

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 02-11,308
:
vs. : CRIMINAL DIVISION
:
KAREEM I. SMITH, :
Defendant : PCRA

OPINION AND ORDER

Before the Court is Defendant's Motion for Post-Conviction Collateral Relief, filed August 9, 2004.¹ A conference on the motion was held October 18, 2004.² Defendant has raised four issues, none of which requires further hearing.

First, Defendant contends trial counsel was ineffective in failing to object when the prosecutor struck from the jury panel "all black persons" resulting in a "jury composed only of white persons". Defendant fails to provide the Court with any specific information, however, and without allegations regarding specifically to whom Defendant is referring, the Court is unable to inquire further.³

Next, Defendant contends trial counsel was ineffective in placing before the jury the fact of his incarceration. Defendant refers to his counsel's questioning of the victim regarding her continued contact with Defendant following the incident, as follows:

Q. You've continued to write to him, have you not?

A. One time.

¹ Defendant's conviction for aggravated assault and related offenses was upheld on appeal. The only issue raised on appeal was that of the propriety of admitting certain photographs of the victim's injuries. Defendant now raises other issues, in the form of claims of ineffective assistance of counsel.

² At the conference, Defendant's counsel indicated uncertainty regarding one of Defendant's claims, and asked for the opportunity to consult further with Defendant as he believed a transcript of the jury selection process might be necessary. On November 23, 2004, counsel informed the Court that he did indeed need that transcript and the court reporter was therefore requested to prepare such. That transcript was completed January 10, 2005.

³ While the record does contain a list of jurors, and shows who was struck by the prosecutor, there is nothing in the record to indicate each juror's race. Further, it may very well be that no black jurors were actually struck, that they were simply not far enough up on the list to be called.

Q. Is it your testimony you've written to him only one time?

A. Yes.

Q. Have you had visits with him?

A. I took my children to see him, yes.

Q. During those visits you also had personal communication with Mr. Smith, is that fair to say?

A. Yes, it is.

Q. And did you at times discuss reconciling with him at some future date?

A. I had, yes.

Although this exchange did not inform the jury that Defendant was incarcerated at the time of the victim's visit, the prosecutor sought and was granted permission to place that fact into evidence, in order to counteract the perception raised by Defendant, obviously in an effort to impeach the victim's credibility, that the victim was not afraid of him. Defense counsel's objection to such was overruled. The following then occurred:

Q. Amanda, did you take your kids to see Kareem?

A. Yes.

Q. How many times?

A. About four or five. I think four or five times.

Q. Did you feel safe?

A. Yes, I did.

Q. Why?

A. Well, because of the present time it was in a safe place. I mean –

Q. Can you tell us where it was?

A. He was incarcerated at the time, and so there was no – you know, it was a safe place. My kids wanted to see their dad. I was trying to be a good mother and take them to see their father.

When the prosecutor finished questioning the victim, defense counsel asked for a curative instruction and the Court instructed the jury as follows:

THE COURT: I think you folks already have the idea of this. Normally we do not permit the fact of Mr. – of a defendant's incarceration to be placed before you because of the fact that there may be a certain inference or a certain prejudice that arises from your knowledge that he may be in some kind of pretrial incarceration in this matter. The reason why it came up was that obviously there was discussions between them, and Mr. Martino (the prosecutor) felt that some explanation should be given as to why she would go and see him wherever he was, and that's the reason it was admitted, for that particular purpose. You are to take no inference other than that from this, and you cannot in any way hold it against Mr. Smith or consider it for any other purpose than what it was offered for. That is the fact that it was the circumstances which Ms. Weaver went to see him, it played in her decision to go and see him.

The Court believes its explanation to the jury that Defendant's incarceration was for the charges presented in the instant matter, and in addition, the admonition to draw no adverse inference from such, sufficiently diluted any possible prejudice. See Commonwealth v. Cunningham, 442 A.2d 335 (Pa. Super. 1982)(curative instruction sufficient to eliminate prejudice from reference to pre-trial incarceration). Further, it appears defense counsel had a reasonable basis for his questioning of the victim and thus was not ineffective in that regard.

Next, Defendant contends trial counsel was ineffective in failing to ask that Officer Moore be removed from the courtroom during the victim's testimony. Inasmuch as Officer Moore was the prosecuting officer and thus not subject to sequestration, however, any request by trial counsel to have him removed would have been denied. Trial counsel was not ineffective, therefore, in failing to make such a request.

Finally, Defendant contends trial counsel was ineffective in failing to advise him regarding his right to seek reconsideration of his sentence or file an appeal from the Sentencing Order. Defendant fails to indicate, however, in what way the sentence was defective, that is,

upon what grounds reconsideration should have been sought or appeal should have been taken. The Court is thus unwilling to address the matter further.

ORDER

AND NOW, this 14th day of January 2005, upon review of the record and pursuant to Rule 907(a) of the Pennsylvania Rules of Criminal Procedure, it is the finding of this Court that Defendant's Motion for Post-Conviction Collateral Relief raises no genuine issue of fact and Defendant is not entitled to post conviction collateral relief.

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Motion. 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 Motion.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
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Kareem Smith, FK0124, 301 Morea Road, Frackville, PA 17932
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Hon. Dudley Anderson