

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CR-671-2008
	:	
v.	:	OTN: K5545551
	:	
JAMES KENNETH BRICKER.	:	PCRA PETITION

OPINION AND ORDER

Before the Court is a Petition for Post-Conviction Relief filed by Defendant on October 2, 2012, pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546, and a Motion to Withdraw as Counsel filed by Defendant’s court-appointed counsel pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. Ct. 1988). After conducting an independent review of Defendant’s petition and considering appointed counsel’s motion, for the reasons provided below, the Court finds that Defendant’s petition lacks merit and that counsel’s motion to withdraw should be granted.

I. Factual and Procedural Background

Jury Trial and Sentencing

By criminal information filed May 2, 2008, the Commonwealth charged Defendant with various sex crimes for his alleged actions pertaining to a group of eleven-year-old boys. On May 5-6, 2010, the Court conducted a jury trial on these charges. On May 6, 2010, the jury returned a verdict of guilty on two (2) counts each of criminal solicitation – rape of a child, criminal solicitation – involuntary deviate sexual intercourse with a child, criminal solicitation – indecent assault, endangering the welfare of a child, corruption of minors, and one (1) count of indecent assault. Also on that date, the Court ordered Defendant to undergo an assessment by the Sexual Offender Assessment Board to determine if he possessed the characteristics of a Sexually Violent Predator, in accordance with the Pennsylvania Megan’s Law Statute. The Court

scheduled Defendant's sentencing for August 30, 2010. Upon continuance requests of Defendant, the Court continued Defendant's sentencing to December 22, 2010, and then to February 2, 2011.¹ On February 4, 2011, the Court found Defendant to be a Sexually Violent Predator subject to the Megan's Law lifetime registration requirement; also on that date, the Court sentenced Defendant to an aggregate period of incarceration in a state correctional institution, the minimum of which should be thirty (30) years and three (3) months and the maximum of which should be sixty (60) years and six (6) months.

Post-Sentence Motion

On February 14, 2011, Defendant filed a Post-Sentence Motion. On May 3, 2011, the Court entertained oral arguments on Defendant's motion. By Opinion dated May 11, 2011, the Court denied Defendant's motion.

Direct Appeal

On May 20, 2011, Defendant filed his Notice of Appeal with the Lycoming County Prothonotary's Office. On May 24, 2011, the Court ordered Defendant to file a Concise Statement within twenty-one (21) days. On June 13, 2011, Defendant filed his statement. By opinion dated July 6, 2011, the Court respectfully requested our Superior Court to affirm its February 4, 2011 Order. By Opinion filed March 27, 2012, our Superior Court affirmed this Court's February 4, 2011 Order. *See Commonwealth v. Bricker*, 41 A.3d 872 (Pa. Super. Ct. 2012). Defendant subsequently filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. The Supreme Court denied this petition on August 28, 2012. *See Commonwealth v. Bricker*, 329 MAL 2012.

¹ Defendant requested continuances of his sentencing dates because his Sexually Violent Predator assessment had yet to be completed.

PCRA Petition – October 2, 2012

On October 2, 2012, Defendant filed a *pro se* Petition for Post-Conviction Relief. On October 4, 2012, the court scheduled an initial PCRA conference with the Commonwealth and court-appointed counsel for December 11, 2012. Due to an error in the court system, Defendant was not assigned counsel until December 13, 2012, and the Court rescheduled the initial PCRA conference for March 4, 2013. On February 1, 2013, court-appointed counsel filed his motion to withdraw pursuant to *Turner/Finley, supra*. On March 4, 2013, the Court held the initial PCRA conference as well as oral argument on counsel's motion.

After careful review of Defendant's October 2, 2012 PCRA petition and counsel's February 1, 2013 motion to withdraw, the Court finds that the petition lacks merit; based upon this finding, the Court will not schedule an evidentiary hearing in this matter and will grant Attorney Martino's motion to withdraw as court-appointed counsel.

II. Issues Raised

In Defendant's PCRA petition, Defendant alleged he was entitled to relief because of constitutional violations that occurred during his pre-trial process and the ineffectiveness of his trial counsel. In particular, Defendant argues that the amount of time that he was held in pre-trial confinement violated Pa. R. Crim. P. 600. Defendant alleged that trial counsel *never* requested the Court to review his pre-trial confinement. Defendant also alleges that the chain of custody was broken in regards to some of the evidence produced during his trial and that there was a delay in his prosecution. Additionally, Defendant raises issues out of his petition for writ of habeas corpus. Lastly, Defendant alleges that his trial counsel was ineffective by failing to perfect a pre-trial appeal on the criminal solicitation issue.

Appointed counsel acknowledged these issues by letter to Defendant dated December 17, 2012. Appointed counsel requested Defendant to further clarify his issues pertaining to the chain of custody, delay in prosecution and the response to the *habeas corpus* petition. By letter dated January 5, 2013, Defendant responded to counsel's request. *See* Counsel Letter, Jan. 11, 2013. By letter dated January 11, 2013, appointed counsel rephrased Defendant's issues as:

- (1) [t]hat your trial counsel was ineffective in failing to appeal the denial of your Motion for Nominal Bail filed pursuant to Pennsylvania Rule of Criminal Procedure 600;
- (2) [t]hat the chain of custody of evidence was broken and returned forty-eight (48) hours later to pick up relocated evidence by then not all information filed with the first appeal;
- (3) [t]hat there was a delay in the prosecution of evidence because it took two (2) years to find it;
- (4) [t]hat the trial court delayed in making a decision on the habeas corpus because it took eight (8) months to make a decision;
- (5) [t]hat there was a delay of three (3) months in response to the habeas corpus; and
- (6) [t]hat your trial counsel, Attorney William Miele, was ineffective by failing to properly perfect a pretrial appeal on the issue of criminal solicitation.

Id. at 2.² After careful analysis of these issues, appointed counsel concluded that Defendant's issues lack merit. After conducting an independent review of Defendant's issues, the Court agrees.

III. Eligibility for Post Conviction Relief

The PCRA provides standards for post conviction relief eligibility. 42 Pa. C.S. § 9543. Section 9543(a) provides that in order to be eligible for relief, a Defendant must be convicted

² In his *Turner/Finley* letter, appointed counsel addressed other issues that Defendant raised with counsel in Defendant's letter dated January 5, 2013. *See* Counsel Letter, Jan. 11, 2013, pg. 7. After review, appointed counsel determined that these issues lacked merit. *Id.* at 8. The Court agrees with appointed counsel's conclusion that these issues lack merit.

and serving a sentence of incarceration. *Id.* In this matter, it is uncontested that Defendant is currently serving a state sentence of incarceration. However, section 9543(a) also lists three (3) other eligibility requirements; these requirements include:

- (2) That the conviction or sentence resulted from one or more of the following:
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

* * * * *

- (3) That the allegation of error has not been previously litigated or waived.
- (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

Id. With these standards in mind, the Court will address Defendant’s ineffective assistance of counsel claims first.

IV. Ineffective Assistance of Counsel Claims

In order to succeed on a claim for ineffective assistance of counsel, Defendant must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Defendant’s underlying claim has arguable merit, (2) trial counsel had not reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Defendant.

Commonwealth v. Chimel, 1111, 1127 (Pa. 2011) (referencing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987)). See also *Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. Ct. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (citing *Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003)). Actual prejudice must occur; that is trial counsel's ineffectiveness must have been so evasive that it is reasonable it had an adverse impact on the proceeding's outcome. *Sampson*, 900 A.2d at 890 (citing *Commonwealth v. Howard*, 645 A.2d 1300, 1307 (Pa. 1994)). With this standard in mind, the Court turns to Defendant's claims.

Rule 600

Three of Defendant's arguments (issues (1), (4), and (5), listed above) pertain to Defendant's claim that his trial counsel was ineffective for failing to appeal the court's denial of his nominal bail motions. The Court does not believe that Defendant's claim is a proper ineffective assistance of counsel claim; specifically, the Court finds that the failure to appeal these denials did not undermine the truth-determining process that no reliable adjudication of guilt or innocence of Defendant could have taken place.

Rule 600 provides that a trial in a matter shall commence within one hundred and eighty (180) days from which the complaint was filed, if the Defendant is incarcerated pursuant to that case, or within three hundred and sixty-five (365) days, if the Defendant is at liberty on bail. Pa. R. Crim. P. 600(A)(2)-(3). When determining the period of time in which a trial should commence, the following times are excluded

(1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;

- (2) any period of time for which the defendant expressly waives Rule 600;
- (3) such period of delay at any stage of the proceedings as results from:
 - (a) the unavailability of the defendant or the defendant's attorney;
 - (b) any continuance granted at the request of the defendant or the defendant's attorney.

Id.

On November 3, 2008, trial counsel filed Defendant's first Motion for Nominal Bail for Violation of Rule 600. R.R., Ex. 13. The Court summarily denied this motion on November 7, 2008. R.R., Ex. 14. On March 2, 2010, trial counsel filed Defendant's second Motion for Nominal Bail for Violation of Rule 600. R.R., Ex. 35. On March 19, 2010, following a hearing, the Court denied Defendant's motion. R.R., Ex. 37. This Court held a jury trial in this matter on May 5-6, 2010. On May 6, 2010, the jury returned a guilty verdict in the eleven (11) counts of record. R.R., Exs. 48-49.

Instantly, Defendant argues that trial counsel was ineffective for failing to appeal the issues found within his motions for nominal bail. However, Defendant provides no explanation as to how this failure to appeal undermined the truth-determining process in his jury trial. The Court believes these denials had no effect on the truth-determining process because the jury was unaware of Defendant's incarceration status. Therefore, the Court finds that Defendant's claim lacks merit.

Criminal Solicitation

Defendant also alleges that his trial counsel was ineffective for failing to perfect a pre-trial appeal on the issue of criminal solicitation. The Court does not agree. Specifically, the

Court finds Defendant's underlying claim does not have arguable merit and that the performance of trial counsel did not prejudiced Defendant.

On September 11, 2008, trial counsel filed a Motion to Dismiss. In this motion, Defendant alleged that he could not be lawfully charged with solicitation (rape of a child, involuntary deviate sexual intercourse, indecent assault, and aggravated indecent assault) because Defendant did not engage in sexual activity with the victims nor did Defendant solicit and over-age person to engage in sexual activities with a child. Defendant's argument was premised on the Court's finding in *Commonwealth v. B.A.M.*,³ that consensual sexual activity between two children under the age of fourteen (14) is not a crime. *See* Motion. By order dated May 14, 2009, the Court denied Defendant's motion. On May 21, 2009, the Court amended its May 14, 2009 Order to comply with 42 Pa. C.S. § 702(b) and Pa. R.A.P. 1311, pertaining to the order involving a controlling question of law and permitting immediate appeal. On May 26, 2009, trial counsel filed his Notice of Appeal of the May 14, 2009 Order with the Lycoming County Prothonotary's Office. On May 27, 2009, the Court ordered Defendant to file his concise statement within twenty-one (21) days. On June 19, 2009, trial counsel filed his concise statement with the Lycoming County Prothonotary's Office. By Order filed December 1, 2009, our Superior Court denied Defendant's amended Notice of Appeal because it was filed two (2) days late. Also in that order, the Court quashed Defendant's appeal. Defendant's case proceeded to trial.

However, following Defendant's conviction, on February 14, 2011, trial counsel filed a Post Sentence Motion; in this motion, trial counsel raised the solicitation issue. R.R., Ex. 61. The Court denied this motion by Opinion and Order filed May 11, 2011. R.R., Ex. 65. On May

³ 806 A.2d 893 (Pa. Super. Ct. 2002).

20, 2011, trial counsel filed a Notice of Appeal. R.R., Ex. 66. In Defendant's Concise Statement of Matters Complained of on Appeal, Defendant alleged "that the [t]rial [c]ourt erroneously denied Appellant's Motion to Dismiss the charges of Solicitation as the Defendant cannot solicit a non-crime." R.R., Ex. 68. In *Commonwealth v. Bricker*, 41 A.2d 872 (Pa. Super. Ct. 2012), our Superior Court affirmed the Court's denial of the motion to dismiss. After receiving the Superior Court's published opinion, trial counsel filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court; our Supreme Court denied Defendant's petition on September 20, 2012.

Thus, based upon the appellate history of Defendant's matter, including its consideration and review by the Superior Court, the Court cannot find that Defendant's underlying claim has arguable merit. Additionally, the Court cannot find that the performance of trial counsel prejudiced Defendant because his solicitation issue was ultimately addressed by the Superior Court, albeit after the jury trial.

V. Remaining Issues

Defendant's remaining issues involve alleged evidentiary errors. In his motion to withdraw, appointed counsel clarified Defendant's second issue for the Court; in Defendant's second issue, he alleges that the backpack the police retrieved from Defendant's apartment could have been tampered with because the police did not actually seize the backpack until forty-eight (48) hours after finding it in Defendant's home. The Court finds that this evidentiary claim is not

valid under the PCRA. Additionally, the Court notes that it addressed an evidentiary issue relating to the backpack and its contents in a May 4, 2010 Order. *See* R.R., Exs. 30, 46.⁴

Appointed counsel similarly clarified Defendant's third issue for the Court; in his third issue, Defendant alleges that he was prejudiced because the Commonwealth provided evidence to trial counsel five (5) days prior to trial. The Court finds that this evidentiary claim is not valid under the PCRA. Again, the Court notes that it addressed this evidentiary issue by order dated May 4, 2010. R.R., Ex. 45.⁵

Similar to appointed counsel, the Court believed Defendant's third issue to raise a claim under the Statute of Limitations. Again, this claim is not valid under PCRA nor does it have merit. *See also* 42 Pa. C.S. § 5552(c)(3).

VI. Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's October 2, 2013 PCRA Petition or deny appointed counsel's February 1, 2013 Motion to Withdraw as Counsel. As the Court finds that no purpose would be served by conducting any further evidentiary hearing regarding this matter, a hearing will not be scheduled. Pa.R.Crim.P. 909(B)(2); *See Commonwealth v. Walker*, 36 A.3d 1, 17 (Pa. 2011) (holding that a PCRA Defendant is not entitled to an evidentiary hearing as a matter of right, but only when the PCRA

⁴ On February 2, 2010, Defendant filed a Motion in Limine to exclude the backpack and its contents, including Johnson's baby power, Johnson's baby lotion, Vaseline, Purell hand sanitizer, and KY touch massage, from trial. R.R., Ex. 30. On May 4, 2010, the Court granted in part and denied in part Defendant's motion; specifically, the Court provided that evidence of the backpack and the KY touch massage could be introduced as long as a witness testified that these materials were utilized as part of the crimes alleged. R.R., Ex. 46. The witnesses testified as to the backpack and lotion at trial. N.T., 41: 15 – 42: 15 (testimony of L.F.); 99: 1-10 (testimony of E.K.) (5/5/11).

⁵ The order pertained to trial counsel's oral motion to exclude evidence contained on two (2) C.D.s; these C.D.s contained interviews with two (2) of the alleged victims. This evidence was obtained by the Commonwealth from the police on the same date that the Commonwealth forwarded the information to trial counsel. The Court denied trial counsel's motion to exclude, citing *Commonwealth v. Collins*, 957 A.2d 237 (Pa. 2008). R.R., Ex. 45.

petition presents genuine issues of material facts). *See also Commonwealth v. McLaurin*, 45 A.3d 1131, 1135-36 (Pa. Super. Ct. 2012).

Pursuant to Pennsylvania Rules of Criminal Procedure 907(1), the parties are hereby notified of the Court's intention to deny the 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 October 2, 2012 petition.

ORDER

AND NOW, this 22nd day of May, 2013, Defendant is hereby notified that it is the Court's intention to dismiss his October 2, 2012 PCRA Petition, unless he files an objection to that dismissal ***within twenty days (20) of today's date***. This Opinion and Order will be served on Defendant as set forth in Pa.R.Crim.P. 907(1).

Attorney Martino's Motion to Withdraw as Counsel (*Turner/Finley* Letter) is GRANTED. Attorney Martino is withdrawn from the above-captioned matter, effective this date.

BY THE COURT,

Date

Richard A. Gray, Judge

cc: DA
Donald Martino, Esq.
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