

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 01-12,161
	:	
vs.	:	CRIMINAL DIVISION
	:	
RICHARD JAMES,	:	
Defendant	:	PCRA

**OPINION AND ORDER**

Before the Court is Defendant's Amended Petition for Relief Under the Post Conviction Relief Act, filed June 14, 2004. A hearing on the petition was held November 16, 2004 and February 9, 2005.

After a bench trial, Defendant was convicted of one count of possession of cocaine with intent to deliver and one count of conspiracy. A direct appeal was dismissed for failure to file a docketing statement. In the instant PCRA petition, Defendant challenges trial counsel's effectiveness in several respects, including his failure to file the docketing statement. The Commonwealth agrees Defendant is entitled to have his right to a direct appeal reinstated nunc pro tunc, and the Court will therefore enter an Order reinstating that right. Further, in view of the Superior Court's recent clarification that when a PCRA Court grants a request for reinstatement of direct appeal rights nunc pro tunc it may address, but not "reach" the merits of any remaining claims, Commonwealth v. Miller, 2005 Pa. Super. LEXIS 110, the other claims of trial counsel ineffectiveness will be addressed in this opinion.<sup>1</sup>

First Defendant claims trial counsel was ineffective in failing to adequately request Brady material, and as a result the Commonwealth did not disclose the existence of an agreement between the Commonwealth and the confidential informant who testified at trial that

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<sup>1</sup> The issue of trial court error which underlies the reinstatement of Defendant's direct appeal rights will be addressed in a 1925(a) Opinion.

she observed Defendant at the residence in question on a date prior to the date of his arrest.<sup>2</sup> The confidential informant freely admitted on cross-examination, however, that she was testifying for the Commonwealth pursuant to an agreement with the Commonwealth whereby in exchange for her cooperation, she avoided “jail time” for three counts of possession with intent to deliver a controlled substance. N.T., January 14, 2003, at pp. 88-89. Thus, counsel’s alleged failure to request discovery in such a way as to uncover the existence of the agreement did not affect the outcome, and Defendant cannot prevail on this basis.

Defendant also challenges<sup>3</sup> trial counsel’s effectiveness with respect to the request for discovery in that the Commonwealth did not provide trial counsel with the confidential informant’s prior record. On cross-examination, the confidential informant was asked to admit that she had pled guilty to receiving stolen property but she did not so admit.<sup>4</sup> Defendant’s counsel was then advised by the Court that he could introduce a certified copy of the informant’s criminal record, but counsel did not have such. Defendant now argues that trial counsel should have either requested the record in discovery, or at least obtained a copy himself during trial once it became an issue. As with the agreement, discussed above, however, even if trial counsel had provided the record and such had shown the informant had indeed pled guilty to receiving stolen property, the Court still would have credited her testimony and the outcome of the trial would not have been different. Therefore, no relief is available on this basis.

Next, Defendant contends trial counsel was ineffective in failing to object to the introduction of evidence of Defendant’s prior misconduct, specifically the testimony of the confidential informant that on a prior occasion, specifically November 6, 2001,<sup>5</sup> she observed Defendant “bagging stuff up”, explaining in response to further questioning that it was white in

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<sup>2</sup> Defendant was arrested on December 15, 2001, at the residence of one Leah Bess, after an undercover agent purchased cocaine from Miss Bess and officers subsequently executed a search warrant at her residence. Defendant was present in the home and appeared to be living there, and several quantities of cocaine were found in the home.

<sup>3</sup> This issue was not raised in the written petition but was raised at the PCRA hearing.

<sup>4</sup> The exchange in this regard was rather confusing; the confidential informant admitted to having been arrested for burglary but stated that she “was not charged with that burglary” and when asked whether she “didn’t end up pleading guilty to receiving stolen property” stated “no”. When counsel asked her, however, whether “the guilty plea that I found on record must be a different Christine Confer”, she stated “that is me”.

<sup>5</sup> Although Defendant refers in his petition to prior misconduct evidence relating to two dates, November 6, 2001, and November 16, 2001, a review of the transcript fails to reveal any reference to November 16 at all, other than that being the date Defendant had an argument with his wife and the police were called.

color, and Defendant was putting it into straws. Id. at p. 79. The Court believed such evidence was relevant to the charge of conspiracy, however, admissible under Pa.R.E. 404(b)(2) to prove plan or knowledge, since Defendant contended he was merely present in the apartment and although he was using cocaine, he was not involved with Miss Bess in its sale to others. Thus, any objection to such evidence would have been overruled. Defendant also contends that even if the evidence were admissible under Rule 404(b)(2), counsel should have objected to its introduction under Rule 404(b)(4), arguing the Commonwealth did not provide the required notice. In support of this argument, PCRA counsel presented the testimony of trial counsel who indicated he did not receive any formal notice from the Commonwealth of an intention to introduce such evidence. Trial counsel admitted, however, that the information was included in discovery materials provided in advance of trial and that he was prepared for its possible use by the Commonwealth at trial. The lack of formal notice, therefore, would not have provided a basis for exclusion and any objection on that ground also would have been overruled. Defendant is not entitled to relief on this basis.

Finally, Defendant contends trial counsel was ineffective in failing to file a request for a bill of particulars, arguing that such would have either limited the Commonwealth's proof at trial or put Defendant on notice that he would be required to defend against such at trial, referring again to the November 6, 2001, evidence. With respect to the first argument, since the November 6, 2001, incident was introduced as simply evidence of a conspiracy alleged to have been in place on December 15, 2001, and not in support of a separate charge of criminal conduct on November 6, 2001, a bill of particulars would not have had any effect on the Commonwealth's presentation. With respect to the notice argument, as discussed above, the Commonwealth did include the evidence in the discovery materials provided to counsel prior to trial. Defendant was thus aware of the allegation being made by the confidential informant and the Court does not see how inclusion of the date in a bill of particulars would have affected the outcome. Defendant is thus not entitled to relief on this basis, either.

**ORDER**

AND NOW, this 22<sup>nd</sup> day of February 2005, for the foregoing reasons, Defendant's request for reinstatement of his right to direct appeal nunc pro tunc is hereby granted. Defendant shall have thirty (30) days from this date in which to file an appeal to Superior Court from the sentencing Order filed March 13, 2003.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA  
Eric Linhardt, Esq.  
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Hon. Dudley Anderson