

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

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	
<b>v.</b>	:	<b>No. 1705-2006</b>
	:	<b>CRIMINAL DIVISION</b>
<b>BRANDON DEAS</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

On April 19, 2010, the Defendant filed a Petition for Relief under the Post Conviction Relief Act (PCRA). On September 9, 2008, the Defendant filed a Pro Se Post Conviction Relief Act (PCRA) Petition. Conflicts Counsel, Joel M. McDermott, Esq., was appointed to represent the Defendant on October 13, 2008. On December 18, 2008, the Defendant filed a First Amended PCRA Petition and on July 14, 2010 the Defendant filed a Second Amended PCRA Petition. A hearing on the Defendant's Second Amended PCRA Petition was held on August 31, 2010. The Defendant raises one issue in his PCRA petition: 1) trial counsel was ineffective for failing to file a timely Motion to Suppress.

***Background***

The transcripts of the trial held before the Honorable Barry F. Feudale on June 28, 2007, show that on September 13, 2006, Trooper Tyson Havens (Havens) of the Pennsylvania State Police was patrolling in the City of Williamsport. While traveling south on Market Street, Havens observed two black males starting up a flight of stairs at 636 Market Street. Havens knew that one of the males was Bilal Justice (Justice), who had at least two felony warrants out for his arrest. Havens stopped his car and began to walk toward where he saw the two males starting up the stairs. Havens went up the stairs where he encountered Brandon Deas

(Defendant) standing on the porch at the top of the stairs. At this point in time, Havens no longer saw Justice. Havens believed that Justice entered the southwest apartment at 636 Market Street. Havens and the Defendant were both standing outside the southwest apartment and the Defendant identified the apartment as his residence. The Defendant indicated that he did not have a key to get in the apartment and that he would have to call his sister, who was inside the apartment, to come and open the door. The Defendant then placed a phone call to his sister. Havens called for backup to come and help him. While Havens and the Defendant waited on the porch for the Defendant's sister to open the door, Havens patted the Defendant down to make sure that he did not have any weapons on him. Havens felt a large bulge in the Defendant's left pocket and asked if the Defendant would mind showing him what was in his pocket. The Defendant then took a large amount of cash out of his pocket. Trooper Jason Caccia (Caccia) and Trooper Frank Harvey (Harvey) arrived as Havens' backup. Then, after about fifteen (15) minutes of waiting, the Defendant's sister, Brandy Deas, opened the door to the apartment. Havens and Caccia made their way past Brandy Deas and into the apartment where they proceeded to search the apartment for Justice. While searching the apartment, Havens observed in plain view a digital scale and suspected cocaine. The Defendant later identified the room where the scale and suspected cocaine were found as his room. The contraband was then seized from the Defendant's room and the Defendant was placed under arrest. The Defendant was then strip searched and glassine bags, a cellular phone and \$1840.00 in cash were found on his person. A search warrant was obtained and executed at the Market Street apartment. As a result of the search warrant, a loaded Smith & Wesson .40 caliber handgun was found in the room that the Defendant previously identified as his. Following his September 15, 2006 arrest, the Defendant went to trial and was found guilty by a jury for the crimes of: Persons not to Possess,

Use Manufacture, Control, Sell or Transfer Firearms; Possession With Intent to Deliver a Controlled Substance (cocaine); Possession of a Controlled Substance (cocaine on the coffee table); Possession of a Controlled Substance (cocaine on the bed); and Possession of Drug Paraphernalia.

***Discussion***

The Defendant alleges that Mr. Lepley was ineffective for failing to file a motion to suppress. The record shows that on November 13, 2006 George Lepley, Esq., entered his appearance as the Defendant's attorney. Mr. Lepley failed to file a suppression motion on behalf of the Defendant. On March 30, 2007 James Protasio, Esq., entered his appearance as the Defendant's attorney and on the same day Mr. Protasio filed a Motion to Suppress on behalf of the Defendant. In response, the Commonwealth filed a Motion to Dismiss the Defendant's Motion to Suppress, alleging that the Motion was untimely filed. On May 22, 2007 the Honorable Richard A. Gray, signing for the Honorable William S. Kieser, granted the motion of the Commonwealth to dismiss the Defendant's Motion to Suppress.

The Defendant alleges in his Second Amended PCRA Petition that a suppression motion should have been filed as Havens patted down the Defendant without permission or justification, and lacked specific reasons to support a reasonable suspicion that the Defendant was armed. The Defendant further alleges that the officers entered the residence without a search warrant, permission or exigent circumstances.

In order to establish a claim for ineffective assistance of counsel, a petitioner must establish:

(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (2009). See Commonwealth v. Pierce, 527 A.2d 973 (1987). In this case, the Defendant argues that the police entered the apartment without a search warrant, consent or exigent circumstances. The Fourth Amendment protects citizens from warrantless searches and seizures. While a warrantless seizure is presumptively unreasonable under the Fourth Amendment, a few specific exceptions to the rule exist. Citing Commonwealth v. Strader, 931 A.2d 630 (Pa. 1997) (See Horton v. California, 110 S. Ct. 2301 (1990)). One exception to a warrantless search and seizure is consent, which can be provided by a third party who has apparent authority to consent. Citing Strader (See Commonwealth v. Hughes, 836 A.2d 839 (Pa. 2003)). Third party consent is valid when police reasonably believe a third party has authority to consent. Citing Strader (see Illinois v. Rodriguez, 110 S.Ct. 2793 (1990)). The trial transcripts of the June 28, 2007 trial before the Honorable Barry F. Feudale, show that the Defendant indicated to Havens that the apartment in question was his. N.T. 21. The Defendant even pointed out the fact that his name was on the mailbox of the apartment. N.T. 21. Havens informed the Defendant why he was there and what he was doing. N.T. 90. The Defendant then called his sister to open up the door of the apartment. N.T. 89-90. A short while later, the Defendant's sister, Brandy Deas, opened up the door to the apartment. N.T. 91. Havens and Caccia then entered the apartment and searched it for Justice. N.T. 91. The Court believes that the facts show that the Defendant consented to the search of the apartment. The fact that the Defendant testified at trial that the apartment in question was his sister's residence and not his own is irrelevant. The police had reason to believe that the apartment was the

Defendant's as the Defendant indicated to Havens that it was his apartment. Consequently, the search warrant was obtained by lawful means and the issue of whether or not Havens' pat down of the Defendant on the porch of the apartment was reasonable is moot. Since the Court finds that the Defendant consented to the search of the apartment, the Defendant would have been searched incident to arrest once the contraband was found in his room. Therefore, the money on the Defendant's person would have been found even without the initial pat down of the Defendant. See Nix v. Williams, 104 S.Ct 2501 (1984). As the Defendant's underlying claim that a suppression motion should have been filed in this case is without merit, the Court finds that he cannot meet the elements for a claim of ineffective assistance of counsel.

### ***Conclusion***

As it appears that the Defendant cannot prove any of the elements needed for a claim of ineffective assistance of counsel, 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. As such, no further hearing 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 Defendant's PCRA Petition. The 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 December, 2010, the Defendant and his attorney Defendant hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907 (1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.

By The Court,

Nancy L. Butts, President Judge

xc: DA  
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