

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 98-11,197, 99-10,322

VS :

STEPHEN ZELLERS :

OPINION AND ORDER

Before the Court is Defendant's Petition, filed *pro se*, for Post Conviction Collateral Relief. Counsel was appointed for the Defendant and a conference on the motion was held December 27, 2001. Defendant's Counsel relied on the issues raised in Defendant's *pro se* petition. In his Petition, Defendant sets forth twenty six questions for review. For the reasons that follow, the Court finds that the allegations in Defendant's petition do not provide a basis for relief under the Post Conviction Relief Act.

42 Pa.C.S. § 9543(a) requires that to be eligible for relief, the Defendant must plead and prove by a preponderance of the evidence **all** of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

...

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of

guilt or innocence could have taken place.

- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

...

- (3) That the allegation of error has not been previously litigated or waived.
- (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

For ease of review, the Court has grouped questions involving similar issues together, therefore taking them out of the order that was presented in the petition.

Sufficiency of the Evidence

Defendant's allegations in Questions 1,2,3,4, 6, 23 and 24 pertain to the sufficiency of the evidence presented at trial. The Court finds that these issues have been previously litigated in the direct appeal, and therefore are not eligible for relief under the Post Conviction Relief Act. See 42 Pa.C.S. § 9543(a)(3).

Ineffective Assistance of Counsel

Defendant next alleges that his trial counsel was ineffective. To be eligible for PCRA relief on an ineffectiveness of counsel claim, a petitioner must plead and prove that his conviction resulted from ineffectiveness of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. [Commonwealth v. Knighten](#), 742 A.2d 679, (PA Super, 1999), *citing* [Commonwealth v. Legg](#), 447 Pa.Super. 362, 669 A.2d 389 (1995). Counsel will be deemed ineffective only when there is arguable merit to the underlying claim, the course

counsel chose had no reasonable basis designed to effectuate the interest of the petitioner, and the petitioner demonstrates prejudice caused by counsel's acts or omissions. Knighton, supra, citing Commonwealth v. Carter, 443 Pa.Super. 231, 661 A.2d 390 (1995).

Testimony of Co-conspirator

Defendant asserts in Question 5 that his counsel was ineffective for failing to object to the testimony of his co-conspirator pertaining to the plea agreement she entered. The testimony referred to by Defendant occurred as follows:

Q: Now, at some point you entered a plea of guilty, is that correct, to the charges that you were charged with?

A: Yes.

Q: Do you recall specifically what charges you would have pled guilty to?

A: I pled guilty to aggravated assault with a deadly weapon, possession of instrument of crime, carrying a firearm without a license, robbery, attempt robbery of a motor vehicle, and conspiracy to attempt robbery.

Q: Okay. Were you given any plea agreement or promises as to what your sentence would be in return for entering a plea of guilty?

A: No.

(N.T. 8/9/99, pp.127-128)

This testimony was elicited by the District Attorney in an attempt to show that the co-conspirator *had not* received any promises in exchange for her testimony. The Court therefore rejects Defendant's contention that there was testimony describing a plea bargain, or any declarations that a bargain had been entered in exchange for the co-

conspirator receiving a lesser sentence. Accordingly, the Court finds no merit to this claim.

Pre-Trial Investigation

Defendant asserts in Question 9 that his counsel was ineffective for failing to conduct a pre-trial investigation. The Court finds no merit to this bald assertion without any indication of what evidence, if any, additional pre-trial investigation would have produced. The Court therefore rejects this claim.

Failure to Move to Suppress Defendant's Post Arrest Statements

Defendant asserts in Question 10 that his counsel was ineffective for failing to move to suppress statements, including a written statement the Defendant made after his arrest. Defendant asserts that his statement was not knowingly and voluntarily made. For a waiver of Miranda rights to be valid, it must be knowing, voluntary, and intelligent. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In other words, the waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." [Colorado v. Spring](#), 479 U.S. 564, 572, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) (quoting [Fare v. Michael C.](#), 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

The test for determining the voluntariness of a confession and the validity of a waiver looks to the totality of the circumstances surrounding the giving of the confession. [Commonwealth v. Jones](#), 546 Pa. 161, 683 A.2d 1181, 1189 (1996). Some of the factors to be considered include: the duration and means of interrogation; the

defendant's physical and psychological state; the conditions attendant to the detention; the attitude exhibited by the police during the interrogation; and any other factors which may serve to drain one's powers of resistance to suggestion and coercion. *Id.*

In this case, the evidence presented was that the Defendant was apprehended at approximately 7:30 p.m., and taken to the Montoursville barracks. The Defendant was not questioned until Corporal Troy Hickman came into the Defendant's interview room at 10:40 p.m..¹(N.T. 8/9/99, p. 180) After entering the interview room, Hickman advised the Defendant of his Miranda rights, in the presence of witness Trooper Kevin Scott. (*Id.*, p. 184) The Defendant indicated at that time that he understood his rights, and that he wished to proceed with giving a statement. (*Id.*, p. 186) The Defendant completely and coherently answered the questions asked of him. Hickman then wrote out Defendant's answers to the questions. There was no indication that the Defendant did not understand what was occurring at the time. The entire interview lasted only 40 minutes, after which, Hickman read back the statement and permitted the Defendant to make any additional comments. (*Id.*, p. 202) The Court therefore finds no merit to Defendant's contention that his waiver of his Miranda rights was not knowing and voluntary.

Prior Record Score Issue

Defendant asserts in Question 14 that his counsel was ineffective for failing to effectively argue the issue of Defendant's prior record score. The Court finds no merit to this issue. At the time of sentencing, the Commonwealth produced Defendant's prior record. Defendant's counsel admitted that the Defendant had two felony two offenses

¹ Trooper Hickman interviewed the Defendant after he concluded his interview of the first suspect.

as a juvenile, and one felony three offense.² (N.T. 11/1/99, p. 2) The felony two offenses each contribute two points to the prior record score, and the felony three contributes one point to the prior record score. The Defendant was therefore found to have a prior record score of five. Given Defendant's prior offenses, there was nothing additional Defendant's counsel could have said or argued that would have had an impact on his prior record. The Court therefore rejects this argument.

Cross-examination of Co-conspirator

Defendant asserts in Question 16 that his counsel was ineffective for failing to adequately cross-examine his co-conspirator. After careful examination of the transcript of the cross-examination, the Court finds no merit to this assertion. Defense Counsel's cross-examination of Defendant's co-conspirator, appears in pages 129-156 of the transcript. Defendant's counsel adequately and thoroughly cross-examined Ms. Derby with regard to inconsistencies in her testimony in an effort to discredit her testimony that she was merely following the direction of the Defendant. This included a letter written by Ms. Derby to the Defendant in which she stated "I'm not one to play games with if I do play games they're my games and my rules." She wrote "I can either be your best friend or your worst enemy. I can either get you through your hard times or make them and I will. They'll be your last too. Think about it." She concluded "I am a conceited vain bitch who always gets what I want when I want it bad enough."(N.T. 8/9/99, p 154) Defense counsel made a great effort to expose the motivations of Defendant's co-conspirator. The Court therefore rejects this argument.

² Defendant's counsel had initially thought that the prior record contained one felony two and two felony threes. After reviewing the prior record produced by the Commonwealth, Defendant's counsel admitted that he had been mistaken as to the grades of the offenses.

Adequate Representation at a Critical Stage

Defendant asserts in Question 17 that his counsel was ineffective for failing to perform his duties at a critical stage of the trial proceedings. The Court finds no merit to this assertion without any facts to support his allegation that his counsel was not present at a critical stage of the proceeding. The Court therefore rejects this claim.

Failure to present character witnesses

Defendant asserts in Question 18 that his counsel was ineffective for failing to present character witnesses for the Defendant. This Court is unable to assess the merits of this claim, as the Defendant has not named any character witnesses he would have had available at the time of trial, or what the substance of their testimony would have been. See [Commonwealth v. Durst, 522 Pa. 2, 6, 559 A.2d 504, 506 \(1989\)](#). (In order to prove counsel's ineffectiveness for failure to call a particular witness, there must, at a minimum, be a showing that the witness's testimony would have been beneficial or helpful in establishing the asserted defense.)

Failure to Raise and Argue Crucial Points of Error

Defendant asserts in Questions 19 and 21 that his counsel was ineffective for failing to raise and argue crucial points of error, both during the trial, and during the direct appeal. The Court finds no merit to this assertion without any facts to support this allegation. The Court therefore rejects this claim.

Jury Instruction

Defendant asserts in Question 22 that his counsel was ineffective for failing to request a jury instruction pertaining to credibility of a co-defendant. The Court finds no merit to this allegation. Defense counsel requested, and the jury was instructed as to

the nature of a co-conspirator's testimony. (Id., pp. 217) The jury was informed as follows:

When a Commonwealth witness was so involved with the crime charged that she was an accomplice her testimony has to be judged by special precautionary rules. Experience shows an accomplice when caught will often try to place the blame falsely on someone else. She may testify falsely in the hope of obtaining favorable treatment or for some corrupt wicked motive. On the other hand, and accomplice may be a perfectly truthful witness.

The special rules that I shall give you are meant to help you distinguish between truthful and false accomplice testimony. In view of the evidence of Katie Derby's criminal involvement you must regard her as being an accomplice in the crime charged and apply the special rules to her testimony. An accomplice may be defined as a person who knowingly, voluntarily cooperates with or aids another in the commission of a crime. These are the special rules.

First, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source;

two, you should examine the testimony of accomplice testimony closely and accept it with care and caution;

three, you should consider whether the testimony of an accomplice is supported in whole or in part by other evidence.

Accomplice testimony is more dependable if supported by independent evidence. However, even if there is no independent supporting evidence, you may still find the Defendant guilty solely on the basis of the accomplice's testimony if after using the special rules I just told you about, you are satisfied beyond a reasonable doubt the accomplice testified truthfully and the Defendant is guilty.

(Id., pp. 274-275)

The Court therefore rejects Defendant's argument.

Delay in Charging

Defendant's Questions 8 and 11 pertain to the Commonwealth's delay in charging the Defendant with additional charges, and whether his counsel was ineffective for failing to argue at the trial that the delay was an attempt to force the Defendant to accept a plea or an effort to forum shop. The first charges were filed against the Defendant June 11, 1998, and included the charges connected with the robbery of the motor vehicle. After conducting additional interviews, additional charges were filed November 24, 1998, and included charges connected with the time shortly before the robbery. The Court explained the addition of the charges during the trial. (*Id.*, p. 210) Additionally, there was no evidence that the addition of the charges was done in an effort to forum shop as the Defendant alleges. The cases in this county are assigned according to the District Magistrate that handles the case. Since the incidents occurred in the geographical areas covered by the District Magistrates assigned to this Court, they were assigned the same trial judge. The Court therefore rejects this argument.

Commonwealth Misconduct

Defendant's Questions 7, 13, 15, 25, and 26 provide general allegations of misconduct by the Assistant District Attorney during the course of the trial. More specifically, Defendant asks whether it was error on behalf of the Commonwealth to "intentionally and deliberately" misrepresent evidence. There are no specific allegations of any statements made by the Assistant District Attorney in support of his claim. The Court finds no merit in these allegations where there are no facts to support them.

Trial Court Error

In Question 12, Defendant alleges that this Court abused its discretion in denying Trial Counsel's request to permit the jurors to read the letter used as impeachment of Defendant's co-conspirator. Upon review of the transcript, the Court finds that Defendant's Counsel did not request that the letters to be published to the jury. Even if his counsel had made the request, the Court would not have permitted the jury to see the letters, given the amount of irrelevant information contained in the letters. The Court therefore rejects this argument.

Defendant's Question 20 asserts that the Court abused its discretion in refusing to dismiss a juror who violated the Court's stipulation to remain sequestered from the witnesses connected with the case. At the time of the trial, this Court was unaware of any communications between a juror and a witness involved in the case. The Court is therefore unable to address this issue.

ORDER

AND NOW, this ____ day of July, 2002, it is ORDERED and DIRECTED that Defendant's Petition for Post Conviction Collateral Relief is DENIED. The defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellant Procedure, a copy of which is attached. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, the defendant may lose forever his right to raise these issues.

A copy of this order shall be mailed to the defendant by certified mail, return receipt requested.

By The Court,

Nancy L. Butts, Judge

cc: DA
James Protasio, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges