

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-303-2015
v.	:	
	:	
LAMAR L. DAVIS,	:	PCRA
Defendant	:	

OPINION AND ORDER

On March 20, 2017, Counsel for the Defendant filed a Petition to Withdraw from Representation of Post-Conviction Collateral Relief pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

Background & Procedural History

On February 12, 2015, Defendant was arrested after a traffic stop and was charged with Possession with Intent to Deliver (Cocaine)¹, False Identification to Law Enforcement Authorities², and a summary motor vehicle offense for failure to have all working lights on the vehicle³. Defendant was represented at trial by Attorney Jeffrey Frankenburger, and was found guilty on all counts in a non-jury trial before the Honorable Dudley N. Anderson. On October 13, 2015, Defendant was sentenced to a minimum of eighteen (18) months to a maximum of four (4) years in a state correctional facility for the Possession with Intent to Deliver charge. Defendant was additionally sentenced to one year of supervision consecutively to his incarceration for

¹ 35 P.S. § 780-113(a)(30).

² 18 Pa.C.S. § 4914.

³ 75 Pa.C.S. § 4303(b).

the False Identification to Law Enforcement Authorities charge, and to a fine of \$25.00 for the summary motor vehicle offense.

Through his appellate counsel Attorney Nicole Spring, Defendant filed a direct appeal to the Pennsylvania Superior Court. The Superior Court affirmed Defendant's sentence on September 16, 2016. On November 4, 2016, the Defendant filed a *pro se* Post-Conviction Relief Act, alleging that both Attorneys Frankenburger and Spring were ineffective because the trial court denied his suppression motion. On November 22, 2016, this Court entered an Order appointing Attorney Trisha Hoover Jasper as PCRA Counsel for Defendant in accordance with Pa. R. Crim. P. 904(C). In its Order, this Court directed Attorney Hoover Jasper to file either an Amended PCRA Petition or a Turner/Finley "no merit" letter. Attorney Hoover Jasper subsequently filed a Turner/Finley letter on March 18, 2017. After thorough review, this Court finds that there are no genuine issues of material fact, that the Defendant is not entitled to post-conviction collateral relief, and that no purpose would be served by any further proceedings.

Discussion

1) *Timeliness of Amended PCRA Petition.*

Under the Post Conviction Relief Act, a defendant has one (1) year after his judgment of sentence becomes final to request Post Conviction Relief unless circumstances exist that prevented the defendant from filing within one year, in which case he must file within sixty (60) days of when his claim could have been presented. 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii). Defendant was sentenced on October 13, 2015. Appellate counsel Attorney Nicole Spring filed a direct appeal to the Pennsylvania

Superior Court on Defendant's behalf, which affirmed the sentence on September 16, 2016. Thus, his judgment of sentence became final one (1) year later on September 16, 2017. The PCRA Petition filed November 4, 2016, is, therefore, timely⁴.

2) Eligibility for Relief Under the PCRA.

Incarcerated defendants, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by a preponderance of the evidence the following four components:

- 1) Defendant has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.
- 2) Conviction or sentence resulted from one or more of the following
 - i. Violation of the US or PA Constitution that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.
 - ii. Ineffective assistance of counsel – same undermining the truth determining process standard as above “undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place”.
 - iii. Plea of guilty induced where inducement caused Defendant to plead guilty when he is innocent.
 - iv. Improper obstruction by government officials of petitioner's appeal right where a meritorious appealable issue was properly preserved in the Trial Court.
 - v. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial had it been introduced.
 - vi. Imposition of sentence greater than the lawful maximum.
 - vii. Proceeding in a tribunal without jurisdiction.
- 3) Allegation of the error has not been previously litigated or waived; and
- 4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel⁵.

⁴ 42 Pa.C.S. § 9545(b)(3).

⁵ 42 Pa.C.S. § 9543.

Here, the Defendant avers that both his trial and appellate counsel, Attorneys Frankenburger and Spring, provided assistance of counsel which was so ineffective that the truth-determining process was undermined such that no reliable adjudication of guilt could have taken place. Defendant contends that this ineffectiveness was the result of Attorneys Frankburger and Spring's failure to argue that the Pennsylvania Due Process Clause does not require a showing of bad faith in his Motion to Suppress.

3) *Ineffective Assistance of Counsel for Failure to Raise a Claim on a Motion to Suppress.*

The Court's standard of review when evaluating a claim of ineffective assistance of counsel is unambiguous and has remained relatively unaltered since its promulgation in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987), in which the Supreme Court of Pennsylvania adopted the standard of review developed by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The court in Commonwealth v. Sneed, 899 A.2d 1067, 1076 (Pa. 2006) held, in relevant part:

[T]he constitutional ineffectiveness standard requires the defendant to rebut the presumption of professional competence by demonstrating that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different.

Id. (citations omitted). If any of the three prongs necessary to succeed on a claim of ineffective assistance of counsel is not satisfied, the claim must be rejected as a whole. Id. (citing Pierce, 786 A.2d at 221-23). Further, trial counsel is presumed

effective, and the burden of proving otherwise is on the defendant. Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999).

As the three prongs for ineffective assistance of counsel apply specifically to the failure to file a suppression motion, the Pennsylvania Superior Court has held, regarding merit, that “[t]he failure to file a suppression motion under some circumstances may be evidence of ineffective assistance of counsel. However, if the grounds underpinning that motion are without merit, counsel will not be deemed ineffective for failing to so move.” Commonwealth v. Metzger, 441 A.2d 1225, 1228 (Pa. Super. 1981). Regarding the ‘reasonable basis’ and ‘prejudice’ prongs, the Superior Court has held that “the defendant must establish that there was no reasonable basis for not pursuing the suppression claim and that if the evidence had been suppressed, there is a reasonable probability the verdict would have been more favorable.” Commonwealth v. Arch, 654 A.2d 1141, 1143 (Pa. Super. 1995) (citing Commonwealth v. Melson, 556 A.2d 836, 839 (Pa. Super. 1989)).

4) *Arguable Merit of the Claim.*

As indicated *supra*, a claim of ineffective assistance of counsel pursuant to the Post Conviction Relief Act will have merit if the underlying suppression motion would have been merited. Metzger, 441 A.2d at 1228. While this is the analysis used when a suppression motion is not made, whereas in the present case the Defendant’s argument is that the suppression motion that was filed did not sufficiently present the Defendant’s state due process argument, these failures are functionally equivalent in their impact and therefore warrant the same analysis.

As such, the analysis here turns to whether the underlying suppression motion sought by the Defendant would have been merited in this case. Because this Court finds that the Defendant's underlying suppression motion sought would have been fruitless even if it had been raised in the original suppression motion, this Court finds that the Defendant's claim of ineffective assistance of counsel fails and that the Defendant is not entitled to post-conviction relief.

Based on the Due Process Clause of the Fourteenth Amendment, the Pennsylvania Supreme Court clearly distinguished between two types of evidence in Commonwealth v. Chamberlain, 30 A.3d 381, 402 (Pa. 2011), and further identified the circumstances under which each type of evidence must be provided. Recognizing that defendants require "access to certain kinds of evidence prior to trial, so they may 'be afforded a meaningful opportunity to present a complete defense,'" id. (*citing* Commonwealth v. Snyder, 963 A.2d 396, 401 (Pa. 2009), the Court in Chamberlain recognized the types of evidence as follows:

This guarantee of access to evidence requires the prosecution to turn over, if requested, any evidence which is exculpatory and material to guilt or punishment, see Brady v. Maryland, 373 U.S. 83, and to turn over exculpatory evidence which might raise a reasonable doubt about a defendant's guilt, even if the defense fails to request it, see United States v. Agurs, 427 U.S. 97 (1976). Snyder, 963 A.2d at 401. If a defendant asserts a Brady or Agurs violation, he is not required to show bad faith.

Chamberlain, 30 A.3d at 402. The Court went on to recognize a second category of evidence: that which "is not materially exculpatory, but is potentially useful, that is destroyed by the state before the defense has an opportunity to examine it." Id. The Court went on to hold that, when the evidence in question is of this second category, "there is no federal due process violation 'unless a criminal defendant can show bad

faith on the part of the police. Id. (citing Arizona v. Youngblood, 488 U.S. 51, 58 (1988)).

The Court in Chamberlain defined the phrase ‘potentially useful’ as evidence of which “the most that can be said of it is that ‘it could have been subjected to tests, the results of which might have exonerated the defendant.’” Chamberlain, 30 A.3d at 403.

The Pennsylvania Supreme Court in Chamberlain further declined to “interpret [Pennsylvania’s] state Due Process Clause to provide more protection than its federal counterpart.” Id. at 403-04. Therefore, the only way of concluding whether there is merit to the argument that a finding of bad faith was not necessary in the Defendant’s suppression motion is to determine whether the misplaced, destroyed, or uncreated video footage of the traffic stop was exculpatory and material to guilt or only potentially useful.

The Court in Commonwealth v. Spotti, 94 A.3d 367, 383 (Pa. Super. 2014) (*en banc*) made explicitly clear that a missing video that may have something helpful for a defendant at trial is not materially exculpatory, as it is not possible to establish the materiality of whatever exists on the tape, and any suggestion that the recorded contents could be materially exculpatory are purely speculative. Id.

The Superior Court again utilized this logic in Commonwealth v. Williams, 154 A.3d 336, 340 (Pa. Super. 2017), where it reasoned that “[j]ust as this evidence could be materially inculpatory, so too could it be materially exculpatory. Having been permanently deprived of the opportunity to view the video, [Appellee] is precluded from any materially exculpatory evidence in it.” Id. Finally, in Spotti, the Court held

that because “there was no evidence that Trooper Armour acted in bad faith in failing to preserve the recording,” there could be no finding of bad faith. Spotti, 94 A.3d at 383. Similarly, in the present case, this Court took testimony from Officer Brown that “after the preliminary hearing, he checked for video of the stop, but there was no video. He testified that he did not know why there was no video . . . [and] that around the time of the stop, he lost an SD card.” Suppression Opinion, 7/17/2015, at 4. This Court further relied on the credibility of Officer Brown to find that the circumstances did not show bad faith. *Id.*

Because Pennsylvania’s state Due Process Clause does not provide more protection than its federal counterpart⁶, this Court’s analysis must be consistent with the established analysis which contrasts evidence which is exculpatory and material with that which is only potentially useful. Further, because a missing videotape can not be shown to be materially exculpatory because any suggestion as to the contents is purely speculation⁷, this Court finds that the contents of the missing video footage is potentially useful only, and that therefore a showing of bad faith is necessary for the Defendant to succeed on his suppression motion. Because the Defendant avers that his trial and appellate counsel were ineffective for failing to raise a state due process argument in his suppression motion when such an argument would have been fruitless, this Court finds that the Defendant’s claim of ineffective assistance of counsel has no merit, and his endeavor for post-conviction relief fails on this prong.

⁶ Chamberlain, 30 A.3d at 403-04.

⁷ Spotti, 94 A.3d at 383.

5) Reasonable Basis Designed to Effectuate Client's Interests.

In order to satisfy the 'reasonable basis' prong in an assertion of ineffective assistance of counsel as it relates to the failure to file a suppression motion—or, as identified *supra*, the failure to articulate a particular argument in a filed suppression motion—Defendant's counsel must have had no reasonable basis for not pursuing the suppression claim. Arch, 654 A.2d at 1143. The Pennsylvania Supreme Court has often premised its ineffective assistance of counsel analysis on the fact that the reasonable basis prong uses an objective reasonableness standard rather than a subjective standard. See, e.g., Commonwealth v. Tharp, 101 A.3d 736, 778 (Pa. 2014); Commonwealth v. Champney, 65 A.3d 386, 386 (Pa. 2013); Commonwealth v. Koehler, 36 A.3d 131, 132 (Pa. 2012). This proposition lends generously to the conclusion reached by in Koehler that “[w]ith regard to the reasonable basis prong, we will conclude that counsel's chosen strategy lacked a reasonable basis *only if* the petitioner proves that the alternative strategy not selected offered a potential for success substantially greater than the course actually pursued.” Id. (emphasis added).

These two propositions considered in tandem lead to the conclusion that if a defendant is not prejudiced by the decision (i.e. if there is not a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,” Strickland, 466 U.S. at 694) then counsel must have had an objective reasonable basis underlying its strategy. As analyzed *infra*, the Defendant was not prejudiced by his counsel's failure to bring a state due process argument that a showing of bad faith was not needed. Therefore, the recent language

in Koehler tying the prejudice and reasonable basis prongs inextricably together requires the conclusion that both Attorneys Frankenburger and Spring had an objective reasonable basis upon which they did not file a suppression motion more specifically pursuing a state due process claim. Koehler, 36 A.3d at 132.

6) *Prejudice of the Defendant's Right to a Fair Trial.*

As identified in Arch, 654 A.2d at 1143, prejudice exists in an ineffective assistance of counsel claim with regards to the suppression of evidence if, had the claim been brought originally, “there is a reasonable probability the verdict would have been more favorable.” Id. (citing Melson, 556 A.2d at 839). However, in the present case, there is not a reasonable probability that the verdict would have been more favorable for the Defendant if, as he is positing, his trial and appellate counsel had raised a state due process argument alleging no need for a showing of bad faith.

This is because, as identified in the analysis for the ‘merit’ prong *supra*, there was, in fact, a need for a showing of bad faith in order for the Defendant to succeed on his suppression claim. As such, the Defendant’s argument to the contrary would have been fruitless even if he brought it originally in his suppression motion. Therefore, the Defendant was not prejudiced by his counsel’s failure to bring a state due process argument that a showing of bad faith was not needed.

ORDER

AND NOW, this 27th day of June, 2017, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The **Motion to Withdraw as Counsel** filed **March 20, 2017**, is hereby **GRANTED** and Trisha Hoover Jasper, Esq. may withdraw her appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA
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