

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

**COMMONWEALTH OF  
PENNSYLVANIA**

**vs.**

**MICHAEL W. McCLOSKEY,  
Defendant**

**: NO. 03-10,880**

**:**

**: CRIMINAL**

**:**

**:**

**: Defendant's Amended Post Conviction**

**: Relief Act Petition**

**OPINION AND ORDER**

The Defendant was found guilty by a jury on March 11, 2004 of the offense of criminal conspiracy to commit the crime of robbery. The date of the robbery was April 23, 2003. Defendant's co-conspirators were listed as Brian McCluskey and Mary Ambrose. Defendant was sentenced on May 18, 2004.<sup>1</sup>

Defendant filed a direct appeal of his conviction, which was denied by a Memorandum Opinion of a panel of the Pa. Superior Court filed June 10, 2005.

Thereafter, Defendant filed this Post Conviction Relief Act (PCRA) Petition alleging he had obtained after-discovered evidence which would warrant the grant of a new trial and ineffective assistance of prior counsel. The Court held an evidentiary hearing on the petition on August 14, 2007.

Factually, the robbery victimized a company called National Cash Advance. This company gives short-term loans to individuals until their next payday. National Cash Advance had an office in the Loyal Plaza in Williamsport.

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<sup>1</sup> Defendant was sentenced to serve a term of 10-20 years in prison. The sentence was imposed pursuant to 42 Pa. C.S.A. §9714(a) (the "two strike" law).

Coconspirator Mary Ambrose and Defendant worked for National Cash Advance for a three-month period and was familiar with their procedures including when they transported money to their bank. The bank was located inside a Giant supermarket also located in the Loyal Plaza.

On April 23, 2003, at about 3:30 p.m. a National Cash Advance employee, Amy Eck, was going to deposit monies from National Cash Advance to the nearby bank. The money was carried inside a plastic bank bag which was inside a grocery bag. Ms. Eck was walking the deposit money to the bank. As she approached the door to the Giant market she was accosted by co-conspirator Brian McCluskey who had a hooded sweatshirt, a blue stocking cap and a nylon stocking over his face. Brian McCluskey pointed a gun in Ms. Eck's face. He then grabbed the bag in Ms. Eck's hand and fled the scene with the deposit money. Ms. Eck, upon seeing the gun, was in fear for her life. The sum of \$3,620 was taken.

Mary Ambrose, one of the Defendant's co-conspirators, testified for the Commonwealth as a witness at trial. She was not given any plea deals in return for her cooperation, but hoped her cooperation would benefit her in her own case.

On April 22 & 23, 2003 Ms. Ambrose stayed at Brian McCluskey's residence on Four Mile Drive in Williamsport with Mr. McCluskey, his wife, Cheryl, and Defendant Michael McCloskey. On the night of April 22<sup>nd</sup>, Defendant and Brian McCluskey discussed committing a robbery, and they wanted to use Ms. Ambrose's vehicle in the robbery. They wanted money to buy heroin. Ms. Ambrose, Mr. McCluskey and Defendant were heroin users. Ms. Ambrose suggested they could rob her former employer, National Cash Advance, because

Ms. Ambrose was familiar with their routine. Ms. Ambrose was aware Ms. Eck would carry significant deposit money over to the bank in the afternoon.

Defendant and Brian McCluskey borrowed Ms. Ambrose's car on the afternoon of April 23<sup>rd</sup> to go to a store named Gander Mountain to steal a gun to use in the robbery. They were gone 45 minutes. When they returned from Gander Mountain the conspirators talked some more about how they would commit the robbery. They all left in Ms. Ambrose's car to go to the Loyal Plaza to commit the crime. Ms. Ambrose drove. Defendant Michael McCloskey was in the front passenger seat and Brian McCluskey was in the back seat behind Defendant. They then waited in the car near National Cash Advance until Ms. Eck came out to make the deposit.

When Ms. Eck came out Ms. Ambrose pointed her out. Brian McCluskey then exited the car to commit the armed robbery.

Ms. Ambrose had been told to move her car to the other side of the Giant market where Ms. Eck had been approaching. Ms. Ambrose made a 360 degree turn and moved the car accordingly.

Within minutes Brian McCluskey returned to the car with a grocery bag. The parties then fled the Loyal Plaza. Just outside the Loyal Plaza, when Ms. Ambrose stopped for a stop sign, Defendant exited the vehicle and pulled off a fake license plate which had been affixed to the car's original license plate. The parties then returned to Brian McCluskey's home where they divided the money from the robbery.

Defendant then burned some of the items used in the robbery.

Ms. Ambrose was soon approached by the Pennsylvania State police about this crime, and she cooperated with the Commonwealth. The State police had surveillance photos from the Giant market which showed Brian McCluskey shortly after he got out of the Ambrose vehicle. The State police, after talking with Ms. Ambrose, obtained surveillance photographs from the Gander Mountain store, which showed Brian McCluskey and Defendant entering the store on the afternoon of the robbery.

The Commonwealth also presented evidence at trial from Colleen Woolley, who worked for Gander Mountain, that an air pistol had been stolen from the store. Employees of the store had found the package for a gun like the one used in the robbery, where the gun had been cut out. Ms. Woolly logged this gun as being noted stolen on May 3, 2003 but the employers found the gun's packaging sometime during the proceeding two weeks.

The Commonwealth at trial also called other witnesses who testified to statements made by Defendant about the robbery. *See*, Testimony of Larry Crowe, N.T., March 9, 10, 11, 2004, pp. 76-97; Testimony of Scott Horner, N.T., March 9, 10, 11, 2004, pp. 200-254.

The Commonwealth called Ronald Burton who testified that in the evening of April 23, 2003, he telephoned Brian McCluskey who convinced him to come over to his house and take Mary Ambrose's car to pick up heroin in New Jersey. Brian McCluskey gave him \$40 in spending money for the trip, and Brian told him there would be \$975 under the seat of the car. Mr. Burton was only at the residence for 15-20 minutes, and he then took the car to Newark, New Jersey to obtain heroin.

The Commonwealth at trial also placed into evidence and played for the jury a tape of a telephone conversation from the Lycoming County Prison. Commonwealth's Exhibit 22.. This conversation occurred on April 30, 2003. Brian McCluskey had been arrested for the robbery in question. He was aware Mary Ambrose was cooperating with the State Police. Brian McCluskey called Defendant Michael McCloskey who had not yet been arrested for the robbery. Defendant was arrested for this robbery May 29, 2003. Both Brian and Michael were aware prison telephone calls were taped. It is obvious in this conversation that both Brian and Michael were reassuring each other to stick together in the face of the investigation. While obviously asserting their innocence for the benefit of the tape recording, it is clear they are formulating their stories and resolving to fight the case because they believed Mary Ambrose was the only witness the Commonwealth had against them to prove the robbery. Brian tells Defendant that they "got to stick to our story here now." Tape Transcript, p. 14. Brian assures Michael that they will "get out of this." Tape Transcript, p. 14. Brian says, "You stick with me and we can team up on her (Ambrose) and get through this." Defendant answers, "Well, yeah, we didn't do nothing, such that . . . we'll get out of it." Tape Transcript, p. 24. Brian says, "Yeah, so stick to the story, ok?" Michael replies, "Alright bud." Tape Transcript, p. 23. *See, also* Testimony of Deputy Prison Warden Kevin DeParlos, concerning the prison taping system. *See* N.T. March 9-11, 2004 pp. 257-262.

**Testimony at the PCRA Hearing**

Defendant Michael McCloskey and Brian McCluskey testified at the PCRA Hearing on August 14, 2007.

Defendant is serving his 10-20 year sentence at the State Correctional Institution at Mahanoy. Bruce Manchester was Defendant's privately retained attorney at trial. While Defendant complained that his trial attorney did not communicate with him prior to trial, Defendant did not clearly tell his trial attorney that Brian McCluskey would be willing to testify for him at trial. Defendant in his testimony acknowledged he did not know if Brian McCluskey would testify for him at trial.<sup>2</sup>

Defendant acknowledged that on the day of the robbery he was at Brian McCluskey's house with Mary Ambrose. He also acknowledged he went with Brian McCluskey to Gander Mountain before the robbery occurred, but he denied being involved in stealing a gun at Gander Mountain.

He went back to Brian McCluskey's house from Gander Mountain. He claims he left Brian McCluskey's house around 3:00 p.m. to get cigarettes. He was gone 30 minutes or more. When he got back to the house Brian and Mary Ambrose were there. Defendant denied he was with the others when they committed the robbery.

Sometime after his trial and after Brian McCluskey pleaded guilty to the robbery Defendant obtained written statements from Brian McCluskey to the effect that Defendant was not involved in the robbery. Brian McCluskey, in the written statements provided to Defendant (Defendant's Exhibits 1 & 2) claims that when he and Mary Ambrose went to

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<sup>2</sup> At the time of Defendant's trial Brian McCluskey was incarcerated in the State of New Jersey. The charges against him were still pending at the time so he would have had his Fifth Amendment Rights to not testify.

commit the robbery they picked up Ron Burton, although Burton was not aware they were going to commit the robbery.

Brian McCluskey testified at the PCRA Hearing. He described Defendant as a friend. He acknowledged he told Mary Ambrose he intended to go to Gander Mountain to steal a gun to use in the robbery. He now claims he lied about this to Mary Ambrose, and he already had the gun for the robbery. He acknowledged he waited outside Gander Mountain while Defendant went into the store.

After going back to his house with Defendant, he left his house with Mary Ambrose to commit the robbery. They picked up Ron Burton but did not tell him what they were doing. He and Mary Ambrose then returned to his house after the robbery.

He testified he may have told Defendant he committed the robbery. He thinks Defendant knew this when Defendant left his house the night of the robbery. He also testified that he told Defendant that when it comes down to it, he would testify for him, but he did not want Defendant to say anything until he (Brian) knew what he was doing.

Brian McCluskey admitted he telephoned Defendant from the Lycoming County Prison after his arrest in April 2003, to ask him to provide a false alibi for him.

### **Conclusions**

The Court finds that Defendant has not proven he received ineffective assistance of counsel at trial or that there is after-discovered evidence which would warrant a new trial.

The Court finds the Brian McCluskey's alleged exculpatory testimony to be obviously false and an attempt to help Defendant overturn the conviction in this case. *See,*

*Commonwealth v. Scott*, 503 Pa. 624, 630, 470 A.2d 91, 94 (Pa. 1983) holding Post Verdict accomplice testimony should be viewed with caution.

The Court has reviewed the transcript of the prison phone conversation between Defendant and Brian McCluskey. Commonwealth's Exhibit 22 at trial, and PCRA Hearing, Exhibit 2. This telephone conversation, in which both men were recorded, occurred on April 30, 2003, shortly after Brian McCluskey was arrested for the robbery and weeks before Defendant would be arrested for the robbery.

As referenced earlier, it is obvious Brian and Michael in this telephone conversation are planning to stick to the story so they can avoid conviction in this case. They are obvious co-conspirators who, after the crime are agreeing to stick to their story of denial to avoid conviction in this case.<sup>3</sup>

In light of this evidence it is clear to this Court that even if Brian McCluskey testified at Defendant's trial the result of the trial would have been the same. He would not have been a credible witness for Defendant. It also appears he was not available to testify.

Accordingly, there is no basis to order a new trial.

**ORDER**

And now, this \_\_\_\_\_ day of September 2007, Defendant's Amended Post Conviction Relief Act Petition is DENIED.

BY THE COURT,

Kenneth D. Brown, P.J.

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<sup>3</sup> We, of course, know that Brian McCluskey's claims of innocence of the robbery which he repeated on the tape asking Defendant to stick to the story with him are false. Mr. McCluskey now readily admits his role in the robbery.



cc: Paul Petcavage, Esquire  
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Work File  
Gary Weber, Esquire (Lycoming Reporter)