

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. 349-2006; 551-2006;
v.	:	552-2006
	:	CRIMINAL DIVISION
DARNELL JOHNSON,	:	
Defendant	:	PCRA

ORDER

On August 27, 2010, the Defendant filed an Amended Post Conviction Relief Act (PCRA) Petition and a Supplement to said Petition on December 20, 2010. Following a Court Conference on the Petition, the Court determined that an evidentiary hearing was needed to examine issues related to the Defendant's allegations of ineffective assistance of counsel concerning the photo array used against him at trial. After several scheduling delays, the evidentiary hearing was finally scheduled for August 23, 2011, at which time both parties expressed uncertainty as to what PCRA issues the evidentiary hearing was actually scheduled to resolve. In light of this uncertainty, and as a result of circumstances beyond the Court's control, the hearing is now re-scheduled pursuant to the Court's Order below.

The Defendant raised four (4) allegations of ineffective assistance of trial counsel in his PCRA Petition: 1) ineffectiveness for failing to object to and/or challenge the trial court's *sua sponte* consolidation of three cases on the eve of trial; 2) ineffectiveness for failing to file a pre-trial motion challenging the identification procedures utilized by the police in these cases; 3) ineffectiveness for failure to object to the late disclosure of hand-written criminal histories of the Commonwealth witnesses; and 4) ineffectiveness for failure to object to the highly prejudicial closing arguments of the prosecutor. 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).

As to the Defendant's allegation that trial counsel was ineffective for failing to object to and/or challenge the trial court's *sua sponte* consolidation of the three cases on the eve of trial, the Court finds that this issue was addressed by the Superior Court in its Opinion of May 27, 2009. The Superior Court affirmed the trial court's consolidation of the three cases, finding that the evidence of each offense would be admissible in a separate trial for the other offenses, the evidence was capable of separation by the jury to avoid the danger of confusion, and that the Defendant would not be unduly prejudiced by consolidation of the offenses. See Commonwealth v. Lark, 543 A.2d 491, 496 (Pa. 1988) (See Pa.R.Crim.P. 582 (A)(1)(a)). In finding that the Defendant would not be unduly prejudiced by the consolidation, the Superior Court did not allude to the trial court's *sua sponte* decision to consolidate the cases on the eve of trial; therefore, this appears to be a non-issue. As this matter was already disposed of by the Superior Court, the Defendant will not be granted a hearing on this issue.

As to the Defendant's allegation that trial counsel was ineffective for failing to file a pre-trial motion challenging the identification procedures utilized by the police in these cases as the photo array was given absent the presence of defense counsel, and as the circumstances of the array were unduly suggestive, the Court finds that the Defendant is entitled to a hearing on both of these issues. The Commonwealth concedes that a defendant's right to have counsel present during a photo array attaches once a defendant has been placed under arrest for the charges for which the photo array is given. See Commonwealth v. Sanders, 551 A.2d 239 (Pa. 1988). At the

hearing, Defense Counsel must first establish that the Defendant was under arrest for the charges relevant to the photo array at the time that the array was given. If the Defendant can show this, the Defendant must then show that any in-court identification of the Defendant made by the witnesses who viewed the tainted photo array was not the product of an independent recollection of the Defendant, but was based solely on the witnesses' acquaintance with the Defendant through the tainted photo array. If the Defendant can also meet this burden, he must then establish that had these witnesses' testimony been precluded at trial, there is a reasonable probability that the outcome of the trial would have been different. As to the unduly suggestive nature of the array, Defendant must establish for the Court that the array was unduly suggestive, that any in-court identification of the Defendant made by the witnesses of the unduly suggestive array was not based on an independent recollection of the Defendant, but was based solely on the witnesses' acquaintance with the Defendant through the array, and that had the testimony of the witnesses' of the unduly suggestive array been excluded at trial, the result of trial would have been different.

As to the Defendant's argument that trial counsel was ineffective for failing to file an objection to the late disclosures of hand-written criminal histories of the Commonwealth witnesses, the Court finds that the Defendant is not entitled to a hearing on this issue. The Defendant asserts that the Commonwealth provided untimely, handwritten criminal histories of the Commonwealth witnesses, rather than authentic computerized criminal histories; however, the Defendant has failed to point out to the Court how in fact he was prejudiced by this disclosure. The Defendant's dissatisfaction with the manner in which the criminal histories was provided is not enough to establish that the Defendant was in fact prejudiced by the disclosure of the criminal histories, and he will therefore not be afforded a hearing on this issue.

As to the Defendant's final argument, that trial counsel was ineffective for failing to object to the highly prejudicial closing arguments of the prosecutor, the Court finds that the Defendant is not entitled to a hearing on this issue either. "The Commonwealth is afforded reasonable latitude in fairly presenting its version of the case to the jury." Sanders at 249 (See Commonwealth v. Upchurch, 513 A.2d 995 (Pa. 1986). In order to require a new trial, a prosecutor's language must be such that its "[u]navoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict." Sanders at 249. (See Commonwealth v. Simon, 248 A.2d 289, 292 (Pa. 1968). The comments which the Defendant alleges were highly prejudicial include the following: "[E]verybody's done their job. I don't want robbers out on the streets, and you don't want people with guns out on the streets. Don't put them there. Don't make the efforts, the actions of those seven people that were scared they told you, don't make them for nothing." N.T., 12/15/06, p. 49. The Court finds that the statements of the prosecutor in this case do not come close to forming a fixed bias in the minds of the jury, and therefore find that the Defendant is not entitled to a hearing on this issue.

ORDER

AND NOW, this 1st day of September, 2011, based on the above discussion, a PCRA Hearing to determine whether trial counsel was ineffective for failing to file a pre-trial motion challenging the identification procedures utilized by the police in these cases as the photo array given was given absent the presence of defense counsel, and as the circumstances of the array were unduly suggestive, is hereby scheduled for **September 27, 2011 at 1:30 p.m. in Courtroom No. 1 of the Lycoming County Courthouse, Williamsport, PA.** Two hours have been allotted for the hearing.

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.
E.J. Rymza, Esq.
Sheriff
April McDonald, CST