IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. 96-11,111
	:	
JEFFREY L. MILLER,	:	CRIMINAL ACTION - LAW
	:	PETITION FOR
Defendant	:	POST CONVICTION RELIEF ACT

Date: December 31, 2003

OPINION AND ORDER

Facts/Procedural Background

Before the Court for determination is Defendant Jeffrey Miller's Petition for Post Conviction Relief ("Petition") filed July 30, 2002. This case arose out of an incident that occurred on June 16, 1996. During the evening hours, Defendant and Richard Haines (Haines) became engaged in an argument and physical confrontation. The confrontation escalated. At some point, Defendant shot Haines and seriously wounded him. The Commonwealth advanced the theory that Defendant shot Haines while Haines was lying on the ground and Defendant was standing over him. Defendant claimed that he shot Haines in self-defense as both were on the ground with Haines on top of and choking him.

Following a jury trial, Defendant was found guilty of two counts of aggravated assault; criminal attempt (homicide); possessing instruments of a crime; simple assault; theft of property lost, mislaid, or delivered by mistake; altering or obliterating marks of identification; firearms not to be carried without a license; and recklessly endangering another person. On December 19, 1997, this Court sentenced Defendant for the aggravated assault (Count 1), possessing of instrumentalities of a crime (Count 4), theft of property lost, mislaid, or delivered by

mistake (Count 8), altering or obliterating marks of identification (Count 9), firearm not to be carried without a license (Count 10) resulting in a cumulative sentence of one-hundred and seventeen (117) months to forty-two (42) years.[1]

On April 3, 1998, Defendant filed a Notice of Appeal to the Superior Court. On March 3, 1999, the Superior Court dismissed the appeal because the Defendant's counsel failed to file a brief. On April 29, 2000, this Court reinstated Defendant's appellate rights *nunc pro tunc*. Thereafter, Defendant took his appeal to the Superior Court. On July 20, 2001, the Superior Court rendered its decision on Defendant's appeal affirming the sentence of this Court.

On July 20, 2002, Defendant filed a Post Conviction Relief Act ("PCRA") Petition. The PCRA Petition claims that Defendant's appellate counsel was ineffective for failing to raise a number of issues on appeal. The Court reviewed the Petition and the record in the case and determined that an evidentiary hearing was not warranted on all the issue raised. By order dated December 10, 2002, the Court directed that an evidentiary hearing would be held to address Defendant's contentions of ineffective assistance of counsel set forth in sub-paragraphs 11(a), (c), (d), (e), and (g). of the Petition.[2]

Discussion

The crux of Defendant's PCRA Petition is that his appellate counsel was ineffective for failing to raise certain issues. In order to determine whether Defendant's appellate counsel was

1 At the time of sentencing, the Court believed that the other counts merged for the purpose of sentencing.

2 At the close of the evidentiary hearing, the Court directed counsel for Defendant and the Commonwealth to file a memorandum of law in support of their respective positions. Defendant filed his on August 15, 2003. As of the date of this opinion, the Commonwealth has not filed a memorandum of law.

ineffective, the Court must examine the underlying claim that was not raised. It is presumed that counsel was effective. ***Commonwealth v. Alderman***, 811 A.2d 592, 595 (Pa. Super. 2002). For a defendant to establish that his counsel was constitutionally ineffective, he must demonstrate that: (1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate the defendant's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Lambert***, 797 A.2d 232, 243 (Pa. 2001); ***Commonwealth v. Todd***, 820 A.2d 707, 711 (Pa. Super. 2002). The defendant bears the burden of proving all three prongs of the ineffective assistance of counsel claim. ***Commonwealth v. Meadows***, 787 A.2d 312, 320 (Pa. 2001). A court is not required to analyze the elements of an ineffective assistance of counsel claim in any particular order of priority; if a claim fails under any element the court may address it first. ***Lambert***, 797 A.2d at 243, n.9.

Appellate counsel's performance, in terms of an ineffective assistance of counsel claim, is governed by the same standards governing trial counsel. ***Lambert***, 797 A.2d at 244. In dealing with an appellate counsel ineffectiveness claim, there are some concerns unique to appellate practice that should be considered. Appellate counsel is not required to raise every non-frivolous claim, in fact he should not, but instead may select from the number of possible claims to maximize the likelihood of success on appeal. ***Ibid***. Sometimes meritorious claims may be omitted in favor of pursuing claims that offer the best chance of success on appeal. ***Ibid***. "This process of 'winnowing out weaker arguments on appeal and focusing on those more likely to

prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.'" ***Ibid***. (quoting ***Smith v. Murray***, 477 U.S. 527, 536 (1986)).

There are five issues raised by Defendant that are before the Court regarding appellate counsel's effectiveness. Defendant asserts the following issues were not raised on appeal:

1. Petitioner's waiver of his right to testify in his own defense was not knowing, intelligent or voluntary. Specifically, Mr. Miller asserts that his trial counsel placed undue pressure on him to persuade him not to testify, and that but for this undue pressure, Mr. Miller would not have given up his constitutional right to testify in his own defense.

2. Prior to trial, law enforcement executed a search warrant of the crime scene, which revealed a bullet hole in the roofline of Mr. Miller's porch. The trajectory from this bullet hole was consistent with Mr. Miller's claim of self-defense, and inconsistent with the prosecutor's theory of the case. Mr. Miller believes, and therefore avers, that this search warrant and its findings were either withheld from Mr. Miller' trial counsel, or his trial counsel was ineffective for failing to use and develop these findings to exculpate him. Mr. Miller avers that if the search warrant and findings were withheld, such would constitute prosecutorial misconduct, and a violation of his constitutional rights, warranting a new trial. Mr. Miller avers that if his trial counsel failed to use this exculpatory evidence, such would constitute ineffective assistance of counsel as a course of action chosen (to *not* have used this exculpatory evidence) had no reasonable basis designed to effectuate petitioner's interest, and the failure to introduce this evidence to the jury prejudiced petitioner's right to a fair trial.

3. During the investigation of this case, police seized and held in evidence, Mr. Miller's blood-soaked shirt. At the time of trial, however, the shirt appeared to have been washed clean. Mr. Miller believes, and therefore avers, that the Commonwealth either destroyed or failed to preserve this evidence, and that the evidence of the blood-soaked shirt was material and exculpatory

and that it was consistent with Mr. Miller's claim that Mr. Haines was on top of him, choking him, when Mr. Haines was shot in self-defense. Mr. Miller further believes and avers that the destruction or failure to preserve this evidence was in bad faith, as its exculpatory value was readily apparent. Mr. Miller therefore avers that the destruction or loss of the exculpatory evidence amounted to a violation of Mr. Miller's right to due process under the United States and Pennsylvania Constitutions.

4. Neither the Defense nor the Prosecution called Richard Haines to testify. Mr. Miller alleges that trial counsel was ineffective for not calling Richard Haines to testify. Because Mr. Haines was never called as a witness, the jury was never aware of Mr. Haines' preliminary hearing testimony, which was inconsistent with and undermined the theory of the case, which the prosecutor had presented to the jury. Mr. Miller further avers that, under the circumstances, the course of action chosen (to *not* call Mr. Haines to testify) had no reasonable basis designed to effectuate Mr. Miller's interests and his failure to testify prejudiced Mr. Miller's right to a fair trial.

5. Mr. Miller claims his trial counsel was ineffective for failing to object to the presence of Officer Lowmiller and County Detective Schriner during trial, despite the Sequestration Order of the Court. Mr. Miller further claims that allowing these officers to remain during trial, constituted prosecutorial misconduct. Mr. Miller asserts that he has been prejudiced by having these officers in the courtroom during the testimony of others, as evidenced by instances in the record where these officers have arguably tailored their testimony based on the testimony of others. For example, Detective Schriner altered his testimony regarding a prior inconsistent statement of Commonwealth witness Dewanda Smethurst, in an attempt to reconcile his testimony with the testimony he heard Ms. Smethurst give at trial.

Defendant's Petition for Post Conviction Relief, ***Commonwealth v. Miller***, No. 96-11,11 at 3-6 (Lycoming Cty). The Court will address the issues *seriatim*.

The first issue raised by Defendant is that appellate counsel was ineffective for failing to raise the claim that Defendant's waiver of his right to testify in his own defense was not

knowing, intelligent, or voluntary. Defendant asserts that his trial counsel, William J. Miele, Esq., placed undue pressure on him not to testify, and but for the pressure he would have testified. Defendant further argues that Attorney Miele's strong opinion that Defendant not take the stand, the urging of Defendant's family that he should listen to his attorney, and the Court's recommendation that Defendant listen to both his family and attorney left Defendant with the feeling that he had no choice but to not testify. The Court concludes that Defendant's appellate counsel was not ineffective for failing to raise this issue.

"The decision of whether or not to testify on one's behalf is ultimately to be made by the defendant after consultation with counsel." ***Lambert***, 797 A.2d at 247. Counsel is ineffective if he interferes with the defendant's right to testify or gives specific advice so unreasonable as to vitiate a knowing and intelligent decision of the defendant not to testify. ***Commonwealth v. Nieves***, 746 A.2d 1102, 1104 (Pa. 2000). However, a defendant does knowingly and intelligently decide not to testify when his attorney informs him of his right to testify and the advice not to testify was reasonable. ***Lambert***, 797 A.2d at 247; ***Todd***, 820 A.2d at 711-12.

Defendant's decision not to testify on his own behalf was knowing, intelligent, and voluntary. There is no question that Defendant knew he had a right to testify. It is just as certain that Defendant was aware that he bore the ultimate responsibility of deciding whether or not to testify. The reason Attorney Miele had for advising Defendant not to testify was reasonable. At trial, Defense advanced the theory that Defendant acted in self-defense when he shot Haines. In a self-defense situation, it is very important to demonstrate that Defendant was not aggressive.

Attorney Miele believed that Defendant would not make a good witness because he was a "hot-head." If Defendant was to take the stand and display a temper or aggressive demeanor it would hardly be considered a course of conduct that would have effectuated his interests. In light of the self-defense claim, it was reasonable for Attorney Miele to advise the Defendant not to testify so that he would not take the stand and torpedo his defense.

In rendering this reasonable advice, Attorney Miele did not place undue pressure on Defendant not to testify. This was a serious situation with grave consequences. Defendant was facing the possibility of a lengthy prison sentence if he was convicted on the numerous charges confronting him. In light of the gravity of the situation and the danger posed to the self-defense claim, the Court cannot conclude that the fact that Attorney Miele may have raised his voice when talking with Defendant as interfering with his right to testify.

Zealous representation entails advocating the best interests of the client. Often this arises in the context of arguing to third parties on behalf of the client. But sometimes, zealous representation requires the attorney to present the client with an argument on a course of conduct that will best further the client's interests. The attorney must rely on his knowledge, training, and experience to provide Defendant with the best advice possible. In order to do this, Attorney Miele may have been vocal in making his case to Defendant as to what would best effectuate his interests. If raising his voice was necessary to make Defendant aware of the situation and the consequences of his action, then the Court will not say it was impermissible. The Court does not find that Attorney Miele's actions were of such an aggressive or intimidating nature as to abrogate Defendant's right to testify.

In addition to speaking with Defendant, Attorney Miele asked Defendant's family to discuss with him the possibility of not testifying. This was not a form of undue pressure. Attorney Miele asked individuals whose opinion Defendant valued and trusted to apprise Defendant of the seriousness of the situation and the possible harm his testifying could inflict on the self-defense claim. Having the family talk to Defendant was nothing more then another tool used by Attorney Miele to advocate the best interests of Defendant.

It is clear that Defendant knew of his right to testify. Attorney Miele did meet with Defendant and discussed the idea of him taking the stand. The Court also advised the Defendant of his right to testify on two occasions. The first time the Court stated:

> Mr. Miller in this case as in any case you have the decision to make as to whether or not you will or will not testify in the case. Certainly, you should talk to your family and to your attorney, and listen to their advice and take into consideration things that they have to tell you in making that decision, but ultimately sir it is your decision and your's [sic] alone as to whether or not to testify in this case. No one can promise you a result one way or another. No one can force you to make that decision. You should make that decision on your own.

Notes of Testimony, 185-86, October 22, 1997. On the second occasion, the Court stated:

> Mr. Miller, I indicated to you previously about it being your decision as to whether or not to offer testimony in the case. You've heard your counsel state that you were going to rest and no additional testimony is to be presented on your behalf, and specifically that would indicate that you are not going to testify. Do you understand that it is up to you as to whether or not this decision is appropriate?

N.T., 22, October 24, 1997. It is clear that the Court informed Defendant of his right to testify and that ultimately it was his, and only his, decision whether to take the stand.

Because of this, the Court finds particularly vexing the contention that its statement that Defendant should listen to his attorney and family was a directive not to testify. The Court did not order Defendant to follow the advice of his attorney and family and it did not say that Defendant must obey his attorney and family. The Court said that he should listen to them. That is, that he should hear what they have to say and make an informed decision based on advice from knowledgeable and trusted people. A different conclusion as to what the Court meant by "listen" cannot reasonably be made.

Therefore, the contention that Defendant's appellate counsel was ineffective in failing to raise the issue that Defendant's waiver of his right to testify was not knowing, intelligent, or voluntary is without merit. Raising the issue would in no way have benefited Defendant's chance of success on appeal. As such, the Court cannot conclude that Defendant's appellate counsel was ineffective in this regard.

The second issue raised by Defendant is that his appellate counsel was ineffective for not raising the issue of trial counsel's failure to present evidence that would have supported his self-defense claim in the form of an alleged bullet hole found in the exterior of Defendant's home, at 2092 Riverside Drive. Defendant presented testimony at the time of trial that he was lying on his back being choked by Haines when Defendant shot Haines. Defendant acknowledged in his brief that trial counsel did receive a copy of the search warrant with Chief County Detective Kenneth Schriner's trajectory calculations. Defendant argues that Detective Schriner's calculations are consistent with the claim that Haines was shot by Defendant as they were on the ground, since a straight string line could be extended from the alleged bullet hole to a point on the

ground in the area where Haines was found. Defendant argues that this objective evidence could have bolstered his self-defense claim and discredited the Commonwealth's version of the events.

Defendant's appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness as would pertain to the failure to present evidence of the alleged bullet hole and its possible trajectory. Such a course of action was reasonable because the issue did not possess a chance of success on appeal because trial counsel was not ineffective. Even if trial counsel had presented the trajectory evidence, it is not reasonably probable that the outcome of the trial would have been different.

The Commonwealth presented sufficient evidence to permit a jury to conclude that Defendant shot Haines while Defendant was standing over him in contravention of Defendant's self-defense claim. The Commonwealth presented four witnesses to the shooting. Gene Zales, Dewanda Smethurst, James Luedke, and Jeffrey Luedke all testified that they saw an individual standing with his arm extended toward the ground when the shots were fired. Even if the testimony of Gene Zales and Dewanda Smethurst is discounted for reasons advanced by the Defendant *infra*, there is still the testimony of the Luedkes.

Both James and Jeffrey Luedke testified that they were outside in the backyard of 2080 Riverside Drive when the altercation between Defendant and Haines began. They testified that at the time of the shooting they were standing near the property line fence with an unobstructed view. N.T., 147-152; 167-170, October 15, 1987. James testified that he saw one of the individuals involved in the altercation standing with his arm extended at a downward forty-five degree angle and then saw muzzle flashes. N.T., 141-42, October 15, 1987. Jeffrey testified that

he saw an individual standing with his arm extended out and downward. N.T., 158, October 15, 1987. Jeffrey also testified that he saw muzzle flashes toward the ground emanating from where the individual's hand would be. N.T., 159, October 15, 1987. The testimony of James and Jeffrey Luedke provided the jury with clear eyewitness accounts describing one of the individuals involved in the altercation as standing above the other and firing his weapon downward.

Aside from the eyewitness testimony, there is physical evidence that would contradict Defendant's claim that Haines was on top of him when Haines was shot. That evidence is the location of the shell casing. The type of weapon that was involved in the shooting was a .25 caliber semi-automatic handgun. A shell casing from a .25 caliber round was located on a side porch of 2088 Riverside Drive near a recycling bucket. N.T., 95-6, October 17, 1997. Detective Kenneth Schriner testified that after test firing the weapon used in the incident he determined that the weapon discharged shell casings to the right. Detective Schriner testified that the first shell casing eject right about ten feet eight inches to the three o'clock position, the second ejected twelve feet six inches to the two o'clock position, and the third ejected seven feet five inches to the one o'clock position. N.T., 16-17, October 20, 1997.

Based on this testimony, the shell casings ejected from the weapon used by Defendant on June 16, 1996 would be located to the right of the position Defendant was at when the weapon was fired. If the bullet hole in 2092 Riverside Drive was from a round fired on the night of June 16, 1996, then one must conclude that Haines had his back to the residence as he was on top of the Defendant. Therefore, the shell casing would have ejected to the right of Defendant and into the yard of 2092. However, that is not what occurred here.

Looking up (south) toward the rear of Defendant's home, from the Susquehanna River, the property located to the left of Defendant's is 2088 Riverside Drive. The shooting occurred at Defendant's property (2092 Riverside Drive). Haines was found with his feet toward 2092 and his head in the direction of 2088 toward a large bush. N.T., 101, October 17, 1987. The location of the shell casing at 2088 indicates that Defendant was facing toward the Susquehanna River and not 2092 when he shot Haines. The physical evidence is contrary to the theory asserted by Defendant. Therefore, the outcome of the trial would not have been different if the bullet hole evidence was introduced.

Also, the expert testimony presented by Defendant that Haines was shot at close range, thereby giving credence to his claim that Haines was atop him when Haines was shot, was called into serious doubt. Dr. John Shane testified that he believed that the wounds on Haines were inflicted from a weapon that was six inches or less away. N.T., 20, October 21, 1987. This opinion was based upon the South Williamsport Police Department Report in which Dr. Timothy Pagana describes the wounds as having a dark substance around the edges. N.T., 18, October 21, 1987. Dr. Shane interpreted this dark substance to be carbonaceous material. Dr. Shane opined that the presence of this carbonaceous material and lack of tattooing from unburned powder meant that the muzzle of the weapon was six inches or less from Haines when it was fired. N.T., 19, October 21, 1987. Dr. Shane also testified that if Dr. Pagana had indicated that there was no carbonaceous material then his opinion would change. N.T., 26, October 21, 1987.

Dr. Sara Lee Funke testified for the Commonwealth. She testified that she, nor any other forensic pathologist including Dr. Shane, could not determine to a reasonable degree of

medical certainty how far away the weapon was from Haines when it was fired. N.T., 5, 13, October 22, 1997. Dr. Funke stated there was insufficient information since Dr. Pagana's description was vague and confusing. N.T., 5, October 22, 1987. Dr. Pagana was a surgeon not a trained forensic pathologist. Because of this, Dr. Funke believed that he did not accurately describe what he had seen. Dr. Funke believed that what Dr. Pagana had seen and described was more likely an abrasion ring that had darkened over time. N.T., 41, October 22, 1997.

The Commonwealth's expert poked serious holes in Defense's expert by attacking the underlying basis of the opinion. Also, Dr. Shane himself testified that his opinion would change if what Dr. Pagana saw was not carbonaceous material. If the jury believed Dr. Funke that it was not carbonaceous material, then it was likely that they would not subscribe to Dr. Shane's opinion.

Therefore, trial counsel's failure to introduce the trajectory evidence did not prejudice Defendant. The Commonwealth presented sufficient evidence to allow the jury to determine Defendant did not shoot Haines in self-defense. The trajectory evidence would not overcome this as there was the eyewitness testimony of James and Jeffrey Luedke, the physical evidence contradicted the self-defense theory and there was no expert testimony determining the distance of the weapon when it was fired to help support this theory. As such, Defendant's appellate counsel made a reasonable decision based on the likelihood of success on appeal and was not ineffective for failing to raise trial counsel's ineffectiveness on this issue.

The third issue raised by Defendant is that appellate counsel was ineffective for failing to raise the issue that Defendant's due process rights were violated when the police either

destroyed or failed to preserve a blood-soaked shirt he was wearing the night of the incident. Defendant contends that the blood-soaked shirt was material and exculpatory evidence, in that it, was consistent with his claim that Haines was on top of him when Defendant acted in self-defense. Defendant argues that if he had been able to show the jury the blood-soaked shirt, then he would have been able to support his claim of self-defense and undermine the Commonwealth's theory. The Court concludes that Defendant's claim is without merit.

Generally, the prosecution has a duty to disclose to the defense exculpatory or impeachment evidence favorable to the defense. ***Commonwealth v. Grant***, 813 A.2d 726, 730 (Pa. 2002). A violation of the defendant's due process rights occurs when the prosecution suppresses this type of evidence to the defendant's prejudice. ***Commonwealth v. Paddy***, 800 A.2d 294, 305 (Pa. 2002). The prosecution is not required to turn over every piece of evidence, but only is required to disclose evidence that is material to guilt or punishment. ***Ibid***.

The prosecution not only has a duty to disclose evidence, it also has a duty to preserve certain evidence in its possession. Evidence is constitutionally required to be preserved for disclosure if the evidence " 'possesses an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that that defendant would be unable to obtain comparable evidence by other reasonably available means.'" ***Commonwealth v. Craft***, 669 A.2d 394, 396 (Pa. Super. 1996) (quoting ***Commonwealth v. Gamber***, 506 A.2d 1324, 1327-28 (Pa. Super 1986)).

With respect to preserving the shirt Defendant wore the night of the incident, the Court concludes that the Commonwealth did not violate the due process rights of Defendant. The

Commonwealth did not destroy evidence. Defendant claims that the shirt was blood-soaked in the stomach region covering an area eight to nine inches in diameter. He does not claim that there were just a few drops or some blood on the shirt. Defendant asserts that it was blood-soaked, and that the various police agencies or the Commonwealth washed the shirt. In examining the shirt, there is no indication of any type of residual bloodstain in the stomach area. There is no indication from the shirt that there ever was blood on it. In summary, the Commonwealth cannot destroy what did not exist.

Therefore, Defendant's appellate counsel was not ineffective for failing to raise the destruction of the blood-soaked shirt issue. The Commonwealth did not destroy the blood-soaked shirt by washing it, since it was never blood-soaked. Defendant's appellate counsel took a reasonable course in not pursuing this issue on appeal because it would not have been successful.

The fourth issue Defendant raises is that appellate counsel was ineffective for not raising the issue of trial counsel's ineffectiveness as would pertain to trial counsel's failure to call Haines as a witness. Defendant argues that there was no reasonable basis for trial counsel not to call Haines to testify. Defendant contends that the preliminary hearing testimony of Haines was significantly different from the version of events testified to by the Commonwealth's witnesses at the time of trial. Defendant argues that if Haines was called at trial, then he would have been able to discredit Haines and the version of events advanced by the Commonwealth.

The Court concludes that trial counsel was not ineffective for failing to call Haines as a witness since such course of action did not prejudice Defendant. For a defendant to establish a claim for ineffective assistance of counsel for failure to call witnesses, he must establish:

> (1) that the witnesses existed; (2) that the witnesses was available; (3) that counsel was informed of the existence of the witnesses or should have known of the witnesses' existence; (4) that the witnesses were available and prepared to cooperate and would have testified on [defendant's] behalf; (5) that the absence of the testimony prejudiced the [defendant].

Meadows, 787 A.2d at 320. To establish prejudice, defendant must show that " 'there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different.'" ***Todd***, 820 A.2d at 711 (quoting ***Commonwealth v. Wallace***, 724 A.2d 916, 921 (Pa. 1999)).

Calling Haines to testify and confronting him with the inconsistent statements would not change the outcome of the trial. As previously stated, the Commonwealth presented sufficient evidence that Defendant shot Haines while Haines was lying on the ground and that Defendant did not act in self-defense. Even if Haines had testified and the inconsistencies made known to the jury, it is unlikely that the inconsistent testimony of Haines could overcome the case presented by the Commonwealth.

Had trial counsel actually called the victim to testify it would have done more harm to Defendant's case than good. Haines would have been a sympathetic figure being confined to a wheelchair and enduring a host of medical problems associated with the wounds he received as a result of the shooting. With Haines on the stand, the jury would see first hand the outcome of this altercation and might be motivated to hold Defendant responsible. With this in mind, it is probably better that Defendant's trial counsel did not call Haines to testify.

Finally, Haines would have more likely than not refuted Defendant's self-defense claim despite some inconsistencies in statements he previously had made. Haines inconsistencies

would have been easily explainable due to the shock and severity of the injuries he received. Had Haines testified Defendant would likely have been forced to testify. This would have been the polar opposite of the strategy Defendant chose to follow.

Therefore, Defendant's appellate counsel was not ineffective for failing to raise the issue of trial counsel's ineffectiveness for not calling Haines. Trial counsel was not ineffective, because the failure to call Haines did not prejudice Defendant in light of the Commonwealth's evidence. Defendant's appellate counsel acted reasonably in not raising this issue since it would not have been successful on appeal.

The fifth contention Defendant asserts centers around the presence of two law enforcement agents in court during testimony despite the Sequestration Order. Defendant alleges that appellate counsel was ineffective for failing to raise two issues that arose from this situation. First, Defendant argues that appellate counsel was ineffective for failing to raise the issue that trial counsel was ineffective for failing to object to the presence of Officer Lowmiller and Detective Schriner during the trial despite the Sequestration Order. Second, Defendant argues that allowing the law enforcement agents to remain in violation of the Sequestration Order constituted prosecutorial misconduct. Defendant argues that the presence of the law enforcement agents prejudiced him because they arguably tailored their testimony in response to the testimony of other witnesses. Specifically, Defendant alleges that Detective Schriner altered his testimony in an attempt to reconcile a prior inconsistent statement of a Commonwealth witness, Dewanda Smethurst, by doubting the accuracy of his report, which contained her original statement to him

Detective Schriner's report stated that Smethurst went out of the house with her son, Gene Zales, when she heard the shots. Zales testified that he was in the backyard and saw Defendant standing with his arm extended Zales heard the gunshots. Detective Schriner tried to bolster testimony of Smethurst as to where she and Zales were when she heard the shots. Detective Schriner testified that he was not sure whether she told him that they were both in the house when the shots were fired. Detective Schriner testified that he believed Smethurst told him that she was in the house talking to relatives when she heard the shots. Detective Schriner further testified that he could not say for certain whether Zales had said he was inside or outside of the house when the shots were fired.

Appellate counsel was not ineffective for failing to raise the ineffectiveness of trial counsel with regard to his failure to object to the presence of Detective Schriner. Defendant was not prejudiced by Detective Schriner's presence. Detective Schriner had issued a report which trial counsel had thoroughly reviewed and did effectively cross-examine Schriner as to variances in his testimony from that in the report. Otherwise, it is clear Detective Schriner's testimony conformed to the report and did not go beyond it to any significant extent. Although Detective Schriner (now District Justice Schriner) acknowledged that having heard the testimony of Ms. Smethurst he was able to give some emphasis in his trial testimony while on direct examination, there is no doubt that the prosecuting attorney would have elicited the same testimony by specific questions to Detective Schriner in order to give the same emphasis to the jury. Therefore, no harm ensued at trial from the sequestration violation. In addition, the jury was well aware of the sequestration violation and this very well could have caused the jury to believe Defendant's contention that

Detective Schriner was trying to buttress his testimony to be more in conformance with Ms. Smethurst.

Even if the Court was to conclude that Zales and Smethurst were in the house and did not witness the shots, there were other witnesses who did. As noted earlier in this opinion, James and Jeffrey Luedke testified that they witnessed one of the individuals involved in the altercation standing with his arm extended toward the ground when the shots were fired. In light of the Commonwealth's evidence, trial counsel's failure to object to the presence of Detective Schriner did not change the outcome of the trial. Therefore, counsel was not ineffective for failing to object and appellate counsel reasonably did not raise this issue since it would not have been successful on appeal.

Appellate counsel was also not ineffective for failing to raise the issue of the Commonwealth's alleged prosecutorial misconduct in allowing the two law enforcement agents to remain in the courtroom despite the Sequestration Order. "The essence of a finding of prosecutorial misconduct is that the prosecutor, a person who holds a unique position of trust in our society, has abused that trust in order to prejudice and deliberately mislead the jury." ***Commonwealth v. Pierce***, 645 A.2d 189, 197 (Pa. 1994). A new trial is warranted when the "conduct of the prosecutor misleads the jury so that they form in their minds a fixed bias such that they cannot fairly weigh the evidence and render a true verdict." ***Id***. at 196.

There is no indication that the Commonwealth intended to prejudice Defendant and deliberately mislead the jury by having the two law enforcement agents remain in the courtroom. The Commonwealth presented witnesses, independent of the two law enforcement agents, to

demonstrate that Defendant did not act in self-defense but shot Haines while he lay on the ground. As to Smethurst's inconsistent statement and Detective Schriner's attempt to bolster her testimony, no prejudice resulted because of the Commonwealth's other witnesses. Even if the jury disbelieved Smethurst and Detective Schriner, the jury would have still reached the same conclusion based on the other evidence presented. Therefore, appellate counsel was not ineffective for failing to raise the prosecutorial misconduct issue on appeal because it was reasonable not to do so since it would not succeed.

Conclusion

Defendant's trial counsel was not ineffective for failing to raise the issues set forth by Defendant. Appellate counsel acted reasonably in choosing not to pursue these issues on appeal because they would not have been successful and would not have benefited Defendant. Therefore, Defendant's PCRA Petition must be denied.

O R D E R

It is hereby ORDERED that Defendant Jeffrey Miller's Petition for Post Conviction Relief filed July 30, 2002 is denied.

BY THE COURT,

WILLIAM S. KIESER, JUDGE

cc: Kenneth A. Osokow, Esquire, ADA
Eric Linhardt, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire, Lycoming Reporter