

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	
<b>v.</b>	:	<b>No. 47-2009; 499-2009</b>
	:	<b>CRIMINAL DIVISION</b>
<b>CORY CLARK,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

On April 19, 2010, the Defendant filed a Petition for Relief under the Post Conviction Relief Act (PCRA). Conflicts Counsel Andrea Pulizzi was appointed on April 19, 2010 to represent the Defendant. On June 4, 2010, Ms. Pulizzi filed a Motion to Withdraw as Counsel, citing as her reason to withdraw that the Defendant's Petition raised no issues of merit. On June 29, 2010, an initial Court Conference was held on both the PCRA Petition and Counsel's Motion to Withdraw. After the Conference, the Court concluded that a more thorough review of the transcripts was needed to determine whether the Defendant's PCRA Petition had merit<sup>1</sup>. The Court issued an Order indicating that after its own review of the transcripts, the Court would determine whether or not to schedule a hearing on the Petition. A review of the record revealed to the Court that a hearing on the matter would indeed be necessary<sup>2</sup>. A hearing on the Petition was held on February 8, 2011.

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<sup>1</sup> Given the nature of the underlying charges which required the Defendant to register as a sexual offender, the Court recognizes the difficulty for current counsel to adequately review the Defendant's PCRA Petition. The Defendant's underlying charges stem from an offense committed in Florida. In the record of the Sentencing Hearing held before the Honorable Kenneth D. Brown on August 14, 2009, the Court stated the nature of the charge committed in Florida that led to the Defendant's registration requirements here in Pennsylvania. None of the parties involved in the sentencing proceeding seemed to be aware of the loophole in Pennsylvania's Sexual Offender Registration statute which made it impossible for the Defendant to be convicted for failing to register in Pennsylvania. Given this fact, current counsel, without knowing where to look, would also not know that a loophole in Pennsylvania's statute made the Defendant's conviction impossible.

<sup>2</sup> This Court is not in the habit of creating extra work for itself. However, it believes that Commonwealth v. Turner, 544 A.2d 927 (Pa.1988) and Commonwealth v. Finley, 550 A.2d 212 (Pa.1988) and their progeny require that a truly thorough review of the record should be made before counsel may allege there are no issues of arguable merit.

At the request of the Court, the Defendant raises one issue in his PCRA petition: 1) trial counsel was ineffective for failing to advise the Defendant before entering his plea of guilty that he was not in fact guilty of the offense of Failure to Comply With Registration of Sexual Offenders Requirements under 18 Pa.C.S. §4915(a)(1).

***Background***

On January 9, 2009, Officer Aaron Levan (Levan) and Officer Jeremy Paulhamus (Paulhamus) of the Williamsport Bureau of Police were on routine patrol when they were dispatched to 124 Emery Street for a male sleeping in the back seat of a vehicle. After an investigation, it was determined that the man was Cory Clark (Defendant), a registered sex offender. Levan and Paulhamus made contact with the Defendant and smelled a strong odor of alcohol on him. The Defendant admitted to drinking alcohol that evening. The Defendant's last registered address was 643 Elmira Street, the American Rescue Workers. The Defendant stated that he moved from 643 Elmira Street to 963 High Street on January 7, 2009. However, further investigation revealed that the Defendant moved from 643 Elmira Street on December 17, 2008. The Defendant's landlord at 963 High Street confirmed that the Defendant moved to that residence on December 17, 2008. The Defendant pled guilty to Failure to Comply With Registration on June 22, 2009. On August 14, 2009, the Defendant was sentenced to incarceration for a period of three (3) to seven (7) years.

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It is the Court's responsibility to determine whether such a review has been made. While the Court believed the Defendant's Petition to have merit initially, admittedly it did not find this particular issue upon first review. However, while reviewing the issues raised by the Defendant and discussed at the time of the hearing, the Court discovered this particular issue.

## *Discussion*

The Court notes that the Defendant's argument in his PCRA Petition is that his trial counsel was ineffective for failing to inform him that he was not in fact guilty of the crime of Failure to Comply With Registration of Sexual Offenders Requirements because he was not a resident or domiciled for thirty (30) days or more. Although the Court does not find that this argument has any merit, the Court finds a more pressing issue with the Defendant's case. As noted above, the Defendant pled guilty and was sentenced for the offense of Failure to Comply With Registration under Megan's Law 18 Pa.C.S. §4915. During the sentencing hearing held before the Honorable Kenneth D. Brown on August 14, 2009, Judge Brown pointed out that the offense that the Defendant committed that led to the registration requirement occurred in Florida. N.T. 3. Judge Brown stated that the Defendant had intercourse with a 13 year old girl.<sup>3</sup> N.T. 3. The offense committed by the Defendant under Florida law was FS 800.04(4) Lewd or Lascivious Battery, which is committed by a person who "Engages in sexual activity with a person 12 years of age or older but less than 16 years of age...." The equivalent offense in Pennsylvania to Florida's Lewd and Lascivious Battery is 18 Pa.C.S. §3122.1 Statutory Sexual Assault. A person commits Statutory Sexual Assault when "[t]hat person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other<sup>4</sup>."

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<sup>3</sup> The Court notes that the record is unclear as to whether the victim in this case consented to the intercourse. If the victim did not consent, the equivalent Pennsylvania statute the Defendant would have committed would be either 18 Pa.C.S. 3121 Rape or 18 Pa.C.S. 3124.1 Sexual Assault. If this were the situation, the Defendant would have been required to register pursuant to 42 Pa.C.S. §9795.b(4), which is also omitted from 18 Pa.C.S. §4915 Failure to Comply with Registration Requirements as it currently exists.

<sup>4</sup> The offense in Florida appears, from the Defendant's JNET prior record sheet, to have occurred in the year 2000. The Defendant was born in January 1979, making him twenty- one (21) years of age at the time of the offense.

Given that the offense committed in Florida requires the Defendant to register as a Megan's Law lifetime registrant, pursuant to 42 Pa.C.S. §9795.2(b)(4)(v) the Defendant is also required to register under Pennsylvania law. However, the penalties in Pennsylvania for failing to register pursuant to 18 Pa.C.S. §4915 Failure to Comply with Registration Requirements, are limited. 18 Pa.C.S. §4915 only applies to individuals who are subject to sexual offender registration requirements under 42 Pa.C.S. §9795.1(a) and 42 Pa.C.S. §9795.1(b)(1) (2) or (3). Since the Defendant was required to register in Pennsylvania pursuant to 42 Pa.C.S. §9795.2(b)(4)(v) which is not included in 18 Pa.C.S. §4915 Failure to Comply with Registration Requirements, the Defendant **could not** have been charged with a crime in this case. Therefore, the conviction of the Defendant pursuant to 18 Pa.C.S. §4915 was unlawful. See Commonwealth v. Gordon, 992 A.2d 204 (Pa.Super.2010) where a literal reading of the statute made clear that a defendant subject to registration under 42 Pa.C.S. §9795.1(b)(4) is not subject to the penalties under 18 Pa.C.S. §4915.

As the Defendant's conviction for Failure to Comply with Registration Requirements was unlawful, the Court finds that previous counsel was indeed ineffective in allowing the Defendant to plead guilty to an offense for which he could not be convicted under Pennsylvania law.

### ***Conclusion***

Based upon the Court's review of the record, the Court finds sufficient evidence to grant the Defendant's PCRA Petition.

**ORDER**

**AND NOW**, this 29<sup>th</sup> day of March, 2011, the Commonwealth is hereby notified that it is the Court's intention to grant the Defendant's Petition unless they file an objection to this decision within twenty (20) days of today's date. If no response is received within that time period, the Court will enter an Order granting the Petition.

By The Court,

Nancy L. Butts, President Judge

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