

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**JONATHAN KRESS,
Defendant**

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:
:

**No. 1279-CR-2008; 1990-CR-2008
CRIMINAL DIVISION
PCRA**

OPINION AND ORDER

On February 11, 2013, Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Motion to Dismiss pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his Petition should be dismissed.

Background

On December 4, 2008, Jonathan Kress (Defendant) pled guilty under 1279-2008 to Involuntary Deviate Sexual Intercourse, a felony of the first degree;¹ and under 1990-2008 to Sexual Abuse of Children, a felony of the third degree.² The defendant pled guilty in exchange for a negotiated plea agreement of a minimum of ten (10) years for the IDSI charge, consecutive probation for the Sexual Abuse of Children charge, and the dismissal of all remaining charges. On April 24, 2009, the Defendant was sentenced to ten (10) to twenty (20) years in a State Correctional Institution followed by seven (7) years of supervision by the Pennsylvania Department of Probation and Parole. The Defendant was determined to be a Sexually Violent Predator and was advised that he was a lifetime registrant under the Megan’s Law Statute.

¹ 18 Pa.C.S. § 3123(A)(6).

² 18 Pa.C.S. § 6312(d)(1).

On May 8, 2009, the Defendant filed a Notice of Appeal to the Superior Court of Pennsylvania. The Defendant alleged that the Court erred in finding there was clear and convincing evidence that he was a Sexually Violent Predator. The Defendant's appeal was denied on March 16, 2010. Subsequently, the Defendant filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which was denied on October 24, 2011.

On December 6, 2012, the Defendant filed a *pro se* Post Conviction Relief Act (PCRA) Petition. The Defendant alleges six (6) issues: 1) trial counsel provided ineffective assistance by coercing the guilty plea; 2) trial counsel was ineffective by altering the terms of the plea agreement; 3) Defendant did not give an appropriate recitation of the facts to support a guilty plea; 4) police violated the Fourth Amendment by entering his residence without a search warrant; 5) Defendant was denied an attorney prior to police executing the search warrant on his residence; and 6) police coerced the Defendant into confessing to the crimes charges and that he was denied an attorney during the interrogation. On December 13, 2012, Donald Martino, Esquire was appointed to represent the Defendant for the PCRA Petition. On February 11, 2013, Attorney Martino filed a Petition to Withdraw as Counsel and a Memorandum Pursuant to Turner/Finley. In a letter dated March 8, 2013 to the Court, the Defendant additionally argues that his trial counsel did not advise him of the Mistake of Age defense. After an independent review of the record and an additional PCRA conference, the Court agrees with Attorney Martino that Defendant failed to raise any meritorious issues in his PCRA Petition.

Whether the Defendant waived his right to raise defenses and defects not concerning jurisdiction of the court, legality of sentence, and validity of plea

The Defendant alleges defenses and suppression issues in his PCRA Petition. The entry of a plea of guilty, however, "usually constitutes a waiver of all defects and defenses except

those concerning the jurisdiction of the court, legality of sentence, and validity of plea.”

Commonwealth v. Coles, 530 A.2d 453, 457 (Pa.Super.1987); Commonwealth v. Moyer, 444 A.2d 101 (1982); Commonwealth v. Casner, 461 A.2d 324 (1983). Thus, this Court will assess whether the Defendant entered a valid guilty plea to determine if he has waived many of the issue raised in his PCRA Petition.

Manifest injustice is required to withdraw guilty pleas which are requested after sentence has been imposed. Commonwealth v. Flick, 802 A.2d 620, 623 (Pa. Super. 2002). Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly. Commonwealth v. Persinger, 615 A.2d 1305 (Pa. 1992). It does not matter if the Defendant is pleased with the outcome of his decision to plead guilty as long as he did so knowingly, voluntarily, and intelligently. Commonwealth v. Yager, 685 A.2d 1000, 1004 (Pa. Super. 1996).

The minimum inquiry required of a trial court must include the following six areas: (1) Does the defendant understand the nature of the charges to which he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the defendant understand that he has a right to trial by jury? (4) Does the defendant understand that he is presumed innocent until he is found guilty? (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged? (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Young, 695 A.2d 414, 417 (Pa. Super. 1997). In Yeomans, the Superior Court further summarized:

In 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. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. 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.

Commonwealth v. Yoemans, 24 A.3d 1044 (Pa. Super. 2011) (citing Commonwealth v. Fluharty, 632 A.2d 312, 314 (Pa. Super. 1993); see also Commonwealth v. Scott, No. 1732 MDA 2011 (Pa. Super. Filed July 24, 2012).

A review of the transcripts of the guilty plea hearing in this case confirms that the Defendant did in fact enter into his plea knowingly, voluntarily, and intelligently. This Court informed the Defendant of the maximum sentence/fine for the charges. N.T., 12/4/2008, p. 6. The Defendant was made aware of the elements of the crime and that the Commonwealth must prove the elements of the crime beyond a reasonable doubt. Id. at 6-7. The Defendant gave the Court an extensive factual basis for the guilty plea and was informed that he had the right to go to trial and to select a jury. Id. at 7-12. In addition, the Defendant filled out a written guilty plea colloquy highlighting many of these factors in greater detail, to which he stated he understood.³ According to Pennsylvania law, the Defendant's guilty plea was entered knowingly, voluntarily, and intelligently.

As the Defendant entered a valid guilty plea, he cannot now raise defects and defenses that his trial attorney failed to bring. Therefore, the Court finds that the Defendant has waived the issues of whether police violated his Fourth Amendment rights, whether he was denied an attorney prior to the execution of the search warrant, and whether police coerced him into confessing to the crimes.

Whether trial counsel provided ineffective assistance by coercing the Defendant to plead guilty

The Defendant alleges trial counsel coerced him into pleading guilty. To make a claim for ineffective assistance of counsel, a defendant must prove the following: (1) an underlying claim of arguable merit; (2) no reasonable basis for counsel's act or omission; and (3) prejudice

³ The Court's Order dated September 8, 2010 found that he knowingly, voluntarily and intelligently entered his guilty plea.

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) (citing Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper, 941 A.2d at 664 (citing Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)). Further, Counsel is presumed to have been effective. Id.

First, the Defendant merely states that he was “coerced into the plea” and does not state any grounds or information to support this. Pa.R.Crim.P. 902(A) states that the PCRA Petition is to contain the relief requested, the grounds for the relief requested, and the facts supporting each ground. Without any more facts to support this claim the Court is unable to find that this issue has merit.

In addition, the Defendant’s statements made on the record and under oath contradict the allegations made in the PCRA Petition:

COURT: Is anyone forcing you in any way to get you to plead guilty here today?

DEFENDANT: No, ma’am.

COURT: Anybody promising you anything to get you to give up your right to a jury trial?

DEFENDANT: No, ma’am.

COURT: Are you doing this of your own freewill?

DEFENDANT: Yes, ma’am.

COURT: And ultimately whose decision was it to plead guilty here today?

DEFENDANT: It is mine.

Id. at 14.

COURT: Okay. And you're satisfied with your attorney's representation here today of you being available to answer questions and explain anything that you needed to decide?

DEFENDANT: Yes, ma'am.

COURT: Do you feel as though he's pressuring you or forcing you in any way to get you to plead guilty here today?

DEFENDANT: No, ma'am.

Id. at 15. Based upon the record, the Court finds that the Defendant's issue is without merit.

Whether the Defendant gave an appropriate recitation of the facts to support a guilty plea

The Defendant contends that he did not give a proper recitation of the facts to support his guilty plea. The Court finds that this issue is without merit and will rely on the record:

LINHARDT: The allegation, your Honor, is that the Defendant had both oral and anal sex with a 14 year old boy, the Defendant being 26 years old at the time.

COURT: Okay. And it's alleged that this individual would have come over to your house one night.

DEFENDANT: Um-hum.

COURT: And you watched some movies with him.

DEFENDANT: Right.

COURT: And then exactly specifically you need to tell me what happened between the two of you.

DEFENDANT: We had oral and anal sex.

COURT: Who did what?

DEFENDANT: My penis was inserted in him.

COURT: Inside his anus?

DEFENDANT: Yes.

COURT: And then who had oral sex on whom?

DEFENDANT: We each did.

COURT: On each other?

DEFENDANT: Yes.

...

COURT: Do you acknowledge that you did tell the police that you knew that he was 14 when they interviewed you?

DEFENDANT: Yes, during the interview, yes, I did know that he was 14.

...

COURT: What did they find when they searched your home?

DEFENDANT: They found pornographical images on one of the hard drives that was in my - -

COURT: What type of images did they depict?

DEFENDANT: The paper work says between - -

COURT: Well, you tell me what you saw.

DEFENDANT: I didn't see anything, but they - - it says that it was naked boys between the ages of 2 and 15.

COURT: It was on your computer?

DEFENDANT: The hard drives were mine, yes.

COURT: Did you download those images?

DEFENDANT: Yes. I had gotten them before.

Id. at 8-11.

Whether trial counsel was ineffective by altering the terms of the plea agreement

The Defendant alleges that his trial counsel had altered the terms of the plea agreement.

There is no record of any issue raised by the Defendant of an altered plea agreement in the

written guilty plea colloquy, the guilty plea transcripts, and the sentencing transcripts. The record shows that the plea agreement remained the same from the guilty plea to when the Court accepted the negotiated plea agreement at sentencing. N.T., 4/24/2009, p. 26-28. As the Defendant did not state any grounds in his PCRA Petition to substantiate his claim, the Court finds that this issue lacks merit.

Whether trial counsel was ineffective for not discussing the mistake of age defense with the Defendant

The Defendant contends that he was unaware that the victim was fourteen (14) and was unaware of the mistake of age defense prior to pleading guilty. A person commits Involuntary Deviate Sexual Intercourse if they engage in deviate sexual intercourse with a complainant “who is less than 16 years of age and is four or more years older than the complainant.” 35 Pa.C.S. 3123(a)(7). “In matters involving sexual offenses against children, when criminality depends on the child’s being below a specified age but older than fourteen years, it is a defense for the defendant to prove that he or she reasonably believed the child to be above the critical age. Because Section 3102 places the initial burden on the accused to prove mistake of age, defendant’s knowledge of or belief as to the age of the child victim. Commonwealth v. A.W.C., 951 A.2d 1174, 1178 (Pa. Super. 2008).

As stated above, to prove ineffective assistance of counsel the Defendant must prove (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. When a defendant alleges that his guilty plea was induced by ineffective counsel they must prove that their attorney was not competent and that it caused them to enter an involuntary or unknowing plea. “Allegations of

ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea.”

Commonwealth v. Anderson, 995 A.2d 1184, 1192 (Pa. Super. 2010). “Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.”

Id.

Here, the Defendant had previously confessed to police that he knew the victim was fourteen (14). In addition, at the Defendant’s guilty plea hearing, he acknowledged under oath that “yes, I did know that he was 14.” N.T., 12/14/2008, p. 10. The fact that trial counsel may not have discussed the mistake of age defense with the Defendant is within the range of competence demanded of attorneys, since the Defendant had previously stated that he was aware of the victim’s age. There is no merit that the ineffectiveness of trial counsel caused the Defendant to enter an involuntary or unknowing plea.

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 April, 2013, 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 February 11, 2013, is hereby GRANTED and Donald Martino, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

xc: DA (KO)
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