IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-50-2003**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
RICHARD W. ILLES, SR.,	:	
Appellant	:	**1925(a) Opinion**

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

This opinion is written in support of the Order of Senior Judge Kenneth D. Brown[1] dated January 12, 2010, which denied Appellant's Post Conviction Relief Act (PCRA) petition. The Court notes a Notice of Appeal was filed with the Court February 8, 2010. A concise statement of the matters of complained of on appeal was filed by the Appellant on February 24, 2010, and a second concise statement of matters complained of on appeal was filed by the Defense Counsel on May 13, 2010.

In his statement of matters complained of on appeal, the Appellant asserts that the Court erred when it did not find his trial attorneys ineffective.

The Appellant first asserts that the trial court erred in finding that his attorneys were not ineffective for failing to call him as a witness at his trial. The Court cannot agree. Initially, the Court notes that the Appellant knowingly, intelligently and voluntarily waived his right to testify in his own defense. N.T., 2/17/2004, at pp. 122-128. The Court explained to the Appellant that his attorneys could advise him one way or the other but the decision whether or not to testify was his. The Court also explained that if he were convicted, the

1 Judge Brown retired from active judicial service on 12/31/2009.

Appellant could not come back later and say he wanted a new trial so he could testify; he was giving up his right to testify for all time. The Appellant indicated that he understood and he chose not to testify in this case.

In order to sustain a claim that counsel was ineffective for failing to call him as a witness, the Appellant was required to "demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf." Commonwealth v. Uderra, 706 A.2d 334, 340 (1998); see also Commonwealth v. Lambert, 797 A.2d 232 (2001); Commonwealth v. O'Bidos, 849 A.2d 243 (Pa. Super. 2004).

The Appellant claimed that the only reason he did not testify was because counsel advised him against doing so. Relying predominantly on Commonwealth v. Breisch, 719 A.2d 352 (Pa. Super. 1998), the Appellant asserted that the advice of his attorneys was unreasonable because he was the only one who could establish his defense and provide explanations for conduct the Commonwealth interpreted as incriminating. The Court did not agree with the Appellant's assertion.

First, the Court found Breisch distinguishable. Initially, it is not clear that the court conducted a colloquy with Breisch to establish a knowing and intelligent waiver of her right to testify. Although Breisch and her attorney spoke about her right to testify, Breisch indicated she did not know until the defense rested that she was not going to be called to the stand. 719 A.2d at 355. If the court had conducted a colloquy with Breisch, she should have known that she was not going to testify. More importantly, Breisch's defense was that she did not have the intent to defraud because she was authorized to commit the acts in question, and she was the only one who could provide that testimony. Here, the Appellant was not the

only one who could establish his defense. The defense in this case was the Appellant's alibi. The Appellant provided a taped statement to the police informing them of his activities on the night the victim was killed. The Commonwealth played this tape for the jury. Therefore, the Appellant's own statements regarding his whereabouts were before the jury without him being subjected to cross-examination. Furthermore, the defense presented testimony from employees of the Lewisburg McDonald's and employees of Harrisburg area hotels to establish the Appellant's alibi that he was on his way to visit his sister on the night in question.

The Appellant contended that his attorneys should have called him as a witness to testify regarding his state of mind and the rationale for many of his actions that the Commonwealth argued demonstrated consciousness of guilt. Again, the Court did not agree. Based on the testimony presented at the hearings, the Court found that the Appellant's attorney's advice not to testify was reasonable. The Court agreed with the Defense Counsels' testimony that Appellant's explanations would hurt his defense, potentially open the door to harmful information that the Commonwealth chose not to introduce, and were not necessary because other evidence provided the explanation without subjecting the Appellant to cross-examination.

The Court will not reiterate every explanation the Appellant wanted to provide, but rather will list only a few for illustrative purposes.

The most glaring example that would have been harmful to the defense and hurt the credibility of the Appellant's case is the Appellant's explanation for Norma Ulmer's testimony that she overheard Appellant state "I wish the bitch were dead." Ms. Ulmer's testimony regarding this statement can be found at N.T., January 21, 2004 at p. 209. The

defense combated this testimony in several respects without calling the Appellant as a witness. Ms. Ulmer was not a party to the conversation, but she was upstairs in Dr. Zama's house eavesdropping. Id. The defense brought out the fact that in her preliminary hearing testimony Ms. Ulmer did not recall the context of the conversation and she did not recall what else was said. Id. at p. 213. She also initially told the police that she thought this conversation occurred around Christmas or New Years, but the residence Dr. Zama was living in around Christmas or New Years did not have an upstairs. Id. at 214-215. Moreover, Dr. Zama's testimony was that the Appellant was just generally complaining about what he was going through in the divorce and he said something about the bitch is just making my life miserable, I wish she would just go away. N.T., January 30, 2004, pp. 44-45. The defense brought out that the conversation was so inconsequential to Dr. Zama that, despite speaking to the police a half-dozen times, Dr. Zama did not tell them about this conversation. It was only after Corporal Bramhall received this information from Norma Ulmer and asked Dr. Zama about it that Dr. Zama made any mention of the conversation. Id. at 64-69. The defense also elicited that when the Appellant said he wished she would just go away, Dr. Zama took that to mean he wished she would move out of town. Id. at 70.

Rather than rely on defense counsel's minimization of this alleged statement, the Appellant contended that they should have called him as a witness so he could testify that Miriam had been pestering him so much about the location of a castle from Richie's fish tank that the statement he actually made at Dr. Zama's was "I wish the fish were dead." The Appellant's attorneys testified that they believed the Appellant's explanation would lend credence to Ms. Ulmer's testimony since it was so similar to the statement "I wish the bitch were dead," and would undercut the credibility of the defense. The Court agreed with the

assessment of the defense attorneys. The Appellant's explanation seemed contrived and utterly incredible.

The Appellant routinely claimed his statements were misunderstood or taken out of context. Some examples of this are:

(1) Gordon Butler testified that the Appellant said to Miriam "You could die" as a threat. N.T., January 30, 2004, at pp. 29-30. The Appellant indicated he may have said these words but it was in the context of a discussion about their respective risk factors for heart attack or premature death.

(2) James Swann testified that the Appellant told him if the Appellant were going through the things Mr. Swann was going through in his divorce he would "take her out." N.T., January 21, 2004, at p. 84. The Appellant testified it was Mr. Swann who made the statement about taking his wife out and the Appellant sarcastically responded to the effect "Go ahead James; that's real smart."

(3) The prosecutor argued that the Appellant had access to drugs that could knock his son out the night his wife was killed. The Commonwealth presented the testimony of Katherine Fostick that when she took Richie to get a crew cut in the summer of 1999, the beautician noticed there was a spot underneath the front of Richie's hair where it appeared Richie had cut his own hair. When Ms. Fostick discussed this with the Appellant, the Appellant brought up that maybe Miriam's family had Richie's hair cut so it could be drug tested. Ms. Fostick did not understand what the Appellant was talking about. The Appellant explained that Richie was inconsolable the night he found out his mother was killed, so the Appellant gave him something to help him sleep. Ms. Fostick knew that the Appellant mentioned controlled substances and she thought the Appellant told her he gave Richie

Darvocet and Valium. N.T., January 28, 2004, at pp. 129-133. The Appellant testified that Katy had been drinking and misunderstood him. The Appellant stated that he told Katy he was glad he didn't give Richie narcotics, because it was clear they took the hair for testing. The Appellant also stated that he only gave Richie some children's cough medicine to calm him after he found out about his mother's death, because the Appellant knew there was no safe dosage of narcotics for a child.

One of the biggest problems with these explanations is that they admit that the Appellant made statements or had conversations on this subject matter, which would not be helpful to the defense. This problem is aggravated with each additional explanation. The more frequently the Appellant tried to explain everything away, the more it made him look guilty. When such explanations are utilized once or twice, it may be simply a misunderstanding. However, the more the Appellant tried to explain everything away, the more it appeared that the Appellant was making things up to get himself out of trouble.

The Appellant's testimony also would have opened the door to other evidence that would not have been helpful to the defense. For example, the Appellant wanted his attorneys to call him as a witness so he could explain that he was writing the manuscript, hoping it would be published and lead to new information that would result in the arrest and prosecution of Miriam's killer. When the Appellant was arrested in Washington however, he made statements to the police that he thought he knew who was responsible for Miriam's death. There were also several statements of witnesses other than Gordon Butler and Leslie Smith that the Court ruled that the Commonwealth could present, but the Commonwealth did not. The belief of the defense attorneys, which the Court shared, is that the Commonwealth was saving some of this information for cross-examination of the Appellant in the event he

testified.

Given the testimony on this issue as a whole, the Court found that the defense attorneys' advice to the Appellant not to testify was reasonable; therefore, they were not ineffective for failing to call him as a witness.

The Appellant also contends that the trial court erred when it failed to find trial counsel ineffective for failing to object to a fifty year old photograph of Joseph Kowalski. The Appellant fails to specify how or why this photograph was allegedly objectionable. The fact that the photograph was used as part of the evidence to tie the murder weapon to the Appellant does not make it objectionable; it makes it relevant.

The Appellant also asserts that the trial court erred because the Appellant's attorneys were ineffective for failing to object to Appellant's manuscript "Heart Shot – The Murder of the Doctor's Wife" going out with the jury during their deliberations. The Appellant argued that since the Commonwealth called the manuscript a confession, it was reversible error for the manuscript to go into the jury room under Rule 646 (B)(2). The Court did not agree. The manuscript was not a confession per se; it did not state that the Appellant was the killer. The prosecutor indicated the manuscript was not a direct confession; instead, he argued that the manuscript was the Appellant's way of bragging about the crime without confessing to being the killer. N.T., February 18, 2004, pp. 206-211.

The Appellant next claims that the trial court erred because his attorneys were ineffective for failing to request a cautionary instruction when highly prejudicial statements by Mr. Butler and Mrs. Smith were admitted under 'state of mind' exception to the hearsay rule; thus allowing the jurors to use such statements as substantive evidence. The Court noted that the Appellant challenged the admissibility of Mr. Butler and Mrs. Smith's

testimony in his direct appeal and did not prevail. The Court did not believe that the Appellant could prevail on this aspect either. The testimony of Mr. Butler and Mrs. Smith was a small part of the trial and counsel, for strategic reasons, may not have wanted to highlight or emphasize this testimony by requesting a cautionary instruction. Furthermore, it is highly unlikely that even if a cautionary instruction had been given the jury would have acquitted Appellant. Mr. Butler and Mrs. Smith's testimony was admitted to show motive, intent, the parties' relationship, and state of mind. This, however, was not the only such evidence admitted at trial. Testimony was introduced from various witnesses about statements the Appellant made and this testimony was admissible as substantive evidence. For example, James Swann testified that, when he was discussing the amount his divorce was costing him in terms of attorney fees, temporary alimony and child support, the Appellant stated that if he were under those circumstances he would take his wife out. N.T., 1/21/2004, at p.84. Norma Ulmer testified that she overheard a conversation between the Appellant and Dr. Zama where the Appellant said "I wish the bitch were dead, my life would be a whole lot easier." N.T., 1/21/2004, at p. 209. Dr. Nche Zama testified that the Appellant would call his wife a wicked bitch. N.T., 1/30/2004, at p. 43. With respect to the conversation overheard by Norma Ulmer, Dr. Zama testified that the Appellant came over to Dr. Zama's house and said something to the effect of the bitch is just making my life miserable, I wish she would just go away. N.T., 1/30/2004, at p. 44. Justin Lee, who was in the cell next to the Appellant's at the prison, testified he overheard the Appellant say I'm glad the bitch got it or I'm glad I got the bitch. N.T., 2/05/2004, at pp. 100-101. When the Appellant found out Mr. Lee told the district attorney what he heard, the Appellant called Mr. Lee a mother f***ing snitch. N.T., 2/05/2004, at p. 103. Based on the foregoing, the Court does not believe the

Appellant was prejudiced by his attorneys' failure to request a cautionary instruction.

The Appellant contends that the trial counsel was ineffective for not objecting and requesting a curative instruction or a mistrial when the DA expressed his opinion that Dr. Illes was guilty of the murder of his wife. The Court does not believe that the DA at any point during trial expressed his opinion that the Appellant was guilty of the murder of his wife. During closing arguments, the prosecutor commented that the Appellant was the only person who could have committed this crime. The prosecutor's statements during closing arguments were that Appellant was the only person who could have benefited from the victim's death and that a review of the evidence pointed to the Appellant's guilt. Taken in context, the Court believes that the DA did not express his opinion that the Appellant was guilty of murdering his wife. See Commonwealth v. Motalvo, 986 A.2d 84, 108 (2009). Based on the foregoing, the Court does not believe that the Appellant was prejudiced by his attorneys' failure to object or request a curative instruction or mistrial.

The Appellant contends that the trial court erred when it did not find trial counsel ineffective for failing to object to the Court's examples of circumstantial evidence in its jury instructions, because only examples of strong circumstantial evidence were given, leaving the jury to possibly infer that all circumstantial evidence is strong. This issue is without merit. The examples given were appropriate. See N.T., 2/18/2004 at pp. 228-232. In fact, the example about it raining while in a movie theater is very similar to the illustration in the comment to Pennsylvania Suggested Standard Criminal Jury Instruction 7.02A, which states, "If, while walking outdoors, you hear thunder and see lightning and see water falling on the ground and on you, you have direct evidence that it is raining. On the other hand, if you leave a movie theater and see that the streets, sidewalks, and grass are wet, and that people are

carrying umbrellas and wearing coats, even though you didn't see it raining, you have circumstantial evidence that it rained while you were at the movies." Therefore, even if counsel had objected to the Court's examples of circumstantial evidence, the Court would have overruled the objection.

The Appellant's final argument is that the lower court erred when it determined that the cumulative effect of his attorneys' ineffectiveness did not deprive him of a fair trial. Relevant to this claim is the court's statement in Commonwealth v. Dennis, 950 A.2d 945, 987 (2008) that "no number of failed claims may collectively attain merit if they could not do so individually." Quoting Commonwealth v. Bracey, 795 A.2d 935, 948 (2001). As the Appellant's claims of his attorney's ineffectiveness could not attain merit individually, the Court finds that these claims also do not have merit cumulatively.

The Defense Counsel filed a supplemental 1925b statement on May 3, 2010, in which he raised three additional issues for appeal.

The Defense Counsel contends that the PCRA Court failed to fund the expert report of Dr. Carol Chaski and pay for Dr. Chaski's appearance at a PCRA Hearing. Judge Brown entered an Order on June 29, 2009, which denied the Defendant's request for funds to retain Dr. Carol Chaski as an expert. For purposes of this appeal, this Court will rely on the Order of June 29, 2009, in response to the Defense Counsel's claim that the PCRA Court failed to fund the expert report of Dr. Chaski and pay for Dr. Chaski's appearance at a PCRA Hearing.

The Defense Counsel next contends that it was an error for the PCRA Court to fail to order trial counsel to provide a full and complete accounting of the Appellant's pretrial deposit of $85,000.00 for experts to be used in the defense of the Appellant. On April 1, 2009, Judge Brown entered an Order which denied the Appellant's Motion to Compel the

trial counsel to produce an accounting of the $85,000.00 escrow account. For purposes of the appeal on the issue of an accounting of the $85,000.00, this Court will rely on the April 1, 2009 Order of Judge Brown. The Court notes that the Defense Counsel also mentions, in conjunction with his argument for a full and complete accounting of the $85,000.00, that the failure to retain various experts to be used in defense of the Appellant caused irreversible prejudice to the Appellant. However, the Defense Counsel has not identified any witness who could testify as an expert, with the exception of Dr. Carol Chaski, which was addressed supra, nor has he provided a certification from any such witness. The Defense Counsel's argument therefore fails to plead the elements required in a claim for failure to call a witness. See Commonwealth v. Washington, 927 A.2d 586 (2007). Furthermore, it is clear from the record that the defense attorneys at trial consulted with an expert on bullet lead analysis, and the trial was not in session on Friday, February 13, 2004, so that the defense attorneys could consult with their witness. N.T. 2/11/2004 P, 227-229, 235. The record reveals that the defense attorneys at trial also questioned the FBI experts about the availability and commonness of foam, PVC, and wire. N.T. 2/4/2004 P. 111, 114, 116-118, 163-164, 178. The defense attorneys pointed out in their questioning and their arguments that the DNA evidence found that did not match the Appellant. However, the DNA evidence would only be a reliable way to identify the murderer if the DNA came from the murderer. Just because a cigarette butt was found at the murder scene does not mean that the murderer smoked the cigarette. The Commonwealth would have cross-examined any defense expert on this topic. Based on all of the evidence at trial, the jury could have found that the cigarette butt found at the scene did not belong to the murderer, but was planted at the murder scene. Based on the foregoing, the Court does not believe the argument that the Appellant was irreversibly

prejudiced by the failure to retain various undisclosed expert witnesses has any merit.

The Defense Counsel's third and final argument is that the PCRA Court abused its discretion and committed substantial errors of law by not ordering the funding of the expert report or the appearance of Dr. Carol Chaski, and by not ordering trial counsel to provide a full and complete account of the Appellant's $85,000.00 pretrial deposit for experts. This Court will again assert the reasoning of the Dennis Court that "no number of failed claims may collectively attain merit if they could not do so individually." Quoting Bracey at 948. As both of the above stated claims fail separately, the claims do not attain merit when the Defense Counsel groups them together and alleges that the collective result of the PCRA Court's decision in each situation amounts to the PCRA Court abusing its discretion and committing substantial errors of law.

As none of the Appellant's contentions have merit, the Court requests that Senior Judge Brown's Order of January 12, 2010, which denied the Appellant's PCRA Petition, be affirmed.

DATE: _____________ Respectfully Submitted,

____
Nancy L. Butts, President Judge

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