

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-196-2011; CR-630-2011
 :
 BILAL SABUR, :
 :
 Defendant :
 :
 OPINION AND ORDER

This matter came before the court on the Amended Post Conviction Relief Act (PCRA) petition filed on behalf of Defendant, Bilal Sabur (hereinafter “Sabur”). In an Opinion and Order entered on December 16, 2016, the court gave Sabur notice of its intent to dismiss several of his claims without holding an evidentiary hearing. However, the court scheduled an evidentiary hearing on three of Sabur’s claims. Specifically, the court granted a hearing on Sabur’s claims that trial counsel was ineffective for failing to: (1) interview Devon Darby; (2) request a jury instruction regarding “misidentification;” and (3) object based on 42 Pa. C. S. A. §5918 to the Commonwealth’s cross-examination of Sabur about his convictions for firearm offenses.

Sabur was the sole witness to testify at the evidentiary hearing. Sabur testified that he met trial counsel once at his preliminary hearing and the met and spoke once briefly prior to trial. Trial counsel did not question him about firearms; the Commonwealth did. Sabur indicated that he did not have an opportunity to discuss his prior criminal history with counsel. Counsel made an objection to the Commonwealth’s questioning of Sabur about his firearm convictions but, according to Sabur, she did not clarify what she was objecting to.

Sabur also testified that counsel did not discuss jury instructions with him. He

did not recall discussing his testimony with his attorney. He indicated that counsel did not prepare him for questioning or advise him of his right not to testify. He admitted that he spoke to counsel prior to jury selection, but claimed her discussions with him were about pleading to the crime, and were not about a defense to the charges.

DISCUSSION

Counsel is presumed effective and the defendant bears the burden of proving otherwise. *Commonwealth v. Fears*, 86 A.3d 795, 804 (Pa. 2014). In order to prevail on an ineffective assistance of counsel claim, a petitioner must show that the claim is of arguable merit, counsel's performance lacked a reasonable basis to effectuate the petitioner's interests, and prejudice. *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001); *Commonwealth v. Correa*, 664 A.2d 607, 609 (Pa. Super. 1995). Prejudice in this context means that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's unprofessional errors. *Commonwealth v. Johnson*, 139 A.3d 1257, 1272 (Pa. 2016).

The court finds that Sabur failed to meet his burden of proof. Sabur's evidence barely touched on the issues on which the court granted an evidentiary hearing.

Sabur claims that counsel was ineffective for failing to interview Devon Darby, who would have testified that Bernard Daniels admitted he was the shooter. Sabur, however, failed to call Devon Darby as a witness to so testify at the PCRA hearing, and he failed to call trial counsel to show that she did not have a reasonable basis to call Darby as a witness at trial. Therefore, this claim must fail.

Sabur also asserts that trial counsel was ineffective for failing to request a

“misidentification” jury instruction. Again, Sabur failed to call trial counsel as a witness to establish why she did not request such a jury instruction. Sabur’s own testimony did not even address this specific jury instruction. Quite simply, Sabur has failed to prove counsel’s ineffectiveness.

Sabur alleges that trial counsel was ineffective for failing to object, based on 42 Pa. C. S. A. §5918, to the Commonwealth questioning him about his prior convictions for firearm offenses. While it is true that trial counsel failed to make such an objection, Sabur failed to present any evidence to establish that counsel lacked a reasonable basis for failing to object, or that he was prejudiced as a result.

Section 5918 does not preclude Sabur’s firearm convictions from being admitted into evidence; it only precludes the Commonwealth from questioning Sabur about them. If trial counsel had objected based on section 5918, the court would have precluded the Commonwealth from questioning Sabur about his firearm convictions, but it would have permitted the Commonwealth to present evidence of his firearms convictions in rebuttal, because Sabur opened the door to this type of evidence when he testified that he did not carry firearms. Since evidence of Sabur’s firearm convictions would still have been admitted into evidence, the outcome of the proceedings would not have changed.

ORDER

AND NOW, this 29th day of June 2017, for the reason set forth in the

foregoing Opinion and in the Opinion and Order entered on December 6, 2016, the court DENIES Sabur's Amended Post Conviction Relief Act (PCRA) petition.

Sabur 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 requirements 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, Sabur may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to Bilal Sabur by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire
Matthew Slivinski, Esquire
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Work File