IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	**:**	
	:	
v.	**:**	**No. 99-10,182**
	:	**CRIMINAL DIVISION**
BRIAN WILLIAMS,	**:**	**PCRA**
Defendant	**:**	

OPINION AND ORDER

Before this Honorable Court, is the Defendant's Petition under the Post Conviction Relief Act ("PCRA"), filed February 18, 2005, by previous PCRA counsel, Eric Linhardt, Esq. On February 22, 2006, an Amended PCRA was filed by Court appointed conflict counsel, Jay Stillman, Esq., a Subsequent Amended PCRA petition was filed on August 16, 2006, and a Subsequent Amended PCRA Supplement was filed on October 13, 2006. Counsel also filed a Revised Amended PCRA Petition on October 23, 2007. In his Revised Amended Petition, the Defendant alleges four issues: (1) that Trial Counsel was ineffective for failing to call an eye witness; (2) that Trial Counsel was ineffective for failing to present evidence regarding the victim's propensity for aggressive conduct; (3) that Trial Counsel was ineffective for failing to object to the hearsay testimony of the victim; and (4) that Trial Counsel was ineffective for failing to request a missing witness instruction. 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 assaulting Glenroy Marks ("Marks") in a residential neighborhood on November 25, 1998. Defendant, along with his girlfriend, Sandra Kolfleich ("Kolfleich"), and Kolfleich's two nieces, Tanya Lee Brown and Felicia Hill were riding in

Defendant's car down Cherry Street to the intersection at Louisa Street. At the intersection, Defendant saw Marks, who was Kolfleich's ex-boyfriend outside a house on the corner. Defendant circled around the block and came back to the house. At this time, Defendant and Marks got into a physical fight. Shots were fired, with one shot hitting Marks. Defendant claims that he acted in self-defense.

On August 11, 1999, after jury trial, Defendant was convicted of two counts of Aggravated Assault at 18 Pa. C.S.A. § 2702(a)(1), one count of Aggravated Assault at 18 Pa. C.S.A. § 2702(a)(4), one count of Recklessly Endangering Another Person at 18 Pa. C.S.A. §2705, one count of Simple Assault at 18 Pa. C.S.A. §2701(a)(1), one count of Simple Assault at 18 Pa. C.S.A. §2701(a)(2), one count of Simple Assault at 18 Pa. C.S.A. §2701(a)(3) and one count of Possessing Instrument of Crime at 18 Pa. C.S.A. § 907(a). At sentencing, Defendant was represented by W. David Marcello, Esq. On November 9, 1999, this Court sentenced the Defendant to five (5) to ten (10) years and a concurrent term of one (1) to (12) months incarceration in state prison. Defendant filed a direct appeal to the Superior Court on December 9, 1999. On December 7, 2000, the Superior Court dismissed the appeal for Counsel's failure to file a brief.

On January 3, 2001, J. Michael Wiley, Esq., was appointed to represent Defendant and on January 22, 2001, Defendant's direct appeal rights were reinstated *nunc pro tunc*. Defendant filed his second direct appeal on February 21, 2001. Thereafter, this Court issued a 1925(b) Order directing the Defendant to file a Concise Statement of Matters Complained of on Appeal, which was never filed. On April 27, 2001, this Court filed its Opinion in Support of Order in Compliance with Rule 1925(a) of the Rules of Appellate Procedure, stating that all issues should be deemed waived for failure to file a 1925(b) Statement.

Thereafter, Gregory A. Stapp, Esq., began handling the appeal. Attorney Stapp filed a petition to withdraw from representing the Defendant, pursuant to Anders v. California, 386 U.S. 738 (1967). By Memorandum Opinion dated March 15, 2002, the Superior Court found that Attorney Stapp did not comply with the procedures relating to withdrawal under Anders. The Court then remanded the case for preparation of either a proper Anders petition or an advocate's brief. The Court also instructed counsel, that waiver under Commonwealth v. Lord, 719 A.2d 309 (PA. 1998) could be avoided by asserting Attorney Wiley was ineffective for failing to file a 1925(b) Statement.

Defendant then retained new counsel, Kyle W. Rude, Esq., to represent him on appeal. Attorney Rude filed an advocate's brief, but failed to assert Attorney Wiley's ineffectiveness. On July 30, 2002, the Superior Court held that Defendant's issues remain waived under Lord and affirmed the judgment of sentence.

On September 9, 2002, Eric Linhardt, Esq., was appointed to represent Defendant. Again, on November 22, 2002, Defendant's appeal rights were reinstated *nunc pro tunc*. Defendant filed another direct appeal to the Superior Court on December 4, 2002. Attorney Linhardt filed a 1925(b) statement but did not allege that Attorney Wiley was ineffective for failing to file a 1925(b) statement. However, in Defendant's brief, prepared by Donald F. Martino, Esq., he specifically asserted Attorney Wiley's ineffectiveness. The Superior Court found under Pa.R.A.P. 302, that raising the issue for the first time in an appellate brief is impermissible. On September 4, 2004, the Court affirmed judgment of sentence without prejudice to Defendant's rights to file a timely PCRA Petition. Defendant's sentence became final on October 4, 2004, thirty days after judgment of sentence was affirmed. Defendant's PCRA Petition was timely filed on February 15, 2005.

Discussion

Defendant contends in his PCRA Petition that Trial Counsel, James Protasio, Esq., was ineffective. Defendant points to several facts in the record to support his claim: first, that Trial Counsel was ineffective for failing to call an eye witness; second, that Trial Counsel was ineffective for failing to present evidence regarding the victim's propensity for aggressive conduct; third, that Trial Counsel was ineffective for failing to object to the hearsay testimony of the victim; and finally, Trial Counsel was ineffective for failing to request a missing witness instruction when the Commonwealth did not call the victim as a witness at trial.

First, Defendant alleges that Trial Counsel was ineffective for failing to call Kolfleich, an eyewitness to the incident, to testify at trial. The Defendant argues based on Kolfleich's testimony at the Preliminary hearing, her testimony would have been critical as it would have substantiated Defendant's testimony that he acted in self-defense. In opposition, the Commonwealth asserts Kolfleich was unavailable to testify at trial and that there is no reasonable probability that the verdict would have been different based on her testimony.

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).

After review of the Preliminary Hearing transcript, wherein Kolfleich testified and review of the Trial transcript wherein Defendant testified on his own behalf, the Court finds that Trial Counsel was not ineffective for failing to call Kolfleich. At trial, Defendant testified that he fired

first. At the Preliminary Hearing, Kolfleich testified that prior to the shooting, she knew Brian had a gun, but she did not know if Marks had a gun. Preliminary Hearing Transcript, pg. 30-31. She also testified she saw two guns after the men broke apart, but did not see who fired first. Id. Based upon Kolfleich's assertions that she did not see who fired first, her testimony would not have been critical to substantiate Defendant's claim of self-defense.

The Court also finds that Trial Counsel's failure to call Kolfleich at trial to testify to Marks prior violent history with her was a reasonable trial tactic. Kolfleich's testimony as to Marks prior violent history was not needed, as some of that history was stipulated to by Defense Counsel and the Commonwealth. Her testimony would have merely been cumulative. As there is no reasonable probability that the jury's verdict would have been different, the Court finds these arguments without merit.

Second, Defendant alleges that Trial Counsel was ineffective for failing to present evidence regarding the victim's propensity for aggressive conduct. The Court finds no merit to this argument as Agent David Lee Ritter ("Ritter") of the Williamsport Bureau of Police testified that Defendant indicated he knew Marks was on parole for assaulting Sandra Kolfleich. N.T. 8/11/99, pg. 46. Further, Defense Counsel and the Commonwealth stipulated on the record in front of the jury that Marks entered a plea of guilty on May 2, 1996 to Simple Assault, with the victim being Sandra Kolfleich, and again on January 26, 1998 entered a plea of guilty to Simple Assault, with the victim being Sandra Kolfleich. N.T. 8/11/99, pg. 75-76. Counsel also stipulated that Marks was on parole for the second Simple Assault offense when this incident occurred. Id. Further, Defendant testified that he believed the Defendant to be a violent individual. Id. at 97. Based upon the presentation of this evidence, the Court finds that Trial Counsel did present evidence regarding the victim's propensity for aggressive conduct.

Third, Defendant alleges Trial Counsel was ineffective for failing to object to the hearsay testimony of the victim. In support of his position, Defendant relies on Commonwealth v. Seltzer, 437 A.2d 988, 990 (Pa. Super. Ct. 1981), for the proposition that failing to object to hearsay testimony is ineffective assistance of counsel. In that case, "Trial Counsel repeatedly allowed the Commonwealth to present inadmissible and prejudicial hearsay testimony without objection." Id. Additionally, the hearsay testimony came from virtually the only witness, which made the testimony more prejudicial. Id. In this case, the Commonwealth asserts in opposition that the hearsay was objected to and the objection sustained.

After review of the record, the Court finds Seltzer, supra, inapplicable. Officer Marvin Daniel Miller ("Miller") testified on direct examination that Marks told him "Brian had shot him." N.T. 8/11/99, pg. 6. Miller also testified that Marks told him he knew Brian because he was "his ex-girlfriend's new boyfriend. And I said what's her name. He said Sandy Ko[l]fleish." Id. Shortly thereafter, when the Commonwealth asked Miller, "[d]id Mr. Marks describe how the shooting took place?", Trial Counsel objected. While the testimony previous admitted is hearsay testimony that was not objected to, Trial Counsel did not fail to repeatedly object to the admittance of "inadmissible and prejudicial hearsay testimony." Id. Further, Defendant admitted he shot Marks and he was Kolfleich's girlfriend, therefore this hearsay testimony in no way prejudiced the Defendant. See Commonwealth v. Wilson, 707 A.2d 1114, 1124 (Pa. 1998) (finding that "it was not unreasonable for Trial Counsel not to object to the hearsay testimony because there was explanatory or counterbalancing evidence that would negate any prejudice to Appellant's position.")

Fourth, Defendant alleges Trial Counsel was ineffective for failing to request a missing witness instruction when the Commonwealth did not call the victim as a witness at trial. The

Commonwealth asserts in opposition that Marks testimony was not needed as there were multiple eyewitnesses and Marks was also unavailable to both parties.

According to the Pennsylvania Superior Court, "[t]he missing witness rule provides that a negative inference may be drawn from the failure of a party to call a particular witness who was in his control." Commonwealth v. Sparks, 492 A.2d 720, 723 (Pa. Super. Ct. 1985) (and cases cited therein). Exceptions to this rule are as follows:

> 1. The witness is so hostile or prejudiced against the party expected to call him that there is a small possibility of obtaining the unbiased truth;
> 2. The testimony of such a witness is comparatively unimportant, cumulative, or inferior to that already presented;
> 3. The uncalled witness is equally available to both parties;
> 4. There is a satisfactory explanation as to why the party failed to call such a witness;
> 5. The witness is not available or not within the control of the party against whom the negative inference is desired; and,
> 6. The testimony of the uncalled witness is not within the scope of the natural interest of the party failing to produce him.

Id. See also Commonwealth v. Pursell, 724 A.2d 293, 308 (Pa. 1999) (holding that Trial Counsel was not ineffective for failing to request a missing witness instruction when the witness' testimony would have been "cumulative, or inferior to other testimony already presented . . .") The Court finds that Trial Counsel's failure to request a missing witness instruction was not ineffective assistance of counsel. Marks was equally unavailable and not in control of the Commonwealth. Further, as there were multiple witnesses who testified as to the shooting, Marks testimony would have been cumulative to what was already presented.

Finally, the Court would like to address Attorney Stillman's failure to allege Attorney Wiley's ineffectiveness in the PCRA Petition. The Court believes that this issue should have been raised so that Defendant's appeal rights could yet again be reinstated *nunc pro tunc*. However, the Court finds that even if Attorney Stillman was to raise Attorney Wiley's

ineffectiveness, and yet another direct appeal granted, Defendant's claims would still fail for lack of merit.

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 August 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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