

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-1173-2010
	:
vs.	: Notice of Intent to Dismiss PCRA Petition
	: Without Holding an Evidentiary Hearing
GREGORY A. BARTO,	: and Order Granting Counsel's Motion to
Defendant	: Withdraw

OPINION AND ORDER

Before the court are Petitioner Greg Barto's (Barto) Post-Conviction Relief Petition (PCRA) and his attorney's motion to withdraw as counsel.

By Information filed on October 7, 2010, Defendant was charged with numerous counts of sexually related crimes including but not limited to, involuntary deviate sexual intercourse, statutory sexual assault, aggravated indecent assault, and endangering the welfare of children.

From June 2006 through May 2007, K.W. was 16 to 17 years old and worked for Barto and his wife. During this time span, Barto and his wife offered K.W. drugs, alcohol and money for the return of sexual favors. On one occasion, K.W. claims that Barto forcibly raped her.

K.W. had sexual intercourse with Barto on more than one occasion until it stopped after she was forcibly held down by Barto's wife, while Barto had sexual intercourse with her. During the time that she worked for Barto, he exposed her to pornographic movies and offered her drugs and alcohol.

Around the spring of 2003, K.P., who was 14 years of age at the time, went to Defendant's place of business looking for employment. She was hired by Barto and his wife to perform various duties. After a few days of working, the minor was requested by Barto to work

overtime at his trailer behind the business premises. She went to the residence and saw pornography on the television, drugs on the table and alcohol in the refrigerator. Barto and his wife apparently smoked marijuana in front of her and asked her to get in the hot tub to go tanning. During the “tanning” session, Barto had inappropriate contact with her as did Barto’s wife. Barto and his wife also had sexual relations with each other in front of the minor.

During the pendency of the case, Barto filed a motion to dismiss based on section 110 of the Crimes Code, 18 Pa.C.S. §110. Barto contended that the prosecution should be barred because he was formerly prosecuted and convicted on offenses allegedly based on the same conduct or arising from the same criminal episode and the present offenses were known to the appropriate prosecuting officer at the time of the commencement of the first trial. 18 Pa. C.S.A. § 110 (1) (ii).

Barto was in fact prosecuted and convicted following a jury trial in May of 2010 at the following Informations: CR-1079-2008; CR-110-2009; CR-844-2009; CR-896-2009; CR-1606-2009; and CR-1632-2009.

In connection with these charges, at varied times over a period of approximately ten (10) years between 2000 and 2010, Barto engaged in conduct, along with his wife, which involved soliciting minor girls who had worked for him at his tire shop to use alcohol and/or illegal substances such as cocaine and marijuana and then convince them to participate in one or all of the following activities: viewing pornography, making pornographic videos, engaging in sexual relations with Barto, engaging in sexual relations with Barto’s wife, and engaging in sexual relations with both Barto and his wife. Barto was convicted of numerous charges including but not limited to forcible rape, sexual assault, indecent assault, conspiracy and

corruption of minors.

On May 19, 2011, the court issued an opinion and order denying the motion to dismiss, finding that the offenses were not part of the same criminal episode. Although the offenses in this matter occurred in some of the same years as those previous offenses, none of the offenses in those cases involved the same victims.

On June 8, 2011, Barto's first attorney, Philip Masorti, filed a motion to withdraw, which the court granted on July 28, 2011. Barto's second attorney, Daniel-Paul Alva, entered his appearance on August 1, 2011.

On October 13, 2011, Barto filed a second motion to dismiss, again asserting that the current offenses were part of the same criminal episode as the former offenses. On November 8, 2011, the court entered an order summarily denying this second motion, noting that the second motion raised the same issue as the previous motion to dismiss and rejecting Barto's assertion that "new evidence" justified another hearing on this issue.

Barto appealed the court's denial of the second motion to dismiss on November 21, 2011. The Superior Court affirmed this court's decision in a decision dated January 31, 2013. Barto filed a petition for allowance of appeal, which the Supreme Court of Pennsylvania, denied on July 16, 2013.

Mr. Alva withdrew as counsel on December 4, 2013. Robert Cronin, an assistant public defender, entered his appearance to represent Barto on February 19, 2014.

On July 17, 2014, Barto entered a no contest plea to endangering the welfare of children, corruption of the morals of minors, conspiracy to commit indecent assault of a minor and indecent assault.

On June 16, 2015, this court sentenced Barto to two to four years of state incarceration to run entirely concurrent to the sentence that Barto was currently serving.

On June 23, 2016, Barto filed a pro se PCRA petition. Counsel was subsequently appointed. The court gave counsel the opportunity to file an amended PCRA or a no merit letter in accordance with *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 379 Pa. Super. 390, 550 A.2d 213 (1988).

After obtaining the relevant transcripts, reviewing the issue thoroughly with Barto and researching the relevant law, defense counsel filed on August 31, 2016 a motion to withdraw which included a “Turner/Finley” no merit letter. Apparently, in correspondence with counsel, Barto discussed an additional issue regarding the discipline of a law enforcement officer involved in his prosecution. Since counsel believed Barto waived that issue by entering his guilty plea and his double jeopardy issue lacked merit, counsel did not file an amended PCRA petition.

The court notes that by letter dated September 15, 2016 to this court, Barto disputed PCRA counsel’s analysis of his issue related to the law enforcement officer, Trooper Douglas Sversko.

After independent review of the record, the court finds Barto’s PCRA lacks merit.

The PCRA is the sole means of obtaining post-conviction collateral relief in this Commonwealth. 42 Pa. C.S.A., § 9542. Counsel is presumed to have rendered effective assistance and the burden is on the PCRA petitioner to prove otherwise. *Commonwealth v. Treiber*, 121 A.3d 435, 445 (Pa. 2015); *Commonwealth v. Philistine*, 53 A.3d 1, 10 (Pa. 2012).

To do so, the petitioner must show that (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result, *Commonwealth v. Spatz*, 84 A.3d 294, 311 (Pa. 2014).

The sole issue asserted in Barto's PCRA petition is that his second attorney, Mr Alva, was ineffective for his failure to request nunc pro tunc reinstatement to file an interlocutory appeal because he was just retained and prior counsel failed to file an appeal from the denial of Barto's pretrial double jeopardy motion under Rule 110. The premise of Barto's ineffectiveness claim is that his counsel failed to properly appeal Barto's double jeopardy claim which was based on 18 Pa.C.S.A. §110.

As Barto's counsel notes in his Turner/Finley letter, "...before you can proceed with establishing whether your trial counsel did something with no reasonable basis and his actions prejudiced your case, you must first establish that the issue they should have pursued, or in your case should have pursued in a different manner, had merit."

In order for Barto's claim to have merit, he must demonstrate that it was improper for the court to deny the motion to dismiss. Barto still contends that his prosecution should be barred because he was formerly prosecuted and convicted of offenses allegedly based on the same conduct or arising from the same criminal episode.

This issue was exhaustively addressed in this court's opinion and order dated May 19, 2011 denying Barto's motion to dismiss as well as this court's April 16, 2012 opinion in compliance with Rule 1925 (a) of the Rules of Appellate Procedure.

A single criminal episode analysis is a totality of the circumstances analysis. *Commonwealth v. Schmidt*, 919 A.2d 241, 246 (Pa. Super. 2007); *Commonwealth v. M.D.P.*,

831 A.2d 714, 719 n.3 (Pa. Super. 2003). The courts consider the logical and/or temporal relationship between the charges, whether the charges share common issues of law, whether the charges share common issues of fact, whether separate trials would involve substantial duplication and whether separate trials would be a waste of scarce judicial resources. *Schmidt*, supra.

The case most analogous to this case is *Commonwealth v. M.D.P.*, supra. In *M.D.P.*, the defendant had pled guilty to two counts of indecent assault involving one of his minor sons, which occurred between June 1, 2000 and July 16, 2000. Prior to defendant pleading guilty, the police met with the defendant and he admitted to inappropriate sexual contact with his two other sons. Subsequently, the defendant was charged with numerous sexual offenses against his other sons. Not unexpectedly, the defendant filed a motion to dismiss pursuant to 18 Pa. C.S.A. § 110, claiming the second prosecution was barred because the police were aware of the defendant's conduct prior to his guilty plea in the first prosecution. The Superior Court concluded that the two cases presented different legal questions and different facts because they relied on different victims, different witnesses and contained different evidence. Therefore, the two prosecutions were not logically related and did not constitute a single criminal episode.

The same is true in connection with Barto's cases. While there may be some duplication of legal issues because of the similarity of some of the charges, those legal issues clearly relate to different factual scenarios. Indeed, the pertinent facts in each case differ. The specifics of the alleged incidents are unique to each victim, and only specific victims can testify to the crimes at issue. While the conduct can generally be characterized as sexual assault, the

evidence relating to the prosecutions is different. Furthermore, there are some different charges in each case. This is the first case where Barto was charged with endangering the welfare of children. Similarly, Barto was charged in the previous cases with terroristic threats, sexual exploitation of children, sexual abuse of children, possession of a small amount of marijuana for distribution but not for sale, possession with intent to deliver cocaine and conspiracy to deliver cocaine, none of which are charged in this case. As in *M.D.P.*, the cases present different legal questions and different facts. See also *Commonwealth v. Spatz*, 563 Pa. 269, 759 A.2d 1280, 1285 (2000); *Commonwealth v. Bracalielly*, 540 Pa. 460, 650 A.2d 755 (1994); *Schmidt*, supra.; *Commonwealth v. Lee*, 435 A.2d 620 (Pa. Super. 1981).

Although the Superior Court resolved Barto's appeal on procedural grounds, it noted its agreement with all of this court's determinations, particularly this court's reliance on *M.D.P.* See *Commonwealth v. (Gregory) Barto*, 2037 MDA 2011, at 5 & n.7 (Pa. Super. 1/31/2013). Since this court correctly found that the charges arose from separate criminal episodes based on *M.D.P.*, Barto's claim that Attorney Alva was ineffective for failing to file a request to appeal the first motion nunc pro tunc lacks merit.

Similarly, Barto was not prejudiced by Attorney Alva's filing a second motion to dismiss instead of a request to appeal nunc pro tunc the denial of the first motion to dismiss. As the crimes arose from separate criminal episodes, an appeal nunc pro tunc from the first motion to dismiss also would not have been successful.

Barto seems to raise a separate issue via his September 15, 2016 letter to this court. Specifically, Barto claims that Attorney Cronin "should not have entertained a plea without bringing" a matter involving the affiant "to this court via a pretrial motion." Barto

argues that counsel “would be ineffective for failure to investigate this matter to determine why the Commonwealth failed to disclose this information to defense after he was arrested and to disclose the evidence they discovered that was tampered with related to this matter.”

Barto claims that Trooper Sversko, of the Pennsylvania State Police, had tampered with evidence that was used in Barto’s trial in an unrelated case and that a hearing should have been conducted to determine why the information was not turned over to the defense prior to trial in the separate case and prior to his plea in the instant case. (Barto’s September 15, 2016 PCRA Petition letter). Barto claims that this constituted a Brady violation.

Barto’s bald assertions fail to satisfy the required prongs with respect to merit and/or prejudice. Simply because a defendant alleges a pre-plea Brady violation without more does not constitute sufficient merit. Barto has not asserted that if he had known of the alleged Brady violation he would not have entered his no contest plea.¹ Moreover, Barto cannot claim and has not claimed any prejudice whatsoever.

Trooper Jennifer Jackson was the affiant in this case, not Trooper Sversko. Furthermore, K.W. and K.P., the minor females with whom Barto engaged in sexual acts, would have been the primary witnesses against Barto at trial had he not entered his plea.

As well, the failure of the Commonwealth to provide Barto’s counsel with information regarding Trooper Sversko’s criminal case does not constitute a Brady violation under the facts and circumstances of this case. Trooper Sversko was prosecuted by the Attorney General’s office, not the Lycoming County District Attorney’s office. See CP-22-

¹ There are risks associated with pursuing the alleged Brady violation. If Barto prevailed on such a claim, the result would be that his plea would be vacated, and all the charges would be reinstated, not just the ones to which he entered his no contest plea. If Barto was convicted, the court would have the discretion to impose concurrent or

0001042-2011. The Commonwealth was not required to obtain the police reports or other information regarding Trooper Sversko's charges, because the governmental agency that possessed that information (the Attorney General's office) was not involved in the prosecution of Barto. *Commonwealth v. Miller*, 605 Pa. 1, 987 A.2d 638, 656 (2009). Furthermore, the fact that Trooper Sversko was charged was a matter of public record and several central Pennsylvania newspapers published articles about Trooper Sversko's arrest. Therefore, even if the Commonwealth had committed a Brady violation, Barto would not be entitled to relief because Barto could have discovered information about Trooper Sversko's charges by exercising reasonable diligence. *Id.* at 655 ("a Brady violation will not afford a defendant relief if the defendant either knew of the existence of the evidence in dispute or could have discovered it by exercising reasonable diligence").

Barto has not provided any documents or witness certifications to show that any

evidence related to this case was found in Trooper Sversko's possession or residence.²

Pa.R.Crim.P. 902. In fact, Barto did not even assert this claim in his PCRA petition.

Finally, Barto has not alleged what motion counsel should have filed with the court or what relief counsel could have requested or obtained. In all likelihood, the disclosure of information regarding Trooper Sversko would have provided material for use during cross-examination of Trooper Sversko if Barto had elected to go to trial; it would not have resulted in dismissal of the charges.

ORDER

AND NOW, this 21st day of December 2016, following a review of Barto's PCRA petition and the motion to withdraw as counsel, the court GRANTS counsel's motion to withdraw. The court notifies Barto that it intends to dismiss the PCRA for the reasons set forth in this Opinion and Order. Barto may respond to this proposed dismissal within twenty (20) days of today's date.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire, ADA
Donald F. Martino, Esquire
Gregory A. Barto, #KJ-7251
Box A, Bellefonte PA 16823
Gary Weber, Esquire (Lycoming Reporter)
Work file

² There were rumors about copies of videos from Barto's other cases being found in Trooper Sversko's residence when it was searched pursuant to a warrant, but the court is not aware of anything that would indicate the videos used at trial were altered in any way, or that evidence from this case was in Trooper Sversko's residence.