

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

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	
<b>v.</b>	:	<b>No. 05-10,556</b>
	:	<b>CRIMINAL DIVISION</b>
<b>PHILIP ROY COLYER,</b>	:	<b>APPEAL</b>
<b>Defendant</b>	:	

**OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)**  
**OF THE RULES OF APPELLATE PROCEDURE**

The Defendant appeals this Court’s Order dated June 10, 2008, dismissing his Post Conviction Relief Act (PCRA) Petition. The Court notes a Notice of Appeal was timely filed on July 7, 2008. On July 15, 2008, this Court directed the Defendant, in accordance with Pa.R.A.P. No. 1925(b), to file within thirty days a concise statement of matters complained of on appeal; Defendant failed to file a concise statement. On November 18, 2008, the Superior Court of Pennsylvania granted Defendant’s application to file a Rule 1925(b) statement *nunc pro tunc* within twenty-one (21) days. Defendant’s Concise Statement of Matters Complained of on Appeal was then timely filed on December 3, 2008. Defendant raises eight issues on appeal; however, most of the issues were addressed in this Court’s Opinion filed on May 15, 2008 and the Court will rely on that opinion for purposes of this appeal. This opinion addresses the two remaining issues.

***Attorney Devecka failed to promptly secure the video surveillance tapes from the Weis Market***

Defendant contends in his Statement of Matters Complained of on Appeal that Defendant’s Trial Counsel, Joseph Devecka, Esq., was ineffective for failing to promptly secure

the video surveillance tapes from the Weis Market, where some of the incidents of the alleged abuse occurred.

In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate:

1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Counsel is presumed to have been effective. A failure to satisfy any prong of this test is fatal to the ineffectiveness claim.

Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007) (and cases cited therein).

In Commonwealth v. Lopez, the Pennsylvania Supreme Court found that trial counsel was not ineffective for failing to call witnesses which the defendant specifically named in his PCRA Petition, since the defendant did not provide any objective proof that the witnesses actually existed or were willing to testify on his behalf. 739 A.2d 485, 496 (1999), *cert. denied*, 530 U.S. 1206 (2000). In Commonwealth v. Jones, there was no evidentiary basis for a new trial where trial counsel was alleged to be ineffective for failing to call witnesses when there was no positive evidence that witness would have provided testimony helpful to the defense. 652 A.2d 386 (Pa. Super. Ct. 1995), *appeal denied*, 663 A.2d 688 (Pa. 1995).

The Court finds that the Defendant is unable to show Attorney Devecka was ineffective for failing to secure the video surveillance tapes. While this is not a situation where trial counsel failed to call witnesses, the Court finds the above cases relevant to the matter at hand. Just as in Lopez there was no proof the witnesses existed, in this case, there is no proof the video tapes were available then and would be available now. We can also presume if a videotape had existed the District Attorney's Office or the Pennsylvania State Police would have obtained it to corroborate the victim's story. Further, like in Jones, here, there is no evidence showing if the

videotapes were available that they would be helpful to the Defendant. Therefore, the Defendant's claim of ineffective assistance of counsel is without merit.

***Attorney Devecka was ineffective for failing to file a bill of particulars***

Defendant alleges Attorney Devecka was ineffective for failing to file a bill of particulars seeking the specific details of times and places of the alleged abuses.

According to the Pennsylvania Supreme Court, “[a] bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the statute of limitations.”

Commonwealth v. Dreibelbis, 426 A.2d 1111, 1114 (1981). In Commonwealth v. Petras, the Defendant asserted trial counsel was ineffective in failing to demand a bill of particulars. 534 A.2d 483, 488 (Pa. Super Ct. 1987). The Pennsylvania Superior Court found the victim's uncertainty as the date of the incident was presented to the court, and therefore, held that the Defendant's post-verdict allegation that additional notice and preparation might have resulted in more effective use of the facts was too vague and speculative to find the trial counsel ineffective. Id.

The Court finds Attorney Devecka was not ineffective for failing to request a bill of particulars. As in Petras, there was much testimony regarding the uncertainty of the exact dates of each incident of abuse, however, the witnesses' all alleged the abuse occurred on Monday nights between October 4, 2004 and December 2004. Furthermore, the criminal complaint stated the incidents occurred on Monday nights between October 4, 2004 and December, plus the specific incident on January 1, 2005, including the place and general nature of each of the offenses. The purpose of the bill of particulars is to put the Defendant on notice so that he may

prepare a defense and avoid surprise. Upon review of the transcript, the Court notes the Defendant was on notice of the times and places of the alleged abuse, as Attorney Devecka was very aggressive in limiting the Commonwealth to the stated dates, times, and locations the Commonwealth provided in the information as to when the Defendant allegedly abused the victim. The Court believes the purpose of a bill of particulars was served in this case by the information provided in the criminal information. The Court is uncertain what more a bill of particulars from the Commonwealth could have provided. Since nothing was specifically alleged by PCRA Counsel, this Court finds that Attorney Devecka was not ineffective for failure to file a request for a bill of particulars. See Commonwealth v. Gee, 458 A.2d 263 (Pa. Super. Ct. 1983) (finding the defendant had sufficient notice of the charges in order to prepare a defense based upon the information contained in the criminal complaint).

Accordingly, the Court suggests that dismissal of Defendant's PCRA Petition should be affirmed.

DATE: \_\_\_\_\_

By the Court,

Nancy L. Butts, Judge

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