

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : **No. 342-2006**
 : **CRIMINAL DIVISION**
 NATHANIEL CLARK :
 Defendant : **PCRA**

OPINION AND ORDER

On June 18, 2010, the Defendant filed a Petition for Relief under the Post Conviction Relief Act (PCRA). Conflicts Counsel, Andrea Pulizzi, was appointed on June 22, 2010, to represent the Defendant. On August 20, 2010, Ms. Pulizzi filed a motion to withdraw as counsel as she believed the Defendant's PCRA petition was untimely. A court conference was held on this matter on September 9, 2010. The Defendant raises two issues in his PCRA petition: 1) trial counsel was ineffective for failing to move for the confidential informant's statements to be suppressed; 2) the Defendant was denied the opportunity to cross examine his accuser in violation of the *Confrontation Clause*. Despite Ms. Pulizzi's assertion that the Defendant's PCRA petition was untimely, the Court will address the merits of the Defendant's argument.

Background

The facts of this case as identified in the June 16, 2006 Opinion of the Honorable Dudley N. Anderson are as follows.

The Commonwealth presented the testimony of two law enforcement officials involved in Defendant's arrest: Sergeant Terrance O'Connell of the South Williamsport Borough Police Department and Officer Jeremy Brown of the Williamsport Police Department, who also serves as an undercover officer for the Lycoming County Drug Task Force. According to the officers, after one Taurance Johnson had been arrested on December 7, 2005, on drug charges he agreed to cooperate with authorities by setting up a controlled buy with his

supplier, whom he identified as 'Pook'. O'Connell contacted the Lycoming County Drug Task Force and Officer Brown then met with Johnson at the South Williamsport Police Department. Johnson confirmed his willingness to cooperate in setting up his supplier. Johnson provided a cell phone number and Officer Brown dialed the number. In the presence of both officers, Johnson arranged with someone to purchase cocaine, agreeing to meet at the Giant Plaza on Third Street in Williamsport. Johnson was then transported to the Giant Plaza in an unmarked U.S. marshal's [sic] vehicle. Johnson informed the officers that 'Pook' would be arriving in a silver Chevy Impala. While they were waiting in the vehicle at the Giant Plaza, Johnson received a call on his cell phone from 'Pook', who indicated he would be arriving in a couple minutes. A couple minutes later, they observed a silver Chevy Impala pull into the parking lot and park. Johnson indicated the vehicle looked like the one driven by 'Pook' and after the marshal's [sic] vehicle was moved closer and the driver of the Impala exited his vehicle, Johnson positively identified him as 'Pook'. 'Pook' then went into the store, and came back out after five to ten minutes. At that time, he was arrested, and identified as Nathaniel Clark, Defendant herein.

Suppression Court Opinion¹, 6/16/2006 at 1-2.

Discussion

The Defendant contends that his trial counsel was ineffective for failing to move for the confidential informant's statements to be suppressed, as suppression of the statements could have changed the outcome of the trial. The Defendant argues that he was arrested based on information provided to the arresting agency and that the confidential informant did not testify and was therefore unavailable for cross examination. As the informant did not testify, the Defendant believes he was denied the opportunity to cross examine his accuser, in violation of the *Confrontation Clause*.

¹ Judge Anderson's Suppression Opinion concerned the suppression of evidence obtained as a result of the Defendant's arrest, as the Defendant argued that the arrest was not supported by probable cause.

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).

Despite the Defendant's argument to the contrary, a review of the record reveals that Defense Counsel did in fact move for the confidential informant's statements to be suppressed. Transcripts from the trial on October 24, 2006, before the Honorable William S. Kieser, reveal the following statement by Defense Counsel:

MR. GREENBURG: I want you to exclude any out-of-court statements made by Taurance Johnson. Those out-of-court statements come in through the testimony of police officers or other witnesses who may have heard them, to prohibit that type of out-of-court statement by Taurance Johnson.

N.T. 7-8. Judge Kieser answered Defense Counsel's request to exclude Taurance Johnson's statements by way of an Order:

THE COURT: This order is made in response to the oral motion in limine made by the defense counsel at the beginning of this case outside the presence of the jury seeking to suppress and preclude introduction of statements made by Mr. Johnson at the police department following conversations allegedly made after phone calls to the Defendant to set up the drug transaction at issue in this case. . . . The motion is granted as noted on the record this date as follows: the Commonwealth cannot introduce evidence relating to the identification made at the Giant parking lot by Mr. Johnson's words as would relate to the Defendant being identified as, quote, that's him, end of quote, or his verbal assertion of that by the nodding of his head, and may not introduce the other three statements attributed to Mr. Johnson that he could do 4 and a half ounces for 3600, he would call back in ten minutes, he would meet at the Giant parking lot on the Golden Strip, for the truth of those statements, but may introduce them for the very

limited purpose of explaining the officers' acts in connection with their investigation.

N.T. 29-30. Judge Kieser followed the holding in Commonwealth v. Dargan, 897 A.2d 496 (Pa.Super. 2006) when he allowed in testimony on three specific statements attributed to Mr. Johnson, the confidential informant. The Dargan Court found that the trial court allowed a detective to testify as to information provided to him by a confidential informant for the “[v]ery limited purpose of explaining the officer’s acts in connection with his investigation.” Dargan at 502. “The hearsay rule provides that evidence of a declarant’s out-of-court statements is generally inadmissible because such evidence lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence.” Dargan at 500. (citing Commonwealth v. Chamberlain, 731 A.2d 593 (Pa. 1999)). However, the Dargan Court reasoned that when a hearsay statement is offered for a reason other than to prove the truth of the contents of the statement, such statement is not hearsay and is not barred by the hearsay rule. Id. at 500. More specifically, “[a]n out-of-court statement offered to explain a course of conduct is not hearsay.” Dargan at 500. (citing Commonwealth v. Dent, 837 A.2d 571, 577 (Pa.Super.2003)). Furthermore, the Dargan Court reasoned that when a statement is offered for a purpose other than the truth of the matter asserted, such statement is not barred by the *Confrontation Clause*, as “[t]he focus of the *Confrontation Clause* is testimonial hearsay.” Dargan at 500. (citing Crawford v. Washington, 541 U.S. 36 (2004)).

Following his Order on the subject, Judge Kieser did instruct the jury that statements made by Mr. Johnson to the testifying witnesses were to be considered for the limited purpose of explaining the officers' actions in the course of their investigation. N.T. 58-59, 109-110. A presumption exists that the jury will obey the trial court's instructions. Dargan at 501. (citing

Commonwealth v. O'Hannon, 732 A.2d 1193 (Pa. 1999). The Defendant presented no evidence to rebut the presumption. A review of the relevant law reveals that Judge Kieser's decision to allow in three specific statements attributed to Mr. Johnson was proper.

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 12th day of October, 2010, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is 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.
2. The application for leave to withdraw appearance dated August 20, 2010, is hereby GRANTED and Andrea Pulizzi, Esq. may withdraw her appearance in the above captioned matter.

By The Court,

Nancy L. Butts, President Judge

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