

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

: No. 87-11,020

:

:

vs.

: CRIMINAL DIVISION

:

:

JOSEPH WALTERS, a.k.a.

HARRY SWEENEY

Defendant

: 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 issued March 9, 1999 in which the Court denied the defendant's Post Conviction Relief Act (PCRA) Petition.

The relevant facts are as follows. On October 23, 1987, the defendant was arrested and charged with rape, statutory rape, involuntary deviate sexual intercourse, indecent assault and incest against his minor daughter. On or about December 6, 1993, the defendant pled guilty to one count of rape, a felony of the first degree. The terms of the plea agreement were that the defendant would receive a 5 ½ year minimum sentence and the remaining charges would be dismissed. In the written guilty plea colloquy, the defendant indicated he fully understood the permissible range of sentences. In response to the question "Why do you wish to plead guilty?", the defendant responded, "Because I am." At the guilty plea hearing, the Honorable William S. Kieser informed the defendant if he did not make parole at the end of his minimum sentence he could be kept in prison up to his maximum sentence and the defendant responded that he understood. N.T., December 6, 1993, at pp. 7-8. The defendant then acknowledged that he threatened his daughter into having sexual intercourse with him and entered a plea of guilty to one count of rape. N.T., December 6, 1993, at pp. 11-13, 16. The Court sentenced the defendant to a term of incarceration at a state correctional institution of 5 ½ to 20 years on March 2, 1994.

On or about July 26, 1994, the defendant filed a Post Conviction Relief Act (PCRA) petition alleging, inter alia, counsel was ineffective and his guilty plea was unlawfully induced. The court appointed James Protasio, Esquire to represent the defendant. Mr. Protasio filed two amended PCRA petitions on the defendant's behalf. The Court held conferences on each petition to determine if any issue was raised which

would require an evidentiary hearing. After determining that no such issue was raised, the Court issued an Opinion and Order on or about September 5, 1995 notifying the defendant of its intent to dismiss his PCRA petitions.

On or about September 20, 1995, the defendant filed a second pro se PCRA petition which contained the same allegations as the first. The Court treated this petition as a response to its proposed dismissal of the first petition and dismissed the petitions and amendments thereto in an Opinion and Order issued on or about January 18, 1996.

On February 2, 1996, the defendant appealed this Court's dismissal of his PCRA petition. On July 24, 1996, the Pennsylvania Superior Court affirmed this Court's ruling in a memorandum opinion.

On August 19, 1998, the defendant filed another PCRA petition. In this petition, the defendant asserted the following: (1) his plea agreement had been violated by the Commonwealth because he was not paroled at the expiration of his minimum sentence; (2) his sentence was illegal because it was not for a definite period of incarceration; (3) his plea was not knowing and/or counsel was ineffective because he was not informed that the Commonwealth (through the Pennsylvania Board of Probation and Parole) would not comply with the plea agreement and release him at the completion of his minimum sentence. The Court notified the defendant of its intention to dismiss this PCRA petition in its Order of December 16, 1998. The petition was then dismissed by Order dated March 9, 1999. It is this order from which the defendant is currently appealing.

There are numerous reasons why the defendant is not entitled to the relief requested. First, this is a second or subsequent PCRA petition. Therefore, in order to be entitled to relief, the defendant must make out a prima facie showing that a miscarriage of justice has occurred or that he is innocent. Commonwealth v. Lawson, 519 Pa. 504, 513, 549 A.2d 107, 122 (1988); Commonwealth v. Loach, 521 Pa.Super. 527, 533-35, 618 A.2d 463, 466-67 (1992). To make such a prima facie showing of a miscarriage of justice, the defendant must establish either that the proceedings were so unfair that no civilized society could tolerate the verdict or that he is actually innocent of the crimes charged. Commonwealth v. Szuchon, 534 Pa. 483, 487, 633 A.2d 1098, 1100 (1993). The defendant has not even

pled these elements. The record clearly reflects that the defendant pled guilty and his reason for doing so was because he was guilty. N.T., December 6, 1993, at p.6. Furthermore, the defendant admitted that the Commonwealth's factual statement was true and that he threatened his daughter to get her to have sexual intercourse with him. N.T., December 6, 1993, at pp. 12-13. The defendant also cannot claim what he asserted during his colloquy was false and obtain relief on that basis. Commonwealth v. Mitchell, 319 Pa.Super. 170, 465 A.2d 1284 (1983). Moreover, the proceedings were fair. The Court advised the defendant of his rights and the consequences of his guilty plea, including the fact if he did not make parole he could be incarcerated until the expiration of his maximum sentence. N.T., December 6, 1993, at pp. 7-8.

Second the defendant's claims are not cognizable under the PCRA. The defendant's claims revolve around the fact he has not been paroled or counsel was ineffective for failing to advise him he would not be paroled. Since these claims do not involve the truth-determining process, they are not cognizable under the PCRA. See Commonwealth v. Moore, 439 Pa. Super. 48, 653 A.2d 24 (1995).

Third, the defendant's claims are meritless. In order to prevail on a claim of ineffective assistance of counsel, the petitioner must plead and prove the following: (1) the underlying claims is of arguable merit; (2) counsel's performance was unreasonable; and (3) counsel's ineffectiveness prejudiced the defendant, i.e., but for counsel's act or omission the outcome of the proceedings would have been different. Commonwealth v. Whitney, 550 Pa. 618, 708 A.2d 471, 475-76 (1998); Commonwealth v. Henry, 550 Pa. 346, 706 A.2d 313, 323 (1997); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). The defendant cannot meet any of these elements. The defendant received a five and one-half (5 ½) year minimum sentence; therefore the Commonwealth complied with the plea agreement. Contrary to the defendant's assertions, the plea agreement did not guarantee he would be paroled at the expiration of his minimum sentence nor could it because parole is not a right but rather a matter of grace lying solely within the discretion of the Board of Probation and Parole. Bowman v. Pa. Board of Probation and Parole, 709 A.2d 945, 948 (Pa.Cmwlth. 1998). The defendant's sentence also complied with 42 Pa.C.S.A. §9721(e). Section 9721(e) does not require a definite sentence, but merely a definite term. Stewart v. Pa. Board of

Probation and Parole, 714 A.2d 502, 506 (Pa.Cmwlt. 1998). The defendant's term is definite; his minimum term is five and one-half (5 ½) years and his maximum term is twenty (20) years. Assuming arguendo that the defendant's claims have arguable merit, counsel cannot be faulted for failing to predict in 1993 that the defendant would be denied parole at the expiration of his minimum sentence in 1998. Finally, the defendant was not prejudiced by counsel's failure since the Court informed the defendant that he could remain in prison until the expiration of his maximum sentence if he was not paroled. N.T., December 6, 1993, at pp. 7-8.

For the forgoing reasons, the defendant is not entitled to relief under the PCRA.

DATE: 10/11/99

By The Court,

Kenneth D. Brown, J.

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