

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 834 - 2006
:
vs. : CRIMINAL DIVISION
:
KYION BALL, :
Defendant : PCRA

OPINION AND ORDER

Before the Court is Defendant’s Amended Petition for Post-Conviction Relief, filed January 21, 2010.¹ A conference on the petition was held March 23, 2010.² Defendant has raised four issues, all of which challenge trial counsel’s effectiveness and thus the Court is guided by the standard set forth in Commonwealth v. Miller, 987 A.2d 638 (Pa. 2009):

(1) a defendant must demonstrate that the issue underlying the claim of ineffectiveness has arguable merit; (2) if the claim does have arguable merit, the court must determine whether counsel's failure to pursue the matter had some reasonable basis designed to serve the interests of his client; and (3) even if it appears that counsel was ineffective, it must still be demonstrated that counsel's ineffectiveness so prejudiced the defendant's case that it is likely that the result would have been different absent the errors. Applying this standard to the allegations of error made by Defendant herein, the Court finds that none requires further hearing.

First, Defendant contends trial counsel was ineffective in failing to call one Diamond Harris on direct examination or in failing to impeach her testimony with prior statements to defense counsel. Defendant contends Ms. Harris told defense counsel prior to trial that Defendant had been at her home on the day and at the time of the murder. Defendant called two witnesses who testified they had been at Ms. Harris’ home on that day and that Defendant had been there with them all day. The Commonwealth attempted to impeach this testimony on

¹ Defendant’s conviction for first degree murder, aggravated assault, recklessly endangering and related weapons offenses was upheld on appeal.

rebuttal and on sur-rebuttal, Defendant called Ms. Harris but asked her only whether one of the two witnesses had been at her home on the day of the murder. She was not asked whether Defendant had been there. Assuming she would have testified consistently with her prior statement to defense counsel, Defendant argues such failure to question Ms. Harris deprived him of important alibi testimony. Assuming she would have contradicted her earlier statement, Defendant argues defense counsel should have impeached her with her prior inconsistent statement and failing to do so also deprived him of important alibi testimony. The Court believes that even were it to find defense counsel ineffective, however, the proposed testimony would not have led the Court to believe Defendant's alibi. Defendant makes much of the fact that Ms. Harris does not have a criminal record, and argues such removes much of the Court's concerns regarding the other alibi testimony,³ but Ms. Harris' statement that Defendant was at her home on the day of the murder would not have overcome the evidence of Defendant's guilt.⁴ Therefore, Defendant is not entitled to relief on this basis.

Next, Defendant contends trial counsel was ineffective in failing to file a timely alibi notice. The Court did note the notice's untimeliness in commenting on Defendant's alibi and in announcing that it found the Commonwealth to have disproved the alibi beyond a reasonable doubt. The Court believes that factor only served to strengthen an already strong case against the alibi, however. It was not a crucial factor. As noted with respect to the first contention, above, the evidence of Defendant's guilt was so overwhelming that even had the alibi notice been timely filed, the result would not have been different. Therefore, Defendant is not entitled to relief on this basis.

Third, Defendant contends trial counsel was ineffective in failing to raise on appeal the issue of the Court's admission over his objection of the grand jury testimony of one Eric Locke, who testified for the Commonwealth at trial in a manner contrary to his previous testimony before the grand jury and at a preliminary hearing. Defendant contends the admission of the

² An initial conference had been held on December 11, 2009, after which defense counsel was given additional time in which to file an amended petition.

³ Both of the other alibi witnesses were inmates and the Court commented on the "them against us mentality" of prisoners charged with serious crimes.

⁴ In light of the corrections officer's testimony regarding the conversation he overheard wherein Defendant was having trouble putting a face to a name, the Court would not have credited Ms. Harris' testimony to any significant degree.

grand jury testimony is a clear violation of the Confrontation Clause of the United States Constitution, citing Crawford v. Washington, 541 U.S. 36 (2004). The Court finds Crawford inapposite, however, as in that case, the witness whose prior testimony (in the form of a statement made in response to police interrogation) was found to have been admitted into evidence in violation of the Confrontation Clause *did not testify at trial*. In a footnote, the Court “reiterate[s] that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” Id. at 59, n. 9. Therefore, this issue has no arguable merit and trial counsel was not ineffective in failing to raise it on appeal.

Finally, Defendant contends trial counsel was ineffective in failing to request this Court to recuse itself, arguing that statements made by the Court in an unrelated case eight days after the murder make it “very likely that a significant minority of the lay community could reasonably question this Court’s impartiality to preside over” Defendant’s trial. The statements relied upon by Defendant in making this contention were made during a sentencing hearing on April 4, 2006. Before the Court that day were two co-defendants, both of whom had pled guilty to marijuana-related charges and possession of a firearm without a license. The Commonwealth agreed to a six-month county sentence for one co-defendant but for the other, sought the imposition of a five-year mandatory state sentence. The Court questioned the Commonwealth respecting the difference in their position in each matter and postponed the hearing in the matter involving the state sentence. The Court then imposed the six-month sentence, and, according to an article in the Williamsport Sun-Gazette, stated to that defendant: “Before you breathe real hard, be glad you’re not in Mr. Beamer’s shoes. He came close to being sentenced to five years in a state penitentiary. ... Firearms are now a very sensitive issue in Williamsport. The pressure is on. The sentences will get longer and tougher for firearms violations.” The Court fails to see how these statements would lead the lay community to reasonably question the Court’s impartiality to preside over the trial of Kyion Ball. The statements had nothing to do with Kyion Ball personally,⁵ but with the criminal use of firearms,

⁵ Commonwealth v. Darush, 459 A.2d 727 (Pa. 1983), does not support Defendant’s argument. There, the judge stated “we want to get people like him [the appellant] out of Potter County.” That statement was directed at the defendant in that matter, unlike the statement in the instant case, which was made in general, in an unrelated case.

and in fact, the reference to sentences getting longer could reasonably be interpreted to refer to the Commonwealth's position at sentencing, rather than the Court's view. Moreover, the Court also stated, as was reported in the Sun-Gazette, that "This is my problem: I've got a kid from Williamsport with no prior record (Beamer) and I got this guy from Philadelphia with a (long) prior record. ... It seems to me this guy ought to be getting the bigger sentence. I want to make sure we are fair to everybody in this Courtroom." Therefore, the Court finds this issue has no arguable merit and Defendant is not entitled to relief on this basis.

Accordingly, the Court enters the following:

ORDER

AND NOW, this 29th day of April 2010, upon review of the record and pursuant to Rule 907(a) of the Pennsylvania Rules of Criminal Procedure, it is the finding of this Court that Defendant's Amended Petition for Post-Conviction Relief raises no genuine issue of fact and Defendant is not entitled to post conviction collateral relief.

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to deny the Motion. 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 Motion.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
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Hon. Dudley Anderson