

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-410-2013
v.	:	
	:	
JASON GARDNER,	:	PCRA
Defendant	:	

ORDER

On January 9, 2013, Terrell Henderson-Littles was shot and killed in an alley in the City of Williamsport. On September 19, 2014, a jury found the Defendant guilty of second-degree murder¹, robbery (threatens with or intentionally puts in fear of serious bodily injury)², conspiracy to commit robbery³, and flight to avoid apprehension, trial, or punishment⁴. The jury found the Defendant not guilty of conspiracy to commit murder⁵, aggravated assault⁶, robbery (inflicts serious bodily injury)⁷, firearms not to be carried without a license⁸, prohibited offensive weapon⁹, and possessing instruments of crime¹⁰. On that same day, the Petitioner was sentenced to imprisonment for life without the possibility of parole.

Petitioner filed a Post Sentence Motion on September 26, 2014 which was denied by this Court on January 26, 2015. On January 27, 2015, Petitioner filed a notice

¹ 18 Pa.C.S. § 2502(b).
² 18 Pa.C.S. § 3701(a)(1)(ii)
³ 18 Pa.C.S. § 903(a) and 18 Pa.C.S. § 3701(a)(1).
⁴ 18 Pa.C.S. § 5126(a).
⁵ 18 Pa.C.S. § 903 and 18 Pa.C.S. § 2502
⁶ 18 Pa.C.S. § 2702(a)(1).
⁷ 18 Pa.C.S. § 3701(a)(1)(i).
⁸ 18 Pa.C.S. § 6106(a)(1).
⁹ 18 Pa.C.S. § 908(a).
¹⁰ 18 Pa.C.S. § 907(b).

of appeal to the Superior Court. On April 11, 2016 the judgment of sentence was affirmed by the Superior Court. On May 10, 2016, trial counsel filed a petition for allowance of appeal which was denied September 19, 2016. No further appeals were taken; therefore Petitioner's judgment of sentence became final on December 19, 2016¹¹. On March 30, 2017, Petitioner filed his *pro se* petition seeking post-conviction relief (PCRA). His petition is timely. See 42 Pa. C.S.A. 9545(b)1.

On April 24, 2017 Trisha Hoover Jasper, Esquire counsel was appointed to represent Petitioner and an initial PCRA conference was scheduled for July 11th, 2017. That conference date was continued and was rescheduled for November 13, 2017.

Petitioner advances one issue in his petition. Petitioner alleges that the Commonwealth used a visual aid during closing argument which was not presented to trial counsel or to the judge in advance which the Court allowed over trial counsel's objection and as a result trial counsel was ineffective for failing to request a cautionary instruction be given to the jury.

Incarcerated Petitioners, 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) Petitioner 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 U.S or PA Constitution that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

¹¹ December 18, the true 90 day run date was a Sunday in 2016.

- 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 Petitioner 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 counsel.

42 Pa.C.S. § 9543 (eligibility for relief).

To make a claim for ineffective assistance of counsel, a Petitioner must show 1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. *Commonwealth v. Cooper*, 941 A.2d 655, 664 (2007). See *Commonwealth v. Carpenter*, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. *Cooper*, at 664. (See *Commonwealth v. Sneed*, 899 A.2d 1067, 1076 (2006)).

Was trial counsel ineffective for failing to request a cautionary instruction for the use of the visual aid

The Court first notes that the issue of the visual aid itself was litigated on direct appeal. The Superior Court in its opinion stated that “a prosecutor must be given reasonable latitude to present the Commonwealth’s theory of the case during closing arguments, and that the trial court did not abuse its discretion in permitting the Commonwealth to use the visual aid.” See Superior Court Opinion, 4/11/2016, at p.7. Therefore, this Court wonders if despite appellate review and dismissal of the issue of the visual aid generally, what effect a cautionary instruction might have had on the jury, had one been given. This issue then would appear to have arguable merit.

PCRA counsel cites the case of *Commonwealth v Serge*, 896 A.2d 1170 (Pa. 2006). The court in *Serge* held that computer-generated evidence and admissions are admissible as demonstrative evidence provided that they are properly authenticated, relevant and the probative value outweighs any prejudicial effect. *Id.* at pp. 1178-1179. The CGA¹² used by the Commonwealth depicted an animation which illustrated the Commonwealth’s theory of the homicide. Although the trial court gave the jury a cautionary instruction, the Superior Court did not hold that such an instruction was required¹³.

¹² Computer generated animation

¹³ This Court believes that there was a significant difference in the demonstrative evidence used by the Commonwealth in *Serge* versus the white board photo diagram used here by the Assistant District Attorney in his closing argument. Defense Counsel in *Serge* believed that the CGA cost between \$10,000 and \$20,000 and appeared to be more of a reenactment through animation rather than a still photograph with stationary marks identifying where the actors stood based upon the Commonwealth’s recollection of the testimony of the witnesses.

The overriding principle in determining if any evidence, including demonstrative, should be admitted involves a weighing of the probative value versus prejudicial effect. We have held that the trial court must decide first if the evidence is relevant and, if so, whether it's probative value outweighs its prejudicial effect. *Commonwealth v. Hawk*, 551 Pa. 71, 709 A.2d 373, 376 (1998). This Commonwealth defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. Relevant evidence may nevertheless be excluded "if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403. Therefore, was the visual aid used by the Commonwealth in its closing over the objection of the trial counsel potentially so prejudicial that a cautionary instruction was warranted and that trial counsel was ineffective for failing to request one.

It is well settled that the decision whether to seek a jury instruction implicates a matter of trial strategy. See *Commonwealth v. Hawkins*, 586 Pa. 366, 894 A.2d 716, 730 (2006); *Commonwealth v. Garcia*, 585 Pa. 160, 888 A.2d 633, 638 (2005); *Commonwealth v. Sullivan*, 450 Pa. 273, 299 A.2d 608, 610 (1973). "An assertion of IAC for failure to request such an instruction cannot succeed unless the defendant makes the requisite three-prong showing, including a demonstration of prejudice." *Hawkins, supra*, 586 Pa. at 377, 894 A.2d at 722.

Although PCRA counsel pled generally that trial counsel had no reasonable basis for his strategic choice not to request a cautionary instruction and that specific prejudice

was created in the form of a perception by the jurors, the Court is hard pressed to find where such a cautionary instruction would have resulted in a different outcome.

On September 18, 2014, after the jury was dismissed for the day, counsel and the Court came together to discuss jury instructions and other matters. This conversation was held in preparation for closing arguments which would begin the next day. See *Notes of Testimony, 9/18/2014* at pp. 171-189. After a brief discussion of the jury charge and verdict slip, trial counsel raised a question about several exhibits the Commonwealth was intending to use. Commonwealth's attorney indicated that he was planning on using the demonstrative aids in his closing. *Id.* at p. 183. The Commonwealth referred to a number of exhibits but only one that had been not marked and previously admitted into evidence; it was this exhibit with which the trial counsel took exception. *Id.* The visual aid prepared by the Commonwealth was a diagram prepared based upon his recollection of the testimony of the witnesses during the trial as to the approximate location of the participants when Little's was shot. Trial counsel was concerned that the jury would use the diagram to "add more credibility to the co-Defendant," and "confuse the jury since it was never admitted as an exhibit." *Id.* at pp.183-184. The Court overruled the objection. Trial counsel then expressed his concern that "as long as the jury is aware that it is not an exhibit. It hasn't been testified to. It's for argument." *Id.* at p.185.

When the Commonwealth then used the diagram or visual aid it did not refer to it as an exhibit, as it did the other diagrams but rather as a "visual." See *N.T. 9/19/2014* at pp.30-31. While using the visual the Commonwealth readily admits that they do not know "exactly where they were standing", only where Little's "fell dead." *Id.* at p.31. At no

time did the Commonwealth hold it out to be an exhibit or lead the jury to believe that the diagram had been testified to during the trial. As an additional precaution, the Court made certain prior to closing arguments to instruct the jury that it “was their [the jury’s] recollection of the testimony or evidence that controls” *Id.* at p.3. Since PCRA counsel cannot show how Petitioner was prejudiced by the failure of the instruction to be requested, this claim has no merit.

ORDER

AND NOW, this day of April 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this Court's intention to dismiss Petitioner's petition without holding an evidentiary hearing. Petitioner 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,

Nancy L. Butts, President Judge

xc: DA (KO)
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