IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1314-2003**
	:	**(03-11,314)**
vs.	**:**	
	:	
	:	
DAYLE WHEELOCK,	**:**	
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 judgment of sentence docketed March 17, 2005.

On July 22, 2003, Appellant was living in an apartment located in the same building as Pappa's Pizza, a restaurant in Picture Rocks, Lycoming County, Pennsylvania. The co-owner of the restaurant, Greta Evans, was a t her business when she was alerted to a large amount of smoke coming from a back room. She believed that the building was on fire and called for assistance. The dispatcher to whom she spoke asked that she attempt to evacuate the building. She grabbed a set of pass keys maintained by her father, the owner of the building, and went through the apartment area of the building, knocking on the doors of the seven apartments and doing her best to be certain that no one was inside. At two of the apartments, one of which was Appellant's, she did not receive an answer to her knock. She used the pass key to enter the apartment and went through to the other end of the apartment (Appellant's bedroom) to be certain that no one was there. Along the way to Appellant's bedroom and eventually inside of Appellant's bedroom, Ms. Evans observed what she felt

were disturbing photographs of young boys, many of whom were nude and/or posed in sexually provocative positions. Many of the photographs were arranged in collage form and displayed primarily in Appellant's bedroom, although some were also located in the living room. Ms. Evans quickly left the apartment as the building was on fire and she still had to make sure that other apartments were empty. After the fire department declared the building safe, she called the Pennsylvania State Police about the disturbing things she had seen in Appellant's apartment. The police obtained a search warrant for Appellant's apartment and seized various books, photographs, pictures, paintings, pamphlets, brochures, videotapes and magazines that the police believed depicted child pornography. Appellant was arrested and charged with four counts of possession of child pornography in violation of section 6312(d)(1) of the Crimes Code, 18 Pa.C.S. §6312(d)(1).[1]

On April 22, 2004, the court began a non-jury trial in this matter. After three or four Commonwealth witnesses testified, Appellant entered a guilty plea. There was no agreement for a specific sentence; however the Commonwealth agreed one of the counts would run concurrent and as to the remaining counts the court would determine whether they should run concurrent or consecutive. In its Order accepting Appellant's guilty plea, the court noted there was an issue concerning Appellant's prior record score. The court also noted the Commonwealth believed the prior record score might be a four and the defense believed it may be as low as a one or two. See Order docketed April 26, 2004.

Sentencing was scheduled for July 19, 2004. At that time, counsel indicated his client wished to withdraw his guilty plea. The court continued the sentencing

1 Count 1 was for possession of magazines, Count 2 was for possession of pamphlets and books, Count 3 was for possession of photographs and videotapes, and Count 4 was for possession of brochures and drawings.

hearing and directed defense counsel to file a written motion.

On July 26, 2004, counsel filed a motion to withdraw guilty plea, in which he asserted Appellant should be permitted to withdraw his plea because he believed his prior record score was a 1 or 2, with corresponding standard minimum guideline ranges of 1-12 months or 3-14 months. When he realized on the day of sentencing that his prior record score would be a 4 and the standard minimum guideline range would be 9-16 months, Appellant no longer wised to plead guilty. The court held a hearing on Appellant's motion on August 26, 2004. The court denied Appellant's motion in an Opinion and Order docked October 11, 2004.

Due to the nature of the charges to which Appellant pled guilty, the court ordered an assessment by the Sexual Offenders Assessment Board. On February 16, 2005, the Commonwealth filed a praecipe for a Megan's Law hearing. The court scheduled the Megan's Law hearing and sentencing for March 3, 2005.

Immediately prior to the hearing, counsel filed a request for reconsideration of the court's denial of Appellant's motion to withdraw his guilty plea. In this motion, Appellant contended the admitted acts did not constitute a criminal offense, i.e., although Appellant admitted he possessed the items in question he did not believe the items met the definition of child pornography. The court denied the motion, found Appellant to be a sexually violent predator, and sentenced him to undergo incarceration in a state correctional institution for an aggregate term of 3 to 21 years.

Appellant filed a timely notice of appeal. In this appeal, Appellant raises two issues. Appellant first avers the court erred in denying Appellant's motion to withdraw his guilty plea. The reasons for the court's denial of Appellant's motion to withdraw his guilty

plea are found in the Opinion and Order docketed October 11, 2004. The court's reasons for denying the request for reconsideration are stated on the record. See N.T., March 3, 2005, at pp. 9-10. The court noted (1) the request was untimely; (2) Appellant had the opportunity to present any basis for withdrawing his plea at the August 2004 hearing; and (3) whether the materials constituted child pornography was a legal issue, not a factual assertion of innocence.[2]

Appellant next asserts his counsel was ineffective for failing to request an expert to testify on his behalf on the issue of whether he is a sexually violent predator under Megan's Law. Initially, the court notes that this claim was never raised in the lower court. Thus, it appears it is not a proper issue for appeal, but rather should be raised in a Post Conviction Relief Act (PCRA) petition. Pa.R.App.P. 302(a)("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (Pa. 2002)(generally a defendant should wait to raise claims of ineffective assistance of counsel until collateral review). In the event the appellate courts disagree, the court will endeavor to address the merits of this claim to the best of its ability without having had an evidentiary hearing on this issue.

In order to prevail on an ineffective assistance of counsel claim, Appellant must prove: (1) the claim is of arguable merit; (2) counsel had no rational basis for his or her action or inaction; and (3) prejudice, i.e. there is a reasonable probability that, but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Reyes, 870 A.2d 888, 896 (Pa. 2005); Commonwealth v. Pierce, 567 Pa.

2 While reviewing the file to prepare this Opinion, the court noticed that Appellant challenged whether the materials were pornographic in his motion to suppress filed October 15, 2003. The Honorable Nancy L. Butts ruled against Appellant in her Opinion and Order filed February 26, 2004, pp. 3-4.

186, 203, 786 A.2d 203, 213 (Pa. 2001).

The court believes Appellant's assertion of ineffective assistance of counsel should fail for two reasons. First, counsel is not ineffective for failing to predict developments or changes in the law. Commonwealth v. Todaro, 549 Pa. 545, 551-52, 701 A.2d 1343, 1456 (Pa. 1997). In Commonwealth v. Curnutte, 871 A.2d 839 (Pa.Super. 2005), a case of first impression, the Pennsylvania Superior Court found that an indigent defendant has a right to a court appointed expert under the Megan's Law statute. The Curnutte decision was filed March 22, 2005. The Megan's Law hearing in this case occurred on March 3, 2005. Second, the court does not believe Appellant can show prejudice. The evidence presented at the Megan's Law hearing overwhelmingly established Appellant as a sexually violent predator. Appellant has a prior conviction from New York for sexually abusing four boys between the ages of 9 and 12. N.T., March 3, 2005, at pp. 15, 19, 42. In his writings, his interview with the pre-sentence investigator and his statements at sentencing, Appellant expresses a sexual interest in boys under the age of 12. Id. at 48-49, 59, 61. Appellant had a list of boys' names and ages with a rating system that appeared to represent a catalog of sexual contacts and possibilities. Commonwealth Exhibit 3; Id. at 25-26. Appellant's employment history was filled with positions were he could have access to young boys. He worked as a bus driver, a foster parent, and an associate pastor. He acknowledged to the Commonwealth's assessor that he used these jobs to be social with young boys. Id. at 47. When Appellant worked for Sears in 2002 or 2003 he observed two families with boys between the ages of 10 and 12 years old. He obtained their addresses from records at Sears, wrote to their parents and attempted to get them to allow him to spend time with the boys. Id. at 20-21, 44-45. The letters were introduced into evidence as Commonwealth's Exhibits

1 and 5. Based on this evidence, the court does not think Appellant could find an expert who would opine that he was not a sexually violent predator.

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: Robert Ferrell, Esquire (ADA)
Jay Stillman, Esquire
Work File
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)