IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	
v.	**:**	**No. 02-10,922**
	:	**CRIMINAL DIVISION**
HEATH GRAY,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

Before this Honorable Court, is the Defendant's February 15, 2007 Petition for Relief under the Post Conviction Relief Act (hereinafter "Petition"). A "no merit" letter has been submitted to the Court by PCRA counsel for the Defendant, Paul J. Petcavage, Esq., in compliance with the requirements of *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988). After an independent review of the entire record, the Court agrees with PCRA counsel, finds that the Defendant has failed to raise any meritorious issues in his February 15, 2007 pro se Petition, and therefore, announces its intent to dismiss said Petition.

Factual Background

At 12:00 A.M., on April 30, 2002, the Williamsport Bureau of Fire responded to a structure fire at Mount Carmel Avenue in the City. Upon their arrival at the scene, firefighters rescued two individuals, Diana Blase and Heath Brink, from the rear roof. Unfortunately, attempts to rescue Ms. Blase's five-year-old son, who was asleep in a second floor bedroom at the time of the blaze, were unsuccessful and he was pronounced dead at the scene.

The next morning, the Pennsylvania State Police informed investigators that a witness to the fire, Katherine Boell, was at the State Police Barracks in Carlisle, Pennsylvania and that she had given them a statement about the events leading up to, during, and following the fire.

Agents William Weber and Stephen Sorage met with Ms. Boell in Carlisle at which time she agreed to return with the agents to Williamsport and give a statement about the incident.

During the October 2003 non-jury trial, Ms. Boell testified that she was in Williamsport, on April 29, 2002, to stay with her friend Keith Young at his home in Picture Rocks, Pennsylvania. N.T. 10/27/03, pp. 112-3. Ms. Boell went on to testify that later that evening, several individuals came to Mr. Young's residence, one of which she identified as the Defendant, Heath Gray. *Id.,* p. 114. Even later in the evening, Ms. Boell testified that she, Mr. Young, and the Defendant talked about Mr. Young's ex-girlfriend, Ms. Blase, with whom he shared a child. *Id.,* p. 115. The conversation ended with the three of them (herself, Mr. Young, and the Defendant) leaving the residence and driving to Williamsport with the intent of harassing Ms. Blase and her fiancé Mr. Brink. *Id,* p.115-6. Ms. Boell drove the parties to Williamsport, and after a couple of stops, they parked the vehicle a few blocks away from Ms. Blase and Mr. Brink's residence on Mount Carmel Avenue in the City; she estimated that they arrived at the residence shortly after 11:00 P.M. *Id.,* p. 116-7. Ms. Boell then testified that Mr. Young and the Defendant approached Mr. Brink's truck and that one or both of the men slashed the tires of the truck. *Id.,* p. 118. The two men, Ms. Boell testified, proceeded to the side of the residence and eventually entered the residence through the backdoor. *Id.,* p. 120. Ms. Boell testified that at this time, she began walking back to the vehicle and that no more than ten to fifteen minutes later, the two men ran behind her and told her to run with them to the vehicle. *Id,* p. 121. With Mr. Young behind the wheel, Ms. Boell testified that as they drove away, she witnessed emergency vehicles headed to the Mount Carmel area and Ms. Blase and Mr. Brink's residence engulfed in flames. *Id.,* p. 122. The parties continued back to Mr. Young's residence in what Ms. Boell described was an erratic fashion that culminated with Mr. Young crashing the vehicle

in Picture Rocks. *Id.*, p. 123. At that point, the three individuals began walking back to Mr. Young's residence during which time, the two men divulged that they had lit furniture on fire and turned on the gas stove while they were inside Ms. Blase and Mr. Brink's residence. *Ibid.* Ms. Boell also testified that the Defendant stated that "he enjoyed the adrenaline rush." *Ibid.* Once the three arrived at Mr. Young's residence, Ms. Boell testified that the Defendant left and, soon thereafter, Mr. Young's mother telephoned him to tell him that his and Ms. Blase's son had perished in the fire. *Id.*, p. 125-6. Ms. Boell stated that she remained with Mr. Young until his mother arrived at which time she left, returned to Shippensburg, and once there, eventually contacted the police in Carlisle. *Id*, p. 127-8.

Mr. Young also testified at the October 2003 trial. Mr. Young corroborated Ms. Boell's testimony and added detail to the events Ms. Boell did not personally witness. Specifically, Mr. Young testified that the Defendant slashed one set of tires on Mr. Brink's truck and that he assisted him in cutting the cable wires leading to the residence. *Id.*, p. 61-2. Mr. Young continued that the Defendant entered the residence first and that once inside, they used the Defendant's lighter to each light a piece of furniture on fire. *Id.*, p. 64-6. Mr. Young then testified that the two men fled the scene and, as Mr. Young would later testify, met up with Ms. Boell, got into the car, drove, erratically, back to Picture Rocks, crashed the vehicle, and walked to Mr. Young's residence from the scene of the automobile accident. *Id.*, p.67, 70-1.

Procedural Background

On June 25, 2002 and June 28, 2002, the Commonwealth filed its Notice of Intent to Seek the Death Penalty and Notice of Joinder, respectively, as to both the Defendant and Mr. Young. On July 8, 2002, Mr. Young filed a Motion to Recuse grounded in this Court's membership in the same fire company where the fireman who retrieved the victim's body, also

his nephew, from the fire was also a member. On July 24, 2002, from the bench, this Court denied Mr. Young's Motion. At the July 24, 2007 hearing, counsel for the Defendant was present; however, the Court precluded him from making any argument regarding the Motion to Recuse because it was Mr. Young not the Defendant who filed said Motion; the Defendant proceeded to trial and through to verdict without ever raising the recusal issue.

In July 2002, the Defendant and Mr. Young filed, *inter alia*, Motions to Sever; on January 2, 2003, the Court denied the Motions to Sever. In March 2003, pursuant to a plea agreement with the Commonwealth whereby it would not seek the death penalty, Mr. Young pleaded guilty to second-degree murder, arson, conspiracy to commit second-degree murder; the Court sentenced the Defendant to life imprisonment without the possibility of parole on March 17, 2003. Several months later, in September 2003, the Defendant agreed to waive his right to a jury trial pursuant to an agreement with the Commonwealth whereby it would not seek the death penalty.

The Defendant's bench trial began on October 27, 2003. The Commonwealth presented testimony from Diana Blase and Heath Brink, resident's of the home at issue, Harold Thomas, a neighbor of the victims, Matthew Oldt, first fireman on the scene, Trent Peacock and Agent Stephen Sorage, Williamsport Police Officers, Fire Chief Dean Heinbach, Katherine Boell, eyewitness, and Keith Young, eyewitness and former co- defendant. The Defense presented two witnesses at the Defendant's October 27, 2003 trial, one character witness, Edna Riddell, and Rhonda McDonald from Lycoming County Children and Youth. After several days of testimony, the Court, on October 31, 2003 rendered its decision finding the Defendant guilty as to all charges; a prompt appeal ensued.

In his Concise Statement of Matters Complained of on Appeal, the Defendant raised three issues for the Courts consideration: that the verdict was against the weight and sufficiency of the evidence, that the Court should have recused itself, and that the Court erred when it denied the Defendant's Motion to Suppress Evidence regarding statements the Defendant made to police in May 2002. On January 21, 2005, the Superior Court of Pennsylvania issued an Opinion affirming this Court's October 2003 verdict and sentence.

After the Supreme Court of Pennsylvania denied the Defendant's Petition for Allowance of Appeal on May 9, 2006, he filed a February 15, 2007 *pro se* Petition for Post Conviction Relief alleging that his trial counsel was ineffective and/or harbored animus for him. This Court appointed PCRA counsel and, on February 26, 2007, granted the Defendant thirty days to either amend his Petition or file a no merit letter. On May 7, 2007, this Court received a no merit letter from PCRA counsel stating that the four issues the Defendant raised in his *pro se* Petition are without merit.

Discussion

To be eligible for relief under the PCRA, the Defendant must plead and prove by a preponderance of the evidence that (1) he has been convicted of a crime in Pennsylvania, and at the time the relief is granted, is currently serving a sentence of imprisonment, probation or parole; (2) that said conviction was the result of a violation of the Constitutions of the Commonwealth and/or the United States and/or ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place; (3) that said allegation(s) were not previously waived or litigated; and (4) that the failure to previously litigate the issue was not a rational, strategic or tactical decision by counsel. 42 Pa.C.S. § 9543.

Instantly, the crux of the Defendant's Petition is ineffective assistance of counsel. More specifically, the Defendant claims that his trial counsel was ineffective for (1) failing to move for the trial Court to recuse itself, (2) the advice given to the Defendant regarding waiving his right to a jury and to testify on his on behalf, and (3) harboring a personal antipathy towards the Defendant.

It is well established that counsel is presumed to be effective. *Commonwealth v. Alderman,* 2002 PA Super. 352, P5, 811 A.2d 592, 595 (Pa. Super. Ct. 2002) (citations omitted). To make out a claim for constitutional ineffective assistance of counsel, a defendant must establish that (1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate the defendant's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. (citations omitted). *Commonwealth v. Lambert,* 568 Pa. 346, 365, 797 A.2d 232, 243 (Pa. 2001). Although a defendant bears the burden of establishing all three elements of the aforecited ineffective assistance of counsel standard, the Court need only find that he/she has failed to prove one of the three elements in order to deem the claim meritless. *Id.* at 365, 243, n.9.

Trial/Appellate counsel was not ineffective for failing to move for this Court to recuse itself

On July 8, 2002, before the Defendant and Mr. Young's cases were severed as a result of Mr. Young's March 2003 guilty plea, Mr. Young filed a Motion to Recuse. The Defendant did not file his own such Motion nor did he join in Mr. Young's Motion. Even though the Defendant failed to raise the recusal issue prior to trial, the Court will assume that his argument for such a Motion would be similar to those made by his previous co-defendant Mr. Young and will accordingly address those arguments as if made by the Defendant. Mr. Young's Motion

contended that because this Court is a member of a local fire department, a member of which, on his own accord and not in connection with his duties as a firefighter, was at the scene because his nephew was the victim, the Court might have had access to information pertaining to the incident and/or that members of the fire department may be called as witnesses during trial giving, at the very least, the appearance of impropriety. After conclusion of the July 24, 2002 argument on Mr. Young's Motion, the Court denied the Motion from the bench stating, in relevant part:

> . . . I've been a member [of the fire department] since 1992. There have been a number of cases, including one death penalty case, I believe, where I was close personal friends with the paramedic who responded to the scene and no motions were filed on any of those occasions. . . . if I spend five hours a month at the firehall I'm lucky. I don't talk to anybody about anything anymore they know better than that I know Matt Oldt [the witness at issue in this matter] because he's one of the lieutenants, but I don't fight fire. . . I haven't run in the field as an EMT since May of 1996. . . I know absolutely nothing about this case and, in fact, couldn't even tell you who responded that night, so I'm going to deny your request [i.e. to recuse] because I honestly do not know anything and everybody at the firehall knows when it comes to something that's involved of a criminal investigation no one talks to me at all, in fact, I deliberately avoid those conversations. . .

N.T. 07/24/03, pp. 7-8. At the July 24, 2002 argument on Mr. Young's Motion, the Court, because it was not his motion, prohibited the Defendant from making any argument on the issue; however, the Defendant did attempt to raise the matter in his appeal. Finding that the Defendant had waived the issue for failure to raise it prior to appeal, the Superior Court found it could not address the issue. The Superior Court did however comment on the Court's decision to sit as trier of fact in the instant matter:

> . . . we are concerned by the trial judge's decision to sit as trier-of-fact in this case. Our inquiry is not whether the trial judge was, in fact, prejudiced against the Appellant, but whether, even if actual bias or prejudice is lacking, the conduct, statement, or **affiliation and familiarity of the court** raises "an appearance of impropriety". . . . In the instant case, the fact that the trial judge was a volunteer of the same fire department as a witness who was a first responder to the fire and the victim's uncle raises the appearance of impartiality, especially in light of the trial court's role as the finder-of-facts.

Superior Court of Pennsylvania Opinion in *Commonwealth v. Gray,* 1794 MDA 2003, p. 10 (01.12.05). Although the Superior Court appears to believe that the Court's mere membership in a fire department, whose member was at the scene, raises an appearance of impropriety, this Court respectfully disagrees.

The following is the relevant standard for recusal issues, as set forth in *Commonwealth v. Abu-Jamal,* 553 Pa. 485, 720 A.2d 79 (Pa. 1998), summarized by the Pennsylvania Supreme Court in *Commonwealth v. White,* 557 Pa. 408, 734 A.2d 374 (Pa. 1999), and utilized by the Superior Court of Pennsylvania in its January 21, 2005 Memorandum Opinion regarding the Appeal in the instant matter[1]:

> It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially. [citations omitted]. As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. [citations omitted]. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. [citations omitted]. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion. [citation omitted]. In reviewing a denial of a disqualification motion, we recognize that our judges are honorable, fair, and competent. [citation omitted].

Instantly, Mr. Young's argument (which, as previously noted, this Court will address as if made by the Defendant) for recusal was, because the Court is a member of a fire company, one whose member was at the scene because of a personal connection to the victim, may know possible witnesses by virtue of said membership, that this fact, coupled with the possibility that the Court's membership in the fire company may have exposed her to comments on the case,

[1] Although the Superior Court engaged in a cursory analysis of the recusal issue in its Memorandum Opinion on this matter, the Court found that the Defendant had waived the issue and therefore, the Court did not ultimately rule on the issue in said Opinion.

gives an appearance of impropriety. As previously cited, this Court explained that it was not exposed to any information about the case through her membership in the fire company. Furthermore, this Court explained that its involvement in the fire department is very limited; the Court is a certified EMT and participates in a few activities throughout the year. Lastly, because a large number of cases before the Court involve EMTs, volunteer firefighters, or both, the ultimate result of the Court being required to recuse itself from all cases that involve a fire department would be its having to decide between community involvement/volunteer work and sitting on the bench. For these reasons, and those cited above, the Court believes that its decision to sit as trier-of-fact and law in this matter was not an error (i.e. the claim is without merit) and, therefore, trial counsel's failure to raise said issue did not render his assistance ineffective.

Trial/Appellate counsel was not ineffective for the role, or lack thereof, he may have played in neither the Defendant's decision to waive his right to a jury trial nor the Defendant's decision to forgo testifying on his own behalf

The right to a trial by jury is a basic and fundamental right, the waiver of which must be knowing and intelligent. Pa. Const. Art. I, § 6. In order to ensure that such waiver is knowing and intelligent, "[t]he judge shall ascertain from the defendant whether [the waiver] is a knowing and intelligent waiver, and such colloquy shall appear on the record. The waiver shall be in writing, made a part of the record, and signed by the defendant, the attorney for the Commonwealth, the judge, and the defendant's attorney as a witness." Pa.R.Crim.P. No. 620; *Commonwealth v. Lott,* 398 Pa. Super. 573, 584, 581 A.2d 612, 618 (Pa. Super. Ct. 1990) (citations omitted). Three imperative areas that the Court must cover when conducting the colloquy with a defendant regarding his/her waiver of a jury trial are that a jury would be chosen from members of community, that their verdict must be unanimous, and that the defendant must be allowed to participate in jury selection. *Id.* "In the past, Pennsylvania courts have held that

. . . an inadequate colloquy, required reversal and remand for a new trial. (citations omitted). More recently, however, our Supreme Court has abandoned this per se rule in favor of a totality of the circumstances analysis which looks to, among other things, the extent to which counsel and client may have discussed the waiver. (citation omitted)." *Commonwealth v. Shablin*, 362 Pa. Super. 289, 293, 524 A.2d 511, 513 (Pa. Super. Ct. 1987).

Similarly, a defendant's right to testify on his/her on behalf is a basic and fundamental right the waiver of such must be knowing and intelligent. Pa. Const. Art. I, § 9. "In order to sustain a claim that counsel was ineffective for failing to call the appellant to the stand, the appellant must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf." *Commonwealth v. Uderra*, 550 Pa. 389, 402, 706 A.2d 334, 340 (Pa. 1998) (citations omitted).

Instantly, this Court conducted an on the record colloquy with the Defendant regarding both his waiver of a jury trial and his decision to not testify on his on behalf. *See*, N.T. 07/23/03, pp. 5-7 and N.T. 07/28/03, pp.228-232 respectfully. During both colloquies, the Court explained, *inter alia*, to the Defendant his right to a jury trial and his right to take the stand on his own behalf, whether he was being coerced in anyway to waive those rights, and whether he was making the decision to waive those rights himself. *Id.* The Defendant stated that he understood his rights, that his waiver of those rights was not the product of coercion, and that it was his decision alone to waive those rights. *Id.* Additionally, on September 19, 2003, the Defendant signed a Waiver of Jury Trial form in the presence of his counsel, the Commonwealth, and the Court.

It is clear to this Court that the Defendant's instant contentions regarding his decision to proceed without a jury and to not testify on his on behalf are without merit. First, the on-the-record colloquies on both issues, coupled with the signed waiver of jury form, are, in this Court's opinion, sufficient evidence that the Defendant's decisions were knowing and intelligent. Second, the Defendant has failed to highlight evidence that trial counsel inappropriately interfered with, coerced, or otherwise was ineffective with regard to the instant issues; in fact, it is clear to the Court that, in addition to the Court's discussion with the Defendant, counsel explained to the Defendant his rights regarding a jury trial and taking the stand on his on behalf and that the Defendant's ultimate waiver of those rights was his and his alone. Lastly, it should be noted that the issue of proceeding with this matter as a non-jury trial was pursuant to an agreement with the Commonwealth whereby the Commonwealth agreed to not seek the death penalty in exchange for the Defendant waiving his right to a jury trial; the Defendant was made aware of this offer prior to making his decision to waive his right to a jury trial. For the aforestated reasons, this Court believes that the Defendant's claims that counsel was ineffective with regards to his decision to waive his rights to a jury trial and to testify on his on behalf are without merit.

The is no evidence that Trial/Appellate counsel harbored personal antipathy towards the Defendant thereby resulting in ineffective assistance of his counsel

As stated above, this Court does not believe that counsel in this matter was ineffective; therefore, any allegations that counsel harbored personal antipathy towards the Defendant, although this Court does not believe such allegations to be true, are irrelevant to disposition of this instant matter.

ORDER

AND NOW, this _____ day of August 2007, the Court pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), hereby notifies the parties of this court's intention to deny the PCRA petition. The Defendant, through his counsel, may respond to this proposed dismissal within twenty (20) days of the date of his Order. If no response is received within that time period, the Court will enter an Order dismissing the petition.

By The Court,

_____
Nancy L. Butts, Judge

xc: DA
Paul J. Petcavage, Esq.
Heath Gray
Judges
Hon. Nancy L. Butts
Laura R. Burd, Esq. (Law Clerk)
Gary L. Weber, Esq. (Lycoming Reporter)