

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR- 233-2005
:
vs. : CRIMINAL DIVISION
:
:
MARK A. SMITH, : Notice of Intent to Dismiss/Deny
Defendant : PCRA

ORDER

AND NOW, this ___ day of February 2009, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the Court gives Defendant notice of its intention to dismiss or deny his Post Conviction Relief Act (PCRA) petition without holding an evidentiary hearing.

Initially, the Court notes that neither Defendant nor his attorney has provided any witness certifications. The PCRA states:

Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

42 Pa.C.S. §9545(d); see also Pa.R.Cr.P. 902(A)(15). Since there currently are no witnesses whose testimony would be admissible under section 9545(d), there is no need to hold an evidentiary hearing.

Even if Defendant or his attorney had provided witness certifications, the Court finds Defendant would not be entitled to relief as a matter of law. The basic factual allegations of the petition follow.

At approximately 3:15 p.m. on April 10, 2008, Defendant's

public defender advised him of the prosecutor's plea offer of two years probation for a guilty plea to corruption of minors and the other charges would be dismissed. When Defendant arrived at his home, there was a message on his answering machine that if he wanted to take the plea, he had to come back the next morning at 8:30 a.m. Defendant called back and said he had questions so either way he would come in the next morning. When he arrived the next morning, he was not able to speak to the public defender who had been handling his case. Another public defender flipped through his file and asked if he could answer his questions. The secretary informed Defendant that if he wanted to take the plea, he had to go to court at 9:00 a.m. Defendant appeared in court and entered his guilty plea. With the agreement of all parties, the Court immediately sentenced Defendant in accordance with the plea agreement to two years probation.

Defendant contends his rights were violated, his attorney was ineffective and the plea was not knowingly, voluntarily and intelligently entered because: (1) he was under pressure or duress due to the limited time he had to accept the plea offer and the roughly fifteen or twenty minutes he had to speak with a public defender who was not familiar with his case; and (2) his attorney did not inform him of the ramifications of his plea including that his picture would be on the internet as a sex offender, his rights to hunt and own a firearm would be affected, and an indicated letter of abuse in Harrisburg would become a founded letter.

These allegations, even if true, are insufficient to render Defendant's plea involuntary. Mere shortness of time to confer with counsel does not of itself establish that counsel was ineffective. Commonwealth v. Coffield, 310 Pa. Super. 356, 361, 456 A.2d 650, 652-53 (Pa. Super. 1983); Commonwealth v. Warner, 228 Pa. Super. 31, 34, 324 A.2d 362, 364 (Pa. Super. 1974). Defendant also has not alleged that any prejudice occurred as a result of the shortness of time spent conferring with counsel prior to entering his plea.¹ Moreover, Defendant indicated on the record and in the written colloquy that he was not coerced, threatened, or pressured into pleading guilty. N.T., April 11, 2008, at p. 8; Written Colloquy, p.6, questions 34 and 35. The Court even asked Defendant if he was satisfied he had enough time to talk to counsel about and he replied, "I suppose, yes." N.T., at p.8. Pennsylvania case law also states that a defendant need not be advised of collateral consequences of his plea agreement and the failure to advise him of such consequences is not a basis for withdrawal of the plea. Commonwealth v. Leidig, 956 A.2d 399, 404 (Pa. 2008); Commonwealth v. Duffey, 536 Pa. 436, 639 A.2d 1174 (Pa. 1994); Commonwealth v. Frometa, 520 Pa. 552, 555, 555 A.2d 92, 93 (Pa. 1989). The ramifications that Defendant asserts he is subject to but was not informed of

¹ The Court also believes the plea agreement was a good one for both parties. Defendant was charged with numerous felony and misdemeanor sex offenses against his daughter who was twelve years old at the time the offenses occurred. The case was tried in November 2007 and victim testified, but a mistrial was declared because the jury was deadlocked. The Commonwealth agreed to drop the more serious offenses and accept a plea to corruption of minors for a sentence of two years probation. Although Defendant claims that his daughter no longer wished to pursue the case, that does not mean the Commonwealth did not have a case against him. The decision whether to pursue a case rests with the prosecutor, not the witnesses. The Commonwealth could have subpoenaed the victim to require her to testify even if she did not want to do so. Furthermore, depending on the circumstances, there is the possibility that the Commonwealth could have utilized the victim's

prior to his plea are collateral consequences. See Leidig, supra (finding notification and registration requirements under Megan's law are collateral consequences and noting many other examples of collateral consequences to a plea of guilty may be the loss of the right to vote, to enlist in the armed services, to inherit property, to own a firearm or fishing license, to practice certain professions, and to hold public office or public employment).

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Petition. Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an order denying/dismissing the petition.

By The Court,

Kenneth D. Brown, P.J.

cc: Kenneth Osokow, Esquire (ADA)
James Protasio, Esquire
Mark Smith, 5702 S.R. 287, Jersey Shore, PA 17740
Work file

testimony from the first trial. See Pa.R.E. 804(b)(1).