IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 96-11,111
	:	
JEFFREY MILLER,	:	
	:	
Defendant	:	1925(a) Opinion

Date: September 18, 2000

SUPPLEMENTAL OPINION IN SUPPORT OF THE ORDER OF DECEMBER 19, 1997 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant in the above captioned matter was sentenced December 19, 1997,[1] after being convicted on October 27, 1997 of aggravated assault (two counts), criminal attempt – homicide, possession of instruments of crime, simple assault, theft, altering or obliterating marks of identification, carrying a firearm without a license and recklessly endangering another person. Defendant was sentenced to serve a total of one hundred seventeen (117) months to forty-two (42) years, which is in the top of the aggravated range. The incident for which Defendant was sentenced occurred June 16, 1996, when Defendant engaged in an argument with victim Richard Haines outside his home in South Williamsport. The argument escalated into a physical altercation. During the fight, Defendant went into the house and retrieved a gun. Returning outside, he shot the victim in the neck and abdominal area. As a result, the victim is now a quadriplegic.

[1] The Court notes that in our supporting Opinion pursuant to Pa.R.A.P. 1925(a), we mistakenly referred to the Order of December 16, 1997; a second error occurs in the first paragraph, where we refer to the date of sentence as December 19, 1998. The correct sentencing date is December 19, 1997.

Defendant originally filed a Notice of Appeal April 3, 1998; the record was transmitted to the Pennsylvania Superior Court August 25, 1998. However, on March 3, 1999, the appeal was dismissed due to Defendant's failure to file a brief. On June 29, 1999, pursuant to defense counsel's failure to perfect Defendant's appeal rights and the concurrence of the District Attorney's office, Defendant's appeal rights were reinstated. A Concise Statement of Matters Complained of on Appeal was filed August 8, 2000.

This Opinion is written in support of the Sentencing Order of December 1997, both to supplement our previous Opinion filed August 3, 1998, as well as to address the additional issues of the ineffectiveness of trial counsel now being raised in Defendant's Concise Statement of Matters Complained of on Appeal. Accordingly, the Court relies upon the prior Opinion, supplemented as necessary *infra*, and will not herein address paragraphs 1, 3 or 5 of the Concise Statement. Specifically, paragraph 1 was previously listed as paragraph 2 in the Concise Statement of Matters Complained of on Appeal, filed April 29, 1998, and is addressed in our prior Opinion at pp. 4-5; paragraph 3 was previously listed as paragraph 1 and is addressed at pp. 3-4; paragraph 5 was listed as paragraph 5 and is addressed at pp. 6-8, and also the Court's statements of record as set forth in the Sentencing Transcript of July 31, 1998, at pp. 68-71. The remaining issues are: (1) whether trial counsel was ineffective for failing to recall Defendant's wife, Lisa Miller, as a witness after her testimony was rebutted by a reading of a prior inconsistent statement (Concise Statement, paragraph 2); and (2) whether trial counsel was ineffective for failing to recall the defense expert to provide contradictory testimony to the Commonwealth's expert, who testified in rebuttal (Concise Statement, paragraph 4).

The standard for evaluating a claim of ineffective assistance of counsel is set forth in ***Commonwealth v. Savage***, 695 A.2d 820 (Pa.Super. 1997):

> Our standard of review when evaluating a claim of ineffective assistance of counsel is well settled. We presume that trial counsel is effective and place on the defendant the burden of proving otherwise. We are first required to determine whether the issue underlying the claim is of arguable merit. If the claim is without merit, our inquiry ends because counsel will not be deemed ineffective for failing to pursue an issue which is without basis. Even if the underlying claim has merit, the appellant still must establish that the course of action chosen by his counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial.

Id. at 822. More specifically, to succeed on a claim of ineffectiveness for failing to call a witness, it must be shown that: (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or should otherwise have been aware of the witness; (4) the witness was prepared to cooperate and testify for appellant at trial; and (5) the absence of the testimony so prejudiced appellant so as to deny him a fair trial. ***Commonwealth v. Gonzalez***, 608 A.2d 528, 532 (Pa.Super. 1992) (citations omitted). As a matter of trial strategy, the trial counsel may choose not to call a witness. ***Ibid.*** Failure to call a possible witness will not be equated with a conclusion of ineffectiveness absent some positive demonstration that the testimony would have been helpful to the defense. ***Commonwealth v. Knight***, 618 A.2d 442, 446 (Pa.Super. 1992). For example, in ***Commonwealth v. Gonzalez***, *supra*, one of the claims of ineffective assistance of counsel claimed by defendant concerned his counsel's failure to call a witness who had already testified for the Commonwealth. Defendant asserted that, had this witness been called, she could have testified that heroin which was seized was not his, and the effect the witness may have had on the jury may have

been helpful to his defense. ***Id***. at 532. The Superior Court found that, even assuming defendant had established factors one through four (listed *supra*), defendant had not demonstrated the fifth- namely, that the absence of the witness' testimony so prejudiced him as to deny him a fair trial. The appellate Court pointed out, *inter alia*, that defendant's convictions were based upon his possession of cocaine, not heroin, and that no heroin was seized in connection with the crimes for which defendant was charged.

In the instant case, Defendant has not made any positive demonstration that the additional testimony of either witness he claims should have been recalled would have been helpful to his defense, nor that he was so prejudiced by the exclusion of such testimony that he was denied a fair trial. In fact, both witnesses were called by defense counsel; it is defense counsel's failure to recall the witnesses that is in issue. Both witnesses testified in detail; if either had been recalled, they could do no more than repeat what they had already stated. Generally, when an *arguable* claim of ineffective assistance of counsel is made, and trial counsel has not had an opportunity to explain his or her conduct, the Superior Court will remand the case for an evidentiary hearing. ***Commonwealth v. Savage***, 695 A.2d 820, 825 (Pa.Super. 1997) (emphasis added). For the reasons that follow, we find Defendant has not made an arguable claim of ineffective assistance of counsel, has not shown that trial counsel's failure to recall witnesses had no reasonable basis, and has failed to show how he was prejudiced such that he was denied a fair trial. Therefore, we do not believe an evidentiary hearing is warranted.

At trial, the defense position was that Defendant shot Mr. Haines in self-defense as the victim was choking him and both men were standing when the shooting occurred. The

Commonwealth's theory was that Defendant shot Mr. Haines while the victim was lying on the ground and Defendant was standing over him. To support the self-defense claim, Defendant had to show that the wounds were inflicted at very close range.

To this end, the defense presented the expert testimony of Dr. John J. Shane, Chairman of the Department of Pathology of Lehigh Valley Hospital in Allentown, Pennsylvania. Dr. Shane testified that to determine the distance from which a gun is fired, a very important thing to look for is carbonaceous material in or near the wound. 10/21-27/97 Volume I, N.T. 57. To form his opinion as to what occurred, Dr. Shane relied upon the observations made by Dr. Timothy Pagana, the surgeon who operated on the victim. Dr. Pagana indicated that he observed a dark substance around the entrance wounds of the victim. On cross-examination of Dr. Shane, however, it was determined that Dr. Shane was relying not upon the victim's medical records, but rather upon statements of Dr. Pagana which were contained in a police report.[2] ***Id***. at 68. Therefore, Dr. Pagana was then called by the defense to testify at trial as to his observation of the wounds. 10/21-27/97 Volume II N.T. 211-227. In his testimony, the Doctor stated that he had observed black rings completely surrounding the periphery of the wound which were very narrow, approximately 1 millimeter in width. ***Id***. at 219-220. Dr. Pagana testified that, having been shown a book with pictures of gunshot wounds,[3] it was apparent to him that the dark substance was "probably soot." ***Id***. at 226.

[2] Nowhere in the victim's medical records did Dr. Pagana enter any statement concerning carbonaceous material or gunshot residues in or around the wounds.

[3] The picture was shown to Dr. Pagana previous to the trial, as well as during his testimony.

Defense trial counsel had not released Dr. Shane as a witness, but rather retained him until Dr. Pagana had testified. 10/21-27/97 Volume I N.T. 73-75, Volume II N.T. 236. Dr. Shane was then recalled by the defense. ***Id***. at 238. Dr. Shane reiterated that the description Dr. Pagana gave of the "dark substance," identifying it as soot, was consistent with his opinion that the substance around the wound was "unescapable evidence" that the gun was within two inches (when fired). ***Id***. at 230.

In rebuttal, the Commonwealth called as an expert witness Dr. Sara Lee Funke, a forensic pathologist who also works in the area of Allentown, Pennsylvania. 10/22/97 N.T. 83. Dr. Funke testified that, contrary to the opinion of Dr. Shane, no conclusion could be made to a reasonable degree of medical certainty as to how closely to the victim the gun was fired. ***Ibid***. Dr. Funke characterized Dr. Pagana's description of the wounds as "vague and confusing." ***Id***. at 84. She stated that Dr. Pagana's testimony of a dark substance was very vague, uninterpretable and had no meaning to a forensic pathologist. ***Id***. at 91. With respect to Dr. Pagana's description of the width of the rings around the wound being 1 millimeter wide, Dr. Funke opined that the only way they would be that narrow is if the gun was pressed so tightly against the skin that soot was blown into the wound, skin was blown into the end of the gun, and there was a muzzle abrasion- a red ring around the entrance of the wound- which conformed to the muzzle end of the gun. ***Id***. at 89. Dr. Funke gave further testimony about the photograph shown to Dr. Pagana being a gunshot wound with no soot around it and no "stippling" (red dots around the wound), which meant it was made from a distant range of fire, rather than less than six inches, as Dr. Shane had testified. ***Id***. at 90-91. Dr. Funke stated that

Dr. Shane reached a conclusion that cannot be made with any forensic accuracy, or with a reasonable degree of medical certainty. ***Id***. at 92.[4]

Defense counsel did not recall Dr. Shane. Defendant now argues this was ineffective assistance of counsel. Applying the factors set forth in ***Gonzalez***, *supra*, it is apparent that the witness existed and that trial counsel was aware of him. Further, in our Opinion filed August 3, 1998, we stated that Dr. Shane had not been shown to be unavailable and Dr. Shane's obvious expertise, as demonstrated by his testimony, made it clear that he would have been able to testify on behalf of the defense in response to the various issues raised by Dr. Funke's testimony. ***Id***. at 4. We affirm this statement, acknowledging however that an argument might be made that Dr. Shane was not available immediately, having been released as a witness and leaving the area. *See, e.g.*, 10/22/97 N.T. 53-54, 78, 185. Of course, assuming, *arguendo*, he was not available, Defendant's claim of ineffective assistance of counsel would fail as to the witness being available, cooperative and prepared to testify at trial.

Regardless, because failing to recall Dr. Shane did not prejudice Defendant so as to deny him a fair trial, Defendant's claim has no arguable merit and must fail. The bottom line is that in this case, there were two conflicting opinions rendered by experts on different sides of the issue -- hardly unusual in a trial situation. Dr. Shane testified that, based on the descriptions of the wounds provided by Dr. Pagana, he could render an opinion with a reasonable degree of medical certainty that the dark substance around the wounds was soot, which could only occur

[4] However, on cross-examination, defense counsel asked Dr. Funke if Dr. Pagana could in fact have been describing soot, deposited by a gunshot wound inflicted by a weapon within six inches of the victim, if he had missed the muzzle abrasion or the stippling or forgot to mention it. Dr. Funke replied: "If those two statements are correct then the answer is that there is a possibility that he is describing soot." ***Id***. at 98.

if the barrel of the gun was less than six inches from the victim. Dr. Funke testified that no opinion could be rendered based upon the descriptions. It was for the jury to determine which physician was correct. Dr. Shane testified at length, both before and after Dr. Pagana, as to his position. There was nothing more he could have added. The same observations were testified to by Dr. Funke as had been previously testified to by Dr. Shane; nothing new was presented in Dr. Funke's testimony which would have necessitated recalling Dr. Shane.

As indicated *supra*, Defendant's second claim of ineffectiveness of counsel is the failure of trial counsel to call Lisa Miller, Defendant's wife, in sur-rebuttal. At trial, the defense presented the testimony of Ms. Miller, who was present during the altercation. In her testimony, Ms. Miller described a situation wherein Defendant was upset with she and Mr. Haines, her cousin, because they had been out drinking together. She characterized Mr. Haines rather than Defendant as the aggressor, including stating that the victim, who was bigger than Defendant, had Defendant in a bear hug, was choking Defendant and had hit him, all while Defendant was trying to get away from the victim so he could leave the area. 10/21-27/97 N.T. 137-148. Ms. Miller specifically stated that when the shots were fired, both men were on the ground, struggling. ***Id***. at 167.

In rebuttal, the Commonwealth introduced the testimony of a police officer (Holcomb) who took a prior inconsistent statement from Ms. Miller on the night of the assault. According to the officer, Ms. Miller did not tell him she witnessed anything that happened outside prior to the shots being fired and never described any kind of struggle between the two men on the ground, nor any incidence of the victim choking Defendant. 10/24/97 N.T. 54-55; see also testimony of Officer Lowmiller at 65-67.

Defendant now argues it was error for trial counsel not to recall Ms. Miller after the officers' testimony. We disagree.

Initially, we note that the first four requirements of ***Gonzalez***, *supra*, are met: Ms. Miller existed, was available, was known to trial counsel and was willing to cooperate and testify. The notes of testimony reveal that trial counsel asked Ms. Miller to wait outside the courtroom to possibly testify after she had been called to the witness stand a second time. 10/24/97 N.T. 40-41. However, we do not see how anything Ms. Miller could have stated in sur-rebuttal would have benefited Defendant to any extent such that the absence of such testimony denied him a fair trial.

Ms. Miller testified on cross-examination that on the night in question, she was under the influence of alcohol to an extent that she was intoxicated; with respect to gaps in her memory she stated that at times she was "in and out." 10/22/97 N.T. 151. Asked by the Commonwealth whether she would be better able to recall details of the event on the night in question or closer to that night, rather than presently, she denied this, indicating that when it happened it was "so quick and shocking," and afterwards she could think about it more. ***Id***. at 152.

Most significantly, Ms. Miller was then asked about her statements to Officer Holcomb and given a chance to review her statement. ***Id***. at 156-157. Ms. Miller stated she could not recall the statement that she had given to the officer, although she did not dispute that the officer did interview her and he did take down notes. ***Id***. at 157-158. Later in her testimony she was asked whether she remembered if she told either Officer Holcomb or Corporal Lowmiller about the struggle between the two men on the ground that she witnessed.

She replied: "Not that I recall what I said to them. There was a bunch of chaos going on, I can't really say." ***Id***. at 168. She also stated that she wasn't really asked that night about the position and also that "things got a little mixed up." ***Ibid***. Asked if she recalled stating to police that she had no idea why her husband shot Richard Haines, she answered she didn't know why, just that they were fighting and she didn't suspect that anybody would do anything. ***Id***. at 169. Finally, Ms. Miller was asked: "You don't know one way or the other what you said that night?" Ms. Miller replied: "No." ***Ibid***. Given this testimony, there is simply nothing more Ms. Miller could have testified to had she been recalled.

Therefore, this Court believes that Defendant has failed to support his ineffective assistance of counsel claims with respect to trial counsel's failure to call either the expert witness, Dr. Shane, or Lisa Miller, Defendant's wife.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Kyle W. Rude, Esquire
District Attorney
Judges
Nancy M. Snyder, Esquire
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