

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	<b>CR-294-2013</b>
	:	<b>CR-1063-2002</b>
<b>v.</b>	:	
	:	<b>CRIMINAL DIVISION</b>
<b>STEVEN P. SCOTT,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

**I. Background**

On January 9, 2003, the Defendant pled guilty to two counts of Involuntary Deviate Sexual Intercourse,<sup>1</sup> two counts of Aggravated Indecent Assault,<sup>2</sup> two counts of Indecent Assault,<sup>3</sup> one count of Endangering the Welfare of a Child,<sup>4</sup> and one count of Corruption of a Minor.<sup>5</sup> On March 7, 2003, the Court sentenced the Defendant on the Indecent Assault counts, which were counts 5 and 6, to placement “under the supervision of the Pennsylvania Board of Probation and Parole (Board) for a period of five years on each count to run concurrent to one another.”

In January of 2013, the Defendant was charged with one count of False Identification to Law Enforcement.<sup>6</sup> The Defendant misrepresented his identity because he was found in a place that violated the conditions of his supervision under the Board. He pled guilty to the False Identification charge on May 20, 2013. On June 6, 2013, pursuant to his plea agreement, the Defendant was sentenced to incarceration for a minimum of 90 days and maximum of one year. A final special probation violation hearing was held also on June 6, 2013. After the hearing, the

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<sup>1</sup> 18 Pa. C.S. § 3123(a)(6) and (7).

<sup>2</sup> 18 Pa. C.S. § 3125(a)(7) and (8).

<sup>3</sup> 18 Pa. C.S. § 3126(a)(7) and (8).

<sup>4</sup> 18 Pa. C.S. § 4304.

<sup>5</sup> 18 Pa. C.S. § 6301.

<sup>6</sup> 18 Pa. C.S. § 4914.

Court found that the Defendant violated the conditions of his supervision. For Count 5 Indecent Assault, the Court resentenced the Defendant to one to three years of incarceration in a state correctional institution. For Count 6 Indecent Assault, the Court resentenced the Defendant to five years of probation under the supervision of the Board. On June 18, 2013, after the Defendant's Motion to Reconsider Sentence, the Court amended its Count 5 sentence to one to two years of incarceration in a state correctional institution. The Court also stated that it did not intend to change the Court's original sentence of March 7, 2003 regarding Count 6.

On January 8, 2014, the Defendant filed a Post-Conviction Relief Act (PCRA) Petition. In the petition, the Defendant argued that his counsel was ineffective during his final special probation violation hearing. He argued that counsel was ineffective for (1) not producing and alerting the Defendant of what was stated in pre-sentence investigation, (2) not raising issues of bias, and (3) not requesting that the Court run the probation violation sentence concurrent with the sentence for False Identification to Law Enforcement. On July 8, 2014, PCRA Counsel filed a *Turner / Finley* "No Merit Letter." A conference on the Defendant's petition was held also on July 8, 2014.

## **II. Discussion**

Under the Post-Conviction Relief Act, a petitioner is eligible for relief if the petitioner "pleads and proves by a preponderance of the evidence . . . that the conviction or sentence resulted from . . . [i]neffective 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." 42 Pa. C.S. § 9543(a)(2)(ii). As PCRA Counsel notes, a defendant has the right to effective assistance of counsel during probation revocation and

resentencing. *See* Commonwealth v. Anderson, 788 A.2d 1019, 1022 (Pa. Super. 2001); Commonwealth v. Cappello, 823 A.2d 936, 940-941 (Pa. Super. 2003). However, a defendant can challenge only “the validity of the revocation proceedings and the legality of the new sentence.” Anderson, 788 A.2d at 1022.

A petitioner is entitled to relief pursuant to the Post Conviction Relief Act for ineffective assistance of counsel only if he or she can show (1) that the argument has merit, (2) that trial counsel had no reasonable basis for course of action, and (3) reasonable probability that but for the act or omission being challenged, the outcome would have been different. Commonwealth v. Kimball, 724 A.2d. 326, 333 (Pa. 1999). If a petitioner cannot show all three prongs of the aforementioned test, the petitioner’s claim for relief will be rejected. *See* Commonwealth v. Busanet, 817 A.2d. 1060, 1066 (Pa. 2002).

The Defendant first argues that his counsel was ineffective for not alerting him of the contents of a pre-sentence investigation report. This argument is without merit because it is not clear that a pre-sentence investigation report was ever done. N.T., 6/6/2013, at 10. In addition, the Defendant has not shown that had counsel presented him with a pre-sentence investigation report, the outcome would have been different. As noted by PRCA Counsel, even if a report was done, the Court did not consider it when making its finding or imposing its sentence. The Defendant argues that if he had been given an opportunity to see the contents of the pre-sentence investigation report, “he may have been able to contest.” However, the Defendant’s statements show that he never intended to contest during the hearing. The Defendant said, “Your [H]onor, I should not have been there. It’s plain and simple. I’m not going to make excuses. . . .” N.T., 6/6/2013, at 11. He also said, “[A]t the end of the day I’m at fault; and there’s no excuse for my actions.” Id. at 16.

Next, the Defendant argues that counsel was ineffective for not raising issues of bias. In his petition, the Defendant does not state specifically what issues of bias existed. However, in correspondence with PCRA Counsel, the Defendant asserted that his probation officers told him that he would never get out of prison without a home plan. The Defendant also asserted that the Court would not have resentenced the Defendant to a lengthy period of supervision had the case not involved offenses of a sexual nature. For these arguments, the Court will rely on the analysis of PCRA Counsel:

The Defendant's allegations are without merit. The law requires that an individual have a home plan before being released from parole. Furthermore, it is wholly appropriate for the Court to consider the nature of the underlying offense when resentencing on a parole/probation revocation. . . . The Court explained at length its reasons for imposing a State Prison sentence and the lengthy period of consecutive supervision.

"No Merit Letter," p. 9. *See* N.T., 6/6/2013, at 16-20.

Finally, the Defendant argues that his counsel was ineffective for not requesting that the Court run the probation violation sentence concurrent with the sentence for False Identification to Law Enforcement. The Defendant has not shown that had counsel requested that the sentences run concurrently, the outcome would have been different. As PCRA Counsel notes, counsel made a number of suggestions for sentencing alternatives during his argument to the Court. During the hearing, counsel argued that the Board's recommended sentence of one to four years for Count 5 was excessive. N.T., 6/6/2013, at 9. Counsel indicated that he sought a time-served recommendation from the Board. *Id.* He argued for "community service or further sanctions that do not require state incarceration." *Id.* at 10. Finally, counsel argued for options other than the statutory maximum. *Id.* at 11. Therefore, the Defendant has not shown that counsel was ineffective.

Because the Defendant may have veiled a challenge to the legality of his sentence with an ineffective assistance of counsel argument, the Court will address the legality of the Defendant's sentence. "A defendant who violates the conditions of his parole and/or probation, is placed in the same position that he was in at the time of the original conviction. The sentencing court has the statutory authority to resentence a defendant to a term of total confinement as punishment for the violations, and such punishment will not constitute a 'second punishment' for the same offense." Commonwealth v. Mysnyk, 527 A.2d 1055, 1058 (Pa. Super. 1987). This is subject to the limits in 42 Pa.C.S. § 9771(c). The Indecent Assault offense of Count 5 is a misdemeanor of the first degree.<sup>7</sup> The maximum lawful sentence for a misdemeanor of the first degree is five years of imprisonment. 18 Pa.C.S. § 1104(1). The Defendant's sentence of one to two years of incarceration is less than the maximum lawful sentence.

When sentencing a defendant, "the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S. § 9721(b). A trial court must "state, on the record, the reasons for the sentence imposed." Commonwealth v. Riggins, 377 A.2d 140, 149 (Pa. 1977).

The Court considered the relevant sentencing factors. The Court considered the gravity of the offense when it emphasized the seriousness of the situation. N.T., 6/6/2013, at 17-18. The Court considered the rehabilitative needs of the Defendant in its reference to the Defendant's inability to conform to the requirements of his supervision. The Court stated, "[Y]ou [the

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<sup>7</sup> Count 5 is Indecent Assault under 18 Pa. C.S. § 3126(a)(7). *See* Information. Indecent Assault under subsection (a)(7) is a misdemeanor of the first degree. 18 Pa. C.S. § 3126(b)(3). When the Defendant pled, Indecent Assault under subsection (a)(7) was misdemeanor of first degree.

defendant] didn't learn the practical reality of the situation which is when [a probation officer] tells you to do something or not to do something you've got to listen to them." N.T., 6/6/2013, at 18. The Court also stated, "[T]he issue is you had rules that you had to obey, and you didn't obey them." Id. at 19. In its reference to the rules of supervision, the Court considered the protection of the public. The Board requires probationers and parolees to conform to rules in part for the protection of the public.

### **III. Conclusion**

The Defendant has not shown that counsel was ineffective. In addition, the Defendant's sentence was legal.

### **ORDER**

**AND NOW**, this \_\_\_\_\_ day of August, 2014, it is hereby ORDERED and DIRECTED as follows:

1. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), Petitioner is hereby notified that the Court intends to dismiss his PCRA petition unless he files an objection to the intended dismissal within twenty (20) days of this order's date.
2. The Petition to Withdraw from Representation, filed July 8, 2014, is hereby GRANTED, and the attorney may withdraw from the above captioned matter.

By the Court,

Nancy L. Butts, President Judge