

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. 02-11,322
:
vs. : CRIMINAL
:
MARK TANNER, :
Defendant : PCRA Petition

OPINION AND ORDER

This matter came before the Court on Defendant's PCRA petition. The relevant facts follow:

On or about August 2, 2002, Defendant was arrested and charged with kidnapping, unlawful restraint, interference with the custody of children, aggravated assault, simple assault, recklessly endangering, possessing an instrument of crime, and attempted kidnapping.

A preliminary hearing was held on October 22, 2002 and the charges were held for court. Defendant's attorney, John Piazza, III waived formal arraignment on November 18, 2002.

Defense counsel filed an omnibus pre-trial motion on December 18, 2002. The omnibus motion consisted of a motion for psychiatric examination and a motion to suppress evidence. The Honorable Dudley N. Anderson held a hearing on the motion on April 2, 2003. In an Opinion and Order dated April 11, 2003 and docketed April 15, 2003, Judge Anderson denied both parts of the omnibus pre-trial motion.

A jury trial was held August 18-19 and 21-22. The jury found Defendant guilty of kidnapping, unlawful restraint, aggravated assault, simple assault, recklessly endangering and possessing instruments of crime arising out of an incident where Defendant

lured or took A.B., a ten (10) year old female, to the 800 block of Poplar Street near a vacant house and assaulted her with stun gun.¹

In an order dated October 14, 2003 and docketed October 16, 2003, the court sentenced Defendant to incarceration in a state correction facility for an aggregate term of 8-½ years to 18 years.

Defendant applied for a public defender to represent him in post-trial matters on or about October 15, 2003. On October 24, 2003, an assistant public defender filed a Petition to Extend Filing Time for Post-Sentence Motions. On October 27, 2003, the public defender's office formally entered an appearance on behalf of Defendant.²

On November 6, 2003, the public defender filed a post-sentence motion. On November 21, 2003 an argument was held on the petition to extend the time for filing post-sentence motions. Since the public defender's office did not represent Defendant at trial and there was no objection from the Commonwealth, the Court granted the motion and gave defense counsel until February 6, 2004 (thirty days after the receipt of the trial transcripts) to file an amended post-sentence motion. The public defender filed an amended post-sentence motion on February 6, 2004. A hearing on the motion was scheduled for February 26, 2004.

Defendant was contending trial counsel was ineffective for failing to call certain alibi witnesses at trial. The defense did not have witnesses on that date, however, so the matter

¹ The jury acquitted Defendant of two (2) counts of attempted kidnapping relating to an eight (8) year old male child (R.R.) and eight (8) year female child (C.S.). The incident for which Defendant was acquitted occurred July 30, 2002. The incident for which Defendant was convicted occurred on December 4, 2001.

² Attorney Piazza filed a "Withdrawal of Appearance" on October 24, 2003. On October 24, 2003, however, there was neither a simultaneous entry of appearance by the public defender nor was a motion to withdraw filed at that time. On October 27, 2003, there was a second withdrawal of appearance by Attorney Piazza docketed, this time accompanied by a simultaneous entry of appearance by the public defender. Attorney Piazza never sought court approval to withdraw his appearance as required by Rule 120 of the Pennsylvania Rules of Criminal Procedure. This case is a good example of why leave of court must be obtained before an attorney

was continued to March 29, 2004. The public defender filed a second amended post-sentence motion on March 10, 2004.

THE MARCH 29, 2004 EVIDENTIARY HEARING

On March 29, 2004, the Court took testimony and heard arguments on all the post-sentence motions. The defense called Keith Johns as its first witness. Mr. Johns testified that he and Defendant were moving a couch into an apartment at 614 Pine Street during the early evening hours of December 4, 2001. Mr. Johns testified he arrived between 6:00 – 6:30 to do this. The couch was part of the last load and it was the only thing they had real difficulty getting into the apartment. The couch got stuck on the steps and the apartment doorway. Mr. Johns testified he pushed and forced it through these areas, ripping the leather couch. He wasn't sure what day of the week it was, but believed it was a Thursday.³ The reason Mr. Johns indicated the date was December 4, 2001 was because he usually receives his disability check on the third of the month. He further testified that he used money from that check to put new tires on his wife's car. He took the car to Auto Specialty to balance and align the tires. When asked if he had a receipt, Mr. Johns said he probably would not because he did the work himself at Auto Specialties, a business owned by his sister and brother-in-law.

During Mr. Johns' testimony, the first assistant district attorney, Kenneth Osokow, came into the courtroom. After Mr. Johns' testimony, Mr. Osokow argued that: (1) all the post-sentence motions were untimely; (2) the court did not have the authority to extend

may withdraw from a criminal case.

³ December 4, 2001 was a Tuesday.

the filing date; and (3) even if the first motion was filed nunc pro tunc, the 150 day time limit of Rule 720 would relate back to October 24, (the last day of the ten (10) day period for filing post-sentence motions) and not run from November 6, the date it was actually filed. Since the court had already begun taking testimony and other witnesses were present and ready to testify, the court deferred ruling on Mr. Osokow's arguments and completed the record regarding trial counsel's alleged ineffectiveness for failing to call certain alibi witnesses at trial.

The next defense witness was Ernest Welch, Jr. Defense counsel directed Mr. Welch's attention to December 4, 2001. Mr. Welch testified he was moving from Howard Street to Pine Street around that time. He testified that Holly Treese, Defendant, Keith Johns and Shirley Tanner were involved in the move. Defendant was driving his truck back and forth from the old apartment to the new one. Mr. Welch was driving behind him in a black Kia Sephia. They started moving around 5:00 p.m. on December 4, 2001 and continued until 9:00 or 10:00 p.m. They definitely didn't finish the move in one day. He and Defendant did most of the moving on December 4th and 5th. Mr. Welch testified that Keith helped load the stuff at Howard Street and he didn't think Mr. Johns came to Pine Street. He testified that they didn't start the move until around 5:00 p.m. because Mark's truck was illegal and Mr. Welch had to drive behind him so no one could see his expired plates. Mr. Welch admitted he didn't recall the exact date at first, but claimed that after he thought about it he knew it was December 4th. N.T., March 29, 2004, at 69.

Holly Treese was the third defense witness. She testified the move took a couple of days. She was not positive of the dates but thought it was December 4th and 5th.

She also testified that they started around 6:00 or 7:00 p.m. N.T., March 29, 2004, at 77. She knew their eviction date was December 10th, and believed they moved sometime during the week preceding the 10th. She testified Keith was mostly at Pine Street and she was mostly at Howard Street. On cross-examination she testified Keith was at Howard Street too, that he came back and forth a couple of times. She said Keith and Defendant moved a leather/vinyl beige sofa during the first week of December. When questioned by the court, Ms. Treese suddenly remembered that they moved over two days, December 4th and 5th. She said she quit working at Perkins on December 4th. She went into work at 4:00 p.m., stayed about twenty minutes, left and did not go back. She stated they moved that night and the next day, using the truck on the December 4th and her car (the black Kia) on the 5th. Ms. Treese testified that she talked to Defendant's mother, Shirley Tanner, about this during the Defendant's trial since she only figured out Defendant's whereabouts on the night in question during the trial. Id. at 86-87. She told Shirley Tanner about this at the trial, but she did not tell Defendant's defense attorney, John Piazza, this information at trial. Id., at 87.

Defendant's mother, Shirley Tanner also testified. Mrs. Tanner testified that Defendant worked on his truck on December 3rd. They started moving on December 4th around 6:00 p.m. She was in her residence, a first floor apartment at 614 Pine Street, babysitting Ernie and Holly's children.⁴ They had a hard time with the couch, so they called Keith Johns. When they were moving the couch, they ripped it. Although she could not give any reason why she remembered the dates, Mrs. Tanner was certain of the dates and distinctly remembered the 4th. On cross-examination, she testified it took a couple of days to

⁴ Erie Welch is Defendant's brother and Shirley Tanner's son.

move; they started on the 3rd and 4th and the last load was on the 5th. Later in cross-examination, Mrs. Tanner testified the couch was probably the last load.

When questioned by the Court, Mrs. Tanner testified the move was a two (2) day effort and she thought the 4th was the first day. Then she testified the couch was the last thing they moved and they could not get it up the steps. She was not sure if it was December 4th or 5th. Apparently, realizing her testimony would put the move of the couch on the 5th, Mrs. Tanner then testified they might have gotten everything moved in on December 4th. She also testified that she spoke to Attorney Piazza about her testimony and the other witnesses and Mr. Piazza would not offer this testimony at trial. According to Mrs. Tanner, Mr. Piazza said the evidence was not relevant.

The final defense witness at this hearing was Defendant, Mark Tanner. He testified he worked on his truck on December 3rd and helped his brother, Ernie Welch move on December 4th. They started at about 6:00 p.m. and finished between 9:00 and 9:30 p.m. His friend, Steve Survais was with him the entire time. Neither Defendant nor his mother knew why Mr. Survais was not present to testify at this hearing on March 29. Defendant testified he told his attorney about these witnesses but he did not call them or him as a witness at trial. Initially, Defendant was certain he was helping his brother move on December 4th, but could not really give a reason why he was sure of the date. On cross-examination, he testified the move took two (2) days, December 4th and 5th. When questioned by the Court, Defendant testified the furniture was moved on the second day, and the couch was the last big thing they moved. Defendant then admitted they could have moved the couch on December 5th.

By Order dated April 6, 2004, the Court was constrained to dismiss Defendant's post-sentence motion as being untimely filed. The order advised Defendant that his recourse would be to file a Post Conviction Relief Act petition (PCRA) in order to raise the issue of ineffective assistance of counsel.

Defendant heeded this advice and filed the PCRA petition on May 13, 2004. Current counsel also filed and amended petition. After a conference with counsel on the PCRA petition, the Court found Defendant received ineffective assistance of counsel regarding the Defendant's right to file an original appeal of his conviction. See, the Order dated November 4, 2004. However, since the Court felt it still had to address the issue of whether trial counsel was ineffective for failing to call alibi witnesses at trial, the Court scheduled an additional evidentiary hearing so it could determine this issue. The Commonwealth and defense agreed that the transcript of the March 29, 2004 evidentiary hearing could be made part of the record to decide this issue. The Court indicated that the Commonwealth or defense counsel would be free to present additional testimony at the evidentiary hearing. The Court originally scheduled the evidentiary hearing for December 2, 2004. Defense counsel, however, requested a continuance because the transcript of the March 29, 2004 hearing was not yet complete. The hearing was rescheduled for January 7, 2004. Although the Commonwealth sent a subpoena to Defendant's trial counsel, he did not appear for the hearing, so the Court continued the matter to January 18, 2004.

THE JANUARY 18, 2005 HEARING

On January 18, 2005, Defendant called two (2) additional witnesses: trial counsel, John Piazza, Esquire; and Clair L. Van Schaick.

Attorney Piazza confirmed that he was privately retained to represent Defendant for the preliminary hearing through the trial in August 2003 and he withdrew his appearance on October 24, 2003.

Attorney Piazza met numerous times with Defendant to prepare for trial including meeting with Defendant in the Lycoming County Prison. He testified he extensively spoke with Defendant before trial, but Defendant did not tell him about an alibi.

He testified that Defendant talked to him about calling character witnesses at trial, but Defendant did not provide any information, which could present an alibi defense. He noted he was familiar with the names of Defendant's family members who testified before the Court on March 29, 2004, but said they were only suggested as character witnesses, not as alibi witnesses. Mr. Piazza testified if Defendant or his family would have provided information about an alibi defense, he would have filed an alibi notice and utilized such defense. Mr. Piazza testified he repeatedly asked Defendant for information that could help him, but Defendant was closed-mouthed with him. Mr. Piazza claimed he would have utilized alibi witnesses at trial if any were made known to him. He testified that at trial he did present witnesses for Defendant concerning the July 30, 2002, incident for which the jury acquitted Defendant, but that he was not notified of alibi witnesses regarding the December 4, 2001 incident. He noted Defendant never told him that on December 4, 2001, he was some place other than the scene of the crime.

Mr. Piazza claimed he made full efforts to secure any such information from Defendant. He testified he worked hard to secure an acquittal for Defendant, and that he did secure an acquittal on the July 30, 2002 charges.

Mr. Piazza has been practicing law since 1996. Since 2002, fifty percent of his practice has been devoted to criminal cases. He testified he was aware of the significance of alibi testimony. He went over the dates of the crime with Defendant to try to determine his whereabouts. He testified that he also spoke with Defendant's mother, Shirley Tanner. He stated he would have "tracked down" alibi information if provided. Although the name Keith Johns sounded familiar to him, Mr. Piazza testified neither Mr. Johns nor Defendant reported to him that Mr. Johns could be an alibi witness for Defendant at trial.

Defendant also called as a witness, Clair L. Van Schaick, the boyfriend of Defendant's mother. Mr. Van Schaick testified that on the second day of Defendant's trial, Shirley Tanner, Steve Servais and his wife told Mr. Piazza that they could testify that Defendant was moving furniture at the time of the crime.⁵ He claimed Mr. Piazza was given the names of four (4) people who could say this. Mr. Piazza indicated the information was unreliable and he would not use it. Mr. Van Schaick acknowledged that Mr. Piazza was not told about the potential alibi witnesses until the second day of trial.

Defendant asserts trial counsel was ineffective for failing to call alibi witnesses at trial. In order to establish ineffective assistance of counsel, Defendant must show: (1) his claim is of arguable merit; (2) counsel had no reasonable basis for the course of action chosen; and (3) prejudice, i.e., but for counsel's act or omission the verdict would have been different. Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203, 213 (2001); Commonwealth v. Miller, 560 Pa. 500, 746 A.2d 592, 598 (2000). When the effectiveness

⁵ At the hearings on March 29, 2004 and January 18, 2005, Defendant did not call Mr. Servais as a witness.

claim involves failure to call a witness, Defendant must show: (1) the existence and availability of the witness; (2) counsel's awareness of, or duty to know of, the witness; (3) the willingness and ability of the witness to cooperate and appear on behalf of the defendant; and (4) the necessity of the proposed testimony in order to avoid prejudice. 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).

The Court must first address the credibility of Attorney Piazza who has testified he was not provided with this alibi information. The court credits his testimony on this matter. It does not make sense that in defending this very difficult and serious trial, Mr. Piazza would not have utilized such testimony on his client's behalf. In defending the charges of the July 30, 2002 incident, for which Defendant was acquitted, Mr. Piazza presented evidence from witness Alyssa Matthews as to seeing Defendant at a certain location to explain why he was in the area where he was arrested. The court does not believe he would have refused to present an alibi defense as to the December 2001 charges if he knew such information.

The court is also skeptical of the alibi witnesses' credibility as testified to at the hearing before the court on March 29, 2004. Defendant's case was in the court system for more than a year before the trial in August 2003. Defendant, his mother Shirley Tanner and other family members were present throughout the trial. Yet many of the witnesses presented by Defendant on March 29, 2004 and January 18, 2005, testified they only remembered the alibi information during the trial after the children had testified against Defendant.

Even if the court assumes arguendo that alibi witnesses were available and ready to testify at trial, the court does not believe this evidence would have produced a different result regarding the December 2001 charges. Much of the alibi testimony was inconsistent to the key events. Mr. Johns believed the events occurred on a Thursday. The crime, which occurred on December 4, 2001, occurred on a Tuesday.

Ernest Welch, Jr., Defendant's half-brother, testified he did not think Mr. Johns was at the Pine Street address on December 4, but rather, he stayed behind on Howard Street.

Many of the witnesses testified the moving effort started about 6:00 or 7:00 p.m. According to the testimony at trial, the crime would have occurred before 6:00 p.m. At trial, Officer Jimmy Rodgers testified he was dispatched to the scene at 5:57 p.m. See N.T., August 18, 2004, at 29-30.

In Mrs. Tanner's testimony, she acknowledged the move of the couch, the key event of the alibi, could have occurred on December 5th, not December 4th. Likewise, when questioned by the Court, Defendant testified the furniture was moved on the second day of the move and that the couch was the last big thing they moved. This would have put this event on December 5th, not December 4th.

Finally, several of Defendant's alibi witnesses testified they did not recall the alibi until the start of Defendant's trial, despite the fact this case was in the court system for a year before it came to trial. Thus, the court does not believe this testimony if presented would have changed the outcome of the trial.

Accordingly, the court does not find Defendant received ineffective assistance of counsel in regard to the alibi evidence.

ORDER

AND NOW, this _____ day of June 2005, the Court **GRANTS** Defendant's PCRA petition on the basis of counsel's failure to timely file an appeal of his conviction. His appeal rights are hereby **REINSTATED**. Defendant shall file a Notice of appeal within thirty (30) days of this order.

On all other issues, the Court **DENIES** Defendant's PCRA petition.

By The Court,

Kenneth D. Brown, P.J.

cc: Public Defender
William Simmers, Esquire (ADA)
Kenneth Osokow, Esquire (ADA)
Mark D. Tanner, Lycoming County Prison
Work file
Gary Weber, Esquire (Lycoming Reporter)