IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**No. 97-10,924**
	:	**97-10,970**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
BARRY KOCH,	:	
Defendant	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Order dated December 7, 2000. The relevant facts are as follows.

97-10924

On May 5, 1997, the defendant was arrested and charged with four counts of indecent assault, four counts of criminal attempt indecent assault and criminal attempt indecent exposure arising out of his contacts with an eleven year old female between December 1996 and February 1997.

On March 2, 1998, the defendant pled nolo contendere to Count 3 indecent assault, Count 5 criminal attempt indecent exposure and Count 6 criminal attempt indecent assault. The facts alleged by the Commonwealth which the defendant did not contest were that the defendant fondled an eleven year old female in the genital area, undressed in front of her and tried to touch her genitals. On the attempt indecent assault, there was a point where the child scratched and bit the defendant to get away from him.

On June 17, 1998, the Court sentenced the defendant to incarceration in a state correctional institution for one year to life for indecent assault, a concurrent one month to twelve months for attempt indecent exposure and a concurrent one year to two years for attempt indecent assault. The life sentence was imposed pursuant to Pennsylvania's Megan's Law, 42 Pa.C.S. § 9791 et seq.

The defendant filed a timely appeal. The Pennsylvania Superior Court found provisions of Megan's Law unconstitutional and remanded the case to this Court for re-sentencing. On November 29, 1999, the Court sentenced the defendant to six months to five years for indecent assault, a consecutive three months to five years for attempt indecent assault, and a consecutive three months to five years for attempt indecent exposure for an aggregate sentence of one to fifteen years. This sentence also was to be served consecutive to the sentence imposed in 97-10,970 and consecutive to the four to twenty year sentence for involuntary deviate sexual intercourse involving a child imposed by Clinton County.

97-10,970

The defendant was arrested on May 21, 1997 and charged with rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, indecent assault, corruption of minors and endangering the welfare of a child from his contact with a ten year old male child the defendant was babysitting in June and July 1996.

On March 2, 1998, the defendant pled nolo contendere to Count 2 indecent assault of a child less than thirteen years of age, Count 4 corruption of minors, and Count 5 endangering the welfare of a child. The factual basis for the plea which the defendant did not contest was that the defendant rubbed the child's penis, took the child into the bedroom, locked the door, pulled down his pants and engaged in oral sex. The plea agreement provided for an aggregate minimum sentence of two years on cases 97-10970 and 97-10924 to be served consecutively to the involuntary deviate sexual intercourse sentence imposed by Clinton County.

On June 17, 1998, the Court sentenced the defendant to incarceration in a state correctional institution for an aggregate of one year to life. The life maximum was imposed pursuant to Pennsylvania's Megan's Law, 42 Pa.C.S. §9791 et seq.

The defendant filed a timely appeal. On October 1, 1999, the Pennsylvania Superior Court found provisions of Megan's Law unconstitutional, vacated the defendant's sentence and remanded the case to this Court for re-sentencing.

On November 29, 1999, the Court sentenced the defendant to incarceration in a state correctional institution for six months to five years for indecent assault, and a consecutive three months to five years for endangering the welfare of a child. The Court stated the aggregate sentence was one year to five years.

On December 6, 2000, the Court received a fax from

the Department of Corrections which sought to resolve the discrepancy between the sentences imposed in the order and the aggregate stated by the Court.1 The Court had the reporter check her notes of the sentencing hearing to determine why this discrepancy existed. The Court reporter discovered that she inadvertently did not include the Court's sentence for corruption of minors in the Order dated November 29, 1999. Based on this discovery, the Court issued an amended sentencing order dated December 7, 2000 to add the three month to five year sentence for corruption of minors. N.T., November 29, 1999, at pp. 10-11. The defendant filed a notice of appeal to this amended order.

The defendant's first appeal issue is that Title 18 requires a person to be a business entity. This issue is meritless. Although the definition of person includes business entities such as corporations and partnerships in many contexts, see Pa.R.Civ.P. 76, the term person is not limited to business entities but also includes natural persons like the defendant.

The defendant next contends counsel was ineffective for failing to pursue a motion to withdraw his plea of nolo contendere prior to sentencing on the basis that he is not guilty. During the sentencing hearing on November 29, 1999, the Court inquired of the defendant if there was anything he wanted to add. N.T., November 29, 1999 at p.6. The defendant responded that he was just going to plead not guilty. Id.

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1 The offenses listed only aggregated to 9 months to 10 years instead of

The Commonwealth objected that the case had been remanded only for sentencing and it would be prejudiced by a withdrawal as at least one of the victims had moved out of state. Id. at p.7. Defense counsel indicated he was unaware that the defendant wished to withdraw his plea and he wasn't sure it was in the defendant's best interests to do so. Id. The Court suggested confirming that was what the defendant was requesting. Defense counsel then asked "Is that what you are requesting? Do you wish to withdraw your guilty plea?" The defendant then responded, "Not really. I don't know." A discussion then was held between counsel off the record. Defense counsel then indicated to the court "we will go to sentence." The Court again asked the defendant if there was anything additional he would like to say and he responded in the negative. Id. at pp. 7-8. Based on this record, it appears the defendant chose not to withdraw his plea and he proceeded to sentencing. Therefore, counsel was not ineffective.

The defendant's final appeal issue is that his sentence is illegal in that it is indefinite and did not give him the right to parole at the completion of his minimum. This issue also is meritless. The defendant has the right to be **considered** for parole at the expiration of his minimum sentence, but he does not have a right to be paroled. Parole is not a right but rather a matter of grace lying solely within the discretion of the Board of Probation and Parole.

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one to fifteen years.

Bowman v. Pa. Board of Probation and Parole, 709 A.2d 945, 948 (Pa.Cmwlth. 1998). The defendant's sentence also complied with 42 Pa.C.S.A. §9721(e). Section 9721(e) does not require a definite sentence, but merely a definite term. Stewart v. Pa. Board of Probation and Parole, 714 A.2d 502, 506 (Pa.Cmwlth. 1998). The defendant's term is definite; his minimum term is one year and his maximum term is fifteen years.

DATE: _____ By the Court,

_____
Kenneth D. Brown

cc: District Attorney
Barry O. Koch, DK-1752
PO BOX 1000, HOUTZDALE PA 16698
Law Clerk
Superior Court (original & 1)
Work file