

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No's. CR-1666-2009
vs. : CR-1353-2009
:
ULYSSES HOFFMAN, :
Defendant :

OPINION AND ORDER

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. (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. (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. (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. (Transcript, pp. 12, 13).

Under Information No. 1666-2009, Defendant also pled guilty on January 13, 2010 to Counts 1 through 4, Criminal Solicitation, 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.” (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 accepted the plea agreement and under Information No. 1353-

2009 sentenced the Defendant on Count 1, Rape of an Impaired Person, 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 sentence 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 but 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 conviction on the solicitation counts under Information No. 1666-2009 on grounds of ineffectiveness and also attacks his sentence on the rape counts under Information No. 1353-2009 as being excessive.

By Order of Court dated July 8, 2011, an initial PCRA Conference was scheduled for September 1, 2011. Counsel was appointed to represent the Defendant.

Following the initial conference and by Order of Court dated September 6,

2011, the Court directed that transcripts of the relevant proceedings be prepared. Another conference was scheduled for November 17, 2011 and defense counsel was given sixty days within which to file an amended PCRA Petition or a Turner/Finley Letter.

Counsel subsequently filed a Turner/Finley “No Merit Letter” attached to a Petition to Withdraw from Representation. The November 17, 2011 conference was eventually cancelled and a hearing on the Petition to Withdraw was scheduled for January 9, 2012.

At the January 9, 2012 hearing, both counsel for the Commonwealth and the Defendant were present. The Defendant, who is presently incarcerated at the State Correctional Institution at Houtzdale, participated by video conferencing.

Prior to the hearing, defense counsel conferred with the Defendant via video conferencing. As a result of their discussion, defense counsel represented at the hearing that Defendant was attacking his conviction on the solicitation charges but not the conviction on the rape charges, only the sentence. Further, defense counsel reiterated her position, as set forth in her Motion to Withdraw and her Turner/Finley letter, that the PCRA Petition was without merit.

Obviously, the Commonwealth agreed with defense counsel’s representations and did not oppose her Petition to Withdraw.

During the hearing, however, the Court raised an issue for the parties’ consideration. Specifically, the Court noted that upon its preliminary review of the record, Defendant may have a cognizable PCRA claim in connection with his rape

convictions. More specifically, the Defendant may have stated insufficient facts to constitute guilt in connection with the rape charges, as it appears the impairment of the victim may not have been without her knowledge as required by 18 Pa.C.S.A. §3121(a)(4).

At the hearing, both defense counsel and the Commonwealth argued that defense counsel had no obligation to review the record to determine whether there were any additional claims that could be raised on behalf of the Defendant in connection with his pending PCRA Petition. The Court disagrees.

In connection with a PCRA Petitioner's claims, the Petitioner is entitled to counsel whose "ability to frame the issues in a legally meaningful fashion ensures the Trial Court that all relevant considerations will be brought to its attention." Commonwealth v. Carrier, 494 Pa. 305, 309, 431 A.2d 271, 273 (1981). It is clear that a PCRA Petitioner is entitled to effective assistance of counsel to litigate a PCRA Petition. Pa. R. Crim. P. 904.

Counsel's duty to provide effective assistance is discharged by articulately setting forth Petitioner's claims to the extent they have merit, by advancing the Petitioner's claims if they have merit, or certifying that they lack merit, and by advancing other claims after a thorough review of the record. Commonwealth v. Michael Hampton, 718 A.2d 1250 (Pa. Super. 1998); Commonwealth v. Kaufmann, 592 A.2d 691 (Pa. Super. 1991). "Once appointment has been made, counsel may seek to withdraw, after a thorough review of the record has been made, were not frivolous issues justifying the

pursuit of Post Conviction Collateral Relief. Kaufman, *supra* at 698, citing Commonwealth v. Finley, 550 A.2d 213, 214, (Pa. Super. 1988).

As the Court in Hampton noted, the functions of an advocate in a PCRA representation are to explore the legal grounds for the petition, investigate the underlying facts and articulate the statement of claims. Hampton, 781 A.2d at 1254; Kaufmann, *supra*. at 697, quoting Commonwealth v. Mitchell, 427 Pa. 395, 235 A.2d 148 (1967).

Accordingly, because counsel had admittedly not thoroughly reviewed the record to determine if there are any additional claims that might be meritorious on behalf of the Defendant in connection with his PCRA Petition, the Court will deny counsel's Motion to Withdraw at this time and provide counsel with additional time to file an amended PCRA Petition or a Turner/Finley Letter either of which must address, among other things, the issue raised in this Opinion and Order as well as any and all other appropriate issues.¹

ORDER

AND NOW, this ____ day of January 2012, following a hearing and argument, the Court **DENIES** defense counsel's Petition to Withdraw. A PCRA Conference is scheduled for the **20th day of March, 2012 at 9:00 a.m. in Courtroom #4** of the Lycoming County Courthouse. No later than seven (7) working days prior to the hearing, defense counsel shall file with the Court an amended PCRA Petition and/or an

1. Defense counsel should discuss with Defendant the consequences of challenging his guilty plea to the two rape charges, including whether or not Defendant could be risking more time than he received pursuant to the plea agreement. If Defendant does not wish to pursue a challenge to the rape convictions, defense

additional Turner/Finley Letter.

By The Court,

Marc F. Lovecchio, Judge

cc: CST
DA (KO)
Lori Rexorth, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)

counsel should indicate that in any Turner/Finley letter.