

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1022-2009; 1105-2009
:
vs. :
:
DANIEL BRADY HYKES, : Opinion and Order re: Defendant's Request for
: Habeas Corpus relief
Defendant :
:

OPINION AND ORDER

This matter came before the Court on May 13, 2010 on the Defendant's Petition for Immediate Release and Petition for Enforcement of Habeas Corpus Writ. The Court will construe the Defendant's motions as a single motion for habeas corpus relief based on the recent Superior Court cases of Commonwealth v. Arroyo, 2010 PA Super 42 (Pa. Super. March 19, 2010) and Commonwealth v. Gordon, 2010 PA Super 49 (Pa. Super. March 26, 2010). The relevant facts follow.

On or about January 6, 1994, the Defendant was found guilty in the State of Alaska of two counts of sexual abuse of a minor in the first degree in violation of Alaska Statute 11.41.434(a)(2). The disturbing factual allegations surrounding these charges were that the Defendant inserted his finger and his tongue into the vagina of his three-year old daughter. The Alaska court sentenced the Defendant to a total unsuspended term of nine years incarceration.

In 2007, the Defendant came to Pennsylvania and began residing with his sister at 121 Florence Drive, Hepburn Township, Lycoming County, Pennsylvania. He registered this address with the Pennsylvania State Police. When the Defendant failed to verify his address between the dates of April 14-23, 2008, the Megan's Law Unit in

Harrisburg sent an investigation request to Trooper Angela Bieber. On May 16, 2008, Trooper Bieber went to the Defendant's registered address and spoke with the Defendant's sister, who indicated that the Defendant left shortly after Passover and he was somewhere in the Arizona or New Mexico area.¹ Trooper Bieber filed a criminal complaint against the Defendant charging him with failing to report a change of address within 48 hours and failing to verify his address in violation of 18 Pa.C.S.A. §4915. These charges ultimately became case number CR-1105-2009. The Defendant was arrested on these charges on or about May 15, 2009.

The Defendant was unable to post bail on these charges, so he was committed to the Lycoming County Prison. On or about May 19, 2009, prison officials tried to get the Defendant to complete the Sexual Offender Address Worksheet to change his address from 121 Florence Drive to the prison's address, but the Defendant allegedly refused to sign the form. As a result, Trooper Bieber charged the Defendant with another violation of 18 Pa.C.S.A. §4915 for failing to notify the Pennsylvania State Police of a change of residence. This charge was filed to case number CR-1022-2009.

On July 25, 2008, as a result of the Alaska Supreme Court decision in Doe v. State, 189 P.3d 999 (Ak. 2008), individuals who committed their crimes prior to August 10, 1994 were no longer required to register in Alaska. This ruling, however, did not affect the Defendant's underlying criminal convictions.

On or about July 28, 2009, the Defendant filed a request for a bill of particulars. Item 2 of the request asked which specific statute sections and subsections the

¹ In 2008, Passover was April 20th.

prosecution alleges require the Defendant to register in Pennsylvania as an “offender?” On December 15, 2009, the Commonwealth filed its answer to the bill of particulars. The answer to Item 2 listed the following statutes: “42 Pa.C.S. 9792, AS 11.41.434(A)(2)(AK 2009), 18 Pa.C.S. 3123(a)(7), 18 Pa.C.S. 4915(a)(2).”

In the motions currently before the Court, the Defendant argues that he is not subject to prosecution pursuant to 18 Pa.C.S.A. §4915. Following oral argument, the parties were given the opportunity to and did submit written legal memoranda or Briefs. After reviewing the Superior Court’s recent decisions in Gordon and Arroyo, the Court is constrained to agree with the Defendant’s position.

The Defendant is charged with violating subsections (a)(1) and (a)(2) of the Section 4915, which state, in relevant part:

An individual who is subject to registration under 42 Pa.C.S. § 9795.1(a) (relating to registration) or an individual who is subject to registration under 42 Pa.C.S. § 9795.1(b)(1), (2) or (3) commits an offense if he knowingly fails to:

- (1) register with the Pennsylvania State Police as required under 42 Pa.C.S. § 9795.2 (relating to registration procedures and applicability);
- (2) verify his address or be photographed as required under 42 Pa.C.S. § 9796 (relating to verification of residence);

18 Pa.C.S.A. §4915(a)(1) and (2). The first required element for a violation of either subsection is that the Defendant be subject to registration under 42 Pa.C.S.A. §9795.1(a) or 42 Pa.C.S.A. §9795.1(b)(1), (2) or (3). Noticeably absent from the list of individuals within the purview of Section 4915 are individuals who are subject to registration under 42 Pa.C.S.A. §9795(b)(4). Since the Defendant was not convicted of a crime in Pennsylvania or

judicially categorized as a sexually violent predator, the issue in this case is whether the Defendant's Alaska conviction makes the Defendant subject to registration under 9795.1(a)(3) or (b)(4).

To determine whether the Defendant is subject to registration under these subsections, the Court must examine the Defendant's Alaska offenses and determine to what crime or crimes, if any, listed under sections 9795.1(a)(1), (a)(2) or (b)(2) the Alaska offenses are similar. In Arroyo, the Pennsylvania Superior Court defined the term "similar" as very much alike. Arroyo, 2010 PA Super 42, ¶ 14.

The Defendant was convicted of two counts of sexual abuse of a minor in the first degree under Alaska Statute 11.41.434 (a)(2), which provides,

An offender commits the crime of sexual abuse of a minor in the first degree if ... (2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian[.]

ALASKA STAT. §11.41.434 (a)(2)(1993). Sexual penetration as defined by Alaska law "means genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body;" but does not include acts "performed for the purpose of administering a recognized and lawful form of treatment that is reasonably adapted to promoting the physical health of the person being treated[.]" ALASKA STAT. §11.81.900(b)(54)(1993).²

The Court finds this Alaska offense is similar to Pennsylvania's crime of incest. The Crimes Code defines incest as follows:

A person is guilty of incest, a felony of the second degree, if that person knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood. The relationships referred to in this section include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.

18 Pa.C.S.A. §4302. Under Pennsylvania law, sexual intercourse includes genital intercourse, intercourse per os (mouth) or per anus, with some penetration however slight. See 18 Pa.C.S.A. §3101. Both the Alaska and the Pennsylvania statutes criminalize sexual relationships between parents and their children.

In Pennsylvania, incest involving a minor is an offense that requires registration under Megan's Law. The duration of the registration requirement depends upon the age of the victim. Individuals are subject to lifetime registration under 42 Pa.C.S.A. §9795.1(b)(2) when the victim is under 12 years of age. Where the victim is 12 years of age or older but under 18 years of age, an individual is required to register for a period of 10 years. 42 Pa.C.S.A. §9795.1(a)(1). The victim of the Defendant's Alaska crimes was a three-year old. Therefore, the Defendant's Alaska offenses are similar to an offense under section 9795.1(b)(2). Consequently, the Defendant is required to register as a sexual offender for life pursuant to 42 Pa.C.S.A. §9795.1(b)(4). Inexplicably, or perhaps as a result of legislative haste, section 4915 of the Crimes Code³ does not criminalize the failure to comply with sexual offender registration requirements when an individual is required to register under 42 Pa.C.S.A. §9795.1(b)(4).

The Commonwealth argues that the Alaska offense of which the Defendant

² Under current Alaska law, this definition is found in section 11.81.900(b)(59).

was convicted is similar to indecent assault of a complainant less than 13 years of age, 18 Pa.C.S.A. §3126(a)(7). The Commonwealth, while not explicitly stating such, submits that since this offense would be graded as a misdemeanor of the first degree, the Defendant is required to register for a period of ten years under 42 Pa.C.S.A. §9795.1(a)(3) and accordingly be subject to prosecution under 18 Pa.C.S.A. §4915. The Court cannot agree for several reasons.

First, the Court does not believe the Alaska offense is similar to indecent assault. Section 3126(a)(7) of the Crimes Code provides:

A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and: ... the complainant is less than 13 years of age[.]

18 Pa.C.S.A. §3126(a)(7). Indecent assault does not require penetration and it does not mandate any type of familial relationship between the offender and the complainant. Therefore, the Court cannot conclude that indecent assault is “very much alike” the Defendant’s Alaska offense.

Second, a similar argument was made and rejected in Arroyo. The trial court in Arroyo found that the New York offense of rape in the second degree, which required an offender 18 years of age or older to have engaged in sexual intercourse with another individual less than fourteen years old to whom the actor was not married, was a similar crime to indecent assault, as well as rape and aggravated indecent assault. Arroyo, 2010 PA

³ 18 Pa.C.S.A. §4915.

Super. 42, ¶ 7. The Superior Court found that the New York offense was similar to the Pennsylvania crime of Rape of a child, and it was not similar to any of the crimes listed under 42 Pa.C.S.A. §9795.1(a)(1) or (2), including 18 Pa.C.S.A. §3126(a)(7). Id. at ¶ 15.

Third, the Commonwealth did not list 18 Pa.C.S.A. §3126 in its answer to the Defendant's request for a bill of particulars. When a bill of particulars has been furnished, the prosecution is limited to the particulars which it has supplied. Commonwealth v. Cannady, 404 Pa. Super. 215, 220, 590 A.2d 356, 359 (1991); Commonwealth v. Bartman, 240 Pa. Super. 495, 367 A.2d 1121, 1127 (1976).

Finally, the Court finds the Commonwealth's argument, while lodged for a laudable purpose, is a thinly veiled attempt to avoid the harsh consequences of the plain language of section 4915 of the Crimes Code. The Court notes that there is legislation pending to amend section 4915 to include any individual who is subject to registration under 42 Pa.C.S.A. §9795.1 or 9795.2. See 2009 H.B. 1926, Printer's No. 2573. Certainly if that legislation passes and section 4915 is amended to include individuals subject to registration under 42 Pa.C.S.A. §9795.1(b)(4), the Commonwealth will not be arguing that the Defendant's Alaska offense is similar to indecent assault; it will be arguing that it is similar to incest or one of the other offenses listed in section 9795.1(b)(2) so that the Defendant would be subject to registration in Pennsylvania for the rest of his life.⁴

Based on the foregoing, the Court will grant the Defendant's request for

⁴ In light of the pending legislation, the Court cautions the Defendant that the "loophole" in section 4915 appears to be closing and Arroyo and Gordon may not yield habeas corpus relief in the future. Despite his issues with Pennsylvania's Megan's Law statute, the Defendant may wish to heed the adage "it is better to be safe than sorry" and comply with the registration requirements as long as he is living in the commonwealth of

habeas corpus relief and dismiss the charges filed against him. As the Superior Court in Gordon noted, the Courts are without power to rewrite the statute to criminalize Defendant's conduct.

ORDER

AND NOW, this 4th day of June 2010, the Court GRANTS the Defendant's request for habeas corpus relief and dismisses the charges filed against him in cases 1022-2009 and 1105-2009.

By The Court,

Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire (ADA)
Aaron Biichle Esquire (APD- stand by counsel)
Daniel Hykes, pro se
c/o Lycoming County Prison
Gary Weber, Esquire (Lycoming Reporter)