

**IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
v.	:	No.: 98-11,316
	:	
RUSSELL LINDSTROM,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is the Defendant's Amended PCRA petition filed December 17, 2004. The petition alleges ineffective assistance of counsel. Following a jury trial, Defendant was found guilty of Aggravated Assault and Aggravated Assault with a Deadly Weapon stemming from the shooting death of Jeremy Darrow, and was sentenced to five to ten years state incarceration. Defendant's trial and appellate counsel was Peter T. Campana, Esquire. The petition raises several issues based on both representation at trial and on appeal. The Court will address the issues in the order they appear in the petition.

In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable, and; (3) counsel's ineffectiveness prejudiced defendant. *Commonwealth v. Beasley*, 544 Pa. 554; 678 A.2d 773, 778 (1996). Counsel's effectiveness is presumed, so the burden of establishing ineffectiveness rests squarely with the Defendant. Generalized ineffectiveness claims raised in a vacuum must be rejected. Appellant bears the burden of proving his allegation of ineffectiveness. Counsel cannot be found ineffective for failing to

raise a meritless claim. *Commonwealth v. Lilloock*, 1999 PA Super 244; 740 A.2d 237 (1999), *citing Commonwealth v. Baker*, 531 Pa. 541, 561, 614 A.2d 663, 673 (1992).

Ineffective Assistance of Trial Counsel.

1. Defendant argues that counsel was ineffective in failing to request the Honorable Nancy L. Butts to recuse herself from hearing the case. Defendant alleges that the Court had an acquaintanceship with the Defendant's mother and a relationship with Defendant's former co-workers and that therefore counsel should have questioned the impartiality of the Court.

"The party who asserts that a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal." *Commonwealth v. Perry*, 468 Pa. 515; 364 A.2d. 312 (1976). Our courts have "adhered to the prevailing view that judicial fact-finders are capable of disregarding most prejudicial evidence." *Commonwealth v. Council*, 491 Pa. 434; 421 A.2d. 623 (1980).

In order for this Court to find that Defendant's counsel was ineffective for failing to seek recusal, there would need to be some evidence of bias, prejudice or unfairness to which counsel was unresponsive. Counsel certified that he would have been aware of the Court's associations with Defendant's mother and former co-workers. The associations Defendant relies on do not create a presumption of bias, prejudice or unfairness towards Defendant and without some evidence beyond the mere existence of the associations, the Court presumes counsel's effectiveness

with regard to his decision to forgo a motion seeking recusal. See *Commonwealth v. Williams*, 524 Pa. 218; 570 A.2d 75 (1990) (“Trial counsel is presumed to be effective and a defendant has the burden of proving otherwise”).

2. Defendant avers that counsel was ineffective for failing to file a motion to suppress Defendant’s statements to the police. Defendant asserts that he made statements to officers that were obtained in violation of his *Miranda* rights.

A defendant can be cross-examined upon his prior inconsistent statements even though they were obtained in violation of his *Miranda* rights and suppressed. *Commonwealth v. Hannah*, 231 Pa.Super. 522; 332 A.2d 539 (1974). “It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.” *Harris v. New York*, 401 U.S. 222 (1971) (as quoted in *Hannah*, 231 Pa.Super. at 527).

In the present case, counsel intended to call the Defendant to testify pursuant to a claim of self-defense. Counsel asserts that Defendant’s statements would have been admissible for purposes of impeachment as prior inconsistent statements and so did not find it necessary to pursue suppression. The failure to pursue suppression did not prejudice Defendant’s case since the statements were to become admissible at the time of trial even if suppressed. Counsel had a reasonable basis to both pursue self-defense and to forgo a motion for suppression.

3. Defendant avers that counsel was ineffective in failing to object to the District Attorney’s questions that improperly referred to his post-arrest silence. The

post-arrest silence to which the petition refers occurred when an officer testified that Defendant *did not say* that the victim had threatened him.

Defendant's argument falls short of showing ineffective assistance of counsel. The testimony did not concern the Defendant's post-arrest silence. To the contrary, it involved a recorded list of the Defendant's unsolicited comments. The Defendant was not responding to, nor refraining from answering any particular questions when making the statements. (N.T. , 4/10/00 pp. 90). The witness recorded the statements at the time they were made and his testimony, in essence, consisted of reading this list into evidence. The statements were fully examined on both direct and cross-examinations. By the time the prosecutor, via redirect examination, asked the witness whether the Defendant said that Mr. Darrow threatened him, the full list of comments had been fleshed out to the jury. (N.T., 4/10/00, pp. 90-94) It was quite clear by this time what the Defendant's statements had included. The final, clarifying question by the prosecution cannot be said to have prejudiced the defendant, even were it determined to have infringed on his right to post-arrest silence.

4. Defendant avers that counsel was ineffective for failing to object to the testimony of Dr. Frailey. Dr. Frailey testified as an expert about the condition of Defendant's hands, concluding it was inconsistent with Defendant's explanation of events. Defendant asserts that counsel had no reasonable basis for not objecting to the testimony of the witness, as it was not supported by adequate qualifications and expertise.

Pennsylvania Rule of Evidence 702 controls the admission of expert testimony. It states, "If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

An emergency room physician clearly possesses specialized knowledge beyond that possessed by a layperson in the area of human physiology. A physician duly educated and with a decade of experience in an emergency room presumably has knowledge beyond the layperson's concerning wounds and the consequences of a lack of blood flow on appearance and dexterity of a patient's hands. The lenience of the Commonwealth's standard notwithstanding, Counsel attempted to control the evidence against Defendant through numerous objections. (N.T. 4/11/00, pp. 5-13, 13, 14-15, 22). Furthermore, there was no prejudice to the Defendant. Ultimately, the testimony of the Doctor was not particularly damaging to Defendant's case. Mr. Campana certified that he ultimately felt that the testimony corroborated Defendant's statements to police and testimony at trial. Further, no evidence has been presented that would have refuted the Doctor's testimony.

5., 6. Defendant avers that counsel was ineffective for failing to request a continuance when he learned of Dr. Frailey's testimony and to request that the Court order Dr. Frailey to provide an expert report detailing the substance of his anticipated testimony. Counsel did in fact request the Court order a continuance and an expert report. (N.T. 04/11/00, pp. 6). A dispute arose over the timeliness

and adequacy of the Commonwealth's discovery and Counsel's ability to react thereto. The Court made a determination from the bench and the testimony proceeded. Furthermore, and as discussed above, the testimony of Dr. Frailey ultimately did not prejudice the defendant; Counsel certified he believed it corroborated Defendant's version of events. Additionally, neither original defense counsel nor PCRA counsel can offer any testimony or information which may have been obtained had defense counsel had additional time.

7. Defendant avers that counsel was ineffective for failing to request the jury be instructed that the crime of aggravated assault requires that Mr. Lindstrom be found to have acted with malice. It has been held in this Commonwealth that the word 'malice' is not explicitly necessary if the charge to the jury has the requisite general effect. *Commonwealth v. Myers*, 424 Pa.Super. 1; 621 A.2d 1009 (1993).

In the present case, the jury charge read:

[i]n order to find the Defendant guilty of aggravated assault, you must find that each of the elements of the crime has been established beyond a reasonable doubt. There are three elements. Number one, that the Defendant caused serious bodily injury to Jeremy Darrow; number two, that the Defendant acted intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. A person acts intentionally with respect to serious bodily injury when it is his conscious object or purpose to cause such injury. A person acts knowingly with respect to serious bodily injury when he is aware that it is practically certain that his conduct will cause such a result. A person acts recklessly with respect to serious bodily injury when he consciously disregards a substantial and unjustifiable risk that serious bodily injury will result from his conduct. The risk must be of such a nature and degree that considering the nature and intent of the Defendant's conduct and the circumstances

known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the Defendant's situation.

(N.T. 04/14/00, pp. 14-15). The above instructions were sufficient to infer the requisite malice under the holding in *Myers* since it includes the "critical language, 'recklessly under circumstances manifesting extreme indifference to the value of human life.'" *Myers*, 722 A.2d at 1077. See also *Commonwealth v. Carbone*, 524 Pa. 551 (1990) ("willfully, deliberately and with premeditation" satisfied malice aforethought.) Defendant raised this issue on appeal and the Superior Court reached the foregoing conclusion. (No. 1614 MDA 2000). Nothing in Defendant's petition suggests or merits that this conclusion should be reanalyzed or reviewed.

Ineffective Assistance of Appellate Counsel

Defendant avers that counsel was ineffective for failing to raise on appeal:

(1) "Trial Court's erroneous admission of phone company documents when such documents were not properly authenticated;" (2) "Trial Court's error in denying [Defendant's] request to present testimony concerning the decedent's robbery motive," and; (3) "denial of [Defendant's] request that Dr. Frailey's testimony be excluded due to discovery violations by the Commonwealth."

"Trial Counsel is presumed to be effective and a defendant has the burden of proving otherwise." *Commonwealth v. Williams*, 524 Pa. 218; 570 A.2d 75, 81 (1990). Counsel presumably researched the potential issues for appeal and made a determination on each issue's merit. The Defendant points to issues that might

have been raised by Counsel, but none present an oversight that would rise to the level of ineffective assistance of counsel. Counsel must be given latitude in devising a strategy on appeal, part of which may be forgoing argument on issues the attorney finds to be without merit or reasonable chance of success.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. None will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), 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.

ORDER

AND NOW, this ____ day of January, 2005, the Court notifies the Defendant and his attorney that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty days of today's date.

By The Court,

Nancy L. Butts, Judge

xc: DA (KO)
E. Linhardt, Esq.
Hon. Nancy L. Butts
Judges
Gary Weber, Esquire
Law Clerk