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| IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA | |
| COMMONWEALTH | : No. CR-1213-2009; |
| | : CR-1713-2009 |
| | : |
| vs. | : |
| | : Opinion and Order Dismissing |
| DAVID L. KILGUS, | : PCRA Petition |
| Defendant | : |

OPINION AND ORDER

This Opinion is written in response to Defendant’s objections to the Court’s proposed dismissal of his Post Conviction Relief Act (PCRA) petition. In addition to the reasons set forth in its notice of intent to dismiss, the Court would add the following observations regarding Defendant’s claims that he was not competent to waive his Miranda rights or to enter a guilty plea.

In response to the proposed dismissal, defense counsel argues an evidentiary hearing is needed to determine the extent of Defendant’s mental infirmities as will be revealed by testimony from Defendant’s treating neurologist and his family members. Defendant has not offered to call any psychiatrist as a witness in this case. Under Pennsylvania law, competency evaluations are conducted by psychiatrists. See 50 P.S. §7402. Furthermore, Defendant has not provided a certification from any medical professional stating that he was incompetent on July 23, 2009 (the date Defendant was interviewed by the police) or on July 12, 2010 (the date when Defendant entered his guilty plea). In fact, Defendant has not submitted a signed certification with respect to any potential witness in violation of Rule 902(A)(15) and 42 Pa.C.S. §9545(d)(1). Furthermore, it appears from the medical records submitted with Defendant’s petition that Defendant’s

neurologist, Dr. Jeffrey, last examined Defendant in March 2004, years before Defendant was interviewed by the police and then tendered a guilty plea.

Even if a person can be easily influenced, he or she is not necessarily incompetent. In order to prove he is incompetent, a defendant must establish that he was either unable to understand the proceedings against him or to participate in his own defense. In its proposed dismissal, the Court noted that Defendant's responses at the guilty plea hearing showed that he was competent. In addition, it is evidence from Defendant's pro se filings that he understands that he is incarcerated because he had sexual relations with a minor female, T.F. In fact, in his original pro se petition for habeas corpus, which the Court treated as a PCRA petition, Defendant makes several allegations against the minor victim, including claiming that she was promiscuous; she consented to and was the instigator of the sexual relations; and she named another individual as the father of her baby, which was proven false by DNA testing. Notably, Defendant does not deny having sexual relations with the minor victim, but rather blames her for the sexual acts occurring. Thus, Defendant understands the nature of the proceedings and is capable of participating in his own defense. Unfortunately the information alleged by Defendant, does not provide him with a defense in this case because consent is not a defense due to the age of the victim,¹ and her alleged promiscuity is not admissible as evidence under the Rape Shield Law, 18 Pa.C.S. §3104.

With respect to Defendant's waiver of his Miranda rights, the Court would

¹ See 18 Pa.C.S. §311(c)(ineffective consent); Commonwealth v. Duffy, 832 A.2d 1132, 1140 (Pa. Super. 2003) ("the governmental interest sought to be protected by the statutory sexual assault statute is in protecting younger minors from the degradations of older, more mature individuals, even if the minors consent to the sexual conduct."); Pa.SSJI (Crim) 15.3123D (consent is no defense to involuntary deviate sexual intercourse with child over 12 and under 16); Pa.SSJI (Crim) 15.3125D (consent of the child is no defense to aggravated indecent assault of a child less than 16).

rely on Commonwealth v. Chacko, 500 Pa. 571, 459 A.2d 311 (1983). In Chacko, the Pennsylvania Supreme Court found that “the fact that a defendant possesses a low I.Q. does not in itself render his confession involuntary.” 459 A.2d at 317. Instead, the Court must view the totality of the circumstances including:

The duration and methods of interrogation; the length of delay between arrest and arraignment; the conditions of detainment; the attitudes of the police toward defendant; defendant’s physical and psychological state; and all other conditions present which may serve to drain one’s power of resistance to suggestion or to undermine one’s self-determination.

Id. Defendant has not alleged any facts regarding the circumstances surrounding his detainment and interrogation to show how the police undermined his self-determination. The mere fact that he possesses a low I.Q. is insufficient to show that the waiver of his Miranda rights was involuntary.

ORDER

AND NOW, this _____ day of August 2012, after review of defense counsel’s response to the Court’s Order giving notice of its intent to dismiss Defendant’s Post Conviction Relief Act (PCRA) petition, the Court DISMISSES Defendant’s PCRA petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk

of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Prothonotary shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Amy Boring, Esquire
David L. Kilgus, JV-9535 (regular and certified mail)
175 Progress Drive, Waynesburg, PA 15370
Work file
Gary Weber, Esquire (Lycoming Reporter)
Suzanne Fedele, Prothonotary/Clerk of Courts