IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**No. 99-11,144**
	:	
vs.	:	
	:	
	:	**CRIMINAL**
	:	
ANTOINE D. TIBBS,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the Court on the defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts are as follows: On or about July 7, 1999, the defendant was arrested and charged with 2 counts each of conspiracy, solicitation of minors to traffic in drugs, delivery of a controlled substance, possession with intent to deliver a controlled substance, possession of a controlled substance, and corruption of minors arising out of incidents occurring on March 24, 1999 and March 26, 1999. On March 24, 1999, a minor, Sandra Mertz, sold four bags of cocaine to Corporal Scott Heatley for $200. Ms. Mertz told the police that the cocaine she sold was the defendant's and he told her to sell it in order to get bail money for him. On March 26, 1999, the defendant and Ms. Mertz sold five bags of cocaine to Corporal Heatley for $240.

A jury trial was held on December 10, 1999. The jury found the defendant guilty of all the charges. On

February 11, 2000, the Court sentenced the defendant to incarceration in a state correctional institution for an aggregate of four to ten years.

The defendant filed a timely notice of appeal. In the statement of matters complained of on appeal, the defense raised two issues: (1) the Court erred by imposing two sentences within the aggravated range of the sentencing guidelines; and (2) the defendant was not afforded a jury of his peers. This Court treated the second issue as a challenge to the racial composition of the jury. In its 1925(a) Opinion, the Court noted that the issue was waived because it was not raised at the time the jury was selected and that the defendant failed to show any systematic exclusion of a class of persons as required by Commonwealth v. Jackson, 486 A.2d 431, 436 (Pa.Super. 1984). Although this issue was raised in his 1925(b) statement, defense counsel apparently did not pursue this issue on appeal as the Pennsylvania Superior Court opinion only addressed the sentencing issue. The Pennsylvania Superior Court affirmed the defendant's conviction on or about August 20, 2001, and the record was returned to Lycoming County on or about October 16, 2001.[1]

On May 29, 2002, the defendant filed a pro se PCRA petition. The Court appointed conflict's attorney Kyle Rude to represent the defendant in an Order dated May 31, 2002 and

1 At trial and on appeal, the defendant was represented by attorneys from

docketed June 10, 2002. In this Order, the Court gave Attorney Rude sixty days within which to file an amended PCRA petition. On August 12, 2002, Attorney Rude filed an amended/supplemental PCRA petition.[2]

The PCRA petitions assert numerous allegations of ineffectiveness of counsel. Counsel is presumed effective and the defendant bears the burden of proving otherwise. Commonwealth v. Carson, 559 Pa. 460, 741 A.2d 686, 697 (1999). In order to prevail on an ineffectiveness claim, the defendant must plead and prove the following: (1) the claim is of arguable merit; (2) there was no rational or strategic basis for counsel's act or omission; and (3) prejudice, i.e., there is a reasonable probability that the outcome of the trial would have been different but for counsel's act or omission. Commonwealth v. Ford, 809 A.2d 325 (Pa. 2002); Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261, 273 (2000); Commonwealth v. Miller, 560 Pa. 500, 746 A.2d 592 (2000).

The defendant asserts trial counsel was ineffective for failing to impeach Sandra Mertz with a prior inconsistent statement. At trial, Ms. Mertz testified that the defendant called her from prison and said, "Get me out of here. You know what to do, Sandy." N.T., 12/10/99, at 77-78. In her written statement, Ms. Mertz stated:

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the Lycoming County Public Defender's Office.

2 The Court notes there is a typographical error in paragraph 5 of the amended petition. Paragraph 5 should indicate petitioner did not assert

> Earlier that day [March 24, 1999] I spoke to Antoine from jail. He told me to take his cocain[sic] and sell it to bail him out of jail. If I didn't attempt to bail him out of jail he would have gotten out sooner or later and beat me up for not trying to help him, like he has numerous times in the past. I made 200 dollars out of the deal and bailed him out on Thursday [March 25, 1999].

The Court does not believe counsel was ineffective for failing to use this statement at trial. First, the written statement is generally consistent with Ms. Mertz' trial testimony. Second, the written statement is worse for the defense than Ms. Mertz' in-court statement. The written statement is more detailed and indicates Ms. Mertz believed the defendant would beat her if she did not try to bail him out of jail.[3] For these reasons, the Court finds counsel had a rational or strategic decision not to cross-examine Ms. Mertz with her written statement. Moreover, the Court finds the defendant was not prejudiced by counsel's failure to use the written statement for impeachment. If anything, the use of the written statement would have hurt the defense, not helped it.

The defendant next contends counsel was ineffective for failing to object to Corporal Heatley's statement during trial that the defendant was known to city police [N.T., 121/10/99, at 40]. The defense argues this statement unfairly raised the defendant's prior record. This Court cannot agree.

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ineffectiveness of counsel.
3 In her trial testimony, Ms. Mertz did not mention her fear of a beating from the defendant.

The Pennsylvania appellate courts have found that references regarding mere knowledge of a person, one's nickname or where one can be found do not constitute inferences of prior criminal activity. Commonwealth v. Brown, 511 Pa. 155, 161, 512 A.2d 596, 599 (1986)("prior contact with the police in itself proves nothing. It does not prove a prior record or previous crime, it only proves a previous contact."); Commonwealth v. Sanders, 296 Pa.Super. 376, 379, 442 A.2d 817, 818 (1982)("Merely because a police officer knows someone or knows where [he] may be found does not suggest that the person has been engaged in prior criminal activity."). Therefore, this allegation is without merit.

The defendant next contends counsel was ineffective for failing to timely raise the issue of the racial composition of the jury. The defendant is a black male. The Court believes the jury impaneled in this case was comprised solely of persons who indicated their race as "white" on their jury questionnaires.[4] However, this in and of itself does not amount to a constitutional violation. It is not clear from the defendant's petition whether he is alleging a violation of the Sixth Amendment's cross-section requirement for the jury pool or if he is asserting a claim of a racially biased jury selection. Although each claim requires proof of separate elements, the defendant cannot prevail on either theory. In

4 The questionnaires for the prospective jurors not impaneled or not

order for the defendant to make a prima facie case that Lycoming County's jury pool selection system violates the Sixth Amendment's fair cross-section requirement, he must show: (1) the group allegedly excluded is a distinctive group in the community; (2) representation of this group in the poll from which juries are selected is unfair and unreasonable in relation to the number of such persons in the community; and (3) the under-representation is due to the systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); Commonwealth v. Lopez, 559 Pa. 131, 149, 739 A.2d 485, 495 (1999). At a bare minimum, the defendant would need to call a witness or witnesses who could testify regarding the percentage of blacks in Lycoming County as compared to the percentage of blacks in the jury pools. For a witness's testimony to be admissible at an evidentiary hearing, the PCRA petition must include a certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony. 42 Pa.C.S.A. §9545(d)(1). The defendant, however, has not provided a certification for any witness. Therefore, unless or until the defendant provides a certification, there is no need for an evidentiary hearing and the defendant cannot prevail on this claim. Moreover, similar claims have been raised in the past and Lycoming County's jury

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selected were destroyed in accordance with Pa.R.Cr.P. 632(G).

selection system has been found constitutional. Petit Jury, 12 D&C 4th 42 (1990); Commonwealth v. Dunn, Lyc. Cty. No. 00-10685 (11/26/02, Judge Anderson).

In order to establish a prima facie case of racial discrimination in jury selection, the defendant must make a record identifying the race of venire persons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the final jury. Commonwealth v. Marshall, 2002 Pa. LEXIS 2400 (11/22/02); Commonwealth v. Gibson, 547 Pa. 71, 688 A.3d 1152, 1158-59 (1997). The Court believes the final jury was composed entirely of whites. The Court does not believe the Commonwealth exercised its preemptory challenges to exclude any black prospective jurors. Nevertheless, the Court cannot be certain, because this issue was not raised at the time of selection and the jury questionnaires were destroyed in accordance with Rule 632. Therefore, at this stage of the proceedings, the defense would need to call witnesses to meet his burden of proof. The defendant, however, has not provided a certification for any witness. Thus, unless or until the defendant provides a certification, there is no need for an evidentiary hearing and the defendant cannot prevail on this claim.

The defendant also asserts counsel was ineffective

for failing to interview and present crucial witnesses on his behalf. When an ineffectiveness claim involves the failure to call a witness, the defendant must plead and prove: (1) the existence and availability of the witness; (2) counsel's awareness of, or duty to know of, the witness; (3) the willingness and ability of the witness to cooperate and appear on behalf of the defendant; and (4) the necessity of the proposed testimony in order to avoid prejudice. Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203, 214 (2001); Commonwealth v. Gibson, 547 Pa. 71, 100, 688 A.2d 1152, 1166 (1997). The defendant has not named the alleged witnesses in his petition or indicated the substance of their testimony. He also has not indicated whether defense counsel was aware of these alleged witnesses or whether the witnesses were willing to testify on his behalf. The defendant needs a certification addressing these issues. Absent such a certification, there is no need for an evidentiary hearing.

The defendant alleges counsel was ineffective for failing to file a motion to suppress evidence. The defendant does not specify what evidence should have been suppresses nor does he offer a basis for suppression. The defendant's convictions were based sales to an undercover police officer and the testimony of a co-conspirator/accomplice. The Court does not see any basis for a suppression motion in the record.

Therefore, the Court finds this issue is without merit.

The defendant also claims counsel was ineffective for failing to object to his illegal sentence.[5] Under the PCRA, the only sentencing claim that is cognizable is that the sentence imposed was greater than the lawful maximum. 42 Pa.C.S.A. §9543(a)(2)(vii); Commonwealth v. Knighten, 742 A.2d 679, 684 (Pa.Super. 1999). The Court sentenced the defendant on two counts each of solicitation of minors to traffic in drugs, delivery of a controlled substance, and corruption of minors. Solicitation of minors to traffic drugs is a felony of the second degree, which carries a maximum sentence of ten years. The Court sentenced the defendant to 1 ½ to 3 years incarceration on each conviction for this offense. Delivery of a controlled substance is an ungraded felony, which also carries a maximum sentence of 10 years. The Court sentenced the defendant to 6 months to 2 years incarceration on each conviction for this offense. Corruption of minors is a misdemeanor of the first degree, which carries a maximum sentence of 5 years. The Court sentenced the defendant to 3 months to 12 months concurrent incarceration on each

5 The Court notes counsel challenged the defendant's sentence on appeal. Although counsel did not assert the defendant's sentence was illegal, counsel contended that the Court was not justified in sentencing in the aggravated range on two counts.

conviction for this offense. None of the defendant's sentences exceeded the lawful maximum. Thus, the defendant's claim is not cognizable under the PCRA.

The defendant asserts counsel failed to request a jury instruction that the testimony of any accomplice is to be carefully scrutinized and accepted with caution. This assertion is meritless. The Court gave an accomplice instruction. N.T., 12/10/99, at pp. 128-130. As part of this instruction, the Court stated "you should examine the testimony of an accomplice closely and accept it only with care and caution." Id. at 129.

ORDER

AND NOW, this day of December 2002, upon review of the record and pursuant to Rule 907(a) of the Pennsylvania Rules of Criminal Procedure, it is the finding of this Court that Defendant's Post Conviction Relief Act (PCRA) Petition filed in the above-captioned matter raises no genuine issue of fact and Petitioner is not entitled to post conviction collateral relief. As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Petition. Defendant 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,

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Kenneth D. Brown, Judge

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