

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 1357-2009
	:	CRIMINAL DIVISION
TIMOTHY COPENHAVER,	:	
Defendant	:	PCRA

OPINION AND ORDER

On November 14, 2011, current Court Appointed Counsel for the Defendant filed a Motion to Withdraw along with a Turner-Finley letter in accordance with Commonwealth v. Turner, 544 A.2d 927 (1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa.Super.1988). After an independent review of the record, the Court agrees with Post Conviction Relief Act (PCRA) Counsel and finds that the Defendant fails to raise any meritorious issues in his PCRA Petition.

Background

On March 24, 2010, the Defendant pled guilty before this Court to five counts of Sexual Abuse of Children, each of felony of the third degree, and was thereafter sentenced, consistent with his plea agreement, to incarceration in a state correctional institution for two (2) to five (5) years followed by a ten (10) year period of supervision with the Pennsylvania Board of Probation and Parole. No post-sentence motion or direct appeal was filed. On April 28, 2011 the Defendant filed a pro-se PCRA Petition and thereafter the Court appointed Edward J. Rymysza, Esquire to represent the Defendant in this matter. As stated above, Attorney Rymysza filed a Motion to Withdraw on November 14, 2011 and attached therewith a copy of his Turner-Finley

letter. In his Turner-Finley letter finding that the PCRA Petition has no merit, Attorney Rymysza analyzes the four (4) issues raised in the Petition: 1) ineffective assistance of counsel in that his plea was involuntary; 2) the Court did not comply with the terms of the plea agreement when it imposed a state sentence; 3) sufficiency of the evidence; and 4) allegation that a computer expert should have been hired. This Opinion follows the Court's review of the record and Counsel's Motion to Withdraw.

Discussion

The plea was involuntary and the Court did not comply with the terms of the plea agreement

The Defendant alleges that his prior counsel was ineffective as the Defendant entered into his plea involuntarily and that the Court did not comply with the terms of the plea agreement when it imposed a state sentence. As counsel is presumed to be effective, the Defendant has the burden of establishing ineffectiveness. See Commonwealth v. Speight, 677 A.2d 317 (Pa. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show 1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007). (See Commonwealth v. Carpenter, 725 A.2d 154, 161 (Pa. 1999)). Where an allegation of ineffective assistance of counsel is made in connection with the entry of a guilty plea, such allegation will serve as a basis for relief only if the ineffectiveness caused the Defendant to enter into the plea unknowingly or involuntarily. See Commonwealth v. Fluharty, 632 A.2d 312 (Pa. Super. 1993). As noted in the comment to Pa. R. Crim. P. 319, for a defendant to enter into a plea knowingly, voluntarily and intelligently, the court must at a minimum address the following

six 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. See also Fluharty at 313. The reason for this evaluation is that “[i]n order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences.” Id. at 313. “[T]his determination is to be made by ‘examining the totality of the circumstances surrounding the entry of the plea.’” Id. at 313 (quoting Commonwealth v. Shaffer, 446 A.2d 591 (Pa. 1982)).

Thus, even though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

Fluharty at 313 (See Commonwealth v. Shultz, 477 A.2d 1328 (Pa. 1984)).

A review of the transcripts of the Defendant’s guilty plea hearing held before this Court on March 24, 2010 establishes that the Court informed the Defendant as to the nature of the charges to which he was pleading, the permissible range of sentences for the offenses charged, that she as the Judge was not bound by the terms of the plea agreement, and that he had the right to proceed to trial and what the Commonwealth must prove at trial in order for the Defendant to be found guilty. N.T., 3/24/10, p. 2-6. In fact, the Defendant was again informed by the Court several times of his right to proceed to trial at the time of his sentencing hearing on July 20,

2010; however, the Defendant confirmed his intention to proceed with his guilty plea and to be sentenced. N.T., 7/20/10, p. 6-8. A factual basis for the offenses was also established.

THE COURT: Okay. Mr. Copenhaver, how do you wish to plead to the five counts of sexual abuse of children?

....

MR. CALLAHAN: He does not contest the facts of the Commonwealth.

....

DEFENDANT COPENHAVER: Guilty.

THE COURT: Were you in possession of these five videos? It looks like there were -- there were a number of downloaded videos one was Preteen Lolita Kiddy Porn, Private Amteur (sic) Sex Home Videos, were you in possession of these videos?

DEFENDANT COPENHAVER: I was.

THE COURT: That are alleged.

DEFENDANT COPENHAVER: I was.

THE COURT: And that they depicted individuals under the age of 18?

DEFENDANT COPENHAVER: Yeah.

THE COURT: Either engaged in sexual activities or simulating them?

DEFENDANT COPENHAVER: Yeah.

THE COURT: And you knew they were in violation of the law?

DEFENDANT COPENHAVER: Yeah.

N.T., 3/24/10, p. 6-8. In addition to the oral colloquy, the Defendant completed a written colloquy which addressed all six of the areas required for the Defendant to enter a knowing, voluntary and intelligent plea, which the Court incorporated into the oral colloquy at the time of the guilty plea hearing. N.T., 3/24/10. p. 10. Regarding the terms of the plea agreement, the

Court finds that the following exchange between the Court and the Defendant took place at the guilty plea hearing:

THE COURT: The plea agreement for you is to plead to these counts to two to five years in state prison plus a consecutive ten years probation. Is that your understanding of the agreement?

DEFENDANT COPENHAVER: Yes.

N.T., 3/24/10, p. 3. The exact same plea agreement terms as recited by the Court indicated above were also written in the written guilty plea colloquy which the Defendant signed and acknowledged in open court as having understood. The Court finds that the circumstances surrounding the Defendant's guilty plea are more than sufficient to demonstrate that the Defendant was aware of the terms of his plea agreement and the consequence of his plea. As such, the Court finds that the plea was entered into knowingly, voluntarily and intelligently and therefore finds the Defendant's claim that Counsel was ineffective as his plea was entered involuntarily to be without merit. Furthermore, as the Defendant was sentenced to incarceration in a state correctional institution for two (2) to five (5) years followed by a ten (10) year period of supervision with the Pennsylvania Board of Probation and Parole, which were precisely the terms of his plea agreement, the Court finds the Defendant's allegation that the Court did not comply with the terms of the plea agreement when it imposed a state sentence to be erroneous.

Sufficiency of the evidence and a computer expert should have been hired

The Defendant challenges the sufficiency of the evidence to support his convictions for Sexual Abuse of Children and alleges that a computer expert should have been hired in his case. However, in order for a claim to be eligible under the PCRA, a defendant must establish that the issues raised in the PCRA petition have not been previously litigated or waived. 42 Pa.C.S.

9543(a)(3) See also Commonwealth v. Rounsley, 717 A.2d 537 (Pa. Super. 1998). As the Defendant failed to raise a sufficiency of the evidence argument on direct appeal, the Court finds that this issue has been waived. As to the Defendant's assertion that a computer expert should have been hired in his case, the Court finds that by entering a plea of guilty, the Defendant waived the right to assert any defense that a computer expert might have provided. Fluharty at 313 (See also Commonwealth v. Rodgers, 350 A.2d 815, 818 (Pa. Super. 1977)).

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907 (1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The 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 dismissing the Petition.

ORDER

AND NOW, this ____ day of February, 2012, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907 (1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed November 14, 2011, is hereby GRANTED and Edward J. Rymza, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Edward J. Rymza, Esq.
Timothy Copenhaver
JR1027
P.O. Box A
Cresson, PA 16699