

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-288-2017
vs. :
: CRIMINAL DIVISION
: Notice of Intent to Dismiss PCRA
ZACHARY ASKEY, : Without Holding An Evidentiary
Defendant : Hearing

OPINION AND ORDER

By way of background, Petitioner Zachary Askey (hereinafter “Askey”) was charged with one count of rape, three counts of involuntary deviate sexual intercourse (IDSI), three counts of statutory sexual assault, one count of sexual assault, one count of corruption of minors, and one count of endangering the welfare of children as a result of sexual conduct with a 15-year old in early February of 2017.

On May 1, 2017, Askey pled guilty to one count of IDSI, a felony of the first degree. The terms of the plea agreement were that Askey would receive a sentence of 4-10 years’ incarceration in a state correctional institution and the Commonwealth would dismiss the remaining charges in the Information and it would not pursue any charges for any content found on Askey’s electronic devices at the time of his arrest.

On August 16, 2017, the court sentenced Askey in accordance with the plea agreement to 4-10 years’ incarceration. As a result of his IDSI conviction, the court notified Askey that he was a Tier III sexual offender who must register for life under Pennsylvania’s Sexual Offender Registration and Notification Act (SORNA).

Askey sent the court a letter complaining about his plea counsel, which the court treated as a Post Conviction Relief Act (PCRA) petition. Askey asserted that: (1) his

counsel did not get a good deal for him; (2) it was not fair that he had to register for life and, if anything, he should only have to register for 10-15 years; and (3) he was told the plea offer changed from 4-8 years to 4-10 years due to pictures found on his phone for which he would not be prosecuted, but no pictures were provided in discovery and he was never shown any such pictures. The court appointed counsel to represent Askey and directed PCRA counsel to either file an amended PCRA petition or a *Turner/Finley* “no merit” letter.¹ PCRA counsel filed a no merit letter and a supplemental no merit letter. He also requested leave to withdraw as counsel.

After an independent review of the record, the court finds Askey’s claims do not entitle him to relief.

Counsel is presumed to be effective and the burden rests on the petitioner to prove that counsel was ineffective. *Commonwealth v. Crispell*, 193 A.3d 919, 928 (Pa. 2018). To show counsel was ineffective, a petitioner must plead and prove that: (1) the underlying claim has arguable merit; (2) counsel’s performance lacked a reasonable basis; and (3) counsel’s deficient performance prejudiced the petitioner. *Id.*; *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001). In this context, prejudice means that but for counsel’s errors or omissions there is a reasonable probability that the outcome of the proceedings would have been different. *Pierce, id.*

When a defendant pleads guilty, he waives any claims or defenses other than

¹ *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1999)(en banc).

the jurisdiction of the court, the legality of the sentence and the validity of the plea. *Commonwealth v. Harvey*, 595 A.2d 1280, 1282 (Pa. Super. 1991); *Commonwealth v. Johnson*, 466 A.2d 636, 642 (Pa. Super. 1983). A defendant cannot challenge his guilty plea by saying he lied under oath, even if he asserts that counsel induced the lies. *Commonwealth v. Pier*, 182 A.3d 476, 480 (Pa. Super. 2018); *Commonwealth v. Pollard*, 832 A.2d 517, 523 (Pa. Super. 2003). Instead, a defendant must show counsel's ineffectiveness resulted in a plea that was not knowingly, voluntarily, and intelligently entered.

The record shows that Askey's plea was knowingly, voluntarily and intelligently entered. During his guilty plea hearing, he stated under oath that he understood by pleading guilty he was giving up his right to a jury trial, the right to be presumed innocent, and the right to have the Commonwealth prove his guilt beyond a reasonable doubt. Transcript, 5/1/17, at 16. These rights were also explained in the written guilty plea colloquy that Askey completed. He indicated that it was his own decision to plead guilty. *Id.* He was not forced or pressured into pleading guilty, and no promises were made other than those reflected in the terms of the plea agreement. *Id.* He had sufficient time to speak with his attorney, and he was satisfied with her representation of him. *Id.* at 17. He stated that his guilty plea was knowing, intelligent, and voluntary. *Id.* at 18. He understood that the court was not bound to accept the terms of his plea agreement but if it did not he was aware that he could withdraw his guilty plea. *Id.* at 14-15. The court advised Askey of the elements for the offense of IDSI and the maximum penalties of 20 years' incarceration and a \$25,000 fine. *Id.* at 13-14. The court set forth the terms of the plea agreement as well as informed Askey that he would be required to register for life as a result of his conviction. *Id.* at 14. Askey

pled guilty and admitted that on February 17, 2017, he was 21 years old and had consensual oral sex with a 15 year old.

Askey has not alleged that his phone did not contain any images that would constitute child pornography; he has only alleged that he was not shown the photographs and asserted his dissatisfaction with the increase in his maximum sentence. “Buyer’s remorse” or disappointment in the sentence imposed is not a sufficient basis to withdraw a guilty plea. *Commonwealth v. Bedell*, 954 A.2d 1209 (Pa. Super. 2008); *Commonwealth v. Muhammad*, 794 A.2d 378, 383 (Pa. Super. 2002).

Regardless of whether there were images that would constitute child pornography on Askey’s electronic devices, the Commonwealth was free to change the plea offer and the court could have imposed a maximum of 10 years. As the court explained to Askey during the guilty plea hearing, the highest maximum sentence that could be imposed for IDSI in this case was 20 years. A plea offer or agreement is not binding until it is presented to and accepted by the court. *Commonwealth v. McElroy*, 665 A.2d 813, 816 (Pa. Super. 1995). Therefore, there was nothing illegal or improper with the Commonwealth changing the plea offer from 4-8 years’ incarceration to 4-10 years’ incarceration.

Despite what Askey may be hearing from other inmates, his attorney did negotiate a good deal for him. If Askey had not accepted the plea he faced the possibility of a much higher sentence if he went to trial and was convicted of only some of the charges against him, even without additional charges for child pornography. The Commonwealth had witnesses who saw or heard Askey engaging in sexual acts with the 15-year old. Askey could have received multiple, consecutive sentences.

With respect to the duration of his registration requirements, the court had no authority to impose a lesser period of registration. IDSI is a Tier III sexual offense. 42 Pa. C.S.A. §9799.14(d)(4). Tier III offenses require lifetime registration. 42 Pa. C.S.A. §9799.15(a)(3). Since the IDSI offense occurred after December 20, 2012, Askey is subject to SORNA, and the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) does not apply in this case.

With respect to the images of child pornography on his electronic devices, the likely reason that those photographs or images were not contained in discovery is that Askey had not yet been charged with any offenses related to those items. As a result of plea counsel's efforts, Askey was never charged with any such offenses. Furthermore, PCRA counsel spoke with plea counsel who informed him that Askey readily acknowledged that pornographic images would be found on his phone and he did not need to see them. Rather than asking to see the images, Askey asked plea counsel to secure an agreement which would lead to the least exposure possible, which counsel did.

Accordingly, the following order is entered.

ORDER

AND NOW, this ___ day of December 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, as no purpose would be served by conducting a hearing in this matter, none will be scheduled and the parties are hereby notified of this court's intention to dismiss the Petition. Askey 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 petition.

The court also grants PCRA counsel's request to withdraw. Askey may represent himself or hire private counsel but the court will not appoint counsel to represent him unless he files a response and the response shows that his Petition has merit.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Aaron Biichle, Esquire
Zachary Askey, NC 3781
SCI-Benner Township, 301 Institution Drive, Bellefonte PA 16823
Work file