NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAVID LEE KILGUS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1632 MDA 2012

Appeal from the Order August 22, 2012
In the Court of Common Pleas of Lycoming County
Criminal Division at Nos.: CP-41-CR-0001213-2009
CP-41-CR-0001713-2009

BEFORE: DONOHUE, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED MAY 07, 2013**

Appellant, David Lee Kilgus, appeals from the order dismissing his first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9451-9456, without a hearing. We affirm.

On July 12, 2010, Appellant pleaded guilty to statutory sexual assault and related offenses. On December 22, 2010, the court sentenced Appellant to an aggregate term of not less than ten nor more than twenty years' incarceration with a consecutive ten years of probation and ordered lifetime Megan's Law registration. Appellant did not file a post-sentence motion or a direct appeal.

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* Retired Senior Judge assigned to the Superior Court.

On July 16, 2011, Appellant filed a *pro se* motion for writ of *habeas corpus* that the court treated as a first PCRA petition. The court appointed counsel who filed a second amended petition on May 29, 2012. On July 3, 2012, the court issued a notice of its intention to dismiss Appellant's petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907 along with a thorough and well-reasoned opinion in support thereof. Appellant filed timely objections to the Rule 907 notice and, on August 22, 2012, the court entered an opinion that addressed the issues raised by the filing and an order that dismissed the petition.

In its July 3, 2012 opinion, the PCRA court fully and correctly sets forth additional relevant facts and procedural history of this case. Therefore, we have no reason to restate them here. (***See*** PCRA Court Opinion, 7/03/12, at 1-4).

Appellant raises one issue for our review: "Whether the PCRA court erred in dismissing [Appellant's] petition because the court's findings were not supported by the record and were not free of legal error?" (Appellant's Brief, at 7). Specifically, Appellant argues that the court erred in dismissing his PCRA petition without a hearing because trial counsel was ineffective for failing to seek a psychiatric evaluation of him to determine his competency

to enter a valid guilty plea.[1] Additionally, he alleges that counsel rendered ineffective assistance when he failed to challenge the validity of Appellant's waiver of ***Miranda***[2] warnings and to move to suppress the subsequent statements made to police. (***See id.*** at 11).[3]

Our standard of review for an order denying PCRA relief is well-settled:

> This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. Moreover, a PCRA court may decline to

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[1] Generally, "failure to petition to withdraw [a] plea, combined with the failure to pursue direct appeal will bar consideration of an attack on one's plea in collateral proceedings." ***Commonwealth v. Mendoza***, 730 A.2d 503, 507 n.8 (Pa. Super. 1999) (citation and internal quotation marks omitted). In the case *sub judice*, the record reflects that Appellant failed to petition the trial court to withdraw his plea and did not pursue a direct appeal. However, "ineffectiveness claims are distinct[] from those claims that are raised on direct appeal." ***Commonwealth v. Collins***, 888 A.2d 564, 573 (Pa. 2005). Accordingly, we will not find waiver.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] As a general rule, no point will be considered which is not set forth in the statement of questions involved. ***See Commonwealth v. Roman***, 714 A.2d 440, 441 n.4 (Pa. Super. 1998), *appeal denied*, 729 A.2d 1128 (Pa. 1998); ***see also*** Pa.R.A.P. 2116(a). Here, Appellant's vague issue in his statement of questions involved does not raise his ineffective assistance of counsel claims. (***See*** Appellant's Brief, at 7). However, because the argument section of Appellant's brief identifies specific issues, this error does not impede our meaningful appellate review, and we therefore will not find waiver on this basis. ***See Savoy v. Savoy***, 641 A.2d 596, 598 (Pa. Super. 1994) (addressing appellant's issues in spite of failure to include a statement of questions involved where argument section of brief specifically identified them and thus, procedural error did not impact Superior Court review).

> hold a hearing on the petition if the PCRA court determines that a petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted).[4]

Further, it is well-established that:

> In evaluating claims of ineffective assistance of counsel, we presume that counsel is effective. To overcome the presumption of effectiveness, Appellant must establish three factors: first that the underlying claim has arguable merit; second, that counsel had no reasonable basis for his action or inaction; and third, that Appellant was prejudiced. Counsel's assistance is **deemed constitutionally effective** once this Court determines that the defendant has not established any one of the prongs of the ineffectiveness test.

Commonwealth v. Rolan, 964 A.2d 398, 406 (Pa. Super. 2008) (citations and quotation marks omitted) (emphasis in original).

Here, although Appellant's issue is, in effect, premised on allegations of counsel's ineffectiveness, he has failed to provide meaningful discussion regarding any of the three required factors. (***See*** Appellant's Brief, at 11-14); ***see also Rolan***, ***supra*** at 406. Although the brief lists the criteria that must be established, (***see*** Appellant's Brief, at 11-12), it abandons any

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[4] We begin by noting that, when he entered his guilty plea, Appellant waived his allegations regarding counsel's claimed ineffectiveness in failing to challenge his ***Miranda*** warnings and to file a motion to suppress his statements. ***See Commonwealth v. Stradley***, 50 A.3d 769, 771 (Pa. Super. 2012) ("[W]hen a defendant enters a guilty plea, he or she waives all defects and defenses except those concerning the validity of the plea, the jurisdiction of the trial court, and the legality of the sentence imposed.") (citation omitted).

argument about them and their applicability to this case. (***See id.*** at 14-18). Accordingly, Appellant's issue is waived. ***See Rolan***, ***supra*** at 406 (finding waiver where appellant failed to address three prongs of ineffectiveness test).

Moreover, after a thorough review of the record, Appellant's brief, the applicable law, and the well-reasoned July 3 and August 22, 2012 opinions of the PCRA court, we conclude that there would be no merit to the arguments Appellant has raised on appeal. The PCRA court properly addresses and disposes of Appellant's ineffective assistance of counsel allegations. (***See*** PCRA Ct. Op., 7/03/12, at 7-13 (finding that: (1) Appellant's ineffectiveness claims lack arguable merit and counsel's actions did not prejudice him; (2) guilty plea was knowingly, intelligently, and voluntarily entered in spite of low IQ and episodic ataxia; (3) Appellant knowingly and intelligently waived his ***Miranda*** rights; and (4) counsel was not ineffective for failing to file a motion to suppress Appellant's confession to police; ***see also*** PCRA Court Opinion, 8/22/12, at 1-3 (finding that: (1) Appellant did not offer sufficient facts, witnesses or medical certifications to justify a PCRA hearing; and (2) mere fact of Appellant's low IQ did not render his confession to police involuntary)). Accordingly, we would affirm on the basis of the PCRA court's July 3, 2012 and August 22, 2012 opinions, even if Appellant had not waived his issue.

Order affirmed.

Donohue, J., files a Dissenting Memorandum.

Judgment Entered.

Mary A. Hoagland

Deputy Prothonotary

Date: 5/7/2013

S22040-13

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,

PENNSYLVANIA

COMMONWEALTH	:	No. CR-1713-2009
	:	CR-1213-2009
v.	:	
	:	
DAVID L. KILGUS,	:	PCRA
Defendant	:	

FILED
LYCOMING COUNTY
2012 JUL -3 A 8:45
SUZANNE N. FEDELE
PROTHONOTARY &
CLERK OF COURTS

OPINION AND ORDER

On July 12, 2010, under Information No. CR-1213-2009, Defendant pled guilty to Count 1, Statutory Sexual Assault, a felony of the second degree; Count 2, Involuntary Deviate Sexual Intercourse, a felony of the first degree; and Count 3, Aggravated Indecent Assault, a felony of the second degree. Under Information No. CR-1713-2009, Defendant pled guilty to Count 1, Statutory Sexual Assault, a felony of the second degree; Count 2, Involuntary Deviate Sexual Intercourse, a felony of the first degree; Count 4, Statutory Sexual Assault, a felony of the second degree; Count 5, Statutory Sexual Assault, a felony of the second degree; Count 6, Statutory Sexual Assault, a felony of the second degree; and Count 9, Endangering the Welfare of Children, a felony of the second degree. As well, under Information CR-1713-2009, Defendant pled no contest to Count 8, Sexual Exploitation of Children, a felony of the second degree.

During Defendant's guilty plea hearing, he admitted that between January of 2007 and September of 2009, he engaged in sexual intercourse with a female who was less than 16 years of age on five different occasions and engaged in deviate sexual intercourse with the same individual on at least two different occasions. Defendant admitted that during the time period he was four or more years older than the victim. Defendant also

admitted to digital penetration of the female on at least one occasion during the same time period.

Defendant admitted that the victim was the biological child of his girlfriend. At the time, both the mother and victim were living with Defendant at his house. Among other things, Defendant admitted that he had a duty of support for the victim.

With respect to the Sexual Exploitation of Children charge, Defendant did not contest that the Commonwealth could present evidence that on June 14, 2009, he directed the victim to have sexual intercourse with a man who was 26 years old while the victim was 16 years old.

On December 22, 2010, Defendant was sentenced. Under Information No. 1213-2009 with respect to Count 2, Involuntary Deviate Sexual Intercourse, Defendant was sentenced to undergo incarceration in a State Correctional Institution for an indeterminate term, the minimum of which was 10 years and the maximum of which was 20 years.

With respect to Count 2, Statutory Sexual Assault, Defendant was sentenced to a concurrent term of imprisonment of 1 to 2 years. With respect to Count 3, Aggravated Indecent Assault, Defendant was sentenced to a concurrent imprisonment term of 2 to 4 years.

Under Information No. 1713-2009 with respect to Count 2, Involuntary Deviate Sexual Intercourse, Defendant was sentenced to a concurrent term of imprisonment, the minimum of which was 10 years and the maximum of which was 20 years.

With respect to Counts 1, 4, 5, and 6, all Statutory Sexual Assaults, Defendant was sentenced to a term of 3 years of probation on each offense, said sentences to run consecutive to each other and consecutive to the 10 to 20 year sentence.

The sentence with respect to Count 8, Sexual Exploitation of Children, was that Defendant be placed on probation for a period of 2 years to run consecutive to the previous sentences imposed. The sentence of the Court with respect to Count 9, Endangering the Welfare of Children, was a concurrent sentence of 2 years probation.

The aggregate sentence at the above Informations was a period of incarceration, the minimum of which was 10 years and the maximum of which was 20 years, to be followed by an additional term of 10 years probation.

On June 16, 2011, Defendant filed a pro se Motion for Transcripts. By Order of Court dated June 20, 2011, said Motion was denied.

On July 16, 2011, Defendant filed a pro se Motion for Writ of Habeas Corpus. By Order of Court dated July 25, 2011, the Court treated the Motion as a Petition under the Post Conviction Relief Act (PCRA) because the Motion alleged ineffectiveness of counsel. The Court appointed PCRA counsel and scheduled a conference.

On December 12, 2011 Defendant, through counsel, filed an Amended Petition for Post Conviction Collateral Relief. The issues raised in the Petition relate to the voluntariness of Defendant's plea and the alleged ineffectiveness of prior counsel in failing to request a competency evaluation and failing to file a Motion to Suppress.

A conference was held on Defendant's Amended PCRA Petition. By Order of Court dated January 31, 2012, the Court concluded that the Amended Petition failed to comply with Rule 902 of the Pennsylvania Rules of Criminal Procedure. As a result, the Court directed, among other things, that defense counsel further amend the PCRA Petition to set forth particular facts, attach witness certifications and attach records, documents or other evidence in support of Defendant's grounds for relief.

By Order of Court dated May 1, 2012, the Court directed the Court Reporter to prepare a transcript of Defendant's guilty plea hearing held on July 12, 2010, and directed the Second Amended PCRA Petition to be filed on or before May 25, 2011.

Defendant subsequently filed the Second Amended Petition for Post Conviction Collateral Relief. A conference was initially scheduled for June 21, 2012 but at defense counsel's request it was continued to August 21, 2012.

The County contract with defense counsel expired, and as a result, Defendant's case has been reassigned to another conflict PCRA counsel.

Defendant's Second Amended Motion for PCRA Relief asserts that trial counsel provided ineffective assistance by failing to seek a psychiatric evaluation to determine Defendant's competency to fully understand the consequences of the guilty plea he entered. Second, trial counsel provided ineffective assistance of counsel by failing to challenge the validity of Defendant's waiver of his "Miranda" warning and the voluntariness of statements made to the police in the case, as a result of Defendant's alleged mental infirmities.

While the Second Amended Motion does not attach any witness verifications, it does reference five witnesses and summarizes their proposed testimony in support of Defendant's claims. Furthermore, Defendant attached numerous medical records from different medical providers which Defendant contends "demonstrate that the Defendant has an IQ of 64 and suffers a genetic mental infirmity known as Episodic Ataxia." Second Amended Petition for Post Collateral Relief, Paragraph 9f.

In order to establish ineffective counsel, the petitioner must show, by a preponderance of the evidence, that the assistance of counsel "so undermined the

truth-determining process that no reliable adjudication of guilt or innocence could have taken place." Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999). There are three requirements, all of which need to be established to prove ineffectiveness. First, the claim must be of arguable merit. Id. Second, counsel must have had no "reasonable strategic basis for his or her action or inaction." Id. Third, "[B]ut for the errors and omissions of counsel, there [must be] a reasonable probability that the outcome of the proceedings would have been different." Id.

There is evidence to suggest that Defendant is mentally retarded. Three components need to be established for a person to be deemed mentally retarded. Commonwealth v. Miller, 888 A.2d 624, 630 (Pa. 2005). First, the individual must have limited intellectual functioning. Id. This means a person has a sub-average intellectual capability, manifested by a score below 65-75 on the Wechsler scale or IQ test. Id.

Limited intellectual functioning, however, is not the only component needed for a determination of mental retardation. Id. at 630-31. The next component is age of onset. Id. at 630. Lastly, a person must present significant adaptive limitations. Id. Adaptive behavior is the "collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." Id. Limitations in adaptive skills are manifested through "difficulties adjusting to ordinary demands made in daily life." Id.

In 2000, at the age of eighteen, Defendant was evaluated by the Pennsylvania Bureau of Disability. During the assessment, he was subjected to an

IQ examination. Defendant's full scale IQ score was 63. The verbal component was 66 while the performance portion was 67. The Bureau classified Defendant as falling within the mild range of mental retardation.

In regards to age of onset, Defendant's medical records indicate that there may have been development problems as early as six years of age. During an evaluation at the Pediatric Neurology Outpatient Center at Geisinger Medical, Defendant exhibited symptoms of below par coordination, both fine and gross. At the age of seventeen, Defendant was described as "slow" by his Mother. When Defendant was seventeen, Dr. Jay Miller from Geisinger Medical Center stated in his clinical notes that Defendant "carries a diagnosis of mental retardation."

From as early as fourteen years of age, Defendant presented with significant adaptive limitations. Defendant suffered from depression, exhibited behavioral problems, and had suicidal ideations. Defendant removed himself from school in eleventh grade due to behavioral problems, including fighting with other students. Throughout Defendant's education, he received some form of learning support. The Pennsylvania Bureau of Disability determined that at the age of eighteen, Defendant was unable to independently handle his funds in a competent manner. Defendant did not have a driver's license, did not know how to use public transportation, and possessed zero cooking skills. The Bureau also noted that Defendant had poor hygiene. In 2002, at the age of twenty, Defendant ran away from his Father's home on a bicycle because he was unable to deal with the psychosocial stressors present at his Father's house.

Thus, Defendant meets the three requirements to be deemed mentally retarded as established in Miller.

Despite Defendant's apparent mental retardation, it is evident to the Court that his ineffectiveness claims fail both because they lack arguable merit and there is no reasonable probability that the outcome of the proceedings would have been different if counsel took the action suggested by Defendant.

In this case, Defendant pled guilty. Competence to plead guilty "depends upon whether the defendant has the ability to comprehend his position as one accused...and to cooperate with his counsel in making a rational defense." Commonwealth v. Turetsky, 925 A.2d 876, 880 (Pa. Super. Ct. 2007). It also depends on whether the defendant "has sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and has a rational as well as factual understanding of the proceedings against him." Id.

First, Defendant must have been able to comprehend his position as one accused when he pled guilty. Id. Defendant acknowledged in his written guilty plea colloquy that counsel explained to him all the elements of the crime or crimes to which he intended to plead guilty. Written Colloquy, Q.2, p. 2. Furthermore, the Court discussed with Defendant what the Commonwealth would need to prove in order for Defendant to be found guilty of each crime. N.T., 7/12/10, p. 5-7. Defendant responded affirmatively each time he was asked if he understood what the Commonwealth would need to prove. N.T., 7/12/10, p. 5-7. Clearly, despite his

mild mental retardation, Defendant comprehended his position as one accused when he entered a guilty plea.

There is no information to suggest that Defendant was unable to cooperate with his counsel in making a rational defense. Defendant admitted in the written guilty plea colloquy that he wanted to plead guilty because he wanted to "get it over with." Written Colloquy, Q.22, p. 5.

Defendant admitted as well that he had sufficient time to consult with counsel before his oral and written guilty plea colloquies. Defendant affirmed that he thoroughly discussed with counsel all of the facts and circumstances surrounding the charges. N.T., 7/12/10, p. 4, 16; Written Colloquy, Q. 24, p. 5. Defendant admitted that he was satisfied with the representation and advice of his attorney. N.T., 7/12/10, p. 4, 16; Written Colloquy, Q. 25, p. 5. Additionally, Defendant acknowledged that his counsel satisfactorily answered any questions or concerns about Defendant's case or guilty plea. N.T. 7/12/10, p. 16.

The record also indicates that Defendant had a rational understanding of the proceedings, the charges for which he was pleading guilty, and the consequences of pleading guilty to said charges. The Court explained the legal rights that Defendant was waiving by entering a guilty plea. N.T., 7/12/10, p. 17-19. Defendant acknowledged that he knew he waived his right to a jury trial, to be presumed innocent, and for the Commonwealth to prove him guilty beyond a reasonable doubt. N.T., 7/12/10, p. 17-19. Defendant affirmed that he understood the factual basis for each of the charges for which he pled guilty. N.T., 7/12/10, p.

22-32. In some instances, Defendant even explained or clarified the grounds for a particular charge. N.T., 7/12/10, p.30, 31.

Additionally, Defendant affirmatively responded that he understood the permissible range of sentences and fines that could be imposed for the crimes. Written Colloquy, Q. 5, p. 2.; N.T., 7/12/10, p. 7-8. Defendant acknowledged that the Court was not bound by the terms of the plea agreement and that the sentence could be different than the recommendation contained therein. N.T., 7/12/10, p. 7-9; Written Colloquy, Q. 3, 4, p.2.

During his plea hearing, Defendant affirmed that the guilty plea he entered was done so knowingly, intelligently, and voluntarily. N.T., 7/12/10, p. 20. Now, however, Defendant claims that is was not so entered because of his low IQ and genetic mental infirmities.

> The longstanding rule of Pennsylvania law is that a defendant may not challenge his guilty plea by asserting that he lied while under oath, even if he avers that counsel induced the lies. Commonwealth v. Cappelli, 489 A.2d 813, 819 (Pa. Super. Ct. 1985). A person who elects to plead guilty is bound by the statements he makes in open court while under oath and he may not later assert grounds for withdrawing the plea which contradict the statements he made at his plea colloquy. Commonwealth v. Stork, 737 A.2d 789, 790-91 (Pa. Super. Ct. 1999).
>
> Turetsky, 925 A.2d at 881.

Moreover, episodic ataxia is not a cognitive disorder. It is an autosomal disorder that affects the nervous system and causes problems with movement. Genetics Home Reference, Genetic Conditions, Episodic Ataxia, http://ghr.nlm.nih.gov/condition/episodic-ataxia (Last reviewed Aug. 2008). People with episodic ataxia have recurrent episodes of poor coordination and balance. Id.

During the episodes, many people experience ataxia, vertigo, nausea and vomiting, slurred speech, seizures, myokymia, and tinnitus. Id. Episodes of ataxia can be triggered by environmental factors including but not limited to stress and exertion. Id.

There is no evidence to suggest that Defendant suffered from any of these attacks or symptoms while engaged in Court proceedings. N.T., 7/12/2010, p.3. Defendant was advised to alert the Court if he was having difficulty understanding due to his condition. N.T, 7/12/2010, p. 3. There is, further, no evidence set forth in the medical records that supports any contention whatsoever that episodic ataxia would render Defendant incompetent in the legal arena.

Defendant has been taking medication for his episodic ataxia since as early as seven years old. The medication is sold under the name Diamox. The generic name for Diamox is Acetazolamide. U.S. National Library of Medicine, PubMed Health, Acetazolamide Oral, http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000766/ (Last reviewed Sept. 1, 2010). The side effects listed for the medication include upset stomach, vomiting, and loss of appetite. Id. There are no cognitive impairments listed as a side effect of Defendant's medication. Id. In 1989, Dr. Turel from Geisinger Medical Center even mentioned in Defendant's clinical notes that Diamox is a benign medication with relatively few side effects compared to many other medications used.

The Court concludes that Defendant was competent to enter a guilty plea, and Defendant's low IQ and episodic ataxia would not impact such a conclusion.

In order for Miranda rights to be properly waived, the prosecution must prove, by a preponderance of the evidence, that the waiver was knowing and intelligent. Commonwealth v. Logan, 549 A.2d 531, 537 (Pa. 1988).

> First, the waiver must have been voluntary in the sense that it was an intentional choice made without any undue governmental pressure; and second, that the waiver must have been made with a full comprehension of both the nature of the right being abandoned and the consequences of that choice.
>
> Id.

In order for a waiver to be voluntary, it must be the product of free and deliberate choice rather than intimidation, coercion, or deception. Commonwealth v. In re T.B., 11 A.3d 500, 505 (Pa. Super. Ct. 2010). "Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that Miranda rights have been waived." Id. Pennsylvania has traditionally held that defendants "with proven psychological defects are capable indeed of waiving their constitutional rights and giving voluntary confessions." Logan, 549 A.2d at 537. A defendant's confession is not automatically rendered involuntary if the defendant possesses a low IQ. See Commonwealth v. Chacko, 459 A.2d 311, 317 (Pa. 1983).

In Logan, the defendant argued that his statements to the police should have been suppressed because they were the product of a defective mental condition. Logan, 549 A.2d at 535. The Court held, however, that despite the

defendant's mental condition, he was able to waive Miranda rights knowingly and intelligently. Id. at 537. Similarly in Chacko, the Court held that despite the defendant's low IQ, he was able to waive Miranda rights knowingly and voluntarily. Chacko, 459 A.2d 584. The defendant's argument was based solely on his psychiatric evaluation, which revealed an IQ in the "dull-normal" range. Id. at 582. The Court dismissed defendant's argument because there was no evidence to contradict that defendant's statements were voluntary and intelligent. Id. at 584.

In light of Logan and Chacko, the Court concludes that Defendant knowingly waived his Miranda rights in this case. Upon arrest, Defendant was advised of his rights. After, Defendant stated that he wanted to talk about the incident. There is no evidence to suggest that Defendant was intimidated by the officers, coerced, or deceived. The information provided by Defendant was voluntarily conveyed to the officers. Defendant was aware of the fact that the interrogation concerned an investigation into his interactions with the victim. His awareness was manifested by Defendant's immediate explanation of the events upon arrest.

Defendant intelligently waived his Miranda rights. The nature of Miranda rights requires officers to inform the person in custody that he or she has the right to remain silent and that anything the person says can and will be used against that person in court. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Additionally, the person in custody must be informed of his or her right to consult with an attorney and to have that attorney present during questioning. Id. There is no evidence to suggest that Defendant did not comprehend that by volunteering

information, he was waiving his Miranda rights. There is no evidence to suggest that at any point Defendant wished to consult with an attorney. Nor is there evidence that Defendant indicated he did not wish to be interrogated.

Because a per se rule does not exist where a waiver cannot be voluntary when made by a defendant possessing a low IQ, the Court holds that Defendant's proposed Motion to Suppress would not have been granted. Despite Defendant's sub-average IQ, he was aware of his rights; understood that by volunteering information, he was giving up those rights; and knew the consequences of waiving his rights. Accordingly, counsel was not ineffective for failing to file a Motion to Suppress Defendant's statements.

Even though a conference is scheduled, the Court has reviewed the record and concluded that a conference is not necessary.

ORDER

AND NOW, this 27 day of July 2012, the Court **DENIES** Defendant's Post Conviction Relief Act (PCRA) Petition. The parties are hereby notified of this Court's intention to dismiss the Petition without holding an evidentiary hearing, pursuant to Rule 907 of the Pennsylvania Rules of Criminal Procedure. Defendant 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.

By The Court,

Marc F. Lovecchio, Judge

cc: April, CST
Kyle Rude, Esquire
Kenneth Osokow, Esquire
David Kilgus, JV9535
175 Progress Drive, Waynesburg, PA 15370
Angeline Allen, Intern for Judge Lovecchio
Work File
Gary Weber, Esquire (Lycoming Reporter)

S220470-13

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1213-2009;**
	:	**CR-1713-2009**
	:	
vs.	:	
	:	**Opinion and Order Dismissing**
DAVID L. KILGUS,	:	**PCRA Petition**
Defendant	:	

OPINION AND ORDER

This Opinion is written in response to Defendant's objections to the Court's proposed dismissal of his Post Conviction Relief Act (PCRA) petition. In addition to the reasons set forth in its notice of intent to dismiss, the Court would add the following observations regarding Defendant's claims that he was not competent to waive his Miranda rights or to enter a guilty plea.

In response to the proposed dismissal, defense counsel argues an evidentiary hearing is needed to determine the extent of Defendant's mental infirmities as will be revealed by testimony from Defendant's treating neurologist and his family members. Defendant has not offered to call any psychiatrist as a witness in this case. Under Pennsylvania law, competency evaluations are conducted by psychiatrists. See 50 P.S. §7402. Furthermore, Defendant has not provided a certification from any medical professional stating that he was incompetent on July 23, 2009 (the date Defendant was interviewed by the police) or on July 12, 2010 (the date when Defendant entered his guilty plea). In fact, Defendant has not submitted a signed certification with respect to any potential witness in violation of Rule 902(A)(15) and 42 Pa.C.S. §9545(d)(1). Furthermore, it appears from the medical records submitted with Defendant's petition that Defendant's neurologist,

(57)

Dr. Jeffrey, last examined Defendant in March 2004, years before Defendant was interviewed by the police and then tendered a guilty plea.

Even if a person can be easily influenced, he or she is not necessarily incompetent. In order to prove he is incompetent, a defendant must establish that he was either unable to understand the proceedings against him or to participate in his own defense. In its proposed dismissal, the Court noted that Defendant's responses at the guilty plea hearing showed that he was competent. In addition, it is evidence from Defendant's pro se filings that he understands that he is incarcerated because he had sexual relations with a minor female, T.F. In fact, in his original pro se petition for habeas corpus, which the Court treated as a PCRA petition, Defendant makes several allegations against the minor victim, including claiming that she was promiscuous; she consented to and was the instigator of the sexual relations; and she named another individual as the father of her baby, which was proven false by DNA testing. Notably, Defendant does not deny having sexual relations with the minor victim, but rather blames her for the sexual acts occurring. Thus, Defendant understands the nature of the proceedings and is capable of participating in his own defense. Unfortunately the information alleged by Defendant, does not provide him with a defense in this case because consent is not a defense due to the age of the victim,[1] and her alleged promiscuity is not admissible as evidence under the Rape Shield Law, 18 Pa.C.S.§3104.

With respect to Defendant's waiver of his Miranda rights, the Court would

[1] See 18 Pa.C.S.§311(c)(ineffective consent); Commonwealth v. Duffy, 832 A.2d 1132, 1140 (Pa. Super. 2003)("the governmental interest sought to be protected by the statutory sexual assault statute is in protecting younger minors from the degradations of older, more mature individuals, even if the minors consent to the sexual conduct."); Pa.SSJI (Crim) 15.3123D (consent is no defense to involuntary deviate sexual intercourse with child over 12 and under 16); Pa.SSJI (Crim) 15.3125D (consent of the child is no defense to aggravated indecent assault of a child less than 16).

rely on Commonwealth v. Chacko, 500 Pa. 571, 459 A.2d 311 (1983). In Chacko, the Pennsylvania Supreme Court found that "the fact that a defendant possesses a low I.Q. does not in itself render his confession involuntary." 459 A.2d at 317. Instead, the Court must view the totality of the circumstances including:

> The duration and methods of interrogation; the length of delay between arrest and arraignment; the conditions of detainment; the attitudes of the police toward defendant; defendant's physical and psychological state; and all other conditions present which may serve to drain one's power of resistance to suggestion or to undermine one's self-determination.

Id. Defendant has not alleged any facts regarding the circumstances surrounding his detainment and interrogation to show how the police undermined his self-determination. The mere fact that he possesses a low I.Q. is insufficient to show that the waiver of his Miranda rights was involuntary.

ORDER

AND NOW, this 23rd day of August 2012, after review of defense counsel's response to the Court's Order giving notice of its intent to dismiss Defendant's Post Conviction Relief Act (PCRA) petition, the Court DISMISSES Defendant's PCRA petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk

of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Prothonotary shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Amy Boring, Esquire
David L. Kilgus, JV-9535 (regular and certified mail)
175 Progress Drive, Waynesburg, PA 15370
Work file
Gary Weber, Esquire (Lycoming Reporter)
Suzanne Fedele, Prothonotary/Clerk of Courts