IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-1197-2011; CR-1209-2011;**
	:	**CR-1570-2011; CR-1572-2011**
EARL TAYLOR,	**:**	
Defendant	**:**	

OPINION AND ORDER

This matter came before the court on Defendant's Post Conviction Relief Act (PCRA) petition.

Under information 1197-2011, Defendant was charged with burglary, criminal trespass, and criminal mischief. On January 31, 2012, the information was amended to change the grading of the criminal trespass from a felony of the third degree to a felony of the second degree.

Under information 1209-2011, Defendant was charged with aggravated assault, theft by unlawful taking and criminal mischief. This information was amended to add the charge of simple assault.

Under information 1570-2011, Defendant was charged with access device fraud, identity theft, receiving stolen property, theft from a motor vehicle and five counts of forgery

Under information 1572-2011, Defendant was charged with nine counts of conspiracy. This information was amended, however, to change counts 3 and 7 from the inchoate crime of conspiracy to the underlying criminal offenses of criminal trespass and access device fraud, respectively.

On January 31, 2012, the parties reached a global plea agreement pursuant to which Defendant would plead guilty to criminal trespass under information 1197-2011, simple assault under information 1209-2011, theft, access device fraud and a consolidated count of forgery under information 1570-2011 and criminal trespass and access device fraud under information 1572-2011 in exchange for an aggregate sentence of incarceration in a state correctional institution for 3-6 years followed by one year of probation. Defendant entered his guilty plea and sentencing was scheduled for May 15, 2012.

During the time between his guilty plea and his sentencing hearing, Defendant wrote to his attorney on at least two occasions, asking her to get him approved for boot camp. Counsel wrote to Defendant and told him that he was not eligible for the boot camp program.

On May 15, 2012, the court sentenced Defendant in accordance with the plea agreement, and gave him credit for time served from August 22, 2011 to May 14, 2012. At the end of the sentencing hearing when the court asked Defendant if he had any questions, he inquired whether he was eligible for boot camp. The court replied,

> No because your maximum is six years so you would not be boot camp eligible but – well, here's what can happen. If you go to the –I think you might actually be eligible if you serve one year. What will happen when you go to state prison, if they determine you might be appropriate for boot camp they'll write me. If that's the case, then I'll get a hold of the District Attorney and your attorney with the hope that they'll agree to such.

Sentencing Transcript, May 15, 2012, at p. 11.

No one ever stated at the guilty plea hearing or at the sentencing hearing that

the terms of the plea agreement excluded Defendant from the boot camp program or that a condition of Defendant's guilty plea was that he waive his eligibility for the boot camp program.

In October 2012, the Department of Corrections sent an amended order to the court to make Defendant eligible for boot camp, and the court signed the amended order. The Commonwealth objected that the amended order was untimely and/or the court lacked jurisdiction to issue an amended order. As a result, the court vacated the amended order on January 11, 2013.

Defendant filed a timely PCRA petition in which he asserted that plea counsel was ineffective for failing to request a boot camp recommendation.

At the evidentiary hearing on Defendant's PCRA petition, plea counsel testified that she misunderstood the boot camp statute, and she gave Defendant inaccurate advice regarding his eligibility for boot camp. She did not discuss boot camp with the prosecuting attorney or the court, because she mistakenly believed that only an inmate with a sentence of not more than 2 to 5 years of incarceration was eligible for boot camp. Although the Lycoming County District Attorney currently has an unwritten policy that a defendant is only eligible for boot camp if such eligibility is made an express provision of the plea agreement, counsel did not believe that policy was enacted until after she left the public defender's office. Counsel also indicated that if Defendant's minimum sentence had been two years or less she would have asked for boot camp.

Although the Commonwealth did not present any evidence at the PCRA

hearing, its position was that Defendant waived boot camp as part of the plea agreement.

To prove ineffective assistance of counsel, a petitioner must prove that his claim is of arguable merit; counsel had no strategic reason for her act or omission; and prejudice, i.e., but for counsel's act or omission there is a reasonable probability that the outcome of the proceedings would have been different.

The court finds that Defendant's claim has arguable merit.

An "eligible inmate" for the boot camp program is:

> A person sentenced to a term of confinement under the jurisdiction of the Department of Corrections who is serving a term of confinement, the minimum of which is not more than two years and the maximum of which is five years or less, **or an inmate who is serving a term of confinement, the minimum of which is not more than three years where that inmate is within two years of completing his minimum term, and who has not reached 40 years of age at the time he is approved for participation in the motivational boot camp program.** The term shall not include any inmate who is subject to a sentence the calculation of which included an enhancement for the use of a deadly weapon as defined pursuant to the sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing, any inmate who has been convicted or adjudicated delinquent of any crime requiring registration under 42 Pa.C.S. Ch. 97 Subch. H (relating to registration of sexual offenders) or any inmate with a current conviction or a prior conviction within the past ten years for any of the following offenses:
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> 18 Pa.C.S. § 2502 (relating to murder).
> 18 Pa.C.S. § 2503 (relating to voluntary manslaughter).
> 18 Pa.C.S. § 2506 (relating to drug delivery resulting in death).
> 18 Pa.C.S. § 2901(a) (relating to kidnapping).
> 18 Pa.C.S. § 3301(a)(1)(i) (relating to arson and related offenses).
> 18 Pa.C.S. § 3502 (relating to burglary) in the case of burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present.
> 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery).
> 18 Pa.C.S. § 3702 (relating to robbery of motor vehicle).
> 18 Pa.C.S. § 7508 (a)(1)(iii), (2)(iii), (3)(iii) or (4)(iii) (relating to drug

trafficking sentencing and penalties).

61 Pa.C.S. §3903(emphasis added).

The legislative history of this statute clearly shows that the purpose of the amendment that added the language in bold face type was to save costs and reduce the prison population without risking the safety of the public by increasing the number of inmates eligible for boot camp and including inmates who received sentences of 3 to 6 years, once they had served a year of their sentence. In fact, there was a proposed amendment in the House to make an inmate whose minimum sentence was five years eligible for boot camp, but that amendment was modified due to concerns that inmates with a sentence of 5-10 years of incarceration would result in the inclusion of some hard-core individuals and more serious criminals.

Plea counsel incorrectly told Defendant that he was not eligible for boot camp. Defendant is an eligible inmate. His minimum sentence is for not more than three years, he is less than 40 years old, and within the typical three to four months it takes to classify a prison and assign him to his permanent institution he would be within two years of completing his minimum term because he had over nine months of credit for time served.

Plea counsel also did not have a strategic reason for failing to ask the court to make Defendant eligible for boot camp. She simply misunderstood the boot camp eligibility requirements and incorrectly thought that only inmates with a sentence of not more than two years were eligible for boot camp.

Defendant also was prejudiced by counsel's mistake. As evidenced by the

amended order, the court believed Defendant was an appropriate inmate for placement in a motivational boot camp.

In fact, the court believes it also erred in this case. When Defendant asked if he was eligible for boot camp at his sentencing hearing and the court realized that a defendant with a three-year minimum sentence could be eligible for boot camp, the court should have simply added language to the sentencing order that Defendant was eligible for boot camp, instead of waiting for the Department of Corrections to write to the court.

The court rejects the Commonwealth's argument that Defendant waived his eligibility for boot camp or that the plea agreement precluded boot camp. If the Commonwealth believed that the plea agreement was such that it rendered Defendant ineligible for boot camp or that Defendant waived his eligibility for boot camp, the prosecuting attorney should have stated such on the record in open court at the guilty plea hearing. Pa.R.Cr.P. 590(B). Not only did the Commonwealth fail to state this "term" on the record at the guilty plea hearing, it failed to mention its opposition to boot camp when Defendant raised the issue at his sentencing hearing.

The Commonwealth also attempts to argue that it would not have dismissed the charges that it did or agreed to the negotiated sentence if it knew that Defendant was going to be made eligible for boot camp. Despite providing a witness certification from the attorney who was prosecuting this case and having the opportunity to present evidence at the PCRA hearing, the Commonwealth never presented any evidence to support this argument.

Furthermore, the statutory scheme created by the Legislature was established

so that the selection of inmates for boot camp would be controlled by the sentencing judge and the boot camp selection committees. Section 6904, entitled selection of inmate participants, states:

> (a) *Duties of commission.* --Through the use of sentencing guidelines, the commission shall employ the definition of "eligible inmate" as provided in this chapter to further identify inmates who would be appropriate for participation in a motivational boot camp.
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> (b) *Duties of sentencing judge.* --The sentencing judge shall employ the sentencing guidelines to identify those defendants who are eligible for participation in a motivational boot camp. The judge shall have the discretion to exclude a defendant from eligibility if the judge determines that the defendant would be inappropriate for placement in a motivational boot camp. The judge shall note on the sentencing order whether the defendant has been identified as eligible for a motivational boot camp program.
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> (c) *Duties of department.* --The secretary shall promulgate rules and regulations providing for inmate selection criteria and the establishment of motivational boot camp selection committees within each diagnostic and classification center of the department.
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> (d) *Waiver of eligibility requirements.*
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> (1) The prosecuting attorney, in the prosecuting attorney's sole discretion, may advise the court that the Commonwealth has elected to waive the eligibility requirements of this chapter if the victim has been given notice of the prosecuting attorney's intent to waive the eligibility requirements and an opportunity to be heard on the issue.
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> (2) The court, after considering victim input, may refuse to accept the prosecuting attorney's waiver of the eligibility requirements.

61 Pa.C.S. §6904.

While the prosecuting attorney has the discretion to waive the eligibility requirements if the victim has been given notice and the opportunity to be heard, the

sentencing judge still has the ability to reject the waiver. 61 Pa.C.S. §6904(d). In other words, if the sentencing court accepts the prosecuting attorney's waiver, the prosecuting attorney has the discretion to make an individual eligible for boot camp, but there is no statutory authority for the prosecuting attorney to exclude a defendant from eligibility when he or she meets the statutory requirements; that discretion lies with the sentencing judge.

The three to six year sentence provided for in the plea agreement did not render Defendant ineligible for boot camp. While the court had the discretion to exclude Defendant, the court did not determine that he was inappropriate for placement in a motivational boot camp. In fact, given Defendant's age and limited criminal history, Defendant is a prime candidate for boot camp.

Accordingly, the following order is entered.

ORDER

AND NOW, this ___ day of March 2014, the court GRANTS Defendant's PCRA petition and AMENDS its sentencing order to state that Defendant is "Boot Camp Eligible."

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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