IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**: No. CR-1353-2009;**
	: CR-1666-2009
	:
vs.	**:**
	: Notice of Intent to Dismiss PCRA without
ULYSSES HOFFMAN,	**: Holding an Evidentiary Hearing and Order**
Defendant	**: Granting Counsel's Motion to Withdraw**

OPINION AND ORDER

This matter came before the Court on Defendant's Post Conviction Relief Act (PCRA) petition and defense counsel's motion to withdraw. The relevant facts follow.

Under Information No. 1353-2009 on January 13, 2010, Defendant pled guilty to Count 1, Rape of an Impaired Person, a felony of the first degree, and Count 2, Rape of an Impaired Person, also a felony of the first degree.

At Defendant's guilty plea hearing, the Commonwealth submitted that the Defendant on one occasion enticed his then 13 year old daughter to smoke marijuana and then had sexual intercourse with her, and then on another occasion, he gave her alcohol, got her drunk and then had sex with her. Guilty Plea Transcript dated January 13, 2010 (hereinafter "Plea Transcript"), p. 8.

While the Defendant was apparently under the influence on both occasions and could not remember what happened, the Commonwealth would not agree to a no contest plea and insisted that the Defendant admit guilt to the offenses in question. Plea Transcript, p. 9.

As a result, Defendant admitted that on two occasions he had sexual "relations" with his daughter. He admitted that on the first occasion he woke his daughter up

in the middle of the night to smoke marijuana, she agreed to smoke marijuana with the Defendant and he subsequently had sexual intercourse with her. Plea Transcript, p. 11.

With respect to the other occasion, Defendant admitted that he gave his daughter alcohol, she then became intoxicated and he subsequently had sexual intercourse with her on a couch in the living room. Plea Transcript, pp. 12-13.

Under Information No. 1666-2009, Defendant also pled guilty on January 13, 2010 to Counts 1 through 4, Criminal Solicitation, all ungraded felonies, and Counts 5 through 8, Solicitation of Minors to Traffic Drugs, all felonies of the second degree.

Defendant admitted that on several occasions from June of 2009 to early August of 2009, he provided and smoked marijuana with eight different minors at two different locations. He also admitted that he solicited four of those minors to sell cocaine for him "to make a profit." Plea Transcript, pp. 13-14.

The pleas were taken before Kenneth D. Brown, Senior Judge. Sentencing was scheduled before the undersigned on April 21, 2010. At said sentencing hearing, the Court indicated to the parties that it would not accept the plea agreement and as a result sentencing was continued to May 20, 2010. The Court permitted the Defendant to withdraw his plea by filing an appropriate Motion prior to the continued sentencing date. Defendant's sentencing was subsequently continued until December 15, 2010.

Because of Defendant's cooperation with the Commonwealth on an unrelated matter, the parties negotiated a different plea agreement which recommended to the Court an aggregate sentence of state incarceration, the minimum of which would be seven years and the maximum of which would be twenty years to be followed by ten years of consecutive

probation.

The Court subsequently accepted the plea agreement and under Information No. 1353-2009 sentenced the Defendant on Count 1, Rape of an Impaired Person, a felony of the first degree, to undergo incarceration in a State Correctional Institution for an indeterminate term, the minimum of which was seven years and a maximum of which was twenty years. With respect to Count 2, also Rape of an Impaired Person, a felony of the first degree, the Court sentenced the Defendant to undergo incarceration in a State Correctional Institution for an indeterminate term, the minimum of which was seven years and a maximum of which was twenty years. This sentence was to run entirely concurrent to the sentence imposed with respect to Count 1.

Under Information No. 1666-2009, with respect to Count 1, Solicitation to Possess with Intent to Deliver, an ungraded felony, the Court sentenced the Defendant to undergo incarceration in a State Correctional Institution for an indeterminate term, the minimum of which was three years and the maximum of which was six years. This sentence was to run concurrent to the sentences imposed under Information No. 1353-2009.

The sentence of the Court with respect to Counts 2, 3 and 4, additional Solicitation to Possess with Intent to Deliver charges, all ungraded felonies, the Court sentenced the Defendant to undergo incarceration on each count in a State Correctional Institution for an indeterminate term, the minimum of which was three years and the maximum of which was six years. These sentences were to run concurrent to each other and concurrent to the sentence imposed with respect to Count 1.

With respect to Count 5, Solicitation of Minors to Traffic Drugs, a felony of

the second degree, the Court sentenced the Defendant to be placed on probation for a period of ten years under the supervision of the Pennsylvania Board of Probation and Parole. This period of probation was to run consecutive to the sentence imposed at Information No. 1353-2009 and to Counts 1, 2, 3 and 4 at Information No. 1666-2009.

With respect to Counts 6, 7 and 8, additional Solicitation of Minors to Traffic Drugs charges, all felonies of the second degree, the Court imposed a concurrent ten year probationary term on each count.

The aggregate sentence that the Court imposed under both Informations was consistent with the plea agreement and imposed a period of State incarceration, the minimum of which was seven years and the maximum of which was twenty years plus a consecutive ten years of probation.

No appeals were filed on Defendant's behalf; however, on June 29, 2011, Defendant filed an uncounseled "Motion for Post Conviction Collateral Relief" under both Information numbers. While Defendant's uncounseled Motion for Relief is inartfully set forth, Defendant attacks his sentence on the rape counts under Information No. 1353-2009 as being excessive and also attacks his conviction on the solicitation counts under Information No. 1666-2009 on grounds of ineffectiveness.

Defendant's allegation that his sentence for rape was excessive lacks merit. First and foremost, the sentence imposed was the agreed upon sentence pursuant to the parties' plea agreement. The original plea agreement called for a 10 to 20 year sentence on each of the rape charges to be served concurrently to each other. After Defendant cooperated with the Commonwealth in its prosecution of another sex offender, the Commonwealth

agreed to reduce the minimum sentence recommendation to 7 years. Sentencing Transcript (December 15, 2010), at pp. 5-6. Defendant was fully aware and accepting of this sentence; he was merely hopeful that he would be paroled at or near his minimum sentence rather than the maximum sentence. Sentencing Transcript, at pp. 7-8.

Second, the minimum sentence of 7 years incarceration was below the sentencing guidelines. The offense gravity score (OGS) for the rape charge was 13, and Defendant's prior record score (PRS) was RFEL. Therefore, the standard minimum sentencing guideline range was 108-126 months and the mitigated range was 96-108 months. The minimum sentence imposed in this case was 24 months less than the bottom end of the standard range and 12 months below the mitigated range.

Third, there was a 10-year mandatory minimum sentence that could have applied in this case, which the Commonwealth elected not to pursue after Defendant provided cooperation in another case. See 42 Pa.C.S.A. §9718

Finally, the maximum sentence of 20 years was appropriate in light of the following: the seriousness of the offenses; Defendant's significant prior criminal history which indicated to the Court that Defendant needed an extensive period of supervision; and the fact that the victim was Defendant's daughter, who was only thirteen years old when the offenses were committed.

Defendant also claims counsel was ineffective for failing to investigate the charges under case number 1666-2009. If the Court correctly understands this claim, Defendant is asserting that he is innocent of these solicitation charges because four of the minor complainants wrote letters allegedly recanting or disputing the Commonwealth's

version of the events. The Court finds Defendant is not entitled to a hearing or relief on this claim.

In Pennsylvania, it is presumed that counsel was effective; therefore, it is Defendant's burden to prove otherwise. Commonwealth v. Cross, 535 Pa. 38, 634 A.2d 173, 175 (1993).

> To establish ineffectiveness, a petitioner must plead and prove the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. Counsel's actions will not be found to have lacked a reasonable basis unless the petitioner establishes that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different.

Commonwealth v. Miner, 44 A.3d 684, ___ (Pa. 2012) (internal citations omitted). If any prong is not met, the case may be dismissed without determining whether the remaining prongs are met. Commonwealth v. Spotz, 582 Pa. 207, 870 A.2d 822, 829-30 (2005), cert denied, 546 U.S. 984, 126 S.Ct. 564 (2005). Furthermore, claims of counsel's ineffective in connection with a guilty plea will provide a basis for relief only if the ineffectiveness actually caused an involuntary or unknowing plea. Commonwealth v. McCauley, 797 A.2d 920, 922 (Pa. Super. 2001). A defendant need not be pleased with the outcome of his decision to enter a guilty plea; instead, all that is required is that defendant's decision to plead guilty be knowingly, voluntarily and intelligently made. Commonwealth v. Moser, 921 A.2d 526, 528-29 (Pa. Super. 2007); Commonwealth v. Myers, 434 Pa. Super. 221, 642 A.2d 1103, 1105 (1994).

Initially, the Court notes that Defendant has not attached copies of the letters to

his PCRA petition as required by Rule 902(D) of the Rules of Criminal Procedure. Defendant also has not provided a summary of the proposed witness's testimony. Instead, he generally asserts that four proposed witnesses will testify "what statements were false or true."

Although four complainants allegedly are recanting, these are not the same four minors who were solicited. Defendant was charged with numerous drug related offenses, as well as corruption charges, involving eight minors. Only one of the witnesses named in Defendant's PCRA petition, Desiree B., was a victim or complainant in the charges to which Defendant pleaded guilty. The charges that related to her were Count 4 and Count 8. The other three witnesses were the complainants on counts of the Information to which Defendant did not enter a guilty plea. Moreover, Defendant admitted in his guilty plea colloquy that he solicited the minor complainants, including Desiree B., to sell cocaine for him to make a profit. Guilty Plea Transcript (January 13, 2010) at p. 14. A defendant is bound by the statements made during the plea colloquy, and he may not later offer reasons for withdrawing the plea that contradict statements made when he pled. Commonwealth v. McCauley, 797 A.2d 920, 922 (Pa. Super. 2001); Commonwealth v. Lewis, 708 A.2d 497, 502 (Pa. Super. 1998).

Finally, the Court notes that if Defendant was able to contradict the statements he made when he pled and could successfully challenge Count 4 and Count 8, it would have absolutely no impact on his aggregate sentence. Defendant received totally concurrent sentences on these counts. Therefore, even if Defendant's convictions for Count 4 and Count 8 were vacated, Defendant still would be serving an aggregate sentence of 10 to 20 years incarceration for rape followed by 10 years consecutive probation for soliciting other minors

to traffic in drugs.

O R D E R

AND NOW, this ___ day of July 2012, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the Court gives the parties notice of its intent to dismiss Defendant's PCRA petition without holding an evidentiary hearing. As no purpose would be served by conducting any 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 dismissing the petition.

The Court also grants defense counsel's motion to withdraw. Defendant is notified that he has the right to represent himself or to hire private counsel to pursue his issues; however, Defendant is not entitled to another court appointed counsel in this PCRA matter.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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