

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1227-2008
vs. : CRIMINAL
:
TONY MARSHALL, : Omnibus Pretrial Motion
Defendant :

ORDER

AND NOW, this ____ day of February 2009, upon consideration of Defendant's Omnibus Pretrial Motion, it is ORDERED and DIRECTED as follows:

1. The Court DENIES Defendant's petition for writ of habeas corpus on counts 1, 3, 8 and 13. Defendant claims the Commonwealth failed to establish a prima facie case as to the element of forcible compulsion. The Court cannot agree. The victim testified at the preliminary hearing that Defendant forced her to perform sexual acts. Preliminary Hearing Transcript, pp. 4, 7.

2. The Court DENIES Defendant's petition for writ of habeas corpus on counts 7, 11, and 15. Defendant claims the Commonwealth failed to establish Defendant committed the relevant act without the complainant's consent. The victim was asked if she ever told Defendant it was okay or gave him consent and she said no. Preliminary Hearing Transcript, pp. 8-9.

3. The Court DENIES Defendant's petition for writ of habeas corpus on counts 2, 4, 6, 9 and 12. Defendant claims the Commonwealth failed to establish the complainant was less than 13 years of age. At the hearing before the Court, the victim testified that the sexual acts began before she started school and continued for several months, but she not recall exact dates. Although she may have testified on cross-examination that the acts occurred in October, after her thirteenth birthday, it appeared to the

Court that she was confused by the questions and was indicating, not that the first time was in October, but that the sexual acts occurred both before and after her birthday. Based on the testimony as a whole, the Court finds this is an issue for the jury.

4. The Court DENIES Defendant's Motion to Dismiss claiming it is unconstitutional to make oral intercourse a more serious offense than vaginal intercourse. Initially, the Court notes that Defendant is not charged with violating section 3123(a)(7); instead, he is charged with section 3123(b). The Court finds that there is a rational basis for treating oral intercourse under section 3123(b) as a more serious offense than statutory sexual assault under section 3122.1. The grading and offense gravity score are based on the elements of the offense. Section 3123(b) requires the victim to be less than 13 years of age, whereas section 3122.1 requires the complainant to be under the age of 16 and the perpetrator to be four or more years older than the victim. It seems perfectly rational to the Court that the Legislature and Sentencing Commission would provide for a higher grade and offense gravity score for crimes against young children.

By The Court,

Kenneth D. Brown, P.J.

cc: Mary Kilgus, Esquire (ADA)
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Work file