, Appellant filed various *pro se* petitions and changed counsel multiple times. On October 7, 2020, Attorney Eggert filed an amended petition and on November 12, 2020, filed a second amended petition. On December 22, 2020, the PCRA court dismissed Appellant's petition.[1] On January 21, 2021, Appellant filed a timely appeal.

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[1] Appellant did not challenge the trial court's decision to deny his PCRA petition without a hearing or its failure to notify Appellant that it intended to deny his petition without a hearing pursuant to Pa.R.Crim.P. 907.

Appellant raises ten issues for our review on appeal:

1. Did the Trial Court err in ruling that trial counsel was not ineffective for coercing and unduly pressuring [Appellant] into pleading guilty?

2. Did the Trial Court err in ruling that trial counsel was not ineffective for allowing [Appellant] to enter a guilty plea that was not knowing, intelligent, and voluntary?

3. Did the Trial Court err in ruling that trial counsel was not ineffective for allowing [Appellant] to accept an "irrevocable plea"?

4. Did the Trial Court err in ruling that trial counsel was not ineffective for submitting a Guilty Plea Colloquy that she did not adequately review with [Appellant]?

5. Did the Trial Court abuse its discretion in accepting an irrevocable plea?

6. Did the Trial Court violate [Appellant's] rights as guaranteed by the Pennsylvania and United States Constitutions, the Pennsylvania Rules of Criminal Procedure, and Pennsylvania case law by refusing to allow [Appellant] to withdraw his guilty plea?

7. Did the Trial Court abuse its discretion in accepting a plea that was not knowing, intelligent, and voluntary, and did the Court fail to set forth the factual basis for [Appellant's] charges at the time [Appellant] entered his plea of guilty?

8. Did the Trial Court abuse its discretion in finding that [Appellant] entered a plea of guilty without any admission of guilt by [Appellant]?

9. Did the Trial Court err in ruling that trial counsel was not ineffective for failing to present [Appellant's] polygraph results to the District Attorney and to the Court, which would have confirmed [Appellant's] innocence? Appellant's Brief, at 6-7.

10. Did the trial court issue an illegal sentence by failing to consider the financial resources of [Appellant] and the nature of the burden that the payment would impose when it sentenced [Appellant] to pay numerous fines, as required by 42 Pa.C.S. § 9726(d)?

Appellant's Brief, at 6-8 (reordered and renumbered for ease of review).

In reviewing the denial of a PCRA petition, our standard of review is well-established:

> [o]ur review of the grant or denial of PCRA relief is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error. ***Commonwealth v. Cox***, 636 Pa. 603, 146 A.3d 221, 226 n.9 (2016). The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a *de novo* standard of review to the PCRA court's legal conclusions. ***Commonwealth v. Burton***, 638 Pa. 687, 158 A.3d 618, 627 n.13 (2017).

Commonwealth v. Small, 647 Pa. 423, 440–41, 189 A.3d 961, 971 (2018).

Appellant's first four issues on appeal involve his claim that trial counsel was ineffective in representing Appellant in the guilty plea process. Our review is guided by the following principles:

> [a]s originally established by the United States Supreme Court in ***Strickland v. Washington***,466 U.S. 668, [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984), and adopted by Pennsylvania appellate courts, counsel is presumed to have provided effective representation unless a PCRA petitioner pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome at trial if not for counsel's error.
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> ***Commonwealth v. Wantz***, 84 A.3d 324, 331 (Pa.Super. 2014) (citations omitted). "A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness." ***Commonwealth v. Daniels***, 600 Pa. 1, 963 A.2d 409, 419 (2009).

Commonwealth v. Selenski, 228 A.3d 8, 15 (Pa.Super. 2020).

First, Appellant claims on appeal that trial counsel coerced Appellant into taking the irrevocable plea agreement to 50-100 years' imprisonment by telling him that he would get the death penalty if he went to trial. Second, Appellant claims his plea was not knowing, intelligent, and voluntary because "had he known that he was not facing the death penalty, he would have refused a guilty plea and would have insisted on taking his case to trial." Appellant's Brief, at 23.

As an initial matter, we note Appellant did not include in his petition his allegation that trial counsel told him he would face the death penalty if he did not plead guilty. As this specific allegation was not presented to the PCRA court for review, it is waived on appeal. ***See*** Pa.R.A.P. 302 ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal").

In addition, there is no support in the record for Appellant's claim that his guilty plea was somehow coerced or was not voluntary, knowing, or intelligent. Appellant signed and initialed his guilty plea colloquy indicating that he alone had decided to plead guilty, "freely and voluntarily, without any force, threats, pressure, or intimidation." Written colloquy, at 3-4. Appellant also indicated in his written and oral colloquies he was satisfied with the representation of counsel, who had explained the meanings of the terms of the plea agreement with Appellant. Written colloquy, at 4; Notes of Testimony (N.T.), Guilty Plea Hrg., 7/2/15, at 13.

Moreover, at the guilty plea hearing, the prosecutor expressly indicated that the Commonwealth would not seek the death penalty in this case, and as a result, Appellant acknowledged that, by pleading guilty, he was avoiding a sentence of life imprisonment, not capital punishment. N.T. at 11-12. As such, Appellant's first two claims have no arguable merit.

In his third or fourth claims, Appellant asserts that trial counsel was ineffective in advising him to enter his guilty plea without sufficient time to meaningfully discuss the offer, such that Appellant did not understand the nature of the plea and the fact that it was irrevocable.

As noted above, Appellant indicated in his signed guilty plea colloquy that he was satisfied with the representation of trial counsel, who he admitted had explained the terms of the plea document. N.T. at 13. In contradiction to his claim that he did not have sufficient time to review the plea agreement, Appellant confirmed on the record that he had "ample opportunity to consult with [trial counsel] before reading [the written colloquy] and entering [his] plea of guilty." Written colloquy, at 4. Furthermore, the trial court repeatedly emphasized to Appellant that he was entering into an irrevocable guilty plea, explaining that after Appellant plead guilty, he could not revoke the plea for any reason. N.T., at 4-5, 11-12. We likewise find that Appellant's third and fourth claims have no arguable merit.

In his fifth, sixth, seventh, and eighth claims on appeal, Appellant asserts that the trial court erred in refusing to allow him to withdraw his guilty plea before sentencing. However, to be eligible for PCRA relief, a petitioner

must plead and prove that his specific claims have not been previously litigated. 42 Pa.C.S.A. § 9543(a)(3). A claim will be deemed previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right as ruled on the merits of the issue." 42 Pa.C.S.A. § 9544. As this Court held on direct appeal that the trial court did not err in denying Appellant's motion to withdraw his guilty plea, these claims are previously litigated.

To the extent that Appellant argued that his plea agreement did not set forth the factual basis for his charges, Appellant did not raise this specific ground for withdrawing his plea before the trial court. The PCRA deems an issue to be "waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S.A. § 9544. As such, this particular claim is waived.

In his ninth claim on appeal, Appellant argues that trial counsel was ineffective in failing to present Appellant's polygraph results to the trial court and the prosecution. Appellant claims that the polygraph results would have shown his innocence. We initially noted that "upon entry of a guilty plea, a defendant waives all claims and defenses other than those sounding in the jurisdiction of the court, the validity of the plea, and what has been termed the 'legality' of the sentence imposed[.]" ***Commonwealth v. Prieto***, 206 A.3d 529, 533–34 (Pa.Super. 2019) (quoting ***Commonwealth v. Eisenberg***, 626 Pa. 512, 98 A.3d 1268, 1275 (2014)).

Even if trial counsel had attempted to present the polygraph results before Appellant entered his irrevocable guilty plea, references to lie detector tests are inadmissible. ***Commonwealth v. Elliott***, 622 Pa. 236, 290–91, 80 A.3d 415, 448 (2013) (quoting ***Commonwealth v. Camm***, 443 Pa. 253, 277 A.2d 325, 333 (1971) (holding that "[t]he rule in Pennsylvania is that reference to a lie detector test or the result thereof which raises inferences concerning the guilt or innocence of a defendant is inadmissible")). As such, Appellant is not entitled to relief.

Lastly, Appellant claims that the trial court imposed an illegal sentence by failing to specifically inquire about Appellant's financial resources when it sentenced him to pay fines. This Court has provided that:

> [g]enerally speaking, the Pennsylvania Sentencing Code permits a trial court to impose "[a] fine" as one of several "alternatives" available "[i]n determining the sentence to be imposed." 42 Pa.C.S. §§ 9721(a)(5), 9726(a)-(b). However, the Sentencing Code also provides that "[t]he court shall not sentence a defendant to pay a fine unless it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." 42 Pa.C.S. § 9726(c).

Commonwealth v. Snyder, 251 A.3d 782, 796 (Pa.Super. 2021) (emphasis omitted).

Before we reach the merits of this issue, we must determine whether Appellant waived this issue by failing to present it to the trial court. This Court has held that challenges to the legality of a sentence fall within a specific class of issues that are not waived by a defendant's failure to present the argument

to the lower court. ***Commonwealth v. Boyd***, 73 A.3d 1269, 1271 (Pa.Super. 2013) (*en banc*). Moreover, a challenge to the legality of the sentence is always subject to review within the PCRA if raised in a timely PCRA petition. ***Commonwealth v. DiMatteo***, 644 Pa. 463, 481, 177 A.3d 182, 192 (2018) (citing ***Commonwealth v. Fahy***, 558 Pa. 313, 331, 737 A.2d 214, 223 (1999)).

However, it is well-established that "[i]ssues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. *Absent such efforts, an objection to a discretionary aspect of a sentence is waived.*" ***Commonwealth v. Griffin***, 65 A.3d 932, 936 (Pa.Super. 2013) (emphasis in original) (citations omitted).

This Court has recognized in ***Boyd*** that "a claim that the trial court failed to consider the defendant's ability to pay a fine can fall into several distinct categories," which include (1) the absence of "a record of the defendant's ability to pay before the sentencing court[;]" (2) the failure of "the sentencing court [to] consider evidence of record[;]" and (3) the failure of the sentencing court "to permit the defendant to supplement the record." ***Boyd***, 73 A.3d at 1273.

This Court further explained that only the first category constitutes a non-waivable challenge to the legality of sentence when the defendant argues that there is a complete absence of any evidence regarding the defendant's ability to pay. ***Id***. at 1273-74. In contrast, this Court held that so long as

there is some evidence of record regarding the defendant's ability to pay, the second and third categories of claims involve challenges to the sentencing court's consideration of the defendant's ability to pay based on its discretionary reasoning. ***Id***. at 1274. As such, this Court acknowledged that the second and third categories of claims may be waived by the defendant's failure to properly preserve the claim in the lower court.

As such, this Court found Boyd's claim that the trial court sentenced him to pay fines without an evidentiary basis fell within the first category of non-waivable challenges to the legality of sentence and thus, it was not waived by Boyd's failure to present his claim to the sentencing court. However, this Court found that there was an evidentiary basis for the trial court's imposition of fines as the trial court considered a pre-sentence investigation ("PSI") report that included significant information regarding Boyd's educational history, employment history, and existing assets. ***Id***.

Likewise, in this case, Appellant argues that the trial court did not make any inquiry into his financial resources before sentencing him to pay a fine. However, Appellant fails to recognize that the trial court sentenced Appellant with the benefit of a PSI, which evaluated Appellant's educational history, employment history, and existing assets. We thus find that the PSI provided the trial court with an evidentiary basis on which to impose a fine.

To the extent that Appellant claims that the trial court did not properly consider the evidence of record regarding his ability to pay or did not allow him to present evidence on this issue, these arguments are waivable

challenges to the trial court's discretionary reasoning. At the sentencing hearing, after the trial court indicated that it had considered the PSI in imposing Appellant's sentence, which included fines, Appellant's trial counsel did not supplement the record with any additional information for the trial court to consider concerning Appellant's ability to pay. As such, these claims are waived.

For the foregoing reasons, we affirm the PCRA court's decision to deny Appellant's PCRA petition.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/13/2021

HENRY & BEAVER LLP
By: Heather A. Eggert
I.D. #314064
937 Willow Street
P.O. Box 1140
Lebanon, PA 17042-1140
(717) 274-3644

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT
	:	OF PENNSYLVANIA
vs.	:	
	:	
RICK LAVAR CANNON,	:	No. 97 MDA 2021
Defendant	:	

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

HENRY & BEAVER LLP

By: Heather A. Eggert
Heather A. Eggert
I.D. #314064
Attorney for Appellant

HENRY & BEAVER LLP
By: Heather A. Eggert
I.D. #314064
937 Willow Street
P.O. Box 1140
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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

The undersigned counsel hereby certifies that this Petition complies with the applicable word count restrictions, in that it does not exceed 3,000 words.

HENRY & BEAVER LLP

By: Heather A. Eggert
Heather A. Eggert
I.D. #314064
Attorney for Appellant

PROOF OF SERVICE

I certify that I am this day serving the foregoing Petition for Reconsideration upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Kathy G. Wingert, Esquire — Hand-Delivery
Lebanon County District Attorney's Office
400 S. Eighth Street
Lebanon, PA 17042

HENRY & BEAVER LLP

By: Heather A. Eggert
Heather A. Eggert, Esquire
ID# 314064
937 Willow Street
P.O. Box 1140
Lebanon, PA 17042-1140
(717) 274-3644
Attorney for Appellant

Date: August 26, 2021