

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 458-2003
 :
 RICHARD KISSINGER, :
 :
 Defendant : 1925(a) OPINION

Date: April 13, 2007

**OPINION IN SUPPORT OF THE ORDER OF OCTOBER 4, 2006 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant Richard Kissinger has appealed this court's sentence of October 4, 2006. Kissinger contends that the court erred by instructing the jury as to the offense of solicitation to commit aggravated indecent assault and that his trial counsel was ineffective for failing to object to this instruction. Kissinger's appeal should be denied and the sentence affirmed.

On May 26, 2006, a jury found Kissinger guilty of indecent exposure, official oppression, and criminal solicitation. On October 4, 2006, this court sentenced Kissinger to confinement at the Lycoming County Prison for a minimum term of three months and a maximum term of twenty-four months less one day as to the indecent exposure offense, to twenty-four months of intermediate punishment, one month being restrictive intermediate punishment, as to the official oppression offense, and confinement at the Lycoming County Prison for a minimum of twenty-two months and a maximum of five years less one day for the criminal solicitation offense. On October 13, 2006, Kissinger filed a Post-sentence Motion. On February 20, 2007, this court issued an order denying Kissinger's Post-sentence Motion.

On March 22, 2007, Kissinger filed a Notice of Appeal. On March 26, 2007, this court issued an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Kissinger to file a concise statement of matters complained of on appeal within fourteen days of the order. On April 9, 2007, Kissinger filed his statement of matters.

In his statement of matters, Kissinger set forth one issue. It stated as follows:

Defendant Richard Kissinger asserts that the trial court erred, and his trial counsel was ineffective for not objecting to, the court's instructions to the jury as to County (sic) III Solicitation to Commit Aggravated Indecent Assault, as the Defendant was never charged with the offense of Solicitation to Commit Aggravated Indecent Assault. The Defendant was charged with Solicitation to Commit Institution Sexual Assault.

Defendant's Concise Statement of Matters Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b). Kissinger's stated issue contains two issues. The first is that the trial court erred by instructing the jury as to the offense of solicitation to commit aggravated indecent assault since Kissinger was never specifically charged with that offense. The second is that Kissinger's trial counsel was ineffective for failing to object to the court's jury charge in this regard.

As to the first issue, the court believes that it has addressed this issue in the February 20, 2007 order denying Kissinger's Post-sentence Motion. The court hereby reasserts and reaffirms the reasoning set forth in the February 20, 2007 order to address Kissinger's first issue on appeal.

As to the second issue, the court believes that Kissinger's ineffective assistance of counsel claim must fail. In order to establish an ineffective assistance of counsel claim, a defendant must demonstrate that (1) the underlying claim is of arguable merit; (2) counsel's course of conduct was without a reasonable basis designed to effectuate the defendant's

interests; and (3) the defendant was prejudiced by counsel's ineffectiveness, i.e., that there is a reasonable probability that but for the act or omission in question, the outcome would have been different. *Commonwealth v. Brooks*, 839 A.2d 245, 248 (Pa. 2003); *Commonwealth v. Lambert*, 797 A.2d 232, 234 (Pa. 2001). A defendant bears the burden of proving all three prongs of the ineffective assistance of counsel claim. *Commonwealth v. Meadows*, 787 A.2d 312, 320 (Pa. 2001). "A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim." *Commonwealth v. Bromley*, 862 A.2d 598, 606 (Pa. Super. 2004), *app. denied*, 881 A.2d 818 (Pa. 2005), *cert. denied*, 126 S. Ct. 1089 (U.S. 2006).

Kissinger's ineffective assistance of counsel claim fails because he is unable to establish all three prongs of the claim. Kissinger cannot establish that the underlying claim that the court erred in instructing the jury as to the offense of solicitation to commit aggravated indecent assault is of arguable merit. The evidence presented at trial established that Kissinger, a correctional officer at the Muncy State Correctional Institution, solicited inmate Elizabeth Mitchell to perform oral sex upon inmate Maria Rosado and also for her to digitally penetrate Rosado's vagina in a shower room at the Muncy State Correctional Institution while he watched. An individual commits aggravated indecent assault if she engages in penetration, however slight, of the genitals or anus of another individual with a part of her body for any purpose other than good faith medical, hygienic, or law enforcement procedures and she did so without the other person's consent, or by forcible compulsion, or by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution. 18 Pa.C.S.A. § 3125(a)(1)-(3). The evidence presented at trial regarding the acts solicited by Kissinger and

performed by Mitchell would establish the offense of aggravated indecent assault. As such, it was appropriate to instruct the jury as to that offense.

The court acknowledges that the criminal complaint and the information do not allege by name that the crime Kissinger solicited was aggravated indecent assault; in fact, the criminal complaint identifies institutional sexual assault as the offense solicited. The court also acknowledges that the Commonwealth did not move to amend the information and specify what crime Kissinger was alleged to have solicited. If the Commonwealth had moved to amend the information to specify that the alleged solicited crime was aggravated indecent assault the court would have permitted the amendment.

The court would have done so because the amendment would not have prejudiced Kissinger. Kissinger has been long aware of the factual allegations at the center of this case. The criminal complaint identified the underlying factual allegations giving rise to the criminal solicitation charge by stating, “The defendant did encourage/request Elizabeth MITCHELL to engage in sexual acts with Maria ROSADO knowing that neither victim was willing to do so.” The affidavit of probable cause in support of the criminal complaint alleged that, “KISSINGER requested the two inmates, [(MITCHELL and ROSADO)], perform a sexual act together so that he could observe this act.” The testimony elicited at the preliminary hearing was that Kissinger solicited Mitchell to perform oral sex upon Rosado and digitally penetrate Rosado’s vagina while he watched. As such, Kissinger could not claim surprise since he would have been aware of the factual allegations from the beginning and would have had plenty of time to prepare a defense to them.

Nor could Kissinger claim that such an amendment would affect his trial strategy. Kissinger's defense at trial was his steadfast contention that the alleged events never took place. Kissinger attacked the credibility of Mitchell and Rosado by arguing that their accusations were fabricated as part of a scheme to extort money from him and the Department of Corrections through a lawsuit Mitchell and Rosado intended to file based upon their allegations. Notes of Testimony, 162 (5/25/06). Kissinger also attempted to cast doubt upon Mitchell and Rosado's story by arguing that the physical evidence did not corroborate their description of the events. *Id.* at 80, 81-88. In this regard, as would relate to Mitchell's allegation that Kissinger exposed his penis to her in an office and masturbated in front of her, Kissinger presented evidence that he had a barbed wire tattoo around the shaft of his penis. *Id.* at 81, 82, 85-87. Kissinger argued that if Mitchell's allegations were true, then she would have seen the tattoo and been able to testify that she saw it. *Id.* at 76, 77, 78, 112, 118-120. Kissinger argued that since Mitchell failed to testify that she saw any tattoo her allegations must be false. *Id.* at 163, 165. Kissinger's trial strategy boiled down to this - no facts - no crime. As such, it would not matter to Kissinger's trial strategy what crime was identified as the one he allegedly solicited since the underlying facts which would establish that, or any other crime, did not exist.

Since the evidence supported the charge and the court would have permitted an amendment, any objection made by Kissinger's trial counsel to a jury instruction as to the offense of solicitation to commit aggravated indecent assault would have been overruled. Counsel will not be deemed ineffective for failing to pursue a meritless claim. *Commonwealth v. Chimel*, 889 A.2d 501, 541 (Pa. 2205); *Commonwealth v. Payne*, 794 A.2d 902, 906 (Pa.

Super. 2002); *Commonwealth v. Thomas*, 783 A.2d 328, 332-33 (Pa. Super. 2001). Kissinger's trial counsel would have had no basis to object to the jury instruction regarding the offense of solicitation to commit aggravated indecent assault. As such, trial counsel cannot be said to be ineffective for failing to pursue a pointless cause of action.

For the foregoing reasons, the court's sentence of October 4, 2006 should be affirmed and Kissinger's appeal dismissed.

BY THE COURT,

William S. Kieser, Judge

cc: Eric Linhardt, Esquire
DA
Judges
Christian Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)