

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 95-11,407

VS :

THEODORE TYRONE MCCARTY :

OPINION AND ORDER

Before the Court is the Defendant's Petition for Post Conviction Collateral Relief.

On June 25, 1995, the Defendant was charged with Involuntary Deviate Sexual Intercourse (IDSI), Indecent Assault, Burglary and related offenses. On January 18, 1996, a jury found the Defendant guilty of IDSI and indecent assault. The Defendant was sentenced on June 4, 1996 to undergo incarceration for a minimum of forty (40) months and a maximum of ten (10) years on the charge of IDSI, and a minimum of one (1) year and a maximum of two (2) years on the charge of indecent assault, concurrent with the sentence for IDSI.

The Defendant appealed his conviction to the Superior Court on August 27, 1996. The judgment of the sentence was affirmed by the Superior Court by Order dated August 28, 1997. The Defendant filed his petition for post conviction collateral relief on December 8, 1998. A hearing on the petition was held April 13, 1999, after which Defendant's counsel was permitted to amend his petition. On June 29, 1999, after not receiving the amended petition within the allotted time, the Court reviewed the Defendant's petition and proposed its dismissal. Defense counsel responded to the proposed dismissal and requested an extension of time in which to file an amended petition. The Court granted an extension of time to file the amended petition. The Defendant's amended petition was filed on July 27, 1999. In his amended petition it is

averred that the Defendant's trial counsel was ineffective for failing to investigate and call certain witnesses. A hearing with regard to the potential witnesses was held on December 20, 1999.

At the hearing, Marc Lovecchio, Defendant's trial counsel, testified that he did not recall the Defendant requesting or discussing the witnesses that he now claims he wished to testify on his behalf. He testified that he had thought about whether or not to use character witnesses, but decided that he should not. He testified that he had known the Defendant for some time, and he knew of the Defendant's criminal history. It was Mr. Lovecchio's opinion that the Commonwealth had not proven the charges beyond a reasonable doubt. It was his concern that opening the door to the Defendant's criminal history would have weakened their argument and diverted the jurors' attention from what he saw as clear weaknesses in the Commonwealth's case.

Kenny Ketchum, the Defendant's first cousin, was one of the potential witnesses who would have been available to testify on behalf of the defense. Mr. Ketchum testified that prior to the Defendant's arrest, he had social contact with the Defendant approximately 2-3 times per week. He testified that others in the community would say that the Defendant had a good reputation for chastity, and that he was of good moral character. On cross-examination he testified that he defined chastity to be that the Defendant was not looking for sexual gratification in a "fleshy" way. He further explained that he defined chastity as a person's reputation for raping people or not raping people. Mr. Ketchum further testified that the Defendant had never terrorized or assaulted *him*. Mr. Ketchum stated that he was basing his judgments of the Defendant *on the way the Defendant has treated him, and the way he has acted with others*

around him. He admitted that he had not spoken to others in regard to the Defendant's sex life.

Timothy McCarty, the Defendant's brother was the second potential witness that would have been available to testify on behalf of the Defense. He testified that although the Defendant had a few scrapes with the law, the Defendant basically had a good reputation for being a moral person. As far as the Defendant's sexual promiscuity, he testified that the Defendant did not have many sexual partners, and he had never heard anything negative. On cross-examination, he testified that *he bases his opinion of the defendant from his experiences of being around him, and from what he personally believes.*

The Court first finds that the Defendant's Petition was not filed timely in accordance with 42 Pa.C.S.A. § 9545. Section 9545 provides that a petition for post conviction collateral relief shall be filed within one year of the date the judgment becomes final. The Defendant's judgment became final on the date the Superior Court affirmed the sentence, or August 28, 1997. Additionally, the Defendant failed to allege any of the situations which would permit an exception to the time requirement under Section 9545(1).

The Court additionally finds that even if the Defendant were permitted an exception to the time requirement, he has not set out a claim of ineffective assistance under the Post Conviction Collateral Relief Act. In order to make a claim of ineffective assistance of counsel on a PCRA appeal, the Defendant must show that "the underlying claim is of arguable merit; that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate his

interest; and that the commission or omission so undermined the trial that the verdict is unreliable.” Commonwealth v. Lassen, 442 Pa. Super. 298, 659 A.2d 999, 1008 (1995), *citing* Commonwealth v. Szuchon, 534 Pa. 483, 633 A.2d 1098, 1099 (1993).

The Court finds in the instant case that the Defendant’s trial counsel was not ineffective for failing to call Kenny Ketchum and Timothy McCarty at trial. After a review of the testimony of these potential character witnesses, it appears that the witnesses would have testified with regard to their personal *opinions* of the Defendant as opposed to the Defendant’s reputation in the community. Pa.R.E. 405 limits proof of character to reputation evidence and does not allow opinion evidence. See Commonwealth v. Blount, 538 Pa. 156, 170, 647 A.2d 199, 206 (1994) (“Character evidence is not the opinion of one person or even a handful of persons, but must represent the consensus in the community.”) The Court therefore finds that the testimony of the potential witnesses with regard to the Defendant’s character would not have been admissible. As the evidence would have been inadmissible, a claim of error for not using the evidence has no merit.

Even if the evidence would have been admissible, the Court finds that the Defendant’s counsel’s decision not to call the witnesses was grounded on a reasonable basis designed to effectuate the Defendant’s interest. Pa.R.E. 405(a) provides that in cases where character evidence is admissible, “proof may be made by testimony as to reputation. On cross-examination of the reputation witness, inquiry is allowable into specific instances of conduct probative to the

character trait in question,...” Defendant’s trial counsel testified that he was aware of the Defendant’s prior convictions, and was concerned that if the jury were to hear of them, they may have been distracted from the weaknesses in the Commonwealth’s case. The Court therefore finds the Defendant’s argument without merit.

OPINION

AND NOW, this ____day of March, 2000, based on the foregoing Opinion, it is ORDERED AND DIRECTED that the Defendant’s Petition for Post Conviction Collateral Relief is DENIED.

By The Court,

Nancy L. Butts, Judge

cc: CA

Edward J. Rymza, Esquire
Michael Dinges, Esquire
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire