

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 :
 v. : **No. 04-11,019**
 : **CRIMINAL DIVISION**
 :
 DARRELL B. HARROLD, :
 Defendant :

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

The Defendant raises two issues on appeal. First, he contends that his appointed PCRA counsel was ineffective for failing to correspond with him regarding his Petition. Second, the Defendant contends that PCRA counsel was ineffective for failing to timely amend his *pro se* PCRA Petition, as permitted to do so by this Court in its Order of April 16, 2007, to include a claim of ineffective assistance of trial counsel for failure to present character testimony on the Defendant's behalf at his November 2004 trial. For the following reasons, the Court finds that the Defendant's contentions are meritorious.

Background¹

On May 8, 2004, Officer Thomas Bortz of the Williamsport Bureau of Police accompanied Lycoming County Children and Youth to a residence on Trenton Avenue in the City to investigate allegations that the mother of children residing within was using and/or selling illegal narcotics. When they arrived, Officer Bortz testified that the Defendant answered the door dressed in boxer shorts and, according to Officer Bortz, had an erection. The Defendant stated that he was alone in the home with the mother's children; neither Officer Bortz nor the Children and Youth representatives inquired further, entered the home, or sought to see or speak with the children. The next day, the Williamsport Police Department received a report of child sexual abuse at the Trenton Avenue residence; specifically, the report indicated that the

¹ The Court copied following "background" entirely from this Court's Opinion and Order of June 14, 2007.

Defendant had performed oral sex on two boys, ages six and eight, who were staying at the home the previous evening. Investigators interviewed the two boys who confirmed the report. The Defendant was arrested on May 21, 2004 and charged with several counts ranging from corruption of minors to involuntary deviate sexual intercourse with a child. After a two day trial, the jury found the Defendant guilty of five counts of involuntary deviate sexual intercourse, two counts of aggravated indecent assault and indecent assault, and one count each of endangering the welfare of a child and corruption of minors for which the Court, on February 15, 2005, sentenced the Defendant to 20 – 40 years incarceration and 10 consecutive years of probation.

On March 10, 2005, the Defendant filed a timely appeal alleging that the Court erred by failing to merge, for purposes of sentencing, the aggravated indecent assault and involuntary deviate sexual intercourse charges and in May 2006, the Superior Court of Pennsylvania affirmed this Court's decision. On October 21, 2006, the Defendant filed a timely *pro se* Petition for Relief under the Post Conviction Relief Act. The Court appointed counsel and, on April 16, 2007, the Court granted the Defendant thirty days in which to amend his Petition. On April 24, 2007, appointed counsel notified the Court, via letter, that it was his belief that the Defendant's Petition was without merit. On June 14, 2007, this Court, agreeing with PCRA counsel's conclusion that the Defendant's claims were meritless, announced its intent to dismiss the Defendant's PCRA Petition. On July 14, 2007, after receiving no response regarding this Court's intent to dismiss the Defendant's Petition, this Court dismissed the Defendant's PCRA Petition for the reasons stated in our Opinion and Order of June 14, 2007. On July 25, 2007, the Court granted PCRA counsel's Motion to Withdraw.

The Defendant filed a timely July 17, 2007 *pro se* appeal of this Court's July 14, 2007 decision and, on August 10, 2007, appointed counsel filed a timely Concise Statement of Matters Complained of on Appeal.

Discussion

Pennsylvania Rule of Criminal Procedure No. 904(C) directs that, if a Defendant can satisfy the judge that he/she is unable to afford or otherwise procure counsel, the Court shall appoint counsel to represent the defendant on his/her first petition for post conviction relief. Case law supports what common sense tells us: “[i]t is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel. Indeed the right to counsel is meaningless if effective assistance is not guaranteed.” *Commonwealth v. Albrecht*, 554 Pa. 31, 44, 720 A.2d 693, 699 (Pa. 1998), citations omitted.

Counsel is presumed to be effective. *Commonwealth v. Washington*, 927 A.2d 586, P8 (Pa. 2007), citations omitted. In order to overcome this presumption, the defendant must demonstrate that, (1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; and (3) counsel's ineffectiveness prejudiced defendant. *Commonwealth v. Beasley*, 544 Pa. 554, 678 A.2d 773, 778 (Pa. 1996) and *Id.*

Instantly, on January 19, 2007, the Court appointed attorney Paul J. Petcavage, Esq. to represent the Defendant on his October 21, 2006 *pro se* Petition for Post Conviction Relief. After an initial conference, the Court gave Attorney Petcavage until May 16, 2007 to amend the Defendant's *pro se* Petition or file a letter of no merit; Attorney Petcavage filed a no merit letter on April 24, 2007. In Attorney Petcavage's April 24, 2007 no merit letter, he states, as explained by this Court in Footnote number 1 of its June 14, 2007 Opinion and Order, that he [Attorney Petcavage] found the Defendant's Petition to be meritless for lack of specificity; however, it is not clear whether Attorney Petcavage made any attempts to investigate (e.g. communicating with the Defendant) the Defendant's contentions in his Petition (e.g. in his no merit letter, PCRA counsel did not indicate that, after a review of the record, he cannot substantiate the Defendant's contentions but instead states that the Defendant was not specific enough). Nonetheless, this

Court conducted an independent review of the Defendant's Petition, and the entire record, and found nothing upon which to form a basis for post conviction relief. Accordingly, on July 14, 2007, the Court dismissed the Defendant's PCRA Petition.

In his instant appeal, the Defendant clarifies his allegations of ineffective assistance of counsel raised in his PCRA Petition; specifically, the Defendant contends trial counsel was ineffective for failing to present character evidence on his behalf at his November 2004 trial. Unfortunately, this Court did not have the opportunity to address this specific issue as PCRA counsel determined it to be without merit and the Court's independent review of the Defendant's Petition and the Court file, including the trial transcript, did not highlight this particular issue.

It is obvious to this Court that PCRA counsel's performance was unreasonable; if he (PCRA counsel) found the Defendant's Petition to be vague, he had an obligation to discuss said Petition with the Defendant and then determine whether to amend the Petition or file a letter of no merit. It is equally obvious to the Court that PCRA counsel's ineffectiveness prejudiced the Defendant; because of counsel's inaction, this Court was all but forced to deny the Defendant's Petition without reaching the merits of his allegations. Lastly, it is possible that the Defendant's underlying claim (i.e. that trial counsel was ineffective for failing to present character testimony at his November 2004 trial) is of arguable merit; however, this Court, as explained above, was unable to review this issue due to PCRA counsel's ineffectiveness.

Conclusion

For the foregoing reasons, this Court respectfully suggests that the Superior Court find that PCRA counsel was ineffective and grant the Defendant's instant appeal thereby remanding this matter for further PCRA conferences/hearing.

By The Court,

Dated: _____

Nancy L. Butts, Judge

xc: DA
Gregory D. Drab, Esq.
Hon. Nancy L. Butts
Judges
Laura R. Burd, Esq. (Law Clerk)
Gary L. Weber, Esq. (Lycoming Reporter)