

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. 05-10,556
	:	CRIMINAL DIVISION
PHILIP COLYER,	:	PCRA
Defendant	:	

OPINION AND ORDER

Before this Honorable Court, is the Defendant’s Petition under the Post Conviction Relief Act (PCRA), filed on May 29, 2007. After a preliminary conference, an Amended PCRA Petition was filed on January 22, 2008. In his Amended Petition, the Defendant alleges ineffective assistance of Trial Counsel. For the following reasons, the Court finds that the Defendant has not established sufficient grounds for relief under the PCRA.

Background

Defendant was charged with sexually abusing S.R. (“victim”), a nine year old female between October 4, 2004 and January 3, 2005. The Defendant and the victim’s father (“Father”) became friends through their mutual attendance at the Williamsport Assembly of God. Father was a single father of three and had recently separated from his second wife. Defendant offered to help Father by taking his children home from Church play practice on Monday nights. On the way home from church, Defendant stopped at Weis Market for snacks. The victim’s two older siblings would go into the store to assault the victim by touching and fondling her vaginal area. On at least one occasion, Defendant exposed his penis and had the victim touch it.

Defendant also came over to the victim’s house on Wednesday afternoons, while her father was at work. Defendant told the children that it was their little secret. While at the victim’s

house, Defendant would spend a few minutes speaking to each child. Afterwards, Defendant would go into the victims' bedroom and have "private conversations" with her. The "private conversations" involved the Defendant assaulting the victim; on at least one occasion, the Defendant removed the victim's pants and fondled her vaginal area beneath her underwear. He also exposed his penis and had the victim touch and rub his penis. Defendant would then rub his penis against the victim's vaginal area to the point of ejaculation.

On January 3, 2005, Defendant provided the victim and her older brother with guitar lessons. The guitar lessons were conducted in the victim's bedroom. After the victim's brother was finished with his lesson, he went upstairs. The Defendant assaulted the victim, with Father catching Defendant in the act when he came downstairs to the bedroom where the lesson was to be taking place. On this specific occasion, the Defendant was fondling the victim's vaginal area above her clothes.

On October 7, 2005, the Defendant was convicted of one count of Aggravated Indecent Assault at 18 Pa. C.S.A. § 3125(b), one count of Aggravated Indecent Assault at 18 Pa. C.S.A. § 3125(a)(1), one count of Aggravated Indecent Assault at 18 Pa. C.S.A. § 3125(a)(7), sixteen counts of Indecent Assault at 18 Pa. C.S.A. § 3126(a)(7), fifteen counts of Indecent Assault at 18 Pa. C.S.A. § 3126(a)(8), fifteen counts of Indecent Assault at § 3126(a)(1), and eighteen counts of Corruption of Minors at 18 Pa. C.S.A. § 6301(a)(1). On June 22, 2006, this Court sentenced the Defendant to an aggregate of twelve (12) to twenty-four (24) years incarceration at a state correctional institution and ten (10) years of consecutive parole under the supervision of the Pennsylvania Board of Probation and Parole. The Sexual Offenders Assessment Board [of the Pennsylvania Board of Probation and Parole] conducted a Sex Offenders assessment and determined that Defendant was a Sexually Violent Predator ("SVP"). Following a Megan's Law

Hearing on March 20, 2006, this Court found Defendant to be a SVP, and therefore, required him to register as a sex offender under Megan's Law. The Defendant filed a direct appeal to the Superior Court on July 21, 2006. Thereafter, this Court issued a 1925(b) Order directing the Defendant to file a Concise Statement of Matters Complained of on Appeal. On August 29, 2006, this Court filed its Opinion in Support of Order in Compliance with Rule 1925(a) of the Rules of Appellate Procedure, stating that Defendant had not filed a timely 1925(b) Statement. On January 5, 2007, Defendant filed a Praecipe to Withdraw the Appeal. The Superior Court discontinued the appeal on January 9, 2007. Defendant's sentence became final on February 9, 2007, thirty days after his appeal was discontinued. Therefore, Defendant's PCRA Petition was timely filed on May 29, 2007.

Discussion

Defendant contends in his PCRA Petition that prior counsel, Joseph Devecka, Esq., was ineffective. Defendant points to several facts in the record to support his claim: first, Defendant argues that although, Involuntary Deviate Sexual Intercourse ("IDSI") was not charged, Trial Counsel cross examined Kathryn Lewis, MD, regarding her findings as a result of an anal examination and asked Trooper Beth Wilson specifically what the victim reported to her; second, Defendant alleges Trial Counsel's failure to file a Motion in Limine to limit Dr. Lewis's opinion to the date of the examination, allowed her to speculate that there was injury to the victim's vaginal area on January 3, 2005; third, Defendant alleges Trial Counsel was ineffective for failure to question Dr. Lewis that her findings were consistent with no findings of abuse; fourth, Defendant asserts that Trial Counsel did not attempt to impeach Dr. Lewis and thereby allowed the jury to use Dr. Lewis' testimony to corroborate the testimony of the victim; fifth, Defendant

alleges that Dr. Lewis' opinion should have been stricken as she did not testify that her opinions were made within a reasonable degree of certainty; sixth, Defendant asserts Trial Counsel's failure to object to the testimony of Father, regarding the changes in his daughter, created a strong inference that the victim was molested; and finally, Defendant alleges Trial Counsel was ineffective for not objecting to the Commonwealth's questioning of the victim as to whether the abuse happened more than 5 or 10 times, thereby substantiating the number of counts charged in the information. Each of these issues will be addressed seriatim.

First, Defendant alleges he was prejudiced by Trial Counsel's cross examination of Dr. Lewis on her findings as a result of her anal examination, when Defendant was not charged with IDSI. At trial, the Court inquired of the Commonwealth whether they were going to ask questions of Dr. Lewis regarding the findings in her report as a result of an anal examination of the victim. The Defendant was not charged with IDSI, so the Court instructed the Commonwealth not to ask any questions regarding the doctor's findings as a result of said examination. The Commonwealth complied. However, Trial Counsel extensively questioned Dr. Lewis on cross examination regarding these findings. Additionally, Trial Counsel on cross examination of Trooper Beth Wilson ("Wilson") questioned her as to specifically what the victim reported to her. Wilson related that the victim told her the Defendant touched her private parts and butt.

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).

The Court finds Trial Counsel's questioning regarding Dr. Lewis' findings and opinion from an anal examination, which indicated to her multiple sodomizations, was reasonable. The exam occurred on April 7, 2005, which was several months after the January 5, 2005 incident that implicated the Defendant. Dr. Lewis indicated the findings of her anal examination were abnormal. This line of questioning can be seen as trying to show the victim was abused by someone other than the Defendant. Also, the Court finds Trooper Wilson's testimony that the victim stated Defendant touched victim's private parts and butt, shows an inconsistency between the victim's statement to the Trooper and the victim's statement to the Court. This is a reasonable trial tactic; therefore, this Court finds these arguments without merit.

Second, Defendant alleges Trial Counsel's failure to file a Motion in Limine to limit Dr. Lewis's opinion to April 7, 2005, the date of the examination, allowed her to speculate that there was injury to the victim's vaginal area on January 3, 2005. The Court finds Trial Counsel had a reasonable basis for not filing a Motion in Limine to limit Dr. Lewis' testimony. Dr. Lewis is an expert in the field of forensic medical exams and can testify as to the importance of time in sexual abuse cases. Dr. Lewis merely stated that time is a factor when she examines any victim of sexual abuse and if she had seen the victim closer to the time of the alleged abuse, her findings may have been different. Dr. Lewis also stated that even within a few days of slight penetration things could be healed up. Therefore, it can be argued that even if Dr. Lewis saw the victim within days of the alleged abuse, there may have been no abnormal findings. As such, this argument is without merit.

Third, Defendant alleges Trial Counsel was ineffective for failure to question Dr. Lewis that her findings were consistent with no findings of abuse. The Court disagrees with Defense

Counsel that Dr. Lewis was not questioned on cross examination that her findings were consistent with no findings of abuse. The Court finds the following testimony of Dr. Lewis on cross examination relevant:

Q: You don't know what an exam would have shown if it would have been done, like, January 4th, Monday after she was part of this incident or this incident was discovered; is that correct?

A: I don't know what it would have shown, no.

...

Q: You found no abnormalities at all in your gynecological examination?

A: The examination of the vaginal area?

Q: Right.

A: The – just – pardon me. I'm not trying to make it hard. I found the abnormality of the septate hymen, but that is generally considered to be what we call a natural or normal variant, something that she was probably born with.

Q: So in your examination of one time you found no abnormality at all?

A: Not in the vaginal area, no.

N.T. 10/6/05, pgs. 97 & 108. The Court believes Dr. Lewis' testimony establishes that there were no vaginal abnormalities and therefore, no findings of abuse.

Fourth, Defendant asserts Trial Counsel did not attempt to impeach Dr. Lewis and thereby allowed the jury to use Dr. Lewis' testimony to corroborate the testimony of the victim. The Court finds Trial Counsel did attempt to impeach Dr. Lewis. Trial counsel asked Dr. Lewis who paid for the examination and questioned her regarding her findings that there were no abnormalities in the vaginal area. Though, Trial Counsel's attempts to impeach Dr. Lewis were unsuccessful, these attempts do not indicate counsel was ineffective but rather the jury found the testimony of Dr. Lewis to more credible than the Defense witnesses. See Commonwealth v.

Holloway, 572 A.2d 687, 692 (finding that counsel was not ineffective for failing to impeach a witness). Further, it can be argued that Defendant's testimony that he did not touch the victim was corroborated by Dr. Lewis' testimony that there were no vaginal abnormalities. As such, the Court finds Trial Counsel's actions were reasonable.

Fifth, Defendant alleges that Dr. Lewis' opinion should have been stricken as she did not testify that her opinions were made within a reasonable degree of medical certainty. "In Pennsylvania, expert testimony is sufficient to support a finding when given with a reasonable degree of medical certainty. 'The expert has to testify ... that in his professional opinion the result in question came from the cause alleged.'" Commonwealth v. Davido, 868 A.2d 431, 441 (Pa. 2005) (quoting Menarde v. Philadelphia Transp. Co., 103 A.2d 681, 684 (Pa. 1954)). A medical expert is "not required to use 'magic words[,]" therefore, the Court must "look to the substance of their testimony to determine whether it meets the requisite standard." Davido, 868 A.2d at 441 (quoting Commonwealth v. Baez, 720 A.2d 711, 727 (Pa. 1998)). Further, unless the appellate court finds an abuse of discretion, it will not reverse the trial court's determination that the witness was qualified to testify as an expert. Davido, 868 A.2d at 441. The Court finds Dr. Lewis' findings were within a reasonable degree of medical certainty. Dr. Lewis testified to the results of her examination and what those results meant. Further, the parties stipulated to Dr. Lewis' qualifications as being an expert in the area of forensic examinations. Therefore, the Court finds this argument without merit.

Sixth, Defendant asserts Trial Counsel's failure to object to the testimony of Father, that the victim acts differently and has seen three counselors created a strong inference that the victim was molested. In Commonwealth v. Dunkle, the Trial Court permitted an expert to testify about common behavior profiles of children who are victim's of sexual abuse. 602 A.2d 830, 836 (Pa.

1992). Additionally, testimony was admitted by those who knew the victim regarding the changes in her behavior. Id. The Pennsylvania Supreme Court found that by “[p]ermitting an expert to testify about an unsupportable behavioral profile and then introducing testimony to show that the witness acted in conformance with such a profile [was] an erroneous method of obtaining a conviction.” Id. This Court notes that the Pennsylvania Supreme Court did not hold that it was improper for those who knew the victim to testify about her behavioral changes, only that it was improper to introduce that testimony to show the victim acted in compliance with behavior common among abused children. Therefore, this Court finds no error in Trial Counsel’s failure to object to the testimony of Father with regard to the victim’s acting differently and the involvement of counselors.

Finally, Defendant alleges Trial Counsel was ineffective for not objecting to the questions asked by the Commonwealth, such as “Did this happen more than 5 times – 10 times,” and the victim’s answer, “yes,” thereby giving the Commonwealth the factual foundation to substantiate the number of counts charged in the information. N.T. 10/6/05, p. 127). The Court finds this argument without merit. In order to obtain a guilty verdict, the Commonwealth must prove their case beyond a reasonable doubt. The Commonwealth charged the Defendant with multiple counts of Aggravated Assault, Indecent Assault, and Corruption of Minors. In order to prove the multiple counts of Aggravated Assault, Indecent Assault and Corruption charged, the Commonwealth needed to question the witness as to about how many times the incidents occurred. Moreover, the Court is unable to find any authority which states that Trial Counsel’s failure to object to this line of questioning is prejudicial to the Defendant. Therefore, the Court finds Trial Counsel’s failure to object was not ineffective assistance of counsel.

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 May 2008, the Defendant and his attorney are notified that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty days (20) of today's date.

By The Court,

Nancy L. Butts, Judge

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