IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-1079-2008**
	:	**CP-41-CR-110-2009**
vs.	:	**CP-41-CR-844-2009**
	:	**CP-41-CR-896-2009**
	:	**CP-41-CR-1606-2009**
	:	**CP-41-CR-1632-2009**
GREGORY A. BARTO,	:	
Appellant	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's order dated February 2, 2015, which denied Appellant's Post Conviction Relief Act (PCRA) petition without holding an evidentiary hearing.

Following a jury trial in May 2010, Appellant was convicted of numerous controlled substance offenses, and sex and corruption offenses related to separate female victims. The offenses included possession with intent to deliver (PWID) cocaine and marijuana, forcible rape, terroristic threats, corruption of minors, sexual exploitation of children and sexual abuse of children. These offenses were based on a pattern of activity in which Appellant provided alcohol and/or controlled substances to minor females, and then he, and sometimes his wife, would have sexual contact with them. They videotaped their sexual activities with some of the females, and they showed pornographic videos to other females to encourage them to engage in sexual activities. Appellant was sentenced to undergo thirty-five (35) to seventy (70) years of incarceration in a state correctional

institution.

No post sentence motions were filed, but Appellant filed a direct appeal. The Pennsylvania Superior Court affirmed Appellant's judgment of sentence, and the Pennsylvania Supreme Court denied his petition for allowance of appeal.

Appellant filed a timely Post Conviction Relief Act (PCRA) petition. The court appointed counsel to represent Appellant and gave counsel multiple opportunities to amend Appellant's PCRA petition. The court reviewed counsel's amended petition, found the issues lacked merit, and denied the petition without holding an evidentiary hearing.

Appellant filed a timely appeal. On appeal, Appellant asserts five issues:

1. POST TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO FILE A POST SENTENCE MOTION CHALLENGING THE MISCALCULATION OF [APPELLANT'S] PRIOR RECORD SCORE

2. THE MANDATORY SENTENCE IMPOSED AT CR-1632-2009 COUNTS 32 THRU 37 IS ILLEGAL PURSUANT TO ALLEYNE

3. [APPELLANT'S] DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COMMONWEALTH FAILED TO DISCLOSE BRADY EVIDENCE IN REGARDS TO TROOPER DOUGLAS SVERSKO AND A NEW TRIAL IS WARRANTED

4. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE IN REGARDS TO NIKKI [B.] AND ALICIA [W.]

5. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO INFORM [APPELLANT] THAT HE COULD HAVE CHARACTER WITNESSES TESTIFY ON HIS BEHALF.

Appellant first contends that trial counsel was ineffective for failing to file a post sentence motion challenging his prior record score. Appellant asserts that his prior record score should have been a three based on the pre-sentence investigation (PSI), not a five as found by the court.

Counsel is presumed effective and Appellant bears the burden to show otherwise. To prevail on an ineffective assistance of counsel claim, Appellant must plead and prove that: (1) the claim is of arguable merit; (2) counsel had no reasonable basis for his action or omission; and (3) Appellant suffered prejudice as a result. ***Commonwealth v. Watkins***, 108 A.3d 692, 702 (Pa. 2014). Counsel's chosen strategy lacks a reasonable basis only if Appellant proves that "an alternate not chosen offered a potential for success substantially greater than the course actually pursued." ***Id***. To establish prejudice, Appellant must show that but for counsel's action or inaction there is a reasonable probability that the outcome of the proceedings would have been different. ***Id***.

In this case, there was not a miscalculation of Appellant's prior record score, but rather an underreporting of Appellant's prior convictions in the PSI. In preparation for the sentencing hearing, the court conducted its own prior records check based on the information available to it. N.T., 9/30/2010, at 32. Appellant had the following convictions in Lycoming County: disorderly conduct (S) in case 83-10,226; criminal mischief (S) in case 84-10,076; criminal trespass (F2) in case 84-10,169; misrepresent age to buy liquor (M3) in case 84-10404; furnishing alcohol to a minor (M3) in case 86-10,510; furnishing alcohol to a minor (M3) in case 86-10,511; delivery of a controlled substance (F) in case 86-10874; and DUI (M) and resisting arrest (M2) in case 89-11,159. When the court received the PSI and realized that not all of Appellant's Lycoming County cases were listed in the PSI, the court sent a memo to counsel for both parties. See N.T., 9/30/2010, at 32, 46. The memo set forth Appellant's convictions and their case numbers and stated that the court believed Appellant's prior record score was a five, consisting of two points for the criminal trespass conviction,

two points for the felony drug conviction and one point for the misdemeanors.[1] The court also listed all of the convictions on the record at the sentencing hearing. N.T., 9/30/2010, at 33.

Appellant had a conviction for criminal trespass graded as a felony of the second degree in case number 84-10,169, which was not listed in the PSI and added two points to his prior record score. The court was confident that Appellant was the defendant in case 84-10,169, because the defendant had the same date of birth and social security number as Appellant and the parole plan filed of record indicated that, upon his release, the defendant would reside with Rolland and Daisy Barto, who are Appellant's parents and posted Appellant's bail in this case.

The misdemeanor convictions in case 89-11,159 also were not listed in the PSI and added one point to Appellant's prior record score. Similar to case 84-10169, the court was confident that Appellant was the defendant in case 89-11,159 because Appellant's parents, Rolland and Daisy Barto, posted property bail for the defendant's release and the defendant and Appellant had the same name and date of birth.

Therefore, even if Appellant's attorney had filed a post sentence motion challenging the calculation of Appellant's prior record score, the court would have denied the motion.

Appellant next contends that his sentence was illegal pursuant to ***Alleyne v. United States***, 133 S.Ct. 2151 (2013). The Pennsylvania Superior Court recently held that

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[1] The misrepresentation of age to buy liquor did not count in the prior record score calculation because the sentence was imposed in the same judicial proceeding and concurrent to the criminal trespass conviction. The furnishing alcohol conviction in 86-10511 also did not count in the prior record score because the sentence was imposed in the same judicial proceeding and concurrent to the furnishing alcohol conviction in 86-10510. Both

Alleyne is not entitled to retroactive effect in the PCRA setting. ***Commonwealth v. Riggle***, 2015 PA Super 147 (July 7, 2015). Therefore, Appellant is not eligible for any relief pursuant to ***Alleyne***.

Appellant next asserts that his due process rights were violated when the Commonwealth failed to disclose ***Brady*** evidence in regards to Trooper Douglas Sversko; therefore, a new trial is warranted. The court cannot agree.

Appellant's jury trial was held in May 2010. Although the Attorney General's Office may have begun investigating Trooper Sversko in March 2010, he was not arrested or charged with any crimes until March 2011. See CP-22-CR-1042-2011. Furthermore, the Attorney General's Office was not involved in the prosecution of Appellant. Rather, Appellant was prosecuted by the Lycoming County District Attorney's Office. Appellant has neither alleged nor shown that the Lycoming County District Attorney's Office was aware at the time of Appellant's trial that the Attorney General's Office was investigating Trooper Sversko. Therefore, the prosecuting attorney from the Lycoming County District Attorney's office was under no obligation to acquire information regarding the investigation of Trooper Sversko by the Attorney General's Office and provide it to the defense. ***Commonwealth v. Miller*, **605 Pa. 1, 987 A.2d 638, 655-656 (2009)(The Commonwealth was not required to obtain the pre-sentence report regarding one of its witnesses and provide it to the defense because the governmental agency that possessed it was not involved in the prosecution of Appellant; therefore, Appellant's allegation that the Brady rule was violated was meritless and entitled him to no relief).

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the DUI and the resisting arrest counted in the prior record score because consecutive sentences were imposed.

Appellant also avers that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence in regards to Nikki B. and Alicia W. The court cannot agree.

Appellant first claims that there was no testimony from Nikki B. of any intent to deliver cocaine. It was not necessary, however, for Nikki B. to testify that Appellant told her he intended to deliver controlled substances. It also was not necessary for a sale to occur. ***Commonwealth v. Metzger***, 372 A.2d 20, 22 (Pa. Super. 1977)("Under the present Act it is no longer necessary to establish that an exchange of money took place or some other arrangement of barter transpired").

Intent to deliver can be established a number of different ways. One such way is where the defendant actually transfers a controlled substance to another person. See 35 P.S. §780-102 ("'DELIVER' or 'DELIVERY' means the actual, constructive or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship"); Pa.SSJI (Crim) §16.02(b)(B).

Here, Nikki B. testified that Appellant provided marijuana and cocaine to her on numerous occasions. N.T., April 27, 2010, at pp. 13-19, 25, 35-37, and 40-41. Therefore, the evidence was sufficient to establish Appellant's convictions for possession with intent to deliver these substances.

In regards to Alicia W., Appellant alleges that the Commonwealth did not present any evidence to establish that he showed the video to a third person/party. Appellant misconstrues what the Commonwealth was required to prove for sexual abuse of children-dissemination of photographs, videotapes, computer depictions and films, 18 Pa.C.S.A.

§6312(c). This offense not only covers the actual dissemination or display of child pornography to others, but also possession for the purpose of dissemination, display or exhibition to others. In this case, the court charged the jury with respect to this latter aspect of dissemination of child pornography. N.T., May 7, 2010 (Volume IV of IV), at 131-132. The evidence presented by the Commonwealth was sufficient to prove this charge.

> There is sufficient evidence to sustain a conviction when the evidence admitted at trial, and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict-winner, are sufficient to enable the fact-finder to conclude that the Commonwealth established all the elements of the offense beyond a reasonable doubt. Commonwealth v. Markman, 591 Pa. 249, 916 A.2d 586, 597 (Pa. 2007). The Commonwealth may sustain its burden "by means of wholly circumstantial evidence." Id. at 598. Further, we note that the entire trial record is evaluated and all evidence received against the defendant is considered, being cognizant of the fact is free to believe all, part, or none of the evidence. Id.

Commonwealth v. Martin, 101 A.3d 706 (Pa. 2014).

Appellant engaged in sexual conduct with Alicia W. during July and August 2000, when she was 15 years old. N.T., May 5, 2010 (Volume II of IV), at 81, 83-84, 90, 105. Alicia W. testified that she was unaware that the sexual activities were being recorded. *Id*. at 82-83, 113-114. The videotape depicted Appellant and Alicia W. engaging in sexual acts, including fellatio.

Appellant's crimes against the female victims in these cases spanned from 2000 to 2008. Each of the victims testified that Appellant either displayed or offered to display pornography in their presence. Alicia W. testified that pornography was on the television all the time. N.T., May 5, 2010 (Volume II of IV), at 83. Nicole W. testified that Appellant told her that he liked to watch pornography and she could watch it too. *Id*. at 148.

Tiffany H. testified that pornography was on the television about every time she was over at Appellant's house. *Id*. at 38. Stacy H. testified that Appellant asked her if she wanted to watch pornography. *Id*. at 193. Despite the fact that she said no, Appellant persisted. He told her that he had his own porn that they could watch and she could pick out whatever she wanted to watch. *Id*. He then pulled out a box of videos and started playing one. *Id.* The videos were homemade porn. *Id*. at 194. Nikki B. testified that she was invited to the Appellant's residence for lunch and there was porn on TV while she was there. N.T., April 27, 2010 at 8-9. They [Appellant and his wife] would always have porn on. *Id*. at 17. When Nikki B. needed money, Appellant offered her $200 for a sexual video. *Id*. at 11-13, 22-23.

Based on this evidence, the jury could reasonably conclude that: Appellant possessed the videotape of Alicia W. for the purpose of dissemination, display or exhibition to other people; the videotape depicted a child engaging in a prohibited sexual act, the definition of which includes fellatio (18 Pa.C.S.A. §6312(g)); and the child was Alicia W., who at the time was under the age of 18. Therefore, the evidence was sufficient to sustain Appellant's conviction for sexual abuse of children – dissemination of child pornography, 18 Pa.C.S.A. §6312(c).

Appellant's final allegation of error is trial counsel was ineffective for failing to advise Appellant that he could have character witnesses testify on his behalf. This issue is waived. The court has been unable to find any such allegation in Appellant's pro se PCRA petition or any of the amended PCRA petitions filed by counsel. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

Appellant has also failed to allege who trial counsel could have called as a

character witness or what character traits any such witnesses could testify about. To prevail on an ineffective assistance of counsel claim, Appellant must plead and prove that the claim is of arguable merit, counsel had no reasonable basis for his omission, and prejudice. Counsel may have had a reasonable basis for not calling character witnesses. If character witnesses were called in this case, it could open the door to the Commonwealth cross-examining those witnesses about whether they were aware of Appellant's prior convictions. ***Commonwealth v. Fletcher***, 580 Pa. 432, 861 A.2d 898, 915 (2004); ***Commonwealth v. Buterbaugh***, 91 A.3d 1247, 1263 (Pa. Super. 2014). Furthermore, without knowing who the character witnesses would be or what character traits they could testify about, it is impossible to determine whether Appellant was prejudiced.

DATE: _____________ By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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