

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. 563-2009
	:	CRIMINAL DIVISION
MARCUS G. DEGARMO,	:	
Defendant	:	PCRA

OPINION AND ORDER

Following a Court Conference with both parties on the Defendant's Post Conviction Relief Act (PCRA) Petition, the Court concluded that the issues raised in the Petition did not merit an evidentiary hearing. As such, this Opinion addresses the issues raised in the Petition.

Factual Background

In February and March of 2009, the Defendant physically abused his six (6) month old daughter while she was in his care. On one occasion, the Defendant slammed the child into her pack and play and spun her around to get her to calm down. On a separate occasion, the Defendant slammed the child against the arm of the couch, causing the back of her head to slam into the top of an end table. On a third occasion, while changing the child's clothes, the Defendant flipped her over face down, took hold of her onesie, and shook her to the point where she stopped breathing; the Defendant thought that he had strangled the child on this last occasion. On March 9, 2009, the Defendant took the child to the hospital for treatment, where she was diagnosed with bleeding in her eyes as well as lack of growth of her brain. On August 18, 2009, the Defendant pled guilty before the Honorable Nancy L. Butts to one count of aggravated assault. At the guilty plea hearing, the Commonwealth stated that Dr. Thomas

Martin, who treated the child at Williamsport Hospital, concluded that the trauma the child suffered was non-accidental and that it was likely that the injuries would cause permanent damage to the child. The Defendant was then sentenced to five (5) to ten (10) years state incarceration with a consecutive ten (10) year period of probation with the Pennsylvania Board of Probation and Parole.

Procedural Background

The Defendant filed a pro-se PCRA Petition on August 12, 2010. Thereafter, Joel M. McDermott, Esquire was appointed to serve as counsel. Following several extensions of time to file an amended PCRA Petition, PCRA Counsel finally filed an untimely Second Amended PCRA Petition on June 1, 2011.¹ In his amended Petition, the Defendant alleges ineffective assistance of counsel in failing to recommend that the Defendant, instead of pleading guilty to Aggravated Assault, admit to his actions on the record to determine whether the Defendant had the requisite *mens rea* for Aggravated Assault.²

In order to establish a claim for ineffective assistance of counsel, a petitioner must establish:

(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (2009). See Commonwealth v. Pierce, 527 A.2d 973 (1987).

¹ PCRA Counsel filed the Petition as a "Second Amended PCRA Petition." A review of the file indicates that the Petition is actually the first amended petition, and will be referred to by this Court as the amended petition.

² While the Court is aware that the Defendant's case was reassigned to Lori Rexroth, Esquire, on July 18, 2011, the Court will determine the merits of the Petition based on the Amended Petition filed by Attorney McDermott.

Discussion

In his amended Petition, the Defendant alleges ineffective assistance of counsel in failing to recommend that the Defendant, instead of pleading guilty to Aggravated Assault, admit to his actions on the record to determine whether the Defendant had the requisite *mens rea* for Aggravated Assault. The Defendant opines that, based on the facts admitted at the guilty plea hearing, it is probable that the Defendant lacked the “extreme indifference to the value of human life” necessary to be guilty of Aggravated Assault. The Defendant believes that based on the facts admitted, he could have been found guilty of Simple Assault rather than Aggravated Assault, resulting in a lower standard range for sentencing purposes. As a result of this alleged act of ineffective assistance of counsel, the Defendant requests that the Court allow him to withdraw his guilty plea to Aggravated Assault, and that the Court schedule an evidentiary hearing on the question of whether the Defendant had the requisite *mens rea* for Aggravated Assault.

“Where an allegation of ineffective assistance is made in connection with the entry of a plea of guilty, such allegation ‘will serve as a basis for relief only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea.’” Commonwealth v. Fluharty, 632 A.2d 312 (Pa. Super. 1993) (See Commonwealth v. Thomas, 578 A.2d 422, 425 (Pa. 1990)). “A similar standard is applicable to all post-sentence attempts to withdraw a guilty plea, where the defendant must demonstrate a manifest injustice by showing that his plea was involuntary or was entered without knowledge of the charges.” Fluharty (See Commonwealth v. McClendon, 589 A.2d 706, 707 (Pa. 1991)). In determining whether a plea is entered knowingly, voluntarily, and intelligently, the court must at a minimum address the following six (6) areas: 1) whether the

Defendant understands the nature of the charges to which he is pleading; 2) whether there is a factual basis for the plea; 3) whether the defendant understands that he has a right to a jury trial; 4) whether the defendant is aware that he is presumed innocent until proven guilty; 5) whether the defendant is aware of the permissible range of sentences for the offenses charged; and 6) whether the defendant understands that the judge is not bound by the terms of the plea agreement unless he or she accepts the agreement. Fluharty at 313.

A review of the transcripts of the guilty plea hearing establishes that the Court informed the Defendant of his right to a jury trial, of what the Commonwealth would have to prove to find the Defendant guilty, that the Court was not bound by the terms of the plea agreement, and the Court reviewed with the Defendant the nature of the offense of Aggravated Assault and the permissible range of sentence for said offense. N.T., 8/18/09, p. 2-3. The Court also made certain to establish a factual basis for the offense. N.T., 8/18/09, p. 3-6. Trial counsel stated on the record that the Defendant underwent a psychological evaluation and that Counsel was comfortable that the Defendant understood the court proceedings as well as his rights. N.T., 8/18/09, p. 11. In addition to the oral colloquy, the Defendant filled out and signed a written colloquy, also establishing that he was informed of all of the necessary elements of a knowing, voluntary and intelligent plea.

A person is deemed to have committed Aggravated Assault at 18 Pa.C.S. §2702 if that person either attempts to cause, or intentionally, knowingly, or recklessly causes serious bodily injury to another person under circumstances manifesting extreme indifference to the value of human life. Serious bodily injury is described in 18 Pa.C.S. §2301 as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” In this case, the

Defendant was charged with the Aggravated Assault of his six (6) month old daughter. As stated above, the Defendant admitted to multiple physically aggressive actions toward his six (6) month old daughter, resulting in injuries to the child characterized by a doctor as serious bodily injury. The Defendant admitted that while he didn't know his own strength, it was wrong of him to hurt his daughter. N.T., 8/18/09, p. 5-6. The Court finds that the Defendant's behavior in fact caused serious bodily injury to the child, and the behavior was without a doubt "under circumstances manifesting extreme indifference to the value of human life." To further support the Court's conclusion, the Defendant made the following admission on the record:

THE COURT: [Y]ou understand that a six-month-old baby wouldn't have the strength in their neck to be able to hold their head still so every time you would have shaken her you would have caused her head to go back and forth, caused her brain inside of her skull to go back and forth kind of like a tennis ball in a tennis ball can?

DEFENDANT: Yes.

N.T., 8/18/09, p. 5.

The Court finds that the Defendant's Petition is without merit as the Defendant entered into a knowing, voluntary, and intelligent plea, nullifying his allegation of ineffective assistance of counsel in conjunction with said plea. The Court finds that the Defendant's Petition also fails to allege a claim of arguable merit, as the Court finds that the facts do in fact establish that the Defendant committed Aggravated Assault.

ORDER

AND NOW, this ____ day of September, 2011, the Defendant and his attorney are notified that it is the intention of the Court to dismiss the Defendant's PCRA petition unless he files an objection to that dismissal within twenty days (20) of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.
Joel M. McDermott, Esq.
Lori Rexroth, Esq.