

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 99-11,144
:
:
vs. : CRIMINAL DIVISION
:
:
ANTOINE D. TIBBS, :
Defendant : 1925(a) Opinion

OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Order issued January 15, 2003. The reasons for the Court's denial of Defendant's Post Conviction Relief Act (PCRA) Petition can be found in the Opinion and Order of December 18, 2003. In his amended concise statement of matters complained of on appeal, the defendant asserts PCRA counsel was ineffective for failing to file a certification for a potential witness, Joseph Lagan, III, and for failing to properly amend the defendant's pro se petition or certify it lacked merit under Commonwealth v. Finley, 379 Pa.Super. 390, 550 A.2d 213 (1988). The Court believes these new claims also are without merit.

Although appellate counsel has attached a portion

of a police report to indicate the substance of Mr. Laggan's proposed testimony, the defense has neither asserted Mr. Laggan was available to testify as a witness at the trial on December 10, 1999 nor claimed that Mr. Laggan was willing to testify for the defense. This is one of the elements the defendant must **plead and prove** when an ineffectiveness claim involves the failure to call a witness. 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). Since the defendant still has not satisfied this element, he still is not eligible for relief on this issue.

With respect to paragraph 2D of the amended concise statement, the defendant claims his PCRA petition was effectively uncounseled and cites Commonwealth v. Powell, 787 A.2d 1017 (Pa.Super. 2001) and Commonwealth v. Priovolos, 746 A.2d 621 (Pa.Super. 2000). In Powell and Priovolos, however, counsel never filed an amended PCRA petition on the defendant's behalf. Here, PCRA counsel amended the defendant's pro se petition to raise additional issues regarding trial counsel failing to impeach Sandra Mertz, failing to object to Corporal Heatley's statement that the defendant was known to city police and failing to challenge the racial composition of the jury.

Interestingly, these are the issues being pursued on appeal.

The only pro se issue being pursued is the failure to call a crucial witness at trial, presumably Mr. Laggan given the information contained in the defendant's amended concise statement of matters complained of on appeal. As previously noted, however, the defendant still hasn't asserted Mr. Laggan was available and willing to testify on his behalf, and therefore, cannot prevail on this issue. Assuming arguendo that PCRA counsel's representation was deficient for failing to file a Finley letter, the defendant was not prejudiced because the Court has independently reviewed the issues and found them devoid of merit.

DATE: _____

By The Court,

Kenneth D. Brown, Judge

cc: Kenneth Osokow, Esquire
Eric Linhardt, Esquire
Law Clerk
Gary Weber, Esquire (Lycoming Reporter)