

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

|                                      |   |                          |
|--------------------------------------|---|--------------------------|
| <b>COMMONWEALTH OF PENNSYLVANIA,</b> | : |                          |
|                                      | : |                          |
| <b>v.</b>                            | : | <b>No. 1019-2004</b>     |
|                                      | : | <b>CRIMINAL DIVISION</b> |
| <b>DARRELL HARROLD,</b>              | : |                          |
| <b>Defendant</b>                     | : | <b>PCRA</b>              |

**OPINION AND ORDER**

On June 25, 2010, the Superior Court vacated the Court's Order of April 22, 2009, which dismissed the Defendant's Post Conviction Relief Act (PCRA) Petition, and remanded for further proceedings. This opinion is written after those further proceedings were conducted on January 26, 2011 and March 25, 2011.

***Factual Background***

As set forth in this Court's initial opinion of March 26, 2009, the basic facts of the case are as follows. Shortly after 9:30 p.m. on May 8, 2004, Officer Thomas Bortz (Bortz) of the Williamsport Bureau of Police (WBP) accompanied by two Lycoming County Children and Youth Representatives went to a residence on Trenton Avenue to investigate allegations that the mother of the children residing in the residence was using and/or selling cocaine. When they arrived, the Defendant answered the door wearing only white boxer shorts and according to Bortz, had an erection. The Defendant informed Bortz and the Children and Youth Representatives that he was alone in the home with the mother's children; neither Bortz or

Children and Youth Representatives inquired further. The next day, The WBP received a report that the Defendant had performed oral sex on two boys, ages six and eight at the Trenton Avenue residence the previous evening. The two boys were interviewed and confirmed the abuse. The boys also revealed that the Defendant anally abused them.

### ***Procedural Background***

On November 23, 2004, after a two-day jury trial, Defendant was found guilty of five counts of Involuntary Deviate Sexual Intercourse at 18 Pa. C.S.A. § 3123, two counts of Aggravated Indecent Assault at 18 Pa. C.S.A. § 3125, two counts of Indecent Assault at 18 Pa. C.S.A. § 3126, one count of Endangering the Welfare of a Child at 18 Pa. C.S.A. § 4304, and one count of Corruption of Minors at 18 Pa. C.S.A. § 6301. On February 15, 2005, Defendant was sentenced to fifteen (15) to thirty (30) years of incarceration in a State Correctional Institution and ten (10) years of consecutive probation with the Pennsylvania Board of Probation and Parole. On March 10, 2005, Defendant filed a timely appeal alleging that the Court erred by failing to merge, for purposes of sentencing, the Aggravated Indecent Assault and Involuntary Deviate Sexual Intercourse charges. On April 3, 2006, the Pennsylvania Superior Court affirmed this Court's decision.

On October 21, 2006, the Defendant filed a timely *pro se* PCRA Petition. Paul Petcavage, Esq. was appointed to represent the Defendant for purposes of his PCRA. On April 16, 2007, the Defendant was granted thirty days in which to amend his Petition. Via letter on April 27, 2007, Attorney Petcavage notified the Court that he believed the Defendant's Petition was without merit. On June 14, 2007, the PCRA announced its intent to dismiss the Defendant's Petition and on July 12, 2007, the Petition was dismissed. On July 25, 2007, the Court granted Attorney

Petcavage's Motion to Withdraw. Defendant filed a timely *pro se* Notice of Appeal. On July 30, 2007, Gregory Drab was appointed as appellate counsel. Attorney Drab timely filed a Concise Statement of Matters Complained of on Appeal. The Defendant alleged two claims of ineffective assistance of counsel: (1) whether Attorney Petcavage was ineffective for failure to consult with Defendant prior to filing a "no-merit" letter and (2) whether Trial Counsel, Jason Poplaski, Esq. was ineffective for failure to call character witnesses has arguable merit. This Court, in its 1925(a) Opinion, noted that because Attorney Petcavage in his "no-merit" letter did not state that he conducted a review of the record in this case, the Court conducted an independent review of the Defendant's PCRA Petition and the entire record. The Court dismissed the Defendant's Petition because the Court could not address the specific issue as Attorney Petcavage determined it to be without merit and the Court's review did not highlight the issue. In his Concise Statement of Matters Complained of on Appeal, the Defendant clarified his allegations of ineffective assistance of Counsel. This Court then requested the Superior Court remand the matter for further proceedings based upon the possibility that the Defendant's underlying claim could be of arguable merit. After review of the record, the Superior Court adopted this Court's reasoning and reversed and remanded the case.

On remand, this Court examined the Defendant's claim that trial counsel was ineffective for failing to inform him about the importance of character witnesses. The Defendant claims that had trial counsel informed him of his right to call character witnesses, he would have called several witnesses. After review, this Court dismissed the PCRA Petition on April 22, 2009, reasoning that the Defendant's proposed character testimony "would be inadmissible as the evidence does not have a proper relation to the subject matter of the crimes... and at trial [,] the prosecution did not assail the Defendant's community reputation for truthfulness." PCRA Ct.

Op. at 4. However, on appeal, the Superior Court disagreed, and again remanded the case back to this Court for a hearing on the reasonableness of trial counsel's action in failing to call the character witnesses.

The Superior Court pointed out in its 6/25/2010 opinion that character evidence is permitted in cases even where the trait is unrelated to the charge at issue. "Evidence of good character is to be regarded as evidence of substantive fact just as any other evidence tending to establish innocence and may be considered by the jury in connection with all the evidence presented in the case on the general issue of guilt or innocence." Commonwealth v. Hull, 982 A.2d 1020, 1023 (Pa.Super.2009). Since this Court did not hold an evidentiary hearing before dismissing the PCRA Petition, trial counsel did not testify; therefore, the Superior Court observed that even if the Court should have permitted character evidence, without testimony by trial counsel, the court could not determine whether trial counsel had a reasonable basis for his conduct. Following the Superior Court's remand, this Court held an initial hearing on this matter on January 6, 2011, and a subsequent hearing on March 25, 2011.

### ***Discussion***

At the evidentiary hearing held before this Court on January 6, 2011, Trial Counsel, Jason Poplaski, Esq., testified that his goal at trial was to convey that the Defendant was not guilty of the charges filed against him. Mr. Poplaski also relayed that as far as any tactical or strategic reason for not calling character witnesses at trial, he was unsure what his reason might have been due to the length of time since the original trial.

After his arrest, the Defendant admitted in a video taped interview with the police to the facts surrounding the charges in this case. However, at trial, the Defendant's testimony

was that he was in fact innocent of the crimes for which he was charged. The Defendant contended that the reason he admitted to committing the crimes during the video taped interview was to get the interview over with. The following exchange between the prosecution and the Defendant at trial establishes this fact:

Q: So your testimony to this Jury is that you made the whole thing up on video just to get it over with?

A: Why not?

Q: Why not because it's a lie, do you always tell lies to get out of something that's difficult?

A: No. Like I said, simple fact of the matter is under the circumstances that I was in yes, I did make it up just go get out of this.

N.T., 11/22/3004 – 11/23/2004, p. 80. In light of the change in the Defendant's story, Mr. Poplaski conceded during the January 6, 2011 hearing that the Defendant's credibility was indeed an issue at trial.

During the hearings on January 6, 2011, and March 25, 2011, the Court was able to hear the actual or stipulated to testimony of four (4) separate potential character witnesses. Laverne Allen (Defendant's sister) and Denise Allen (Defendant's sister) testified on January 6, 2011, and the testimony of Patricia Cocker (Defendant's sister-in-law) and Gwendolyn Reeves (Defendant's mother-in-law) was stipulated to by agreement of both parties on March 25, 2011. The sum of these witnesses' testimony was that they were each unaware that the Defendant had admitted guilt in a video taped interview to the crimes for which he was charged. Furthermore, each witnesses' testimony was that they were either unsure whether the Defendant would lie just because someone was badgering him with questions, or that they believed that the Defendant would not lie just because someone was badgering him. As the Defendant's credibility in this

case depended on the jury believing that the Defendant had in fact lied at the time of his video taped confession because the police were badgering him, the Court finds that the testimony of these witnesses would not have been helpful to the Defendant.

This Court also took the opportunity to again review the video shown to the jury at the time of trial and finds that the video does not support the Defendant's claim that he was badgered or coerced into confessing to a crime that he did not commit. The Court could reasonably conclude that if trial counsel added the testimony of the proposed character witnesses who believed that the defendant would not have admitted to a crime just because he was being badgered and was not badgered, it would cast a fatal blow to the Defense case.

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

- (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). The Court finds that the Defendant has failed to establish the elements needed to prove ineffective assistance of counsel. As the witnesses testimony was that they believed the Defendant would not lie just because someone was badgering him, the only conclusion the Court can make is that their testimony would have actually been detrimental to the Defendant's case.

Thus, the Court finds that a reasonable basis existed for Mr. Poplaski's failure to call these witnesses to testify. Additionally, even if the testimony of these witnesses had been presented at trial, the Court does not find that a reasonable probability exists that the result of the trial would have been different; the Court believes the additional testimony of these witnesses would have

been very detrimental to the defense case. Therefore, the Court finds that its April 22, 2009 dismissal of the Defendant's PCRA Petition was not in error.

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA Petition. Additionally, as 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 the Court's intention to deny the Petition. The Defendant may respond to this proposed dismissal within twenty (20) days.

**ORDER**

**AND NOW**, this \_\_\_\_ day of July, 2011, the Defendant and his attorney are notified that it is the intention of the Court to dismiss the Defendant's PCRA petition unless he files an objection to that dismissal within twenty days (20) of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.  
Don Martino, Esq.