

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-213-2011
vs. :
GEORGE S. KIBLER, : Notice of Intent to Dismiss PCRA
Defendant : Without Holding An Evidentiary Hearing
:

OPINION AND ORDER

Before the Court are Defendant's Post Conviction Relief Act (PCRA) petition and defense counsel's Turner/Finley letter and motion to withdraw as counsel. The relevant facts follow.

On February 4, 2011, Defendant was arrested and charged with involuntary deviate sexual intercourse with a complainant less than 16 years of age, involuntary deviate sexual intercourse with a child, sexual assault, indecent assault of a person less than 13 years of age, unlawful contact with a minor, corruption of a minor and endangering the welfare of a child, arising out of Defendant allegedly placing his penis in the mouth of his girlfriend's son, who was 7 or 8 years old, on one occasion sometime between June 2009 and the end of October 2010.

On March 21, 2011, Defendant pled guilty to involuntary deviate sexual intercourse with a child, a felony of the first degree. During the guilty plea colloquy, Defendant admitted he put his penis in the mouth of a boy who was less than 13 years of age.

On June 28, 2011, the Court sentenced Defendant to 10 to 20 years incarceration in a state correctional institution, in accordance with the plea agreement.

On August 9, 2011, Defendant filed a PCRA petition, in which he asserted malicious prosecution, ineffective assistance of counsel, and an improper sentence. Since

this was Defendant's first PCRA petition, the Court appointed counsel to represent him, gave defense counsel until October 21, 2011 to file an amended PCRA petition or Turner/Finley letter, and scheduled a conference with counsel for the Commonwealth and defense on November 17, 2011.

After a conference on November 17, 2011, the Court requested the court reporter to prepare a transcript of Defendant's guilty plea hearing and gave defense counsel an additional 60 days to file an amended petition or Turner/Finley letter. The transcript was completed and filed of record on December 1, 2011.

When no amended petition or letter was filed by early February, court staff sent an email to defense counsel inquiring about the status of her overdue filing. No response was received, and the Court issued a rule to show cause why defense counsel should not be held in contempt on March 12, 2012 with the rule returnable by the filing of an answer by March 23, 2012. The Court subsequently learned that defense counsel was off work due to a medical condition for a period of time in February.

On March 21, 2012, defense counsel filed a motion to withdraw from representation, which contained a Turner/Finley letter as Exhibit A.

Discussion

Defendant entered a guilty plea in this case. Therefore, he effectively waived all issues in the case except those of jurisdiction, illegal guilty plea or illegal sentence.

Commonwealth v. Roden, 730 A.2d 995, 997 (Pa. Super. 1999).

The offense in question occurred in Lycoming County; therefore, the Court

had jurisdiction to accept Defendant's guilty plea.

Defendant's guilty plea was entered knowingly, voluntarily and intelligently, which is clear from both the oral and written guilty plea colloquies.

Defendant's sentence was not illegal. Defendant pled guilty to involuntary deviate sexual intercourse with a child. This offense carries a maximum penalty of forty years incarceration. 18 Pa.C.S. §3123(d)(1). The Court sentenced Defendant to 10 to 20 years incarceration in a state correctional institution, in accordance with the plea agreement. Since Defendant's maximum sentence of 20 years did not exceed the statutory maximum of 40 years, Defendant's sentence was not illegal.

From the foregoing, it is clear that the Court had jurisdiction and Defendant's guilty plea and sentence were not illegal. Therefore, Defendant's claims are waived by the entry of his guilty plea.

Even if Defendant's claims were not waived, he would not be entitled to relief.

Defendant first asserts a claim of "malicious prosecution" based on the fact that his warrant listed, as the offense date, a date when he was incarcerated. The affidavit of probable cause indicates the offense occurred sometime between 06/09 and 10/10.

The Court does not have a copy of the arrest warrant, but the docket sheet from the Magisterial District Judge (MDJ) lists the offense date as June 9, 2010, a date on which Defendant was incarcerated in the Lycoming County Prison serving a sentence on other charges. Unfortunately, the computer system for docket sheets does not allow the MDJ

or his staff to input a range of dates. The Court believes the MDJ issues arrest warrants from the same computer system.

There also was some confusion whether the beginning date was June of 2009 or June 9, 2010. While the docket transcript lists the offense date as June 9, 2010, the affidavit of probable cause and the Information state the criminal conduct occurred between June 1, 2009 and October 31, 2010. Therefore, it appears that there simply was some misunderstanding or data entry error when the offense date was listed on the MDJ docket (and likely on the arrest warrant) as June 9, 2010.

Defendant next asserts that his attorney was ineffective because she had very little communication with Defendant and he never received a copy of his discovery, so he had no way to “erect” a defense.

Defendant entered a guilty plea. In a written guilty plea colloquy filled out prior to his guilty plea hearing, Defendant indicated that it was his decision to plead guilty, and the reason he wanted to plead guilty was “to do my time and go home to my family.” Defendant also indicated that he understood that by pleading guilty he was waiving, or giving up, his right to present any defenses the either he or his attorney may think he had to the crimes charged.

During the oral colloquy, Defendant indicated he understood he was giving up his right to have the Commonwealth prove him guilty beyond a reasonable doubt and he was not forced or in any way pressured into entering his plea. N.T., pp. 7-8. He admitted on the record that he put his penis in the mouth of a boy who was less than 13 years old. N.T., pp 8-

9. Defendant appeared at first not to be completely satisfied with his attorney's representation. He stated that he wished he had a little more time to speak to her. The Court, however, repeatedly offered to give Defendant more time to talk to his attorney, but he declined the Court's offers. N.T., pp. 7-8. The Court also asked Defendant if there were any questions that the Court could answer for him, but Defendant did not express that there was anything he needed to ask. N.T., p. 7.

Defendant has not alleged in his PCRA petition any claim or defense that his attorney should have presented. Although he makes two factual assertions, neither would entitle him to relief. First, he asserts that the child lived with his father in Indiana in 2008, which is not relevant because the offense occurred sometime between June 2009 and the end of October 2010. Second, he claims he did not live with the child at the address listed in the paperwork during the time frame within which the Commonwealth alleged the offense happened. It appears that this allegation relates to his assertion that he was incarcerated during a portion of this time period. It must be remembered, however, that the Commonwealth was not alleging that Defendant continually abused the child during this period of time. Instead, the allegation was that the sexual abuse occurred **on one occasion during that time frame**. Neither the specific date of the offense nor the location where Defendant resided is an element of the crime of involuntary deviate sexual intercourse with a child. In other words, the Commonwealth was **not** required to prove that the crime occurred on June 9, 2010 or that Defendant resided at a specific place for the entire time period set forth in the affidavit of probable cause. Since Defendant's factual assertions would not have

provided him with a defense, he cannot prove that counsel's alleged failures prejudiced him.

Finally, Defendant asserts that his sentence may have been improper and he asks for the "sentencing laws that show what mandatory sentencing is and how it related" to his crime. Defendant entered a guilty plea to involuntary deviate sexual intercourse with a child who was under 13 years of age. Section 9718 of the Judiciary Code states: "A person convicted under the following offenses when the victim is under 16 years of age shall be sentenced to a mandatory term of imprisonment as follows: ...18 Pa.C.S. §3123 (relating to involuntary deviate sexual intercourse) – not less than ten years." 42 Pa.C.S. §9718. Therefore, the Court could not impose a minimum sentence of less than ten years.

Section 9756(b) of the Judiciary Code states: "The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum imposed." 42 Pa.C.S. §9756(b)(1). Stated in another way, the maximum sentence must be at least twice the length of the minimum sentence. Section 9756(b) is sometimes referred to as the "min/max rule." With a mandatory ten year minimum, the Court was required by section 9756(b) to impose a maximum of sentence of at least 20 years. The Court could have lawfully imposed a maximum sentence up to 40 years, but it could not impose a maximum sentence of less than 20 years incarceration.

After a review of Defendant's PCRA petition, the court file and relevant law, the Court finds that Defendant's claims are waived or lack merit, and no purpose would be served by conducting a hearing in this case.

Accordingly, the following Order is entered:

ORDER

AND NOW, this ___ day of April 2012, the Court GRANTS defense counsel's motion to withdraw. The parties are hereby notified of this Court's intention to dismiss the Petition without holding an evidentiary hearing, pursuant to Rule 907 of the Pennsylvania Rules of Criminal Procedure. 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.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Lori Rexroth, Esquire
George Kibler, KB 8887
SCI Camp Hill, PO Box 200, Camp Hill PA 17001-0200
Gary Weber, Esquire (Lycoming Reporter)