IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1755-1996**
	:	**(96-11755)**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
HARRY CLARK,	:	
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 March 10, 2005 and docketed March 15, 2005, which denied Appellant's Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Appellant was arrested and charged with statutory sexual assault, aggravated indecent assault, indecent assault and corruption of the morals of a minor. These charges arose out of Appellant's relationship with his girlfriend's thirteen (13) year old daughter, A.V.

A jury trial was held on June 11-12, 1998. G. Scott Gardner was trial counsel for Appellant. At trial A.V. testified that Appellant had sexual relations with her two to three times per week from September 1995 through July 1996. During that time, A.V. was thirteen years old and Appellant was sixty-one years old. A.V.'s mother and Appellant had A.V. watch them engage in sexual intercourse so that when she went to have sex with Appellant she "did it right." A.V. also testified that Appellant engaged in oral sex with her. She stated that Appellant placed his mouth in her vagina and he also put his penis in her mouth. These

sexual activities occurred on one occasion.

In exchange for engaging in sexual acts with A.V., Appellant would give A.V.'s mother money. He also would give A.V. money, candy, and/or similar items.

A.V.'s mother did not have a problem with Appellant engaging in sexual acts with her daughter provided he took precautions so that she did not get pregnant. To that end, Appellant used his fingers to insert suppositories into A.V.'s vagina.

The jury convicted Appellant on all counts. On September 10, 1998, pursuant to portions of Pennsylvania's Megan's Law, which were then in effect, the court found Appellant to be a sexually violent predator and sentenced him to an aggregate term of imprisonment of six years to life plus six years.

Appellant appealed. His counsel on appeal was James Protasio. In this appeal, Appellant raised five issues: (1) the trial court erred in sentencing Appellant above the guideline ranges for these offenses; (2) Megan's Law was unconstitutional; (3) trial counsel was ineffective for failing to request a change of venue due to the pretrial publicity of the case; (4) trial counsel was ineffective for failing to call defense witnesses who would have testified concerning the victim's appearance and demeanor prior to and on the date of Appellant's arrest; (5) trial counsel was ineffective for failing to call as a witness the Children and Youth caseworkers as to statements given by the victim prior to the arrest of Appellant where she denied any sexual assaults; and (6) trial counsel was ineffective for failing to seek a continuance so that witnesses who were needed could be obtained for trial and for failing to subpoena those witnesses. The Pennsylvania Superior Court affirmed Appellant's conviction, but found Megan's Law unconstitutional and remanded the case for resentencing. Although the decision was filed March 20, 2000, the certified record was

remanded on or about May 16, 2000.

On August 2, 2000, the court resentenced Appellant to an aggregate term of six to twenty-seven years. Appellant again appealed. In this appeal, Appellant raised two issues: (1) whether the sentencing court erred by denying Appellant's motion for extraordinary relief for failing to sentence Appellant within ninety days of the Superior Court's decision; and (2) whether the trial court abused its discretion by imposing a sentence that was manifestly excessive. In a decision filed November 5, 2001, the Superior Court rejected Appellant's claims and affirmed his sentence. Appellant filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied on October 3, 2002. During this appeal, Kyle Rude and Gregory Stapp represented Appellant.

Appellant filed a Post Conviction Relief Petition on September 26, 2003. William Kovalcik was appointed to represent Appellant and the court gave Attorney Kovalcik an opportunity to file amendments to Appellant's pro se PCRA petition. Any amendment was to be filed within sixty days of May 3, 2004.[1] After the case was continued twice at the request of defense counsel, a conference was held on or about July 9, 2004. The Commonwealth argued the PCRA petition was untimely because it was not filed within one year of the Superior Court's decision on Defendant's first appeal which found Megan's Law unconstitutional and remanded the case for re-sentencing. The Commonwealth also argued

1 The court calculated this date to be on or about July 3, 2004. However, July 3 was a Saturday and the courthouse would have been closed on Monday, July 5, 2004 for the Fourth of July holiday. Therefore, any amendments were due on or before July 6, 2004.

the issues were previously litigated since ineffective assistance of trial counsel was raised in Appellant's initial appeal. The Court disagreed that the petition was untimely, because it believed the one-year period for filing a PCRA petition did not begin to run until the expiration of the time for seeking review with the United State Supreme Court following the Pennsylvania Supreme Court's denial of Appellant's petition for allowance of appeal on October 3, 2002.[2] The court also believed the PCRA petition asserted different issues of ineffective assistance than were raised in Appellant's initial appeal, so that the PCRA issues were not previously litigated.[3]

The court scheduled a hearing on Appellant's PCRA petition for February 4, 2005. On January 21, 2005, Appellant filed a pro se amendment to his PCRA petition, asserting additional claims. The court denied the amendment without prejudice to counsel filing an amended PCRA petition on Appellant's behalf. At the hearing on February 4, 2005, Attorneys Gardner, Protasio, Stapp and Rude testified. Defense counsel requested a continuance of the hearing because the witnesses named in the PCRA petition were not present to testify, as some of the subpoenas came back. The court granted counsel a continuance to locate the witnesses and secure their attendance. The matter was rescheduled for March 10, 2005.

At the March 10, 2005 hearing, Appellant presented the testimony of himself, Louis Long, Nancy Flook and Ronald Flook. In his petition, Appellant asserted Mr. Long, Mrs. Flook and Mr. Flook were character witnesses, whom trial counsel should have called as witnesses to his good moral character. At the hearing, however, these witnesses did not

2 The court calculated this date to be on or about January 1, 2003.

3 While the failure to raise these issues in that appeal could result in the issues being waived, such a result could be avoided by a properly layered ineffectiveness claim, which Appellant attempted to allege in his pro se

know what Appellant's reputation in the community was; they only knew their own personal opinion of Appellant. At the end of the hearing, the court denied Appellant's petition. N.T., March 10, 2005, at pp. 69-73.

On April 11, 2005, Appellant filed a notice of appeal.

In his statement of matters complained of on appeal, Appellant raises numerous issues. Appellant first asserts his sentence was illegal. Specifically, Appellant alleges his conviction for corruption of the morals of a minor merges with his conviction for statutory sexual assault and his conviction for indecent assault merges with his conviction for aggravated indecent assault. The court disagrees. Appellant had numerous sexual contacts with A.V. over a course of months. As the court explained at the original sentencing hearing, the offenses did not merge because separate acts satisfied the statutory elements for each offense as follows: (1) Appellant had vaginal intercourse with A.V., which satisfied the elements of statutory sexual assault; (2) Appellant's acts of performing oral sex on the victim and placing suppositories in her vagina were the acts which constituted aggravated indecent assault; (3) Appellant placing his penis in A.V.'s mouth satisfied the elements of indecent assault; and (4) Appellant having A.V. watch him have sex with her mother and his paying A.V. for sexual acts established corruption of the morals of a minor. N.T., September 10, 1998, at pp. 50-51. Since there was evidence of separate acts to satisfy the elements of the offenses, none of the offenses merged.

Appellant also claims trial counsel was ineffective in several respects. In order to establish ineffective assistance of counsel, Appellant must plead and prove: (1) the claim is of arguable merit; (2) counsel had no rational basis for his actions or his failure to

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PCRA petition.

act; and (3) prejudice, i.e., but for counsel's act or omission there is a reasonable probability that the outcome of the proceedings would have been different. Commonwealth v. Pierce, 567 Pa. 186, 203, 786 A.2d 203, 213 (Pa. 2001). When the claim involves failure to call a witness, Appellant must prove: (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness's existence; (4) the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) the absence of the testimony prejudiced appellant. Commonwealth v. Bomar, 573 Pa. 426, 468, 826 A.2d 831, 856 (Pa. 2003); Commonwealth v. Morales, 549 Pa. 400, 419-420, 710 A.2d 516, 525-526 (Pa. 1997).

Appellant asserts trial counsel was ineffective for failing to call character witnesses. Appellant did not meet his burden of proof on this claim. In his PCRA petition, Appellant named Grace Baylor, Nancy Flook, Ronald Flook, Anna Eisenhower, and Lewis Long as character witnesses that trial counsel should have called to testify to the good moral character and peaceable reputation of Appellant. Appellant did not call Anna Eisenhower or Grace Baylor as witnesses at either of the hearings on his PCRA petition. Therefore, he did not meet his burden of proof on any of the prongs to show ineffectiveness for failing to call these individuals as witnesses. Furthermore, Mr. Gardner, who was trial counsel in this case, testified he interviewed Ms. Baylor. Ms. Baylor did not want to be involved and did not have anything to say helpful to Appellant. N.T., February 4, 2005, at 36. Mr. Gardner also spoke to Ms. Eisenhower and the evidence she wanted to give related to the victim's promiscuity, which would not have been admissible. Id. at 30.

Mr. Gardner also testified that he subpoenaed Mr. Long, Mr. Flook and Mrs. Flook for trial and interviewed them in the lawyer's lounge at the courthouse. He indicated

that Mr. Long didn't want to get involved and Mr. Long stated that he didn't know anything about the case other than he had heard one of the female witnesses against Mr. Clark call Mr. Clark a dirty rotten bastard and son of a bitch during the summer of 1996. N.T., February 4, 2005, at pp. 33-34. Mr. Long did not provide Attorney Gardner with any information regarding Appellant's reputation for good moral character or peaceableness. Id. at 34. When Attorney Gardner interviewed Mr. and Mrs. Flook they told him that the victim would occasionally dress like a teenage prostitute. They also indicated that on one occasion the victim told them she needed $10 to buy a bicycle and if Mr. Flook would come down to the garage she would "show him something." Mr. and Mrs. Flook interpreted that as an overture by the victim to Mr. Flook for giving him sex for $10. Id. at 32-33. Mr. Gardner also testified Appellant never indicated that he had witnesses that could testify about his reputation for good moral character. Id. at 38. The court found Attorney Gardner's testimony credible. Furthermore, these witnesses' testimonies show that they could not have been called as character witnesses during Appellant's trial. In Pennsylvania state courts, witnesses are not permitted to testify about their opinion of a defendant's character; instead, character is proven by testimony as to reputation in the community. Pa.R.E. 405(a) and comment thereto; Commonwealth v. Blount, 538 Pa. 156, 170, 647 A.2d 199, 206 (Pa. 1994)("character evidence is not the opinion of one person or even a handful of persons, but must represent the consensus of the community"). PCRA counsel asked Mr. Long if he knew or if he had heard anything in the community about Appellant's reputation for moral character and Mr. Long replied in the negative. N.T., March 10, 2005, at p. 46. Similarly, Mrs. Flook indicated it was her opinion that Appellant was a nice person to work with. Id. at 54, 60. She did not testify regarding his reputation in the community. Mr. Flook's testimony

was similar to Mr. Gardner's. He indicated he told Mr. Gardner about A.V. offering to show him something in the garage in exchange for $10, which he took as her propositioning him to have sex with her. Id. at 63, 67. He did not testify about Appellant's reputation in the community. Since Mr. Gardner was not aware that any of these witnesses could testify as to Appellant's character and none of the alleged character witnesses listed in Appellant's PCRA petition testified at the PCRA hearings about Appellant's reputation in the community for good moral character and peaceableness, Appellant's claim that trial counsel was ineffective for failing to call these individuals as character witnesses must fail.

Appellant also asserts trial counsel was ineffective for denying Appellant exculpatory evidence. The only allegation of trial counsel ineffectiveness relating to exculpatory evidence in Appellant's original PCRA petition is that trial counsel failed to call Eva Pleasant as an alibi witness.[4] Appellant could not establish that Ms. Pleasant was available and willing to testify at trial or what her alleged alibi testimony would be, because Ms. Pleasant was deceased.[5] The court also doubts that Ms. Pleasant could have provided an alibi for the "various times of the alleged incidents for which Petitioner was convicted" as Appellant alleges in his original PCRA petition, because the testimony presented at trial was sexual acts between Appellant and the victim occurred at least weekly over a period of months. Moreover, Mr. Gardner testified that he interviewed Ms. Pleasant, but she was not identified as a witness that could provide an alibi or testify regarding Appellant's reputation for good moral character. N.T., February 4, 2005 at 35-36.

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4 The court will address the issues related to the amendment filed by Appellant on or about January 21, 2005 later in this opinion.

5 Ms. Pleasant died some time before May 6, 2001 and Appellant was aware of this fact when he filed his PCRA petition, because he mentions this fact on page nine of his Application for Relief he filed in Superior Court (1936 MDA 2000). A copy of the Application for Relief was placed in Appellant's court file.

Appellant next contends trial counsel was ineffective for failing to object to the court's imposition of an illegal sentence. As previously discussed, Appellant's sentence was not illegal; therefore, trial counsel was not ineffective for failing to raise this issue.

Appellant's fourth claim of trial counsel ineffectiveness is that counsel failed to investigate, interview and adequately prepare a defense at trial. The court cannot agree. Mr. Gardner testified that he met with Appellant at least twice in his office, once in Marc Lovecchio's office, and once in the courthouse. N.T., February 4, 2005, at 28. Mr. Gardner interviewed and/or subpoenaed the individuals Appellant felt should be called to testify at his trial. Id. Generally speaking, the witnesses told Mr. Gardner the victim looked like a teenage prostitute and she was promiscuous. Mr. Gardner determined this evidence was not relevant or admissible. Mr. Gardner was correct. This evidence would be inadmissible under Pennsylvania's Rape Shield Law, 18 Pa.C.S. §3104.

Appellant also contends trial counsel was ineffective for failing to file a pre-trial alibi defense. Appellant did not present any evidence at the PCRA hearings to establish that he had an alibi. Therefore, he has not met his burden of proof and this claim must fail.

Appellant asserts trial counsel was ineffective for failing to object and preserve trial court error for Appellate review. Appellant has not specified any trial court error that trial counsel should have preserved for appellate review. Therefore, this issue is waived.

Appellant also alleges his appellate attorneys were ineffective for failing to raise trial counsel's ineffectiveness. Since Appellant's claims of trial counsel ineffectiveness

lack merit, his derivative claims of appellate counsel's ineffectiveness also must fail. Similarly, Appellant's assertion that PCRA counsel was ineffective for failed to raise layered ineffectiveness of trial counsel and appellate counsel must fail because Appellant has not established either trial counsel's or appellate counsel's ineffectiveness.

Appellant claims PCRA counsel was ineffective for failing to investigate and prepare for examination of witnesses thereby only allowing the witnesses to state opinions of Appellant's character. Contrary to Appellant's assertions, the deficiency was not in counsel's representation of him, but the witness's ability to provide "character" evidence as that term is defined by Pennsylvania law. Attorney Kovalcik attempted to elicit evidence from Mr. Long, Mrs. Flook and Mr. Flook regarding Appellant's reputation in the community, but these witnesses generally were not familiar with Appellant's reputation and could only give their own personal opinion. Unfortunately for Appellant, as previously discussed, such opinion testimony is not admissible under Pennsylvania law.

Appellant also claims PCRA counsel was ineffective for failing to file an amended PCRA petition upon Appellant's request to do so. As with any ineffectiveness claim, Appellant must plead and prove that: (1) the claim is of arguable merit; (2) counsel had no rational basis for his actions or failure to act; and (3) prejudice. Appellant cannot meet this standard. The court finds the issues Appellant wanted PCRA counsel to raise lacked merit.

Appellant first claims PCRA counsel was ineffective for failing to request DNA testing. In this case, however, the victim reported the sexual abuse some time after the

incidents had occurred, so there wasn't a rape kit or any other material on which to conduct DNA testing.

Appellant also claims PCRA counsel was ineffective for failing to assert trial counsel was ineffective for failing to communicate with Appellant to prepare a defense. Appellant has not properly layered this claim. Appellant was represented by three attorneys after trial counsel and before PCRA counsel. Moreover, trial counsel testified that he met with Appellant several times and he interviewed the witnesses Appellant wanted him to call, but they could not offer relevant or admissible testimony. The court found trial counsel's testimony credible. Therefore, Appellant's claims that trial counsel failed to communicate with him to prepare a defense are meritless.

Appellant also alleges PCRA counsel was ineffective for failing to file an amendment alleging ineffectiveness of all prior counsel for failing to contact, visit, speak or write to Appellant, or take information to act on Appellant's behalf. The record, however, reflects that counsel and Appellant communicated through correspondence regarding the issues to be raised in his appeals. Furthermore, Appellant has not shown any issue that he wanted to raise, upon which he would have prevailed. Counsel is not ineffective for failing to raise meritless issues.

Appellant asserts PCRA counsel was ineffective for failing to allege past counsel's ineffectiveness for failing to address the victim's past history of false allegations of sexual assault by her siblings and failing to challenge the victim's false testimony at trial. This assertion also lacks merit and, to some extent, is belied by the record. Pre-trial counsel

Marc Lovecchio made a request for information from Children and Youth files, including information regarding the victim's history of allegations of sexual assault by her siblings. The Honorable William S. Kieser reviewed the materials in camera and entered an order stating A.V. was subject to sexual abuse by several different perpetrators, and the court could not say with certainty that A.V. made any false accusations or statements. Nevertheless due to the volume of statements and records and what appeared to be a change in defense theories, the court permitted defense counsel to examine the records. See Order docketed June 8, 1998.[6] Thus, A.V.'s prior allegations of sexual abuse were true; it is Appellant's premise that is false.

The court also notes that for any issue raised by Appellant in this appeal, he cannot show prejudice. This is not the case of an innocent individual being wrongfully convicted. Appellant admitted in a pre-sentence investigation (PSI) and at sentencing that he had sexual relations with A.V. In the PSI, Appellant said the victim, who appeared to him to be 18, asked him to have sex for money and he admitted to having relations with her on four occasions. See N.T., September 10, 1998, at 5. When the court indicated that according to

6 Furthermore, in a separate Children and Youth proceeding that occurred at least a year prior to the acts that form the basis of this case, the court found clear and convincing evidence that A.V. was the subject of sexual abuse with her brother being the perpetrator. In re: A.V., Lyc. Cty. No. 86-30,246, Order of February 1, 1994 (Smith, J.).

the PSI it appeared Appellant had admitted having sexual relations, Appellant interrupted and said: "Yes, I was propositioned by a prostitute and I can prove that." Id. at 45.

Appellant claims PCRA counsel was ineffective for failing to file a notice of appeal from the court's order denying Appellant's amended petition filed on January 21, 2005 without prejudice to counsel filing an amendment on Appellant's behalf. The court cannot agree. There is nothing in the record to show that Appellant requested PCRA counsel file an appeal from the Order dated January 27, 2005 and docketed January 28, 2005.

The court also believes it was not required to act on Appellant's documents filed January 21, 2005. At the time Appellant filed his amended petition, he was represented by counsel. Rule 576(a)(4) of the Pennsylvania Rules of Criminal Procedure required the Prothonotary to accept the "amendment" for filing and forward a copy to Appellant's attorney and the attorney for the Commonwealth within 10 days of receipt. The comment to Rule 576 states: "The requirement that the clerk time stamp and make docket entries of the filings in these cases only serves to provide a record of the filing, and does not trigger any deadline nor require any response." The court denied Appellant's filings without prejudice to counsel filing appropriate motions on Appellant's behalf, so everyone would be aware that the court was not going to address the merits of Appellant's filings when he was represented by counsel and the filings were not filed by counsel. The court hoped counsel would review the "amended PCRA" and if he believed there was any merit to it, he would file a petition that would comply with the rules and statutes concerning PCRA petitions.

There also was no reason to hold an evidentiary hearing on Appellant's

amended PCRA petition because there were no documents or witness certifications included with or appended to the petition. 42 Pa.C.S.A. §9545(d); Pa.R.Cr.P. 902(A)(12).

Appellant's final issue on appeal is the trial court erred when it filed the amended PCRA without filing the petition for leave of court to file an amended PCRA. This issue is frivolous. The trial court did not file any of Appellant's documents; the Clerk of Courts/Prothonotary did. Appellant's amended PCRA, his petition for leave of court to file an amended PCRA, and his request for a continuance of the hearing scheduled for February 4, 2005 were all filed on January 21, 2005. The court's orders denying Appellant's requests were filed on January 28, 2005.

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)
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