

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 01-10,518
	:
	:
vs.	: CRIMINAL DIVISION
	: Post Sentence Motion
EDWARD J. BOBB, III,	:
Defendant	:

OPINION AND ORDER

After a trial held September 13 and 14, 2001, Defendant was convicted by a jury of aggravated assault, simple assault and recklessly endangering another person. On June 6, 2002, Defendant was sentenced to a term of incarceration of four (4) to eight (8) years. In the instant Post Sentence Motion, filed June 14, 2002, Defendant contends trial counsel was ineffective for failing to file an Alibi Notice, as a result of which two of his alibi witnesses were precluded from testifying at trial. A hearing on the Post Sentence Motion was held October 18, 2002.

To support a claim of ineffective assistance of counsel, a defendant must first demonstrate that the underlying issue is of arguable merit. Commonwealth v Westcott, 523 A.2d 1140 (Pa. Super. 1987). Inquiry must then be made whether the course chosen by counsel was not reasonably designed to protect his client’s best interest, that is, where the alternative not chosen offered a potential for success substantially greater than the tactics actually utilized. Commonwealth v Westcott, supra.; Commonwealth v Whyatt, 476 A.2d 374 (Pa. Super. 1984). Finally, a defendant must show that his counsel’s dereliction so prejudiced him as to deny him the right to a fair trial. Commonwealth v Westcott, supra.

In the instant case, the Commonwealth agrees that Defendant’s underlying claim is of arguable merit. Defendant had two alibi witnesses present at the trial, prepared to testify regarding Defendant’s

whereabouts at the time of the crime. The first part of the test is therefore satisfied by Defendant.

Trial counsel's decision to not file an Alibi Notice does not appear, moreover, to have been designed to effectuate his client's interest. Trial counsel, Mike Rudinski, Esq., testified he did not file an Alibi Notice because the Commonwealth did not file a Bill of Particulars, even though one had been requested by the Defendant. According to Mr. Rudinski, his previous experience indicated he would probably be able to introduce the alibi witnesses even without the notice, in light of the failure of the Commonwealth to file the Bill of Particulars. Mr. Rudinski indicated his basis for not filing the notice was to gain an element of surprise, preventing the Commonwealth from investigating the alibi witnesses. Assuming the alibi witnesses were proposing truthful testimony, however, an investigation would not harm Defendant's defense. Not filing the notice would not, therefore, provide the advantage Defendant suggests. Applying the Whyatt standard to the circumstances in this matter, the Court cannot help but conclude that the alternative not selected, filing the notice, "offered a potential for success substantially greater than the tactics actually utilized", not filing the notice. Had the notice been filed, the witnesses would have been able to testify. By not filing a notice, Defense counsel took a chance that the witnesses would be precluded from testifying, and indeed that is what happened. Defendant has thus satisfied the second part of the test.

Finally, with regard to the element of prejudice, it appears Defendant may indeed have been sufficiently prejudiced by his trial counsel's actions. Although Defendant did present his own alibi testimony and the testimony of his mother, it appears his mother went to bed prior to the time of the incident. The witnesses who were precluded from testifying, Defendant's girlfriend and stepfather, would have provided an alibi for a longer period of time, including the time of the crime and thereafter. The Court thus cannot say Defendant suffered no prejudice when these witnesses were precluded from testifying.

In conclusion, it appears Defendant has presented a case of ineffective assistance of trial counsel, thus necessitating a new trial.

ORDER

AND NOW, this 29th day of October, 2002, for the foregoing reasons, Defendant's Post Sentence Motion is hereby granted and a new trial is awarded. The sentence entered June 6, 2002 is hereby vacated and bail set by Order of March 21, 2002 is hereby reinstated. The Sheriff is requested to transport Defendant from the State Correctional Institution in which he is currently incarcerated to the Lycoming County Prison, at the Sheriff's convenience. The matter shall be placed back on the trial list and the Deputy Court Administrator is requested to schedule a pre-trial conference.

By the Court,

Dudley N. Anderson, Judge

cc: DA
James Best, Esq., 838 Market Street, Lewisburg PA 17837
Sheriff
Eileen Grimes, Deputy Court Administrator
Gary Weber, Esq.
Hon. Dudley N. Anderson