IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 97-10,190

VS :

MICHAEL JOSEPH DOUGHERTY :

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(A) OF THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order dated August 2, 1999 wherein the Defendant was sentenced to undergo incarceration for a minimum of five (5) years and a maximum of twenty (20) years after a jury found him guilty of aggravated assault, simple assault and recklessly endangering another person. On August 30, 1999, Defense counsel filed an appeal. On August 3, 2000, Defendant's appeal was dismissed by the Superior Court for defense counsel's failure to file a brief. On May 29, 2001, Defendant filed a *pro se* Petition for Post Conviction Collateral Relief, alleging *inter alia* his counsel's ineffectiveness for failing to perfect his direct appeal. On February 12, 2002, this Court granted Defendant's Petition in accordance with Commonwealth v. Lantzy, 736 A.2d 570 (1999), and allowed him to file his direct appeal Nunc Pro Tunc. Defendant filed his appeal March 7, 2002.

The following is a summary of the evidence presented at trial. Stacey Tupper testified that she can recall being in a car on the evening of September 7, 1996, and driving to a tower located on Skyline Drive. She can also recall the Defendant's hand at or around her throat, and him throwing her to the ground. She can also remember what she was wearing, including the shoes she wore. Because of the injuries that she suffered, that is the extent of her recollection from that evening. (N.T. 6/15/99, p. 109)

On cross-examination, Ms. Tupper admitted that the Defendant may not have thrown her to the ground that evening, it may have been on another occasion. (Id., p. 120) She also admitted that the Defendant's hands may have been at her throat area for an affectionate purpose. She could not recall the circumstances surrounding the recollection. Ms. Tupper claimed that she had never climbed the tower, and added that she had been afraid of heights since falling off a ten-foot high scaffolding on a previous occasion. (Id., p. 112)

Mr. Gerald Tanhwney, a transporter at Williamsport Hospital, was working on the evening that Ms. Tupper was brought into the emergency room. He and Mr. Charles Tupper were about to walk out of the hospital to smoke a cigarette when they saw the vehicle pull up. When Mr. Tanhwney approached the car, he observed Ms. Tupper kneeling on the floor, her body face down across the front seat. He immediately noticed that her head was bleeding and she appeared unconscious. He testified also that her pants were down to her ankles. (Id., p. 63) The driver of the vehicle, a white male in his late twenty's, smelled of alcohol. (Ibid) The driver told them that the girl was trying to commit suicide "at the towers over in the mountain." (Id., p. 64)

Mr. Charles Tupper, an admissions clerk at the Williamsport Hospital Emergency Room, is also the Uncle of the victim, Ms. Tupper. Charles Tupper believed that the car drove up sometime after five that morning. He recalled that he was about to go outside when the Defendant came in and asked for him. He knew the Defendant from his relationship with his niece. He described the Defendant as upset and concerned. The Defendant sat with him as he started a chart. In their conversation the Defendant related that Ms. Tupper had called him and he went to look for her. He eventually found

her at a radio tower where she frequently went. (Id., p. 72) The Defendant left the hospital after Charles Tupper phoned Ms. Tupper's mother. The Defendant indicated that he was leaving because he did not get along with Ms. Tupper's mother. (Id., p. 74)

Dawn Brooks, an RN at Williamsport Hospital, was also present when Ms. Tupper was brought to the Emergency Room. The Defendant relayed to her that Ms. Tupper was trying to commit suicide, and had jumped from approximately fifteen feet from the radio tower. (Id., p. 78) She thought that the Defendant appeared to be very upset, not about the fact that Ms. Tupper had tried to kill herself, but about the fact that she was badly hurt. (Id., p. 79) She testified that she found unusual the fact that Ms. Tupper did not have any grass or debris on her clothing to indicate that she had been laying in dirt. (Ibid.)

Rodwan Rajjoub, MD, and surgeon specializing in neurosurgery, took over Ms. Tupper's care on September 9, 1996. Ms. Tupper was in his care from September 9, 1996 until she was transferred to a physical therapy rehabilitation program on September 18, 1999. Dr. Rajjoub subsequently saw Ms. Tupper periodically for check-ups.

Dr. Rajjoub testified that Ms. Tupper presented on September 8, 1996 with a severe closed head injury. She was in a comatose state, and had been intubated. She had a laceration which severed through the entire skull to the bone. (Id., p. 10) A CT scan revealed bilateral swelling. There was also a non-depressed fracture to the skull in the right temporal base that went across the coronal suture to the left side. (Id., p. 11, 26) She had small edema in her ventricle area, which was shifted a centimeter to the left; and bleeding in the pia, the first layer above the brain. (Id., p. 11) She was placed

on mechanical ventilation, elevated 30 degrees to encourage the blood to flow to the lower areas of the body, and administered a steroid to decrease swelling. In addition to her head injuries, Ms. Tupper had a fractured left wrist. (Id., p. 12) Dr. Rajjoub found curious the fact that the spinal cord was not injured. This was unusual given the sensitivity of the cervical spine area. He testified that the cervical spine is a much more sensitive or delicate part of the body than the skull, and with Ms. Tupper's extensive skull injury, he would have expected injury to the cervical spine.

Dr. Rajjoub opined that from the injuries he observed, the mechanism of the injuries was separate blunt injuries to multiple areas of the body. (Id., p. 16, 34) He explained that "one injury cannot and will not cause the bilateral skull fracture." (Id., p. 35) On cross-examination, he indicated that he initially believed the primary point of impact to be on the left because of the number of injuries on the left side. (Id., p 25) He testified that he may have also initially indicated to investigators that Ms. Tupper's injuries were consistent with a fall from a height. (Id., p. 37) He testified that on July 10, 1998, after being contacted by the District Attorney's Office, he more carefully examined the file and photos of the injuries. At that time, he changed his conclusion and opined that the injuries resulted from multiple blunt trauma. (Id., p. 38)

Ms. Tupper's mother, Bonnie Tupper, testified that her daughter was hospitalized for over six weeks following this incident. After being released from the hospital, she attended physical and cognitive therapy daily for approximately six months, then every-other day for several months. (Id., p. 89) She stated that her daughter was once active in outdoor sports such as softball and rollerblading. Because of her injuries, she is no longer able to participate in these events. (Id., p. 90) She testified that there are times

her daughter appears very normal. There are other times, however, when she is unable to comprehend simple concepts. (Id., p. 93) Bonnie Tupper testified that there she had no indication that her daughter was suicidal prior to this incident. (Id., p. 91)

Ronald Clark, a Criminal Investigator with the Pennsylvania State Police, Montoursville Barracks, testified that at approximately 10:00 a.m. on September 8, 1996, he accompanied the Defendant to the scene of the incident on Skyline Drive. At the scene, Trooper Clark found two *Budweiser* cans, two *Marlboro Light* cigarettes, and one *Merit* cigarette. On a large rock, Trooper Clark found a large blood stain, tissue, and hair. There was also clothing on the rock. Additional blood spots were found on a cardboard box located between the power line tower and a small access road. (Id., p. 128)

Upon interviewing the Defendant at the scene, his story changed form his initial story given at the hospital. He admitted at that time that he had spent the entire evening and that morning with Ms. Tupper. (Id., p. 137) The Defendant also admitted that he had fabricated the initial story told at the hospital. (Id., p. 144) He claimed that he told that version of the story to protect Ms. Tupper, as he felt that her family would be upset if they discovered that they were still dating. (Ibid.)

The Defendant told Trooper Clark that upon reaching the tower, Ms. Tupper immediately went over to, and climbed up the tower. After she got on the tower, she asked him for help to get down. He climbed up to assist her in getting down. In the process of helping her down, Ms. Tupper fell backwards off the tower. At that time he claimed that her hands were out to her side, and she did not make a sound as she fell. (Id., p. 138) In a subsequent interview with the Defendant, he claimed that he and Ms.

Tupper sat in the car and talked for some time before she climbed on the tower. He also claimed the two had a conversation while she was on the tower. He stated that she was on the tower for some time before she asked him for help to get down. During the subsequent interview, the Defendant claimed that he had already reached the ground when Ms. Tupper fell, and that he did not actually see her fall. (Id., p. 140-143) Although the Defendant denied drinking at the scene that evening, he later admitted that he bought some beer on their way to the tower.

Trooper Clark testified that when he interviewed Dr. Rajjoub on September 10, 1996, he agreed that Ms. Tupper's injuries were consistent with a fall from a height, although he could not estimate the height. Dr. Rajjoub had added that her injuries could have resulted from being pushed to the ground from a standing position. (Id., p. 155)

The Defense recalled Trooper Clark who testified that the only bruising on the Defendant was some abrasion on his inner forearms. The Defendant told him that he received them while climbing down from the tower after Ms. Tupper fell. (Id., p. 159) There were no defensive injuries on the Defendant which would have been an indication of a combative situation. (Id., p. 161)

The Defense presented the testimony of Stanley Lindauer. Mr. Lindauer was working at Lindauer's Tavern on the evening of September 7, 1996. He testified that Ms. Tupper and the Defendant were at the tavern until approximately 9:00 p.m. that evening. He recognized them as patrons who come to the tavern weekly. He testified that they were in a good mood, and did the activities they normally did at the tavern. They were shooting pool and gossiping among themselves. (N.T. 6/16/99, p. 14)

The Defense called Dr. Mark Rackish, an orthopedic surgeon with West Branch Orthopedics and Sports Medicine. He testified that he was contacted on September 12, 1996 to treat Ms. Tupper's wrist fracture. (Id., p. 55) He said that the injury to the wrist was consistent with the history given of a fall.

The Defense also presented the stipulation that if called to testify, Dr. Weaver would state that when Ms. Tupper presented at the emergency room at approximately 4:00 a.m. on September 8, 1996, her blood alcohol content was .28. (Id., p. 59)

VIOLATION OF PA.R.Crim.P. 600

Defendant first asserts that his adjudication of guilt was made in violation of Pa.R.Crim.P. 600. Defendant argues that the time between the filing of the complaint and the entry of his initial plea was in excess of 365 days. Pa.R.Crim.P. 600 provides that trial in a case in which a written complaint is filed against the defendant, where the defendant is at liberty on bail, shall commence "no later than 365 days from the date on which the complaint is filed." In the instant case, the criminal complaint was filed against the defendant on December 27, 1996. His initial plea of guilty was accepted by the Court August 7, 1998. The total time elapsed was 588 days.

Excluded from that time, however, are delays resulting from the unavailability of the Defendant, and any continuances granted at the request of the defendant or the defendant's attorney *Pa.R.Crim.P. 600(C)(3)(b),* and times between the filing and disposition of pre-trial motions if the delay in the commencement of trial is caused by the filing of the pretrial motion. Commonwealth v. Hill, 558 Pa. 238, 736 A.2d 578, (1999). In the instant case, there were several continuances and motions filed on behalf of the Defendant that resulted in the delay of the commencement of trial.

Initially, the Defense filed a Habeas Motion on March 19, 1997. After defense continuances and rescheduling, the Habeas Motion was finally disposed of on July 29, 1997. (133 days excludable) The trial was then set to commence on September 8, 1997. Defense counsel requested a continuance at that time as he had a previously scheduled vacation. The case was continued to the next pretrial. On October 30, 1997, Defense counsel filed a Motion in Limine. On February 13, 1998, Defense counsel filed a Discovery Motion. The Court disposed of these motions by Opinion dated May 15, 1998. (197 days excludable) The case was scheduled for trial on June 8, 1998. Defense counsel requested a continuance because he was scheduled in another trial. The continuance was granted to the next trial term, July 1, 1998. (22 days excludable) On July 1, 1998, the Defense requested a continuance to the August trial term. The pretrial was never held at that time, as the Defendant pled guilty on August 7, 1998. (38 days excludable)

After subtracting the total amount of excludable time of 390 days from the total time elapsed of 588, a balance of 198 days count toward the expiration of 365 days under *Rule* 600. The Court therefore finds this argument without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next alleges that his trial counsel was ineffective. In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; *and* (3) counsel's ineffectiveness prejudiced defendant. Commonwealth v. Beasley, 544 Pa. 554, 678 A.2d 773, 778, (1996). Thus, the mere allegation that trial counsel

pursued a wrong course of action will not make out a finding of ineffectiveness. Commonwealth v. Savage, 529 Pa. 108, 112, 602 A.2d 309, 311 (1992).

Failing to File Motion to Dismiss Based on Rule 600 Violation

Defendant first alleges that his counsel was ineffective for failing to file a motion to Dismiss based on a violation of Pa.R.Crim.P. 600. Based on the discussion in the previous section, the Court finds that this claim is without merit.

Failing to Object to Ms. Tupper's testimony of her BAC

Defendant next alleges that his counsel was ineffective for failing to object to the testimony of Stacey Tupper that her BAC was .28 at the time of the incident. Upon review of Ms. Tupper's testimony at the trial (N.T. 6/15/99, pp. 106-121) the Court finds that Ms. Tupper did not testify to her BAC level at the time of the incident. Ms. Tupper's testimony was very limited, since there were very few things that she recalled from the date of the incident. The issue of alcohol consumption was not raised during direct examination by the Commonwealth. The Defense did, however, raise the issue in cross-examination. Ms. Tupper's testimony was that she was not aware and did not remember that she was drinking on that evening, but she was later told that she was. (Id., p. 114) Given the nature of the questioning the response was not inappropriate. The Court therefore finds this issue without merit.

Failing to Object to Dr. Rajjoub's Testimony

The Defendant next alleges that his counsel was ineffective for failing to object to the testimony of Dr. Rajjoub, as he did not satisfy the thresholds for expert testimony in Pennsylvania. Instantly, the Court notes that Dr. Rajjoub was not called or qualified as an expert witness. He was called to testify as the victim's treating physician. Dr. Rajjoub testified with regard to the nature of the injuries suffered by Ms. Tupper, and the mechanism that could have caused the types of injuries that she suffered. The Court therefore finds that this argument is without merit.

Incidentally, had Dr. Rajjoub been called as an expert, the Court finds that he would have meet the standard to be qualified as an expert. The standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. Miller v. Brass Rail Tavern, 541 Pa. 474, 664 A.2d 525 (1995). Dr. Rajjoub testified as to his training as a physician and surgeon specializing in neurosurgery with over twenty six years of experience. Dr. Rajjoub described the injuries suffered by Ms. Tupper, and was able to offer an opinion with regard to the amount of force and mechanism that could cause such injuries based on his training and experience. The Court therefore finds Defendant's argument on this issue to be without merit.

Failing to Request funds for an Expert/ Provide Expert Testimony

The Defendant next argues that his Counsel was ineffective for failing to request funds for an expert witness. The Court finds this assertion to be without merit. Defendant's counsel filed a Motion to Obtain Funds for a Medical Expert on June 9, 1998, citing the fact that one of the treating physicians had conflicting theories with regard to the mechanism of injury. This Motion was granted by the Court on June 10, 1998. Although the Defense did not present the testimony of an expert at the trial, this is not necessarily an indication that an expert was not consulted prior to trial. The Court would also note that the Defense did present the testimony of the doctor who set Ms. Tupper's wrist fracture. He testified that the fracture was consistent with someone who suffered a fall from a height. The Court therefore rejects this argument.

Failing to Object to Bonnie Tupper's Testimony Regarding Frontal Lobe

Defendant next argues that his counsel was ineffective for failing to object when Bonnie Tupper testified with regard to frontal lobe shut down, despite having no medical training and without being qualified as an expert. The testimony referred to in this issue was as follows:

> A: What I mean is intelligence, she didn't lose any of her intelligence, but cognitively I don't know what percentage you can put on it, but cognitively it's she stays in a very structured environment and she does the same day-to-day, she functions well but if you take her out of that element, Stacey doesn't function well at all. It presents a problem because looking at her talking to her, she can come off as very normal.
>
> Q: But you're indicating that's not always the case?

> A: No, it's not. When her frontal lobe shuts down as she has explained to me—
>
> The Court: Ma'am you can't testify what people told you, it's only from what you perceive her doing.
>
> A: This problem occurs with her, she has no logic, she can't perceive the pros and cons of something. It's the way it is. If you – she decided that she heard somewhere that the sky is black and even if it's blue, it's going to be black. You cannot change her mind. You cannot –you cannot logically try to explain something. But her brain can't comprehend it.
>
> (N.T. 6/15/99 pp. 92-93)

The testimony was elicited to explain how her daughter's injuries affect her daily functioning, not to explain the functioning of the frontal lobe, and therefore not the type of testimony requiring the knowledge of an expert. The Court therefore finds this issue without merit.

Failing to Object to Dawn Brook's Testimony Regarding Defendant's Mental State

Defendant next alleges that his counsel was ineffective for failing to object to the testimony of Dawn Brooks. Defendant argues that she was permitted to testify to the mental state of the Defendant without being qualified as a psychological expert and without having the requisite qualifications. The testimony referred to in this issue was initiated on cross-examination as follows:

> Q: Ma'am, you indicated that this individual was frantic; is that the word you used?
>
> A: He was pacing back and forth. Speech was very agitated, very excited. I believe arms were moving.
>
> Q: Did he appear to be upset then that his friend was hurt?
>
> A: He appeared to be, yes, he did.

> . . .
> (Re-direct)
> Q: You kind of hesitated or paused when you were describing how he appeared. Why is that?
>
> A: Because he didn't appear to be upset about the fact that she had tried to kill herself or whatever. It's just the fact that she was bleeding and she was hurt, not the circumstances about what happened.
>
> (N.T. 6/15/99, pp. 78-79)

The Court would find this testimony, describing Ms. Brook's personal observations of the Defendant as frantic and upset are not beyond the knowledge or experience of the average layman. As such, qualification as an expert was not necessary. The Court finds this issue to be without merit.

Failure to Impeach Dr. Rajjoub with Testimony of Dr. Brown

Defendant next alleges that his counsel was ineffective for failing to impeach the testimony of Dr. Rajjoub with the testimony of Dr. Brown. Defendant claims that Dr. Rajjoub testified at the trial that the victim had a wide variety of abrasions or contusions about her face, and basically all over her body. Alternatively, Defendant asserts that Dr. Brown testified at the preliminary hearing that there were no other contusions or abrasions. The Court finds this argument without merit. The Court carefully reviewed the trial testimony of Dr. Rajjoub. Dr. Rajjoub testified to the fractures and injuries that he treated. As her treating physician, he was also asked about her general appearance at that time. Photos of Ms. Tupper were available to accurately depicted the location and size of the injuries. When asked *by Defense counsel* what other bruises or scrapes were on Ms. Tupper, Dr. Rajjoub replied:

> A: That only area was shaved. I have to refresh my memory with a photo. If I have that I can describe it to you.
> . . .[witness shown photo]
> A: There's several bruises, if you like to call them. On the one on the left cheek, two above that, one lateral or bilateral region slightly above the eyebrow, one below the eyebrow, and the two on the frontal region across this way (indicating).
> (N.T. 6/15/99, p. 27)

Dr. Rajjoub was therefore not testifying from his recollection of the bruising, but from looking at the actual photos depicting the injuries.

Additionally, upon reviewing the testimony of Dr. Brown from the preliminary hearing, the Court finds the characterization of his testimony by Defense Counsel to be inaccurately described. Dr. Brown did not state that Ms. Tupper had no abrasions. Dr. Brown stated "[i]nterestingly she first came in, we did not see abrasions and they started to appear as she spent time in the emergency room." (N.T. 1/29/97, p.13) Dr. Brown clearly indicated that bruises, in which discoloration is not immediately apparent, were beginning to darken the longer she spent in the emergency room. The Court therefore finds this argument without merit.

Failure to Object to Statements of Prosecuting Attorney in Closing Argument

Defendant next alleges that his counsel was ineffective for failing to object to the mention of a hammer, tire iron, and a big rock by the District Attorney, none of which were mentioned during the presentation of evidence. The statement referred to was stated in the following context:

> …Ladies and gentlemen, if you listen to the evidence, if you look at what happened here you're going to see that basically the case boils down to two questions. Do you believe the Defendant's out-of-court version and there are actually two here or do you believe that this was a criminal

> act? You're not going to assess how it occurred, under what circumstances, did he have a hammer in the car, did he get a tire iron out of the car and drive off with it, did he pick up a big rock and pile drive her in the head with the rock. You have to decide do you believe his out-of-court version, whatever one it may be, or do you believe that this was a criminal act?
>
> (N.T. 6/16/99, p. 30)

When reading the statement in context, the Court finds that the reference was reasonable. The Assistant District Attorney indicated that the question was simply whether they believed the Defendant, or whether they believed that Ms. Tupper's injuries resulted from a criminal act. He indicated that the jurors *did not need to assess* how the injuries were inflicted; they only had to assess the evidence of the injuries inflicted and determine whether the evidence established beyond a reasonable doubt that Ms. Tupper's injuries were caused by a criminal act.

Additionally, a prosecutor is always permitted to discuss the evidence and suggest reasonable inferences to be drawn therefrom. *Commonwealth v. Tucker,* 461 Pa. 191, 335 A.2d 704 (1975); *Commonwealth v. Womack,* 307 Pa.Super. 396, 453 A.2d 642 (1982). The remarks made by the assistant were reasonable inferences drawn from the testimony of Ms. Tupper's physician that he believed that her injuries were caused from multiple blunt trauma.

In addition, shortly after the remark, the Court gave its instructions including a statement to the effect that they were the finders of the facts, and it was their responsibility to resolve the issues of fact based only upon the evidence presented. (N.T. 6/16/99, p. 66) *See Commonwealth v Ashmore,* 266 Pa.Super. 181, 403 A.2d 603 (1979) ("The nature of the reference coupled with the curative instructions of the court

were such as to dissipate the harm."). The Court therefore finds this issue to be without merit.

SENTENCING ERROR

The Defendant last alleges that the Court erred in sentencing the Defendant pursuant to the wrong guidelines. The Court disagrees. In determining the appropriate sentence for the Defendant, the Court considered, inter alia, *The Commonwealth of Pennsylvania Commission on Sentencing, Sentencing Guidelines Implementation Manual, Fourth Edition.* These guidelines were effective August 12, 1994 – June 13, 1997. Clearly, this guideline was in effect at the time of the incident on September 8, 1996. Under these guidelines, the standard range for an offense with an offense gravity score of 11 for a defendant with a prior record score of 0 is 42-60 months. A minimum sentence of five years was therefore within the standard range, and appropriate under the circumstances. The Court therefore dismisses this argument.

Dated:

By The Court,

Nancy L. Butts, Judge

xc: Matthew Zeigler, Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges