

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 98- 11, 563  
:   
vs. :   
:   
: CRIMINAL  
:   
SCOTT FINCH, : Post Conviction Relief Act  
Defendant : (PCRA)

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 30, 1998, the police charged the defendant with three counts each of aggravated indecent assault, indecent assault and corruption of minors arising out of allegations of sexual abuse of his stepdaughter, C. B., and his daughter, A. F. and S. F. A jury trial was held May 17-19, 1999. S. F. was unable to testify at trial and the Court granted a demurrer with respect to the counts of the Information listing her as a victim.

The jury found the defendant guilty of aggravated indecent assault against A. F., two counts of indecent assault and two counts of corruption of minors. On or about July 19, 1999, the Court sentenced the defendant to incarceration in a state correctional institution for a minimum of five and one-half (5 ½) years and a maximum of fourteen (14) years.

The defendant filed a notice of appeal on August 17, 1999. In his appeal, the defendant raised the following issues of trial court error: (1) excluding Dennis Foreman as a potential juror; (2) finding A.F. competent to testify but allowing the assistant district attorney to ask leading questions; (3) allowing Amy Hinds and Dr. Susan Lewis to testify regarding prior consistent statements made by C.B. and A.F.; and (4) failing to instruct the jury that it should take the testimony of Lisa Cox, Amy Hinds and Agent Robert Gilson with caution if no valid reason existed for not audio or videotaping the children's statements. In addition, counsel for the defendant filed a brief and petition to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967). In the brief, counsel raised all issues that could possibly support an appeal.

In a decision dated December 4, 2000, the Pennsylvania Superior Court affirmed the defendant's convictions and permitted defense counsel to withdraw, finding the issues raised by the defendant wholly frivolous. The record was returned to Lycoming County on or about February 27, 2001.

On October 8, 2001, the defendant filed a pro se PCRA petition. The Court issued a routine order appointing

the public defender's office to represent the defendant on his PCRA petition. The public defender's office, however, had a conflict as they represented the defendant at trial and on appeal. Thus, Gregory Stapp was appointed conflict's counsel for the defendant. On or about January 18, 2002, the Court held an initial conference on the defendant's PCRA petition. After the conference, the Court gave counsel sixty (60) days to review the transcripts and file any amended PCRA petition.

In February 2002, Mr. Stapp resigned as conflict's counsel and on March 15, 2002 James Protasio was appointed conflict's counsel for the defendant.

On March 26, 2002, the Court held another conference in this case. Since Mr. Protasio had just been appointed to represent the defendant, the Court gave Mr. Protasio sixty (60) days to review the defendant's case and file any amended PCRA petition. Mr. Protasio corresponded with the defendant regarding his case and whether there were any additional issues to be raised in an amended PCRA petition. The defendant wrote to Mr. Protasio and indicated there was no need for an amendment because all the issues in this case were raised in his pro se petition.

On May 29, 2002, the Court held an argument on the defendant's PCRA petition to determine whether there was any

merit to the issues raised therein and to determine whether an evidentiary hearing was needed. After reviewing the petition, the record, and counsel's arguments, the Court concludes the issues raised are without merit and there is no need for an evidentiary hearing.

All of the issues raised by the defendant concern the effectiveness of his counsel. Counsel is presumed effective and the defendant has 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., the outcome of the trial would have probably been different but for counsel's act or omission.

Commonwealth v. Fletcher, 561 Pa. 266, 750 A2d 261, 273 (2000); Commonwealth v. Miller, 560 Pa. 500, 746 A.2d 592 (2000); Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326, 333 (1999).

The defendant first asserts counsel was ineffective for failing to inform the court that the defendant was under treatment for mental illness during the trial and therefore was not competent. In order to prevail on such a claim, the

defendant would need an expert medical witness to testify on his behalf that the effect of his medications such as Prozac and Zoloft would render him incompetent. The mere fact that the defendant may have been on medications does not show he was incompetent at the time of trial.<sup>1</sup> The defendant would need to present medical testimony to show the effect of the medication on his ability to understand the proceedings and his ability to participate in his defense. In order for such testimony to be admissible at a PCRA hearing, the defendant must submit a certification stating his proposed medical witness's name, address, date of birth and the substance of the witness's testimony. Absent such a certification, the witness's testimony would be inadmissible. 42 Pa. C. S. A. §9545(d). Therefore, unless or until the defendant provides a certification for a medical witness, he cannot prevail on this claim and there is no need for an evidentiary hearing.

The defendant next claims counsel was ineffective for failing to object to his confession being entered into evidence. The defendant claims his confession was not knowingly or voluntarily given because of his mental illness and associated drug therapy. As with the previous issue, the defendant would need to present a medical witness to testify

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<sup>1</sup> In fact, the purpose for prescribing such medications is generally to make the patient more functional, not less.

regarding the effects of his medication on his abilities. Unless or until the defendant provides a certification for a medical witness, he cannot prevail on this claim and there is no need for an evidentiary hearing.

The defendant next asserts counsel was ineffective for failing to object to false statements made by the Commonwealth to government witnesses in the presence of the victims, which demonstrated a basis for lying by the victims and tainted their testimony. The Court believes the defendant is referring to statements made to Dr. Lewis by the assistant district attorneys who were handling this case to the effect the children were being brought to Dr. Lewis for an examination due to reports of abuse by the children's stepfather/father. This argument is without merit. The statements were not false. The children were brought to Dr. Lewis, because of reports of abuse. N.T., 5/19-20/99, at 101. The reports were made prior to Dr. Lewis' examination. The defendant believes these statements are false based on the lack of a statement by C.B. during Dr. Lewis' examination. Although C.B. did not make a statement to Dr. Lewis regarding abuse by the defendant, A.F. spontaneously made such a statement to Dr. Lewis. N.T., 5/19-20/99, at 167. The Court also notes the children were examined on or about March 4,

1998. The trial in this case was held in May 17-20, 1999. More than a year passed between the statements being made and the children's testimony. Therefore, it is unlikely that any statement made during the taking of the medical history tainted the children's trial testimony over a year later. Moreover, the statements did not taint C.B. because, if the allegedly false statements influenced C.B., she would have made a statement to Dr. Lewis during the examination at a time shortly after the statements were first made. Finally, the defendant admitted in a signed written statement taken by Agent Gilson that he molested C.B. Thus, the defendant cannot show that the outcome of the trial probably would have been different but for counsel's act or omission

The defendant contends counsel was ineffective for failing to object to a finding of competency of the three victims. Trial counsel challenged the competency of the children to testify. The Court conducted an inquiry on the record and found the children competent. When called to testify, however, S.F. could not and the Court dismissed the charges relating to her. Counsel raised the issue of the competency of A.F. on appeal and lost. Commonwealth v. Finch, 1434 M.D. 1999, at pp.4-7. Therefore, this issue was previously litigated. Counsel could have raised the

competency of C. B. on appeal, but did not. Therefore, this issue is waived. Even if counsel had challenged the competency of C. B., however, the result would not have been different as the record reflects both A. F. and C. B. were competent to testify. In summary, this issue is either previously litigated or waived or the defendant cannot prevail because he cannot establish prejudice.

The defendant next asserts counsel was ineffective for failing to object to testimony, which was coached by the Commonwealth and elicited from the victims to establish competency. As noted previously, all issues relating to the competency of the victims were either previously litigated or waived.

The defendant alleges his counsel was ineffective for failing to object to the Commonwealth's use of perjured testimony and the allowance of untrue testimony to go uncorrected. There is no evidence that any testimony was perjured. The defendant cites to portion of Dr. Lewis' testimony that there was no physical evidence of a vaginal penetrating injury and attempts to use that testimony to contend A. F.'s statements that her father touched the inside of her private area were false. Dr. Lewis explained, however, that you wouldn't necessarily find physical evidence of



penetration because the perpetrator often times in skillful and slow enough that there is not any physical evidence left of digital penetration. N.T., 5/19-20/99 at p.164. The defendant's transcript cites of pages 216 and 221 refer to Agent Gilson's report. Agent Gilson and Amy Hinds interviewed A.F. During that interview, A.F. indicated the defendant put his hands inside her underwear and touched her "pee pee." On cross-examination, trial counsel explored whether Agent Gilson had any notation in his report or whether he recalled A.F. saying specifically that the defendant touched the inside of her private area. On the pages cited by the defendant, Agent Gilson replied in the negative. Just because A.F. may not have mentioned penetration during her interview with Agent Gilson and Amy Hinds does not mean her trial statement that penetration occurred was perjured. Dr. Lewis testified that A.F. told her that her father would put his finger into her vagina and it hurt. N.T., 5/19-20/99, at p. 167. At best, the lack of such a statement during the interview with Agent Gilson and Amy Hinds created a credibility issue. Credibility determinations are within the sole province of the trier of fact. The jury resolved any credibility issues regarding A.F.'s testimony in favor of A.F. and against the defendant, as was the jury's prerogative. Based on the foregoing, the

Court finds this issue lacks merit and, even if counsel had objected, the Court would have overruled any such objection.

The defendant next asserts counsel was ineffective for failing to properly cross-examine a witness for the Commonwealth. Although the defendant does not specifically name the witness, based on the quote from the transcript the Court believes he is referring to his stepdaughter, C.B. Although counsel did not cross-examine C.B. with respect to the details of the defendant's sexual contact with her, counsel did cross-examine C.B. N.T, 5/19-20/99, at pp. 66-71. The transcript passage cited by the defendant pertains to a sidebar argument regarding the admission of prior consistent statements of the victims. Counsel argued that prior consistent statements of C.B. should not be admitted because he didn't suggest her testimony was recently fabricated, as he did not cross-examine her regarding the details of the sexual contact. It appears counsel may have intentionally avoided this area in an attempt to preclude the admission of her prior consistent statements to Children and Youth caseworkers and Agent Gilson. Thus, counsel may have had a strategic reason for not cross-examining C.B. regarding the details of the defendant's sexual contact with her. Regardless whether counsel had a strategic basis, the defendant cannot prove

prejudice. With respect to the allegations of abuse of C. B., the defendant admitted he did the things C. B. claimed he did and he gave Agent Gilson a signed confession to that effect. Therefore, the defendant cannot prevail on this claim.

The defendant also contends counsel was ineffective for failing to object to false statements made by the Commonwealth to the Court which resulted in the admission of prior consistent statements of the victims. This contention is without merit. First, as previously stated, there is nothing in the record to indicate the statements made by the Commonwealth were false. Second, the transcript passages cited by the defendant related to a sidebar argument regarding the medical diagnosis exception to the hearsay rule. The Court ruled against the Commonwealth and in favor of the defendant on that issue. The prior consistent statements were admitted because defense counsel presented the theory that the children had been coached or made up certain aspects of their testimony. Defense counsel challenged the Court's ruling on appeal and the Pennsylvania Superior Court upheld this court's ruling that the prior consistent statements were admissible. Commonwealth v. Finch, 1434 MDA 1999, at pp. 7-14. Therefore, any issue regarding the admission of the prior consistent

statements of the child victims was previously litigated or waived.

The defendant claims counsel was ineffective in failing to file a motion for suppression of his criminal record and for informing the defendant his prior convictions would be used against him if he testified. This claim is meritless. The Court conducted an inquiry on the record concerning the defendant waiving his right to testify in his own defense. N.T., 5/19-20/99 at pp. 241-244. It is clear from this colloquy that the defendant chose not to testify after consulting with his attorney. The attorney noted on the record that the defendant had several convictions for offenses that would constitute *crimen falsi* and all but one of these *crimen falsi* convictions occurred within ten (10) years. Defense counsel also noted a *crimen falsi* conviction that was eleven years old still could have been admissible. Defense counsel accurately advised the defendant of the law regarding his prior convictions. Therefore, there was a rational basis for counsel's conduct and he was not ineffective.<sup>2</sup> Moreover, even if counsel had filed a motion to exclude the defendant's criminal record, such a motion would not have been successful. The pre-sentence investigation (PSI) indicates the defendant

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<sup>2</sup> The Court also notes the Aguado case cited by the defendant is distinguishable from this case in that the convictions in Aguado were not *crimen falsi* convictions being used for impeachment purposes.

had a prior criminal record consisting of the following: (1) burglary, grand larceny and petit larceny offenses that occurred on or about October 5, 1988; (2) a larceny offense that occurred on or about May 16, 1990; (3) a criminal facilitation offense that occurred on or about June 20, 1990; and (4) a criminal possession of stolen property offense that occurred on or about April 4, 1992. The defendant received a probationary sentence for each of these offenses. However, the defendant's probation was revoked on the 1988 burglary and related offenses and the defendant spent served five months in jail. In Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987), the Pennsylvania Supreme Court established the following rule regarding the admissibility of prior convictions for impeachment purposes:

[E]vidence of prior convictions can be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement, and the date of conviction or the last date of confinement is within ten years of the trial date. If a period of greater than ten years has expired the presiding judge must determine whether the value of the evidence substantially outweighs its prejudicial effect.

Id. at 414, 528 A.2d at 1329. Although the PSI lists offense dates and not conviction dates, the offenses for larceny and criminal possession of stolen property clearly would have been admissible under Randall to impeach the defendant had he testified in his own defense. It is also likely that the 1988 burglary and related offenses would have been admissible. Although the offense date was more than ten years from the trial date, the defendant's probation was revoked and he

served five months in jail on this offense. Since the PSI lists the offense date and not the conviction date, it is probable that the defendant's last day of confinement for the burglary and related offenses was within ten years of the May 17, 1999 trial date, rendering these offenses admissible for impeachment purposes. The only offense that might not have been admissible is the 1990 criminal facilitation. Thus, even if counsel should have filed a motion to suppress the defendant's criminal record, the defendant cannot show prejudice because the court would have found the vast majority of his criminal record admissible for impeachment purposes.

Defendant alleges counsel was ineffective for failing to object to Dr. Lewis' testimony when it was confusing and there was no correction of the confusion for the jury. Essentially, the defendant asserts Dr. Lewis did not know which child made a statement to her and she was confusing C.B. with A.F. Defense counsel would have a rational basis for not objecting to Dr. Lewis' testimony. Any confusion on Dr. Lewis' part was helpful to the defense. Counsel could argue that the jury should not accept Dr. Lewis' testimony regarding the statements of the children because she had the children confused or was inconsistent. Defense counsel could also argue that the only thing to which Dr. Lewis consistently testified was that there was no medical evidence of any abuse. Whether the jury accepted counsel's arguments would fall within their discretion, as credibility is a determination within their sole province. Furthermore, the defendant has failed to allege prejudice. Since counsel would have a rational basis for not correcting Dr. Lewis' confusion and the defendant has not alleged prejudice, the defendant cannot prevail on this claim.

The defendant asserts counsel also was ineffective for failing to call his wife as a character witness. When an ineffectiveness claim involves the failure to call a witness, the petitioner must plead and prove: (1) the witness existed; (2) the witness was available to testify; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness' testimony was so prejudicial as to have denied the defendant a fair trial. Commonwealth v. Henry, 706 A.2d 313, 329 (Pa. 1997). For a witness' testimony to be admissible at a hearing on a PCRA petition, the petition must include a certification stating the witness's name, address, date of birth and the substance of the witness's testimony. Absent such a certification, the witness's testimony would be inadmissible. 42 Pa. C. S. A. §9545(d). The

defendant fails to specify to what character trait his wife could testify. It appears the defendant merely wanted his wife to testify that she did not believe the defendant was guilty of these offenses. The Court questions whether such testimony would be admissible, since Pennsylvania does not permit proof of character by opinion evidence. Pa. R. E. 405(a) and comment. Regardless, the Court does not believe such testimony would affect the outcome of this trial. First, the defendant acknowledges in his PCRA petition that his wife initiated a phone call to the police about possible abuse of the children. Second, the defendant signed a confession with respect to C. B. Finally, admitting character evidence may open the door for the Commonwealth to admit evidence of the defendant's bad character, including the defendant's convictions. Pa. R. E. 404(a)(1) and 405(a).

The defendant next claims counsel was ineffective for failing to inform the jury of the possibility of a reasonable doubt. This argument is meritless. The portion of the transcript cited by the defendant in support of this position related to the Court granting defense counsel's demurrer to the charges involving S. F. This statement did not relate to the other children and did not amount to a statement by the Court that there was reasonable doubt with respect to the charges involving A. F. and C. B. Apparently, the defendant wanted trial counsel to argue that because the Court granted a demurrer with respect to S. F., there is a reasonable doubt with respect to A. F. and C. B. Such an argument, however, would be improper and objectionable. Thus, counsel had a reasonable basis for not making such an argument. Moreover, the Court instructed the jury regarding reasonable doubt. N. T., 5/19-20/99 at pp. 247-249. Therefore, the defendant cannot show prejudice.

The defendant next asserts counsel was ineffective for failing to object to the Court's instructions that the jury's verdict had to be unanimous. This argument is meritless. The Court utilized the standard suggested jury instructions, which adequately stated the law regarding unanimity of the verdict. N. T., 5/19-20/99 at p. 261-262. The jury retired and began deliberations at approximately 1:11 p. m. The jury returned with a verdict at 4:30 p. m. There was no indication that the jury could not reach agreement. Therefore, the defendant was not entitled to any jury instruction other than the one given.

The defendant also contends counsel was ineffective for failing to request sequestration of witnesses during trial. The defendant claims the victims' grandmother was

present in the courtroom and influenced the victims' trial testimony. There is nothing in the record to indicate the grandmother influenced the children's testimony at trial. Moreover, the children's grandmother was not a witness. A sequestration order generally only applies to witnesses. Defense counsel claimed the grandmother was a Commonwealth witness, but neither the Commonwealth nor the defense called her as a witness. The Commonwealth, however, agreed to ask her to leave the courtroom if the defense counsel had a problem with her being in the courtroom. N.T, 5/19-20/99 at pp. 31-32. The Court notes this discussion took place during S.F.'s testimony. It arose because S.F. was unable to testify and the Commonwealth wanted the Court to permit her to sit in her grandmother's lap in a chair on the floor instead of in the witness stand. Trial counsel objected to that and requested sequestration. The Commonwealth agreed to sequestration. S.F. was the first victim to testify and the charges involving her were dismissed. Therefore, the defendant cannot show prejudice.<sup>3</sup>

The defendant alleges counsel was ineffective for filing an Anders brief. This allegation is without merit. The Pennsylvania Superior Court reviewed the record and counsel's brief. It found no merit to the issues raised by the defense and allowed counsel to withdraw. Thus, the Superior Court found the Anders brief was appropriately filed. If an Anders brief were not appropriate, the Superior Court would not have allowed counsel to withdraw.

The defendant also asserts the evidence was insufficient to support a guilty verdict. This Court cannot agree. The passages cited by the defendant merely show there was a credibility determination for the jury to make. When a challenge to the sufficiency of the evidence is made, the Court must view the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the Commonwealth. In order to sustain the verdict for aggravated indecent assault, the Commonwealth must show the defendant engaged in penetration, however slight, of the genitals or anus of A.F. with a part of the defendant's body for any purpose other than good faith medical, hygienic, or law

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<sup>3</sup> From the record, one could infer that the children's grandmother was present only during the testimony of S.F. If the defendant believes the grandmother was present throughout the testimony and did something to influence the children's testimony, he would need a certification stating the witnesses who would testify to those facts. He has not provided any certification. Unless and until he provides a certification, any such testimony would be inadmissible.



enforcement procedures and without A.F.'s consent. 18 Pa. C. S. A. §3125(1). A.F. was eight years old at the time of trial and was approximately six years old when this offense occurred. N.T., 5/19-20/99, at 37, 198. A.F. testified that the defendant put his finger inside her private and it hurt. Id. at 39-41. A.F. told her mom, who called the police to report the crime. Id. at 43. This testimony, and the reasonable inferences drawn therefrom, establishes that the defendant penetrated the victim's genitals with a part of his body (his finger) without her consent. Thus, the evidence is sufficient to support the defendant's conviction for aggravated indecent assault.

For the two counts of indecent assault, the Commonwealth had to establish that the defendant had indecent contact with A.F. and C.B. and the victims were under 13 years of age. 18 Pa. C. S. A. §3126(a)(7). Indecent contact is defined as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 Pa. C. S. A. §3101. The testimony presented at trial established the defendant touched A.F.'s privates with his finger when she was about six years old. N.T., 5/19-20/99, at 37-41, 198. C.B. was age ten at the time of trial. Id. at 60. She testified the defendant would come into her room, take her clothes off, take his clothes off, and rub his private area against her private area. Id. at 62-65. Sometimes when he did this, slimy stuff came out of his thing. Id. at 64. When C.B. was interviewed by Agent Gilson, she made similar statements. Id. at 197. When Agent Gilson interviewed the defendant about C.B., he admitted the acts in question and gave a signed confession. Id. at 205-208. The defendant also admitted C.B. was seven years old when the sexual contact started and about nine years old when he stopped. Id. at 205. Based on this testimony, the Court finds the evidence was sufficient to support the defendant's convictions for indecent assault.

For the two counts of corruption of minors, the Commonwealth had to establish the defendant was age 18 or older, the victims were less than 18 years of age and the defendant by any act corrupted or tended to corrupt the morals of the victims. 18 Pa. C. S. A. §6301. The defendant was 29 years old when Agent Gilson interviewed him. N.T., 5/19-20/99, at 199, 207. A.F. was 8 years old at the time of trial and about six years old when the acts in question occurred. Id. at 37, 198. C.B. was ten years old at the time of trial, she was anywhere between 4 and 7 years old when the defendant began having sexual contact with her and she was nine years

old when such contact ceased. Id. at 60, 65, 205. The defendant put his finger inside A.F.'s private. Id. at 38-41. He rubbed his penis against C.B.'s private area and, sometimes, slimy stuff came out. Id. at 61-65, 197, 205-208. Based on this testimony, the Court finds the evidence was sufficient to support the defendant's convictions for corruption of minors.

The defendant contends the accumulation of errors by counsel is a basis for a new trial. Since the Court rejected each claim of ineffective assistance of counsel, there is no accumulation of errors to justify a new trial.

Finally, the defendant contends the jury verdict should not be upheld because it was based entirely upon circumstantial evidence. This contention is without merit. The victims' testimony provided direct evidence that sexual acts were committed against them and the perpetrator was the defendant.

O R D E R

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

cc: Kenneth Osokow, Esquire  
James Protasio, Esquire  
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