

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:
	:
vs.	: NO. 96-11, 696
	: CRIMINAL LAW DIVISION
STEVEN EVICCI,	:
	: POST-CONVICTION RELIEF
Defendant	:

Date: December 22, 2000

OPINION and ORDER

Before the Court is the Defendant's motion for post-conviction collateral relief. On September 12, 1997 Defendant Evicci was convicted by a jury of Rape by Forcible Compulsion, Sexual Assault, Kidnapping, Unlawful Restraint, and Terroristic Threats. Defendant Evicci was sentenced on March 3, 1998. After direct appeal to the Superior Court which succeeded in challenging the constitutionality of the sentencing provisions of Pennsylvania's Megan's Law, Defendant Evicci was re-sentenced on the same charges on February 1, 2000. On July 3, 2000 Defendant Evicci petitioned this Court for post-conviction collateral relief pursuant to 42 Pa. C.S.A. §9541. On October 30, 2000 the PCRA hearing was conducted.

Facts

On September 20, 1996 the Defendant stopped his car along West Fourth Street in Williamsport and forcibly abducted a sixteen-year old girl. The victim was walking to a friend's house when the Defendant forced her into his car. The Defendant then drove the victim a few blocks to a secluded part of the city. After stopping the car, the Defendant

forcibly raped the victim, performed oral sex upon her, and threatened to kill her if she said anything. After the assault, the victim fled the Defendant's vehicle and went to a friend's house. From there she contacted her father and the police were also contacted. The victim was taken to Williamsport Hospital where she was examined and a "rape-kit" analysis conducted. While the victim was at the hospital, the Defendant also went there. While at the hospital, the victim noticed the Defendant and identified him as her attacker. The police then arrested the Defendant. The police were also able to connect the Defendant to the crime based on the victim's description of the Defendant's automobile.

After his arrest, Evicci elected a trial by jury. During the course of the trial, Evicci sought to cross-examine the victim on the issue of her testing positive for gonorrhea. At sidebar conference, Defendant argued that this line of inquiry was relevant to explain the redness of the vaginal area that the doctor observed during her examination. (N.T. 9/11/97, p.2). Defendant also contended that the issue was relevant because during his detention, Defendant was tested for gonorrhea and the results were negative. (*Id.* at pp.3). Defendant argued that his absence of gonorrhea was probative on the issue of whether or not intercourse had occurred. (N.T. 9/9/97 at p.103). Outside the presence of the jury, Defendant questioned the examining physician on the issue of transmittal rate of gonorrhea. The examining physician testified that in his opinion there was a 50% chance that an infected female could transmit the disease to an uninfected male. (N.T., 9/9/97, at p.103). After consideration, the Trial Court decided that the prejudicial value of the proffered testimony outweighed its probative value and did not permit the jury to hear it. The jury did hear evidence that included the victim's testimony, testimony from the police, and testimony concerning DNA identification. On

September 12, 1997, the jury returned a guilty verdict of rape (forcible compulsion), sexual assault, aggravated indecent assault, kidnapping, unlawful restraint, and terroristic threats.

Based on the charges, this Court ordered a pre-sentence investigation and directed Evicci to be evaluated by the Pennsylvania Sexual Assessment Board to determine whether or not he was a “sexually violent predator” under 42 Pa.C.S.A. §9791. On December 3, 1997, Defendant filed a motion challenging the constitutionality of the relevant provisions of Pennsylvania’s Megan’s Law. On March 3, 1998, this Court, en banc, denied Evicci’s challenge and held that he had not overcome the presumption that he is a sexually violent predator. On March 3, 1998, Evicci was sentenced by the Trial Court to an aggregate sentence ranging from eleven years to life. Defendant appealed the sentence.

In his direct appeal of the sentence, Evicci raised three issues. It is the first issue that is directly relevant to the current proceedings.¹ Defendant argued that the Trial Court erred in refusing to allow him to present testimony that the victim was infected with gonorrhea that was untreated at the time of the assault. In analyzing this claim, the Superior Court affirmed the decision of the Trial Court.

We agree with trial court’s conclusion that the evidence was relevant. Additionally, the evidence was not cumulative of other evidence presented at trial. Nevertheless, we find that the trial court properly concluded that the evidence was more prejudicial than probative and thus was not admissible. Appellant did not provide evidence that he was not infected with gonorrhea during a relevant time frame and did not proffer evidence of the incubation period of the disease so as to understand the implications of any

¹ The other 2 issues were 1. Whether the Commonwealth presented sufficient evidence to prove beyond a reasonable doubt that the Defendant engaged in sexual intercourse with the victim by forcible compulsion to support the rape conviction; and 2. Whether the Trial Court’s ruling that Defendant was a sexually violent predator under Megan’s Law, and that Defendant had to abide and conform to the restrictions and requirements assigned to a designated sexually violent predator, was violative of Defendant’s due process rights where the burden was improperly placed on Defendant to rebut the presumption by clear and convincing evidence.

evidence that he did not have the disease while the victim did. We agree with the trial court that without such evidence, the probative value of the proffered evidence is diminished. In comparison, the prejudicial effect of evidence that a teenage victim has a sexually transmitted disease is substantial and could color the jury's view of the victim. Thus, we find that the court did not err in excluding the evidence.

For reasons unrelated to this particular issue, the Superior Court vacated Evicci's sentence and remanded the case back to the Trial Court for re-sentencing.² After a hearing, Evicci was re-sentenced on February 1, 2000. The cumulative effect was that the Defendant is now serving a sentence of 12 years and 8 months to 50 years

On June 7, 1999 Defendant's attorney, George Lepley motioned the Court to withdraw his appearance. In his motion, Attorney Lepley represented that Evicci had not lived up to his financial obligations and as Evicci is currently incarcerated, has no immediate ability to do so. After a hearing on June 23, 1999, the Court permitted Attorney Lepley to withdraw as counsel of record for Defendant though not because Attorney Lepley's allegations were substantiated, but rather because Defendant disputed the allegations. In the same order, Evicci agreed to be represented by the Public Defender's Office in any further proceedings.

On June 27, 2000, Defendant filed a Petition for Post-Conviction Collateral Relief, which is now before the Court for determination. Evicci argues that his trial counsel, Attorney Lepley, was so ineffective that no reliable adjudication of guilt or innocence could have occurred. Specifically, he lists the following:

- (1) Counsel failed to introduce evidence that the Defendant was not infected with gonorrhea, thereby precluding any testimony

² The Superior Court held that placing the presumption upon the convicted offender to prove they are not a "sexually violent predator" was unconstitutional. *Commonwealth v. Halye*, 719 A.2d 763, (Pa.Super. 1998). The Pennsylvania Supreme Court affirmed this holding. *Commonwealth of Pennsylvania v. Williams*, 733 A.2d 593 (Pa. 1999).

that the victim was infected with gonorrhea. If said evidence were offered, the probative value of Dr. Westenberger's testimony would have outweighed the prejudicial effect. This evidence, namely that the victim was infected with the disease at the time of the assault and that a female infected with this disease would more likely than not (better than fifty-percent) infect an uninfected male, was critical to his defense;

(2) Counsel did not make a written proffer of the victim's past sexual conduct, *i.e.* that she was infected with gonorrhea at the time of the sexual assault, pursuant to Pennsylvania's Rape Shield Law, 18 Pa. C.S.A. §3104;

(3) Counsel failed to properly investigate and present exculpatory testimony that Defendant was not infected with gonorrhea. In addition, counsel failed to elicit collateral testimony, including, but not limited to, the transmission and incubation period of gonorrhea.

Based on the averments in the PCRA petition, the Court held a hearing on October 30, 2000. During the hearing the Court heard testimony from George Lepley, Esq. and Dr. Jeff Verzella, the physician who conducted the gonorrhea tests on Defendant.

Attorney Lepley testified that he agreed to represent the defendant on a pro bono basis after being informed by the prison that the Defendant wanted to talk to him. (N.T., 10/30/00, p.4). Attorney Lepley was aware that the victim had gonorrhea because he recalled discussing the matter with Evicci before the trial. (*Id.*, p.5). Attorney Lepley's office then obtained the available records (*Id.*, pp. 6-8), reviewed them (*Id.*, p. 8), learned of Dr. Verzella (*Id.*, p. 9), and had a paralegal do research on the issue (*Id.*, p. 9). Attorney Lepley testified that he thought this was a significant fact because he recalled that Evicci had been tested for gonorrhea a few days after arriving in prison and the test results were negative. (*Id.*, p.10). Lepley wanted to get the negative test results into evidence because he believed it would show that Evicci did not have any sexual contact with the victim. (*Id.* at p.10). Lepley stated, "I mean obviously it was important to the case, I'm not sure that it was all helpful, but there was

some that I thought would be helpful.” (*Id.* at p.11). During the hearing, a line of questioning explored whether Lepley had called Dr. Jeff Verzella, the physician who tested Evicci. In response to a question as to whether or not Lepley thought it would be helpful to call Verzella, Lepley responded “. . .my recollection was, as I recall the fact that he tested negative on September 3^d did not necessarily preclude the possibility of him developing symptoms of gonorrhea later, but I don’t—I don’t recall whether there was additional testing of Mr. Evicci after that date or not. I did not call Dr. Verzella. . . .” (*Id.* at p.15). When asked why he did not file a motion pursuant to the rape shield statute³, Lepley responded, “I can’t tell you now.” (*Id.* at p.17). The only question put to Lepley during the cross-examination was whether or not Evicci admitted to him that he had sex with the victim. (*Id.* at p.20). After ruling that the attorney-client privilege was not applicable, Lepley responded that ultimately the Defendant admitted to having sex with the victim. (*Id.* at p.23). Lepley further testified that initially the Defendant insisted he was innocent and could produce alibi witness. (*Id.* at p.24). Upon further investigation, this did not occur and Defendant altered his version of events several times.⁴ The final area of inquiry for this witness focused on why Lepley sought to withdraw from the case. Lepley testified that initially he agreed to the representation because the Defendant had convinced Lepley’s paralegal that he was absolutely not in the area at the time of the attack. (*Id.* at p.24). Lepley stated that he repeatedly urged the Defendant to apply to the

³³ 18 Pa.C.S.A. §3104(a).

⁴ Lepley testified, “One of the reasons that I initially took the case was he was insisting that he was innocent, and he had witnesses that could corroborate alibi. When we started running that down it fell apart and he said, okay, then he said he was in the area but he never picked the girl up. Eventually that changed to okay, I picked the girl up, but we didn’t have sex; to, okay, we started to make out but we didn’t have sex because I changed my mind; to they had consensual sex.” (N.T., 10/30/00, p.24).

Public Defenders office so that he may obtain expert witnesses, as Evicci had no funds. Evicci refused to do this, instead opting for Lepley to continue his representation. (*Id.* at pp.24-27). The next witness called was Dr. Jeff Verzella.

After giving testimony about his credentials,⁵ Dr. Verzella explained how the samples are collected for the gonorrhea tests. (*Id.* at p. 35.) Dr. Verzella reported that if the tests are correctly administered, the accuracy rate for the results is 90% or higher. (*Id.* at p.35.) Dr. Verzella testified that the incubation period for gonorrhea is anywhere from one to fourteen days for a male.⁶ (*Id.* at p.38). Dr. Verzella agreed that a negative test result within the first three days is no indication that a person has not contracted gonorrhea, but rather it is an indication that the person is free of gonorrhea at the time of the test. (*Id.* at p.39). Most significantly, Dr. Verzella testified that the risk of getting gonorrhea from a single act of intercourse from a female to a male is only about one in five, or 20 percent. (*Id.* at p.40).

Discussion

Rule 902 of the Rules of Criminal Procedure provide that one of the grounds for granting post-conviction relief is if the assistance of counsel was so ineffective that the truth-determining process was undermined to the degree that no reliable adjudication of guilt or innocence could have occurred. Defendant argues that his counsel's failure to properly

⁵ Dr. Verzella has been in practice for 11 years. He went to medical school at Syracuse Upstate Medical Center in New York and did a family practice residency at Tripler Army Medical Center in Hawaii. He has been board certified in family practice since 1985 (N.T., 10/30/00, p.31). For six years, Dr. Verzella has manned the prison clinic at Lycoming County Prison. In addition to completing training in STDs (sexually transmitted diseases), Dr. Verzella is the supervisor for the Department of Health STD. (*Id.* at p.42).

⁶ Dr. Verzella: "Most males, anywhere from 30 to 50 percent, would probably develop symptoms in the first few days, most males develop them two to five days, average is three to three and a half days, only a small percentage of males remain without symptoms after the fourteen days of incubation." (N.T., 10/30/00, p.38).

introduce evidence of his gonorrhea test results constituted ineffective assistance. For the reasons to be discussed, this Court disagrees and hereby denies the Defendant's motion.

Pennsylvania Rule of Evidence 403 states, "although relevant, evidence may 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." After considering the proffered testimony from the PCRA hearing this Court concludes that the evidence presented would still have been insufficient to allow the Court to admit it at trial on the basis that its potential prejudice outweighs its relevance.

In its Opinion, the Superior Court states a lack of evidence of the incubation period and evidence that Defendant was not infected during the relevant time frame were the reasons why they agreed with this Court's initial ruling that the evidence was not relevant. Defendant interprets this to mean that to make his negative test result evidence admissible, he need only proffer what the Superior Court is looking for. He is mistaken. The testimony from the PCRA hearing shows that based on the testimony of Dr. Verzella, Defendant could have presented evidence that on September 23, 1996, he was tested for gonorrhea and did not test positive. Also based on Dr. Verzella's testimony, he would have also been able to present evidence that the incubation period runs from two to fourteen days. Dr. Verzella's testimony would have further established that if infected, positive results would have been more likely in the two to five day range with three and half days being the average. Finally, Dr. Verzella testified that the risk of contracting gonorrhea from a single act of intercourse was only 1 in 5. The proffered testimony still does not tip the scales in favor of its probative value outweighing

its prejudicial value. When Defendant proffered the evidence at trial and asserted there was a fifty percent chance of his becoming infected with gonorrhea if he had sexual intercourse with the victim, this Court found this resulting chance was not sufficiently probative of the fact he did not commit the rape so as to overcome the prejudicial effect of this testimony. The superior Court has affirmed that determination. Though technically the test was performed at the three-and-one-half day interval, the fact that positive results may not occur until up to fourteen days, and the fact that most, but not necessarily all, people have positive results in two to five days, fall short of conclusively proving that Defendant did not contract gonorrhea from the victim. In short, even with the proffered testimony of Dr. Verzella, Defendant still does not lay the foundation needed to make this evidence relevant. By contrast, admitting evidence that a teenage rape victim was infected with a sexually transmitted disease would have been extremely prejudicial. After hearing the proffered testimony of Dr. Verzella, this Court concludes that the test results must still be excluded under Pa. R. E. 403. However, since this petition is grounded in ineffective assistance of counsel, this Court must further analyze this case against the standard for ineffective assistance of counsel.

To demonstrate that his counsel was ineffective, Defendant has the burden to show 1) the underlying claim is of arguable merit; 2) the particular course of conduct of counsel did not have some reasonable basis designed to effectuate his interests; 3) counsel's ineffectiveness prejudiced him. *Commonwealth v. Howard*, 645 A.2d 1300, 1304 (1994). By conceding that Defendant has a claim of arguable merit, Evicci has satisfied the first prong of the test. The second prong Evicci must satisfy is that his counsel's course of conduct did not have some reasonable basis designed to effectuate his interests. This Court believes that both

the original trial transcript and the transcript from the PCRA hearing indicate that Mr. Lepley had a reasonable basis not to present the testimony in question. While he was aware of the victim's infection, Defendant's counsel did not believe it was crucial to the defense; "...I originally felt that it was a stong [sic] argument to use gonorrhea and now I don't think I need that, I would have to put that in, I think it comes in." (N.T., 9/9/97, p.93). Furthermore, Lepley testified at the PCRA hearing that he thought the incubation period was more than a week but less than a month. (N.T., 10/30/00, p.49). Bearing this in mind, Evicci's negative test results take on even less significance the defense. The third and final prong of the *Howard* test is that counsel's ineffectiveness prejudiced him.

Even if this Court assumes that Defendant has satisfied the first two prongs of the *Howard* test, his petition for relief fails because he cannot show that Lepley's actions prejudiced the outcome of the trial. As previously discussed, even with Dr. Verzella's testimony the evidence would still be excluded as irrelevant. In fact, Dr. Verzella's testimony makes Defendant's gonorrhea test results even less relevant. When Defendant was relying on Dr. Westonberger's statement that there was a 50% chance that he would contract gonorrhea, there was some basis to the statement having probative value. By contrast, the proffered testimony of Dr. Verzella, who has a great deal of knowledge of sexually transmitted diseases, reveals that there was only a 20% chance of transmission. The result is that the probative value of Dr. Westonberger's statement drops off precipitously and demonstrates that it was proper for this Court to exclude the testimony. Granted that Attorney Lepley cannot now articulate all the reasons he abandoned this line of defense, it is clear his office learned of and investigated the gonorrhea issue and therefore very likely he knew there was a great likelihood of Dr.

Westonberger's testimony being undermined dramatically by evidence offered in the nature of that given by Dr. Verzella at the PCRA hearing. Certainly when an expert's position that is crucial to the defense gets blown out of the water in front of a jury there is a devastating effect upon a defendant maintaining his innocence. This means that there is simply no way for this Court to conclude Mr. Lepley was ineffective for not proffering irrelevant evidence.

The final matter to consider is the effect of proffered testimony *vis a vis* the entire body of evidence heard by the jury. The jury was able to consider the victim's testimony, including her identification of the Defendant, testimony from the police, testimony of the examining physician (excluding his testimony of the victim having gonorrhea) and DNA evidence. The gonorrhea test results would have constituted a relatively small portion of the amount of evidence admitted against Defendant. Given a review of the record, this Court finds that the properly admitted evidence of appellant's guilt was overwhelming. By contrast, any possible prejudice that could have been attributable to the Defendant's counsel was comparatively insignificant. Consequently, Defendant's petition for post-conviction relief is denied.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
District Attorney
George Lepley, Jr., Esquire
Judges
Jeffrey L. Wallitsch, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)