

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DWAYNE EDWARD MAURER

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2069 EDA 2012

Appeal from the PCRA Order June 12, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0001986-2010

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

FILED AUGUST 20, 2013

Dwayne Edward Maurer appeals from the order of the Court of Common Pleas of Montgomery County dismissing without a hearing his petition brought pursuant to the Post Conviction Relief Act (PCRA).¹ We affirm.

On December 7, 2010, Maurer pled guilty to two counts of involuntary deviate sexual intercourse (IDSI) with a child less than thirteen years old. Maurer indicated that he understood that he would be subject to the lifetime registration requirements of Megan's Law. N.T. Guilty Plea, 12/7/10, at 6. On March 18, 2011, the trial court sentenced Maurer to ten to twenty years'

¹ 42 Pa.C.S. §§ 9541-9546.

imprisonment and a consecutive term of ten years' probation. He did not file a direct appeal.

On February 3, 2012, Maurer filed a *pro se* PCRA petition, and shortly thereafter, the court appointed Scott C. McIntosh, Esquire, to represent him. On April 27, 2012, counsel mailed a "no merit" letter to Maurer in accordance with ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. 1988), explaining that Maurer was not eligible for relief based on the allegations in the petition, and that he could find no additional meritorious issues to raise in an amended petition. The court subsequently terminated Attorney McIntosh's appointment as counsel.

On May 16, 2012, the trial court issued a notice of intent to dismiss the PCRA petition pursuant to Pa.R.Crim.P. 907. On June 8, 2012, Maurer filed a "Motion to Amend PCRA Petition," which the trial court deemed a response to the notice of intent to dismiss. By order dated June 11, 2012, the court dismissed Maurer's PCRA petition.

Maurer, acting *pro se*, filed a timely notice of appeal, and raises the following issues for our review:

1. Whether the lower court erred and abused [its] discretion in dismissing [Maurer's] PCRA petition where the lower court's failure to comply with and/or follow Pa.R.A.P. Rule 1931, resulted in defective transcripts of both this guilty plea and sentencing precluding any type of meaningful review by both the lower and appellate courts?
2. Whether the sentencing court abused [its] discretion, and illegally sentenced [Maurer] to comply with the registration requirement of 42 Pa.C.S.A. § 9793, a statute which has been repealed for over ten years?

3. Whether the trial court committed reversible error in failing to [elicit] from [Maurer] information required or inform [Maurer] of information required by Pa.R.Crim.P. 590, before [accepting] his guilty plea resulting in a defective plea colloquy, and [Maurer] entering an unknowing, involuntary, and unintelligent plea, in violation of the Fourteenth Amendment of the United States Constitution?
4. Whether all prior counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution?

Brief of Appellant, at 5.

“Our 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. The PCRA court’s findings will not be disturbed unless there is no support for the findings in the certified record.”

Commonwealth v. Garcia, 23 A.3d 1059, 1061 (Pa. Super. 2011) (citations omitted).

Section 9543(a)(2) of the PCRA provides that to be eligible for relief a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the following:

- (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (ii) Ineffective assistance of counsel which, in the circumstances of the case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement

caused the petitioner to plead guilty and the petitioner is innocent.

- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

. . .

- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S. § 9545(a)(2). The petitioner must also establish that the allegation of error has not been previously litigated or waived. 42 Pa.C.S. § 9545(a)(3).

Maurer first claims that the transcripts of his guilty plea and sentencing proceedings contain errors, and that contrary to the requirements of Pa.R.A.P. 1922, he was not given the opportunity to make objections to the transcripts. Pursuant to section 9544(b) of the PCRA, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, . . . on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. §9544(b). Because Maurer failed to file a direct appeal of his March 18, 2011 judgment of sentence, he waived his opportunity to challenge the procedure by which the transcripts were prepared and filed. Accordingly, we are unable to review this claim.

Maurer next argues that this guilty plea colloquy was defective. During the guilty plea proceeding, the following exchange took place between the assistant district attorney (ADA) and Maurer:

Q Sir, you understand that part of this guilty plea means that you'll have to register with Megan's Law for your lifetime?

Do you understand that?

A: Yes, I do.

N.T., Guilty Plea, 12/7/10, at 6.

At sentencing on March 18, 2011, the following exchange took place between the court and Maurer:

Q: [T]here are certain Megan's Law registration and supervision requirements that [the ADA] went over with you on December 7th that apply to you simply because entered a plea and you will now stand convicted of involuntary deviate sexual intercourse of a minor under the age of 13.

Do you understand that?

A: Yes, sir.

N.T., Sentencing, 3/18/11, at 10.

Maurer asserts that the portion of his sentence requiring him to comply with the lifetime registration requirements of Megan's law is illegal. Under 42 Pa.C.S. § 9795.1(b)(2), it is clear that any individual convicted of IDSI, like Maurer, is subject to lifetime registration. However, Maurer argues that the court abused its discretion and imposed an illegal sentence due to incorrect citations to the relevant statutory section of Megan's Law.

At sentencing, the court ordered that Maurer “will comply with Megan’s Law requirements of 42 [Pa.C.S. §] 9793.” *Id.* at 20. Furthermore, on the preprinted sentencing form, which was revised in September 2009, the following box is checked off indicating as a special condition of sentence: “Comply with Megan’s Law 42 PA C.S. 9793 registration requirements.” Maurer correctly points out that section 9793 was repealed in 2000. However, it was immediately replaced by section 9795.1, which, as noted, provides for lifetime registration for offenders such as Maurer. Nevertheless, Maurer maintains that his registration requirement is illegal.

Maurer is not entitled to relief on this claim under the PCRA “because his registration requirement does not qualify as a sentence of incarceration, probation, or parole.” *Commonwealth v. Williams*, 977 A.2d 1174, 1177 (Pa. Super. 2009). Accordingly, we are precluded from reaching the merits of this issue, and affirm the trial court’s dismissal of this claim.

Maurer next asserts that the trial court committed reversible error by conducting a defective guilty plea colloquy. As we noted with respect to the first issue on appeal, pursuant to section 9544(b) of the PCRA, “an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, . . . on appeal or in a prior state postconviction proceeding.” 42 Pa.C.S. § 9544(b). Because Maurer did not file a direct appeal of his judgment of sentence, this issue is waived and we are unable to review it.

Maurer next asserts several claims of ineffective assistance of counsel. “[T]o prove trial counsel ineffective, the petitioner must demonstrate that:

(1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) the petitioner was prejudiced by counsel's act or omission." **Commonwealth v. Pierce**, 527 A.2d 973, 975 (Pa. 1987). "It is well-settled that counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." **Commonwealth v. Busanet**, 54 A.3d 35, 45 (Pa. 2012) (citing **Strickland v. Washington**, 466 U.S. 668 (1984)).

Maurer alleges that all prior counsel were ineffective for failing to protect his right to a grand jury presentment as guaranteed by the Fifth Amendment to the Constitution of the United States. There is no arguable merit to this claim because "although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury." **Alexander v. Louisiana**, 405 U.S. 625, 633 (1972). Accordingly, no relief is due on this claim.

Maurer next claims that all prior counsel were ineffective for failing to assert that the lifetime registration provisions of Megan's Law should not apply to him. His argument rests solely on the fact that the trial court and the sentencing form refer to section 9793 of Megan's Law, which was repealed several years before he was sentenced. Maurer's argument ignores the fact that section 9793 was replaced by section 9795.1(b)(2), which provides for lifetime registration for individuals convicted of IDSI. Because

the lifetime registration requirement clearly applies to Maurer, there is no arguable merit to his position that counsel was ineffective for failing to raise the issue.

Maurer next asserts that PCRA counsel was ineffective for failing to raise and litigate the issue of alleged errors in the transcripts of his guilty plea and sentencing proceedings. As we have explained above, these claims are waived for purposes of the PCRA, and therefore counsel was not ineffective for failing to raise them. ***See Pierce, supra.***

Maurer further maintains that trial counsel was ineffective for facilitating an unknowing, unintelligent and involuntary guilty plea, and that PCRA counsel was ineffective for failing to pursue this issue. However, in his written guilty plea, Maurer indicated that his attorney had explained to him “all the things that a person must have done to be guilty of the crime or crimes” to which he was pleading guilty. Guilty Plea, 12/7/10, at ¶14. He also admitted that he “did all the things a person must have done to be guilty of the crime or crimes” to which he was pleading guilty. ***Id.*** at ¶15. He also agreed to incorporate into the record the factual accusations from the affidavit of probable cause, ***id.*** at ¶35. The affidavit of probable cause, which unequivocally supports Maurer’s convictions for IDSI, states, in part:

[Juvenile] stated that Maurer would force her to perform oral sex on him and this occurred after she was awaken[ed] by Maurer at night. Maurer would also masturbate and then ejaculate on [Juvenile’s] body. She related that he began masturbating on her body around age 10 until age 12. She state[d] that Maurer did attempt to forcibly penetrate her with his penis several times between age 10 and age 12. She related that she experienced

pain from Maurer's attempted penetration of her vagina. She stated that Maurer penetrated her vagina with his fingers on multiple occasions between age 10 and age 12.

Affidavit of Probable Cause, 10/13/09, at 1.

It is well-settled that "a defendant is bound by the statements which he makes during his plea colloquy." **Commonwealth v. Barnes**, 687 A.2d 1163 (Pa. Super. 1996). Furthermore, an affidavit of probable cause may state an adequate basis on which to base a guilty plea. **Commonwealth v. Fluharty**, 632 A.2d 312, 218 (Pa. Super. 1993). In light of the written colloquy and the affidavit of probable cause which was incorporated into the record, there was no reasonable basis to assert a claim of ineffective assistance of trial counsel in facilitating Maurer's guilty plea.

Maurer's final claim is that his guilty plea was wrongfully induced because counsel informed him that the maximum aggregate sentence he could receive for two counts of IDSI was forty years. The court confirmed this at sentencing. N.T. Sentencing, 3/18/11, at 12. However, Maurer now asserts that pursuant to section 3132(d) of the Crimes Code, 18 Pa.C.S. § 3123(d)(1), a person convicted of committing IDSI with a child under 13 may be sentenced to a maximum of forty years per count, thus meaning that he faced a possible sentence of eighty years. In light of the fact that Maurer's negotiated sentence of ten to twenty years' imprisonment followed by ten years' probation is more lenient than a sentence of eighty years' imprisonment – or even the forty years that he believed was possible – he has failed to establish prejudice. **Pierce, supra.**

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Accordingly, the court did not err as a matter of law or abuse its discretion in dismissing Maurer's PCRA petition.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambetta", written over a horizontal line.

Prothonotary

Date: 8/20/2013