NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOSEPH DURBIN, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1713 WDA 2013

Appeal from the PCRA Order October 2, 2013
In the Court of Common Pleas of Washington County
Criminal Division No(s).: CP-63-CR-0000384-2002
CP-63-CR-0001249-2001

BEFORE: BOWES, JENKINS, and FITZGERALD,[*] JJ.

MEMORANDUM BY FITZGERALD, J.: FILED: June 4, 2014

Appellant, Joseph Durbin, appeals from the order entered in the Washington County Court of Common Pleas denying his first Post Conviction Relief Act[1] ("PCRA") petition. Appellant sought relief from the October 28, 2002 sentence of eleven to twenty-two years' imprisonment following his conviction of indecent assault,[2] aggravated indecent assault,[3] involuntary deviate sexual intercourse,[4] and corruption of minors.[5] We affirm.

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[*] Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541-9546.

[2] 18 Pa.C.S. § 3126(a)(7).

Following a jury trial on July 15, 2002, Appellant was convicted of the aforementioned crimes. On August 20, 2002, Appellant filed an application for the appointment of new counsel, alleging that Appellant's trial counsel provided ineffective assistance of counsel. The court conducted a sentencing hearing on October 28, 2002, after which it sentenced Appellant to the above term of incarceration and granted Appellant's application for new court-appointed counsel. On November 7, 2002, Appellant filed post-sentence motions. At the hearing on the motions, Appellant requested, and was granted, permission to withdraw his claim of ineffective assistance of counsel and his claim that the Commonwealth's evidence was insufficient to support the jury verdict. Thereafter, the court entered an order denying Appellant's post-sentence motions. Appellant timely filed an appeal to this Court. This Court affirmed the judgment of sentence on November 10, 2003. ***Commonwealth v. Durbin***, 382 WDA 2003 (Pa. Super. Nov. 10, 2003) (unpublished memorandum). Appellant subsequently filed a petition for allowance of appeal to the Pennsylvania Supreme Court on November 26, 2003; it was denied on April 14, 2004. ***Commonwealth v. Durbin***, 848 A.2d 927 (Pa. 2004).

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[3] 18 Pa.C.S. § 3125(a)(1).

[4] 18 Pa.C.S. § 3123(a)(6).

[5] 18 Pa.C.S. § 6301(a).

On May 31, 2005, Appellant filed a PCRA petition. Appellant was appointed counsel and an amended PCRA petition was filed on October 11, 2007.[6] On November 29, 2007, the petition was dismissed as untimely.[7] Appellant filed an appeal from this order on December 17, 2007. On August 6, 2008, this Court vacated the PCRA court's order and remanded the case to the PCRA court for consideration of the issues raised in Appellant's petition. ***Commonwealth v. Durbin***, 961 A.2d 1273 (Pa. Super. 2008) (unpublished memorandum).

Pursuant to the remand, the PCRA court ordered Appellant to file an amended PCRA petition on June 22, 2009. Almost one year later, on June 16, 2010, Appellant complied. The Commonwealth filed a response to the petition on November 7, 2011. On December 17, 2012, the PCRA court issued a Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition without a hearing.[8] The court ultimately dismissed the petition on October 2, 2013. This timely appeal followed.[9]

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[6] The trial court docket reflects that the attorney initially appointed by the PCRA court was replaced. The attorney subsequently appointed filed the amended PCRA petition on behalf of Appellant on October 11, 2007.

[7] It does not appear that the PCRA court issued a Pa.R.Crim.P 907 notice informing Appellant that it intended to dismiss Appellant's PCRA petition without a hearing.

[8] The judge assigned to this matter retired on June 30, 2012, leaving Appellant's petition outstanding. The PCRA court received a letter from Appellant on October 27, 2012, inquiring as to the status of his petition.

Appellant raises four issues on appeal:

> Whether trial counsel was ineffective for failure to call alibi witness[es]?
>
> Whether trial counsel was ineffective for failure to present [a] character witness[es]?
>
> Whether counsel was ineffective for failure to question the competence of a [thirteen] year old witness who was the accuser in a sexual abuse case?
>
> Whether [ ] Appellant's constitutional rights were violation [sic] due to a denial of Appellant's motion to dismiss Rule 600?

Appellant's Brief at 1.[10, 11]

For his first two issues, Appellant claims his trial counsel was ineffective by failing to call witnesses to testify that Appellant's work schedule would require him to be at work during the time of the incidents and to Appellant's character generally. Next, Appellant claims his trial counsel was ineffective by failing to challenge the competency of the thirteen-year-old victim to testify. ***Id.*** at 10, 12, 15. For his last issue,

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Upon review of the record, the PCRA court determined that Appellant's petition was outstanding.

[9] The PCRA court did not order Appellant to file a Pa.R.A.P. 1925(b) statement.

[10] The Commonwealth did not file a brief.

[11] We observe that, in his brief, Appellant fails to fully develop arguments in support of his questions presented. However, we decline to find Appellant's issues waived, and instead summarize Appellant's arguments relying on our review of Appellant's PCRA petition and the PCRA court's restatement of the issues raised therein.

Appellant claims that his right to a speedy trial, pursuant to Pa.R.Crim.P. 600, was violated when the trial court granted him nominal bail at his Rule 600 hearing rather than dismissing the case outright. ***Id.*** at 17. He further claims that appellate counsel was ineffective for failing to raise this matter on direct appeal. ***Id.*** We hold Appellant is not entitled to relief.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1267 (Pa. 2008).

> [C]ounsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his or her conduct; and (3) Appellant was prejudiced by counsel's action or omission. To demonstrate prejudice, an appellant must prove that a reasonable probability of acquittal existed but for the action or omission of trial counsel. A claim of ineffective assistance of counsel will fail if the petitioner does not meet any of the three prongs. Further, a PCRA petitioner must exhibit a concerted effort to develop his ineffectiveness claim and may not rely on boilerplate allegations of ineffectiveness.

Commonwealth v. Perry, 959 A.2d 932, 936 (Pa. Super. 2008) (punctuation marks and citations omitted).

The standard for proving the ineffectiveness of counsel based on a failure to call witnesses is as follows:

> When raising a failure to call a potential witness claim, the PCRA petitioner satisfies the performance and prejudice requirements . . . by establishing that: (1) the witness existed; (2) the witness was available to testify for the

> defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Johnson, 966 A.2d 523, 536 (Pa. 2009) (citations omitted).

With respect to the competency of witnesses, our Supreme Court recently stated:

> Although competency of a witness is generally presumed, Pennsylvania law requires that a child witness be examined for competency. As we have recently reiterated this Court historically has required that witnesses under the age of fourteen be subject to judicial inquiry into their testimonial capacity. A competency hearing of a minor witness is directed to the mental capacity of that witness to perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy, and to tell the truth. In Pennsylvania, competency is a threshold legal issue, to be decided by the trial court.

Commonwealth v. Huchinson, 25 A.3d 277, 289-90 (Pa. 2011) (citations, footnotes, and quotations omitted).

> A party who challenges the competency of a minor witness must prove by clear and convincing evidence that the witness lacks the minimal capacity . . . (1) to communicate, (2) to observe an event and accurately recall that observation, and (3) to understand the necessity to speak the truth.

Commonwealth v. Pena, 31 A.3d 704, 707 (Pa. Super. 2011) (quotation marks omitted). Moreover, the "standard of review of a trial court ruling on

competency is for an abuse of discretion." ***Commonwealth v. Delbridge***, 859 A.2d 1254, 1257 (Pa. 2004).

A defendant's right to a speedy trial is codified in Pa.R.Crim.P 600 which provides, in relevant part:

> (2) Trial shall commence within the following time periods.
>
> (a) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is incarcerated on that case, shall commence no later than 180 days from the date on which the complaint is filed.

Pa.R.Crim.P. 600(2)(a).

Appellant claims that his trial counsel was ineffective by failing to call witnesses to testify that Appellant's work schedule would require him to be at work during the time of the incidents and to Appellant's character generally. Appellant's PCRA petition requests that that the PCRA court grant him an evidentiary hearing. Amended PCRA Pet., 6/16/10, at 10 (unpaginated). The PCRA provides that "where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony." 42 Pa.C.S. § 9545(d); ***see generally Commonwealth v. Faulk***, 21 A.3d 1196, 1203 (Pa. Super. 2011) (affirming dismissal of PCRA petition because defendant filed only a witness list). Similar to the defendant in ***Faulk***, Appellant did not include such a signed

certification with his petition or amended petitions.[12] ***See Faulk***, 21 A.3d at 1203. Therefore, Appellant failed to plead and prove the ineffectiveness of his trial counsel.[13] Accordingly, his first two issues are meritless.

With respect to Appellant's third and fourth issues on appeal, after careful consideration of Appellant's petition and appellate brief, the record, and the well-reasoned opinion of the Honorable Debbie O'Dell-Seneca, we affirm on the basis of the PCRA court's decision. ***See*** PCRA Ct. Op., 10/2/13, at 9-20 (holding, *inter alia*, that (1) Appellant failed to establish that trial counsel had no reasonable basis for declining to call character witnesses, and hence, counsel's failure to call character witnesses was not ineffective; (2) Appellant failed to establish that trial counsel had no reasonable basis for declining to call alibi witnesses, hence counsel's failure to call alibi witnesses was not ineffective; (3) record confirms that thirteen-year-old victim fulfilled the three requirements of competency; and (4) there was no violation of Rule 600, trial counsel petitioned for and received nominal bail under Rule 600, and Appellant entered a plea within 365 days from the filing of the criminal complaint).

Order affirmed.

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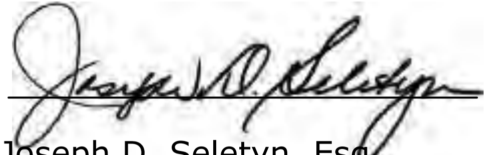
[12] Appellant's petition does include an **unsigned** proposed witness list complete with the witness' names, addresses, dates of birth, and the substance of their testimony. Amended PCRA Petition at 8-9.

[13] Moreover, even if Appellant had included the requisite signed certification, we would affirm this issue on the basis of the trial court opinion, as discussed *infra*.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/4/2014

Mary Bates, Esq

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEATH OF PENNSYLVANIA,

VS.

JOSEPH DURBIN,
Defendant.

No. 1249 – 2001
No. 384 – 2002

FILED
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CLERK OF COURTS
WASHINGTON CO., PA

OPINION IN SUPPORT OF ORDER DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF

This matter comes before this Court on remand from the Superior Court of Pennsylvania for reconsideration of Defendant's Petition for Post-Conviction Relief. Upon consideration of Defendant's Amended Petition for Post-Conviction Collateral Relief filed June 16, 2010, by court-appointed counsel, Jeffrey Watson, Esquire; the Commonwealth's Reply to Rule to Show Cause filed on November 7, 2011; and the record, the Court issues the following Opinion and Order:

Joseph Durbin (Defendant) was charged with various sexual offenses against three minor females on May 29, 2001. He was held for court on Indecent Assault – Person Less Than Thirteen (13) Years of Age (1 count); Corruption of Minors (3 counts); Involuntary Deviate Sexual Intercourse (2 counts); Contact/Communication with Minor – Sexual Offenses (3 counts); Rape – Person Less Than 13 Years of Age (1 count); and Promoting Prostitution (1 count). (1249-01 Appellate Docket No. 7).

Defendant filed a Motion to Dismiss under Pa.R.Crim.P.600 on December 19, 2001, claiming that the Commonwealth had failed to bring the case to trial within 180 days of the complaint being filed. (1249-01 Appellate Docket No. 9). In the alternative, the Defendant requested that his bail be reduced from twenty thousand dollars ($20,000) straight cash bond. On January 4, 2002, following a hearing on the matter, the Court reduced the Defendant's bond to Release on Recognizance (ROR). (1249-01

Appellate Docket No. 11). He was then released from the Washington County Correctional Facility and returned to the Allegheny County Correctional Facility to address criminal matters pending in that county.[1]

On January 28, 2002, a criminal complaint at docket number 384-02 was filed against the Defendant, charging him with additional sexual offenses relative to one of the minor victims in case number 1249-01. The following charges were held for court: Rape – Threat of Forcible Compulsion (1 count); Rape – Person Less Than 13 Years of Age (1 count); Statutory Sexual Assault (1 count); Aggravated Indecent Assault Without Consent (1 count); Aggravated Indecent Assault – Threat of Forcible Compulsion (1 count); Aggravated Indecent Assault – Person Less Than 13 Years of Age (1 count); and Sexual Assault (1 count). (384-02 Appellate Docket No. 7).

On or about February 13, 2002, the Defendant was returned to Washington County Correctional Facility. (1249-01 Appellate Docket No. 12). A hearing was held on March 18, 2012, to determine whether the records of a CYS investigation of the incident on which the Defendant's charges were based should be made available to the defense. Upon the conclusion of an *in camera* review, the Court ordered that the Defendant had a right to the documents. (1249-01 Appellate Docket No. 16).

On April 1, 2002, Mr. Durbin entered a plea of guilty to offenses at both case numbers. At case number 1249-01, he pled guilty to Involuntary Deviate Sexual Intercourse (2 counts). (1249-01 Appellate Docket No. 11), and all remaining charges at that case number were *nolle prossed* upon motion of the district attorney. At case number 384-02, Defendant pled guilty to Aggravated Indecent Assault (1 count). (384-02 Appellate Docket No.18). The Court directed the Washington County Adult Probation Office to prepare a pre-sentence investigation report and the Pennsylvania Sexual Offenders

[1] The Court notes that the Defendant's Motion to Dismiss under Pa.R.Crim.P. 600 lists the date of incarceration at the Washington County Correctional Facility to be "on or about May 26, 2001." (1249-01 Appellate Docket No. 9). The date of the Defendant's release on ROR bond to an Allegheny County detainer was on or about January 4, 2012. This amounts to 223 days.

Assessment Board to complete an evaluation and report. Both agencies were to submit reports to the Court and counsel prior to sentencing.

On April 17, 2002, Defendant filed a Motion to Withdraw Guilty Plea, claiming that the plea was not entered knowingly, willingly, and voluntarily. (1249-01 Appellate Docket No. 20), which was granted after hearing. The Court scheduled both cases for a July 15, 2002 jury trial. (1249-01 Appellate Docket No. 22).

The jury returned a verdict the next day which found Defendant guilty of Indecent Assault, Involuntary Deviate Sexual Intercourse and Corruption of Minors, but not guilty of Criminal Attempt to Commit Rape at case number 1249-01, and guilty of Aggravated Indecent Assault at case number 384-02. Following a reading of the verdict, the Court again ordered the Washington County Adult Probation Office to conduct a pre-sentence investigation and the Pennsylvania Sexual Offenders Assessment Board to conduct an evaluation with reports to be filed prior to sentencing. (384-02 Appellate Docket No.20). Subsequently, the Commonwealth filed its Notice of Intent to Invoke Mandatory Sentencing on the counts of Aggravated Indecent Assault and Involuntary Deviate Sexual Intercourse. (384-02 Appellate Docket No. 19).

On August 20, 2002, the Defendant, through counsel, filed a Petition for Application of Court-Appointed Counsel. His petition was based on Kurt Winter, Esquire's receipt of a letter from Mr. Durbin claiming that he was requesting new counsel because Attorney Winter had provided ineffective assistance of counsel. (384-02 Appellate Docket No. 21).

Prior to sentencing, the Court conducted a hearing on October 20, 2002, to determine if the Defendant met the criteria for a sexually violent predator. Based upon the testimony presented by the Commonwealth, the Court found Mr. Durbin to be a sexually violent predator, and then imposed the following sentence: at case number 1249-01: Indecent Assault, one (1)

year to two (2) years; Involuntary Deviate Sexual Intercourse, six (6) years to twelve (12) years; Corruption of Minors, one (1) year to two (2) years. At case number 384-02: Aggravated Indecent Assault, three (3) years to six (6) years. All sentences ran consecutively, for a total period of incarceration of eleven (11) years to twenty-two (22) years, with credit for time served. All sentences imposed were within the standard range for the crimes charged and with consideration given to the Defendant's criminal history. (384-02 Appellate Docket No. 25).

Following sentencing, Defendant's Petition for Application for Court-Appointed Counsel was granted, and Joseph Zupancic, Esquire, was appointed to represent him. On November 7, 2002, Post-Sentence Motions in the form of a Motion for Judgment of Acquittal and/or Arrest of Judgment, Motion for a New Trial, and Motion for Modification of Sentence were filed. (384-02 Appellate Docket No. 26). At hearing, the Defendant requested permission to withdraw his claim of ineffective assistance of counsel and his claim that the evidence was insufficient to support the jury verdict, which was granted. Thereafter, the Court entered an order denying the Defendant's post-sentence motions and informed him of his right to appeal. (384-02 Appellate Docket No. 29). His timely appeals to the Superior Court and Supreme Court of Pennsylvania were denied.

On May 31, 2005, the Defendant filed a Petition for Post-Conviction Relief, and the Court appointed Michael J. Savona, Esquire, to represent him in all proceedings regarding his PCRA Petition. (384-02 Appellate Docket No. 40). Although the record is unclear, at some point Erin Dickerson, Esquire, was appointed as counsel for Mr. Durbin. She was allowed to withdraw on April, 5, 2006, and Jeffrey Watson, Esquire, was appointed. (384-02 Appellate Docket No. 41). Attorney Watson filed a Memorandum in Support of Motion for Post-

Conviction Relief on Behalf of Defendant on October 11, 2007, (384-02 Appellate Docket No. 45), which was denied as untimely by Memorandum and Order dated November 29, 2007.

Defendant appealed on December 17, 2007. (384-02 Appellate Docket No. 48). After the submission of both a Concise Statement and the Court's Opinion, the Superior Court of Pennsylvania on August 8, 2008, vacated the Order and remanded the case for reconsideration. (1249-01, 384-02 Appellate Docket No. 30).

Pursuant to the remand, the Court ordered the Defendant to file an Amended PCRA Petition, (1249-01, 384-02 Appellate Docket No. 30), which was filed on June 16, 2010. On September 6, 2010, the Commonwealth was ordered to file a response to the Defendant's Amended PCRA, and the Commonwealth did so on November 7, 2011. (1249-01, 384-02 Appellate Docket No. 30). Judge Paul Pozonsky took no action on the Amended PCRA prior to his retirement on June 30, 2012. On October 27, 2012, this Court received a letter from the Defendant inquiring as to the status of his PCRA. This Court discovered that there were 1098 sentencing guidelines along with numerous PCRA petitions, 1925 Opinions, and miscellaneous matters upon Judge Pozonsky's departure. Upon review of the record herein, the Court determined that the Defendant's PCRA was still outstanding and issued this Opinion.

The first prosecution witness was Karen Renz, the mother of minor victim, M.R., and former companion of Defendant. Ms. Renz testified that she became aware of the sexual contact between her daughter and Mr. Durbin after her nephew read about the abuse in M.R.'s diary over Memorial Day weekend in 2001. She stated that her daughter was present when she read the diary and that her daughter was very upset. She then instructed the Defendant to leave her home. Ms. Renz contacted the police and the diary was turned over to them for investigation.

On cross-examination, Ms. Renz testified that she, the Defendant, and her five (5) children, including M.R., spent a considerable amount of time together as a family and that she had never observed any inappropriate touching by the Defendant in relation to M.R. Ms. Renz further stated that M.R. had never informed her of any inappropriate touching in the five (5) years Ms. Renz had a relationship with the Defendant.

On redirect, Ms. Renz stated that the Defendant would often spend time alone with M.R. and would take her places without the permission of Ms. Renz. She characterized the relationship between the Defendant and M.R. as especially close. She also indicated that M.R. never recanted or changed her account of the abuse.

Corporal J. David Dryer of the Donegal Township Police testified as to his participation in the investigation. He stated that he was the officer dispatched to the scene following a complaint of child molestation. He found the victim, M.R., crying with her mother, her sister, and her cousin. He stated that they reported that Mr. Durbin had been molesting M.R. and then gave him the diary, directing him to the entries regarding the molestation. He stated that upon reading the entries, he took further statements from those present and then interviewed Mr. Durbin.

On cross-examination, the officer stated that he was not familiar with the Renz household apart from the present allegations, had no knowledge of any other claims of abuse and noticed no signs of the abuse on the victim during the investigation. The officer further testified that M.R. never changed her story regarding these incidents.

Prior to the victim testifying, the Court and counsel engaged in a lengthy sidebar regarding the admissibility of the diary, due to the fact that it referenced incidents involving the Defendant and two other minors. The Court and counsel agreed not to circulate the diary to the

jury. Further, M.R. was permitted only to testify that this was her diary, that she did write about inappropriate contact with the Defendant, and that her cousin's reading of the diary started the investigation. M.R. could then describe the inappropriate contact, but only as it related to herself.

The victim, M.R., age 13 at the time of the trial, testified that she had not intended for anyone to read her diary. She explained that it was just a coincidence that her cousin read a page referencing the molestation. M.R. testified that she was embarrassed to learn that her cousin had read her diary and tried to prevent him from showing it to her mother. She further testified that the molestation began about a year after the Defendant began dating her mother and continued until her mother discovered the relationship. The molestation occurred in her mother's bedroom, in the Defendant's trailer, and in various other deserted areas. M.R. stated that the Defendant would tell her that she should only lose her virginity to him and that he would marry her. She also said that Mr. Durbin told her that if anyone found out about the molestation, her mother would be hurt. M.R. testified that the molestation consisted of the Defendant placing his erect penis in her mouth on at least ten (10) to fifteen (15) different occasions, attempting to place his erect penis in her vagina on more than twenty (20) occasions, placing his fingers in her vagina on numerous occasions, and touching her breasts and buttocks. The victim testified that she did not like what the Defendant was doing to her, but did not say anything for fear of him hurting her mother. On cross-examination, M.R. stated that most of the sexual encounters between herself and Mr. Durbin occurred in the time period between when he returned to the home after work and when he picked up the victim's mother from her place of employment.

Following the victim's testimony, Ethan Ward, Chief of Police for Donegal Township, testified. Chief Ward testified that the victim related to police that the incidents of molestation

occurred over a period of years. He further provided that the physical examination came back as inconclusive. Chief Ward testified that, in all of the interviews, the victim never recanted her statements or gave inconsistent accounts. At the close of the Commonwealth's case, the Court dismissed the charge of Unlawful Contact or Communication with a Minor.

The defense called the victim's cousin, Robert Ealy, who first discovered the diary. Mr. Ealy, age 15, stated that he found the diary in the living room while searching for paper, and became concerned when he saw the word "molest". He stated that he immediately contacted his aunt, Karen Renz, the victim's mother, and took the diary to her. He testified that when the victim saw him approaching her mother to deliver the diary, she became upset and attempted to stop him.

The defense then called Virginia Wright, a longtime family friend of the Defendant, as a character witness. At a sidebar, the Commonwealth indicated that, if Ms. Wright testified to the Defendant's good character, they would be introducing evidence of the same character trait. The Assistant District Attorney asked if defense counsel was aware of the Defendant's prior indecent assault convictions in other states. At that point, defense counsel ceased direct examination of Ms. Wright.

Following another sidebar regarding the introduction of the results of the medical examination, the defense chose not to introduce the entire report into evidence. The defense further chose not to request a recess in order to find and produce Melanie Caldwell. Ms. Caldwell was the nurse involved in the medical examination of the victim and failed to appear, even though she had been subpoenaed by the defense. Mr. Durbin was advised of his rights to testify and to remain silent. Following consultation with Attorney Winter, he chose not to testify.

The victim was next called as a hostile witness for the purpose of showing that her testimony regarding the place of the last sexual encounter was inconsistent with her preliminary hearing testimony. After another sidebar, the Court permitted the Defendant to call M.R. The victim read her preliminary hearing testimony and stated that the incident referenced at that hearing was, in fact, the last sexual encounter with the Defendant.

Nurse Caldwell finally appeared, but the Defendant's counsel informed the Court that the defense no longer wished to call her to testify and would simply rely on the information regarding the inconclusive nature of the medical exam, which had previously been testified to by Chief Ward.

The Defendant changed his mind and wanted to take the stand. Attorney Winter again reviewed with Mr. Durbin his right to remain silent. The Defendant responded that he understood his right and was taking the stand knowingly and voluntarily. Mr. Durbin testified that he had a good relationship with the victim, her mother and family. He stated that he considered himself a father to the victim and her siblings, and would never do anything to hurt them. The Defendant stated that any touching that could be considered inappropriate might have been brushing up against them in the hall or maybe giving the victim a big hug. On cross-examination, the Assistant District Attorney asked Defendant if he "had been deceptive about [his] past to [Ms. Renz]." Mr. Durbin admitted that he had lied to Ms. Renz about his past because he felt she would leave him if she knew. The defense then rested. It should be noted that neither side elaborated on the references to Mr. Durbin's past.

Analysis

1. Ineffective Assistance of Counsel Regarding the Calling of Witnesses

The Defendant claims that trial counsel was ineffective for failing to call (a) character witnesses, (b) alibi witnesses and (c) credibility witnesses. His Amended PCRA lists seven (7) witnesses that would testify regarding alibi, character, or credibility of the victim.

The Defendant claims that Guy Rush, Lloyd Ealy, Jr., Jacob Wells, and Timothy Reams would testify that the Defendant's work schedule would require him to be at work during the time of the incidents and provide character testimony. The Court notes that the Defendant does not claim that the witnesses could testify that Defendant was actually in their presence for each of the thirty (30) or more incidents scattered over more than five (5) years. Mr. Durbin also claims that Lloyd Ealy, Jr., Timothy Reams, Robert Ealy, Frank White, and Loraine Ealy would testify as to the victim's "issues regarding credibility". (Amended PCRA).

The general standard for proving ineffective assistance of counsel is well established. In *Commonwealth v. Montalvo*, the Supreme Court of Pennsylvania held:

> Appellate courts presume that trial counsel was effective. To rebut this presumption, Appellant must demonstrate that: 1) the underlying claim is of arguable merit; 2) counsel had no reasonable strategic basis for his or her action or inaction; and 3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. Petitioner bears the burden of proving all three prongs of the test.

986 A.2d 84, 102 (Pa. 2009) (citations omitted).

Specifically, the standard for proving the ineffectiveness of counsel based on a failure to call witnesses is as follows:

> When raising a failure to call a potential witness claim, the PCRA petitioner satisfies the performance and prejudice requirements . . . by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Johnson, 966 A.2d 523, 536 (Pa. 2009) (citations omitted).

Further, the Supreme Court of Pennsylvania has held that it is the "[a]ppellant's burden to demonstrate that trial counsel had no reasonable basis for declining to call . . . a witness." *Commonwealth v. Washington*, 927 A.2d 586, 599–600 (Pa. 2007).

a. Character Witnesses

The Defendant claims that Guy Rush, Lloyd Ealy, Jr., Jacob Wells, and Timothy Reams would provide character testimony for him. Pa. Rules of Evidence (Pa.R.E.) Rule 404 controls the admission of character evidence. The pertinent part provides:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. In a criminal case, evidence of a pertinent trait of character of the accused is admissible when **offered by the accused**, or by the prosecution to rebut the same. If evidence of a trait of character of the alleged victim of the crime is offered by an accused and is admitted under subsection (2), **evidence of the same trait of character** of the accused is admissible if offered by the prosecution.

Pa.R.E. Rule 404(a)(1) (emphasis added).

Mr. Durbin's claim fails for several reasons. First, the Defendant failed to establish that the proposed witnesses could actually testify to a relevant character trait in the form of reputation evidence of fine moral character as required by Pa.R.E. Rule 405. Second, and more significantly, defense counsel made a reasonable strategic decision not to offer evidence of Defendant's character, as doing so would have allowed the prosecution to introduce Defendant's two prior in-state convictions; the first for indecent assault and corruption of minors (CP-22-CR-0000635-1993) and the second for indecent assault without the consent of another (CP-02-CR-0009048-1999). In fact, defense counsel did call a character witness, Virginia Wright, but quickly abandoned direct examination, as he did not wish to risk the possible introduction of the Defendant's prior convictions. Such was a prudent and reasonable tactical decision. The Court thus, finds that the Defendant failed to establish that his trial counsel had no reasonable basis for

declining to call character witnesses and, hence, defense counsel's failure to call character witnesses was not ineffective.

The Defendant cited the case of *Commonwealth v. Weiss*, 606 A.2d 439 (Pa. 1992), as an example of defense counsel who was found to be ineffective for failure to call character witnesses. Same is factually distinguishable. In *Weiss*, the proposed witnesses were all capable of giving reputation evidence, a claim the Defendant in the present case does not make. *Weiss*, 606 A.2d at 442-443. Weiss was accused by his wife, and the proposed witnesses were, in fact, the *parents* of defendant's wife. *Id.* at 442. It would be incongruous to compare the impact of such testimony with the possible testimony of the witnesses proffered herein. In *Weiss*, the character of the accuser was doubtful as the wife had a prior conviction for the unauthorized use of a credit card. *Id.* Here the accuser had no such reputation for dishonesty

<u>Alibi Witnesses</u>

The Supreme Court of Pennsylvania defined an alibi defense as one "that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." *Commonwealth v. Hawkins*, 894 A.2d 716, 717 (Pa. 2006) (quotations omitted). The Defendant claims that Guy Rush, Lloyd Ealy, Jr., Jacob Wells, and Timothy Reams will "confirm the defendant's work schedule during the time of the alleged assaults. The witness[es] will testify that the defendant's work requirements would require him to be at work until 4:30 p.m. at the time of the alleged criminal activity." (Amended PCRA). These witnesses would be incapable of providing alibi testimony for two reasons. First, the witnesses do not claim to know that the Defendant was actually *present* at work at the time of the assaults, but merely that his "work requirements would require him to be at work[.]" (Amended PCRA). Second, the Defendant wrongly implies that the sexual

assaults occurred at consistent times and places which conflicted with his work schedule. In fact, the victim testified that there were not "set days" on which assaults occurred. (T.T. 66: 16-17). She testified that the assaults often took place after the Defendant came home from work, (T.T. 65: 7-12). M.R. also testified that the assaults took place when the Defendant removed her from her home to take her to a variety of places including others' trailers and even a "deserted road". (T.T. 48: 16-20).

The victim's testimony portrays an ongoing and seemingly random series of assaults for which it would be impossible to elicit alibi testimony "that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." *Hawkins*, 894 A.2d at 717. The Court, thus, finds that the Defendant failed to establish that defense counsel had no reasonable basis for declining to call the alibi witnesses. Hence, defense counsel's failure to call these alibi witnesses was not ineffective.

c. <u>Credibility Witnesses</u>

Mr. Durbin claims that Lloyd Ealy, Jr., Timothy Reams, Robert Ealy, Frank White, and Loraine Ealy would have testified as to the victim's "issues regarding credibility". (Amended PRCA). The Defendant must plead and prove that "the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial." *Johnson*, 966 A.2d at 536. When alleging prejudice, a defendant is required to prove that "**but for** the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." *Id.* (emphasis added).

Mr. Durbin pled no particular facts that reveal just how the proposed witnesses might contradict the victim's testimony. More importantly, he did not identify "issues regarding credibility".

A review of the trial record reveals some minor contradictions in testimony. As to the location of the last assault, the victim testified in court that it took place in her sister's trailer, but in earlier testimony she identified the location as her mother's bedroom. (T.T. 107-109). As to the number of times that she was assaulted, defense counsel attempted to elicit testimony showing that her estimation of both the number and frequency of the assaults was inconsistent. (T.T. 63-65). However, the prosecution was able to rehabilitate the witness by eliciting testimony that the number had always been an estimate when he asked: "It was whenever. You can only estimate maybe two or three times a week or two or three times a month?" (T.T. 66: 19-21). The victim responded: "Yes." (T.T. 66: 22). Defense counsel did attempt to impeach the victim as to slight discrepancies concerning the location of the last assault and the frequency of the assaults. (T.T. 108-109; 66: 19-22).

At least three witnesses testified that the victim never recanted her story, and that it remained consistent. (T.T. 31: 19-25) (Karen Renz); (37: 12-16) (Cpl. David Dryer); (71: 2-7) (Chief Ethan Ward). The Court notes that in regards to the credibility of the victim's story, the Defendant himself made an inculpatory statement when he was interrogated. The interrogating officer testified that Mr. Durbin said, "Maybe I need help," when discussing contact with the girls in the home. The weight of the evidence supports the guilty verdict and defense counsel's failure to call witnesses to attack the credibility of a 13-year-old girl was not ineffective.

2. **Ineffective Assistance of Counsel Regarding the Competency of Victim**

The Defendant alleges that defense counsel was ineffective in failing to question the competency of the 13-year-old victim of the sexual abuse.

In *Commonwealth v. Gaerttner*, the Superior Court of Pennsylvania found that a 10-year-old victim of sexual assault, who was 11 years old at the time of testifying, was a competent witness and, therefore, defense counsel could not be found ineffective for failing to raise the issue of her competency. 484 A.2d 92, 98 (Pa. Super. 1984); *see also In Interest of J.R.*, 648 A.2d 28, 31 (Pa. Super. 1994). The Court must decide whether the witness was indeed incompetent to testify and whether such testimony prejudiced the defendant for a determination of ineffective assistance for failure to challenge competence.

The Supreme Court of Pennsylvania has recently summarized the nature of the inquiry in cases such as this. The Court stated:

> Although competency of a witness is generally presumed, Pennsylvania law requires that a child witness be examined for competency. As we have recently reiterated, this Court historically has required that witnesses under the age of fourteen be subject to judicial inquiry into their testimonial capacity. A competency hearing of a minor witness is directed to the mental capacity of that witness to perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy, and to tell the truth. In Pennsylvania, competency is a threshold legal issue, to be decided by the trial court.

Commonwealth v. Hutchinson, 25 A.3d 277, 289-290 (Pa. 2011) (citations and quotations omitted).

The "standard of review of a trial court ruling on competency is for an abuse of discretion." *Commonwealth v Delbridge*, 859 A.2d 1254, 1257 (Pa. 2004) (citations omitted). The Court has elaborated, saying that "[a]n abuse of discretion is not merely an error of judgment[.] [I]f in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will . . . discretion is abused." *In re Doe*, 33 A.3d 615, 625-626 (Pa. 2011) (citations and quotations

omitted). The scope of review in determining competency is "plenary as this court may review the entire record in making its decision." *Delbridge*, 859 A.2d at 1257.

It is well established that "[a] party who challenges the competency of a minor witness must prove by clear and convincing evidence that the witness lacks the minimal capacity . . . (1) to communicate, (2) to observe an event and accurately recall that observation, and (3) to understand the necessity to speak the truth." *Commonwealth v. Pena*, 31 A.3d 704, 707 (Pa. Super. 2011) (citations and quotations omitted).

It is true that taint "speaks to the second prong of the competency test," and is regarded as a legitimate question in a case of child sexual abuse. *Commonwealth v. Delbridge, 855 A.d.* 27, 40 (Pa. 2003). Taint is defined as:

> the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify.

Id. at 35. However, the Superior Court of Pennsylvania has held that "[t]hese concerns clearly become less relevant as a witness's age increases, ultimately being rendered totally irrelevant as a matter of law by age fourteen." *Commonwealth v. Judd*, 897 A.2d 1224, 1229 (Pa. Super. 2006). Moreover, "discretion nonetheless resides in the trial judge to make the ultimate decision as to competency." *Commonwealth v. Hunzer*, 868 A.2d 498, 507 (Pa. Super. 2005) (citations and quotations omitted).

The record reveals no basis for the Defendant's competency claim as same clearly confirms that the 13-year-old victim fulfilled the three requirements of competency. The victim, who was on the cusp of legal competency, demonstrated an understanding of the questions, to which responsive answers were given, an ability to recall the relevant events, and an appreciation of the need for honesty. The Assistant District Attorney directly asked the victim several

questions to help establish competency. He elicited testimony that she received good grades; namely, "one B and the rest A's." (T.T. 44: 8). He inquired if she understood what it meant to take an oath, to which she responded, "[y]ou're supposed to tell the truth and you're not supposed to lie." He also asked her about the consequences of lying, and she responded that if one lied under oath, that "they'll find out and something bad will happen." (T.T. 4416-17). He concluded questioning by asking, "[i]s that what you're going to do today is just tell the truth as to what happened?" (T.T. 44: 18-19). The victim responded, "[y]es." Furthermore, the trial judge, in his 2008 opinion, stated that:

> the victim testified at the preliminary hearing, at which time defendant's preliminary hearing counsel, Glenn Alterio, Esquire, Washington County Public Defender, engaged in extensive cross-examination and explored the issue of competency. All things considered, the 13-year-old victim was determined by this Court to be competent to testify at trial.

(January 14, 2008, Opinion).

The Defendant was not prejudiced by defense counsel's failure or decision not to request a competency hearing, and the claim must fail.[2]

3. <u>Violation of Defendant's Right to Speedy Trial pursuant to Pa.R.Crim.P. 600</u>

The Defendant complains that his right to a speedy trial, pursuant to Pa.R.Crim.P. 600 ("Rule 600") was violated. He claims: (a) that the Court erred when it granted him nominal bail at his Rule 600 hearing rather than dismissing the cases outright, and (b) that appellant counsel was ineffective for failing to raise this matter on direct appeal. (Amended PCRA). Rule 600 provided:

a. Dismissal of Charges pursuant to Pa.R.Crim.P. 600

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[2] As to prejudice, Defendant argues that "in challenging [the 13-year-old victim's] competency, the jury in their deliberations could have very well put less weight upon the testimony of the commonwealth's [sic] witness." (Amended PCRA). Defendant's argument is misplaced. First, a competency hearing as to a child witness is properly conducted outside the presence of the jury. *Commonwealth v. Washington*, 722 A.2d 643, 647 (Pa. 1998). Second, the argument does not speak to the 13-year-old victim's competency to testify, but rather the 13-year-old victim's credibility as a witness.

> (2) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is incarcerated on that case, shall commence no later than 180 days from the date on which the complaint is filed.
>
> (3) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.
>
> . . .
>
> (E) No defendant shall be held in pre-trial incarceration on a given case for a period exceeding 180 days excluding time described in paragraph (C) above. Any defendant held in excess of 180 days is entitled upon petition to immediate release on nominal bail.

Pa.R.Crim.P. 600(A-E).

The Supreme Court of Pennsylvania held that "the only situation under Rule [600] which provides for **dismissal** of the charges is where a defendant on bail is not brought to trial within 365 days of the date on which the complaint against him is filed[.]" *Commonwealth v. Abdullah*, 652 A.2d 811, 813 (Pa. 1995) (emphasis added).

The criminal complaint at docket number 1249-01 was filed against the Defendant on May 29, 2001. (1249-01 Appellate Docket No. 7). The Defendant filed a Motion to Dismiss under Pa.R.C.P. 600 on December 19, 2001. (1249-01 Appellate Docket No. 9). The Court did not dismiss the charges, but reduced the Defendant's bond to ROR and released him to an Allegheny County detainer. (1249-01 Appellate Docket No. 11). Mr. Durbin entered a plea of guilty to various offenses at both case numbers on April 1, 2002, which was 308 days after the filing of his criminal complaint. He filed a Motion to Withdraw Guilty Plea on April 17, 2002, which was granted by the Court on May 17, 2002. (1249-01 Appellate Docket No. 22). Jury trial began on July 15, 2002.

The Superior Court of Pennsylvania held that "[f]or Rule [600] purposes, trial commences when a guilty plea is entered by a defendant and accepted by the trial court.

Furthermore, when a defendant subsequently withdraws his guilty plea, the Commonwealth has 120 days to commence new trial[.]" *Commonwealth v. Brown*, 578 A.2d 461, 464-465 (Pa. Super. 1990) (citations omitted).

As the Defendant's plea was entered within the 365 day period, and "the only situation under Rule [600] which provides for **dismissal** of the charges is where a defendant on bail is not brought to trial within 365 days of the date on which the complaint against him is filed[,]" dismissal was not appropriate. *Abdullah*, 652 A.2d at 813. When the Court granted the withdrawal of the Defendant's guilty plea, the Commonwealth "ha[d] 120 days to commence new trial[.]" *Brown*, 578 A.2d at 464-465. Hewas tried 59 days after the entry of the order granting his guilty plea withdrawal and, therefore, no Rule 600 violation occurred.

b. Ineffectiveness of Counsel for Failing to Raise Rule 600 Issues on Direct Appeal.

The Defendant claims that appellate counsel was ineffective for failing to raise Rule 600 issues on direct appeal. The general standard for proving ineffective assistance of counsel is well-established. The Supreme Court of Pennsylvania has stated:

> Appellate courts presume that trial counsel was effective. To rebut this presumption, Appellant must demonstrate that: 1) the underlying claim is of arguable merit; 2) counsel had no reasonable strategic basis for his or her action or inaction; and 3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. Petitioner bears the burden of proving all three prongs of the test.

Montalvo, 986 A.2d at 102 (citations omitted).

The Defendant's claim fails on all prongs. First, there was no violation of Rule 600. Second, prior counsel petitioned for and received nominal bail under Rule 600, and Defendant entered a plea within 365 days from the filing of the Criminal Complaint. Third, Defendant was found guilty of the crime. Hence, the Court was unable to conclude that, but for appellant counsel's inaction, the outcome of the proceedings would have

been different. The Defendant's claim relative to Rule 600 is without merit. Accordingly, this Court enters the following:

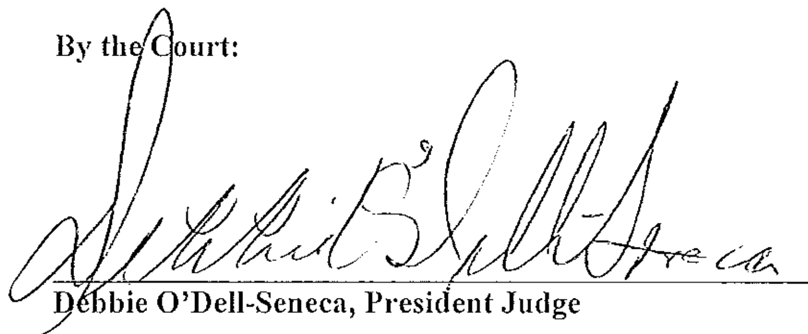
ORDER

AND NOW, this 2nd day of October, 2013, upon consideration of the Defendant's Amended Petition for Post-Conviction Collateral Relief, and a review of the record, the Court finds that the grounds for challenge presented in said Petition are patently frivolous, not supported in law or in fact, no genuine issues of material fact entitle the Defendant to relief, and no purpose would be served by any further proceeding.

Therefore, pursuant to Pa.R.Crim.P. 907, it is hereby ORDERED, ADJUDGED and DECREED that the Defendant's Petition for Post-Conviction Collateral Relief is DENIED.

Pursuant to Pa.R.Crim.P. 907(4), the Defendant is hereby advised that this is a final order from which an appeal may be filed with the Superior Court of Pennsylvania. The Defendant is further advised that such an appeal must be filed within thirty (30) days of the date of this Order.

By the Court:



Debbie O'Dell-Seneca, President Judge