

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 61-2009
	:	CRIMINAL DIVISION
HENRY MCINTOSH,	:	APPEAL
Defendant	:	

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

On October 12, 2011, the Defendant filed an appeal from the Court's Order of August 11, 2009, and on October 19, 2011, the Court directed the Defendant, in accordance with Pa.R.A.P. No. 1925(b), to file within thirty days a Concise Statement of Matters Complained of on Appeal. The Court received the Defendant's Concise Statement of Matters Complained of on Appeal on November 8, 2011.

Factual background

At the original jury trial held before this Court on June 15, 2009, Michael Koch (Koch) testified that after receiving two Retail Theft charges he agreed to work as a confidential informant for Agent Don Mayes (Mayes) of the Williamsport Bureau of Police. On July 16, 2008, Mayes came to Koch's house on East Mountain Avenue in South Williamsport and Koch called Henry McIntosh (Defendant), and asked if he could buy a bundle of heroin off of the Defendant. The Defendant informed Koch he was not around at that time, but that Koch should contact Tricia Derr (Derr), who Koch knew to be the Defendant's girlfriend, in order to purchase the heroin. Derr testified that the Defendant called her and informed her that Koch would be

calling her to purchase heroin. Koch then called Derr and arranged to meet her on Locust Street in Williamsport where he purchased \$180.00 worth of heroin from her. On July 18, 2008, Mayes again came to Koch's house where Koch called the Defendant to purchase another bundle of heroin. The Defendant and Derr then came to Koch's house to deliver the heroin; Koch went outside and got into the vehicle with the two where he handed the Defendant money and the Defendant gave Koch the heroin.

Derr's testimony confirmed Koch's narration of both the July 16 and 18, 2008 drug purchases. Derr also testified that the heroin she sold to Koch she obtained from the Defendant, her boyfriend at the time with whom she was living, and that she had previously taken trips with the Defendant to Philadelphia and Newark to pick up heroin. On the trips to Philadelphia to get heroin, Derr stated that the Defendant took a black and silver handgun that he kept under the passenger side seat of the vehicle. The trips to Philadelphia were made before and after the drug transactions in July of 2008. Derr also revealed that she was charged for her part in selling heroin to Koch and that she intended to plead guilty to the charges against her.

Mayes testified as an expert in the areas of packaging, distribution, and trafficking of controlled substances. Mayes had previously testified as an expert, and trial counsel, Joel McDermott (McDermott), did not object to Mayes' qualifications as an expert at trial. Mayes' testimony also confirmed Koch's account of the events of July 16 and 18, 2008. Based on the evidence obtained during the July 2008 controlled buys, Mayes obtained a warrant for the Defendant's arrest and executed the warrant on November 6, 2008. The Defendant was searched incident to arrest and was found to have ten (10) bags of suspected heroin, a cell phone linked with a different number than the one Koch used to contact him for the controlled buys, pieces of paper with phone numbers written on them, and a small amount of currency. The suspected

heroin found on the Defendant field tested positive for heroin. Mayes believed the Defendant possessed the heroin with the intent to deliver based on the fact that the Defendant had on two prior occasions sold bundles of heroin, ten (10) bags of heroin, like the bundle found on him at the time of arrest, and based on the fact that the Defendant indicated that he was not a drug user, but was found to be in possession of heroin. Mayes also testified that the fact the Defendant recently changed cell phone numbers was indicative of someone in the drug dealing business, as dealers frequently change phone numbers.

Agent Gary Heckman (Heckman) a narcotics agent with the Pennsylvania State Attorney General's Office, who is also certified as a PWID expert, testified that he assisted Mayes in conducting surveillance of the controlled buys on both July 16 and 18, 2008 and also assisted during the Defendant's arrest on November 6, 2008. Heckman's testimony confirmed the account of the events on July 16 and 18, 2008 as previously testified to by Koch, Derr and Mayes. Heckman testified that he believed the drugs found on the Defendant's person at the time of the Defendant's arrest were possessed with the intent to deliver. Heckman based this opinion, first and foremost, on the fact that the Defendant told Heckman that he was not a drug user, information which Heckman then recorded on the Defendant's personal history/arrest report. Heckman also based his opinion on the fact that the Defendant was suspected of dealing heroin on at least two prior occasions, that the Defendant possessed ten (10) individual packets of heroin, along with cash and a cell phone, phone numbers, which drug dealers often keep on them to contact other sources or customers, and the fact that the Defendant did not possess any paraphernalia to indicate that he intended to use the heroin himself.

On June 16, 2009, following the jury trial, the Defendant was found guilty of Criminal Conspiracy and Criminal Use of a Communication Facility for the events of July 16, 2008, for

Delivery of a Controlled Substance, Possession With Intent to Deliver, Criminal Use of a Communication Facility and Criminal Conspiracy for the events of July 18, 2008, and finally of Possession With Intent to Deliver, Possession of a Controlled Substance, and Possession of Drug Paraphernalia for his November 6, 2008 arrest. Following the Defendant's conviction, trial counsel, Joel M. McDermott, untimely filed an appeal before the Defendant was sentenced, but subsequently withdrew the appeal so that the Court could proceed to sentencing.

Procedural Background

On March 2, 2010, the Defendant filed a pro-se Post Conviction Relief Act (PCRA) Petition; thereafter Edward J. Rymsza, Esq., was appointed to represent the Defendant. After being granted several extensions of time, Attorney Rymsza filed an Amended PCRA Petition on October 25, 2010. The Court granted the Defendant an evidentiary hearing, which was held over several days in March, April, and May, 2011, on three of the issues raised in the Amended Petition. At the conclusion of the hearing, the Court granted both parties the opportunity to submit briefs; the Court received the Defendant's brief on June 3, 2011, and the Commonwealth's brief July 18, 2011. The Court then issued an Opinion and Order dated August 31, 2011, which addressed all of the issues raised in the Amended PCRA Petition. However, as one the issues raised in the PCRA Petition was failure of trial counsel to timely file a direct appeal, the Court subsequently vacated its August 31, 2011 Opinion, and via an Order dated September 19, 2011, granted the Defendant's PCRA Petition, thereby reinstating his appellate rights, *nunc pro tunc*.

This appeal followed, and in it the Defendant raises several allegations of ineffective assistance of counsel: 1) failure to object to and/or file an appropriate motion regarding the

PWID expert testimony of Officers Mayes and Heckman where such testimony violated the notice and expert report rules set forth in Rule 573 of the Pennsylvania Rules of Criminal Procedure; 2) failure to object to the testimony of co-conspirators Tricia Derr and Michael Koch regarding prior alleged drug activity of the Defendant where such testimony was unduly prejudicial, was without any required notice and otherwise violated Rule 404(b) of the Pennsylvania Rules of Evidence; 3) failure to request a cautionary instruction regarding the highly prejudicial and irrelevant testimony regarding the Defendant's possession of a firearm during his alleged drug trafficking activities; 4) failure to request either a cautionary instruction and/or jury charge advising the jury that they could not consider the guilty plea of co-conspirator Tricia Derr as evidence against the Defendant; 5) failure to request a corrupt source instruction regarding the testimony of Tricia Derr; and 6) that the cumulative effect of these ineffectiveness claims denied the Defendant a fair trial.

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).

Discussion

PWID testimony in violation of Pa.R.Crim.P. 573

The Defendant contends that expert reports by Mayes and Heckman were not offered into evidence or disclosed to the defense at any time, violating Pa.R.Crim.P. 573. In his brief in support of his PCRA Petition, the Defendant elaborated that the failure of the Commonwealth to provide the expert reports negatively impacted the Defendant's ability to prepare his defense in that he had no opportunity to prepare an effective cross examination or to challenge qualifications.

As the Commonwealth correctly points out, the Pennsylvania Rules of Criminal Procedure do not require that an expert report be prepared and provided to the defense; the rules merely provide the Court with the discretion to order such a report be prepared upon motion. Pa. R. Crim. P. 573(2)(b). Furthermore, at the hearing on the PCRA, Attorney McDermott admitted that he was aware of the subject of both Mayes and Heckman's testimony prior to trial; Attorney McDermott's notes taken at the Preliminary Hearing establish this fact. See Commonwealth's Exhibit No. 1. Attorney McDermott was therefore able to formulate an effective cross examination of both Mayes and Heckman as reflected in the trial transcripts. N.T., 6/15/09, p. 103-116, 121-126, 136-138, 140. In light of these facts, the Court finds that the Defendant's argument fails.

Prejudicial testimony of co-conspirators in violation of Pa.R.Crim.P. 404(b)

The Defendant contends that trial counsel was ineffective for failure to object to the testimony of co-conspirators Derr and Koch regarding prior alleged drug activity of the Defendant where such testimony was unduly prejudicial and was provided without notice and

otherwise in violation of Pa.R.E. 404(b) regarding prior bad acts. The testimony the Defendant refers to concerns Koch's statements that he used to purchase drugs from the Defendant and that he had purchased drugs from the Defendant for about two years, and Derr's statements that she previously went on trips with the Defendant to Philadelphia and Newark to get heroin. N.T., 6/15/09, p. 18, 46-49.

The Court finds that the testimony of Koch and Derr was admissible pursuant to Commonwealth v. Pattakos, 754 A.2d 679 (Pa. Super. 2000) as the testimony illustrated the relationship between the parties and explained why the police and Koch targeted the Defendant for the controlled buys. The Court also finds that the Defendant received sufficient notice of both Koch's and Derr's statements and potential testimony. At the PCRA hearing on May 6, 2011, trial counsel testified that he was aware from the discovery he received in this case that the confidential informant (Koch) was involved with the Defendant on other prior drug transactions. As for Derr's testimony, Attorney McDermott took notes at the preliminary hearing in this case which reflect that Derr testified that she and the Defendant were "more or less partners in the drug dealing business" from which the Court finds trial counsel should have inferred that Derr was involved with the Defendant on prior drug transactions. See Commonwealth's Exhibit No. 1. In light of these facts, the Court finds that the testimonies of Koch and Derr were admissible, and that the Defendant received sufficient prior notice as to enable him to be prepared for cross-examination.

The Court notes that even if this testimony had been precluded, there is no reasonable probability that the verdict would have been any different. The fact that both Derr and Koch were involved with the Defendant on prior drug transactions did not improve their testimony relating to the events on July 16 and 18, 2008, which were the only relevant dates in this case.

Cautionary instruction regarding the Defendant's possession of a firearm

The Defendant contends that trial counsel was ineffective for failing to request a cautionary instruction regarding the highly prejudicial and irrelevant testimony regarding the Defendant's possession of a firearm during his alleged drug trafficking activities. In his brief in support of his PCRA Petition, the Defendant asserted that Derr's testimony concerning the Defendant's possession of a firearm was merely improper character evidence used to demonstrate the Defendant's bad character. Defendant argued that trial counsel should have requested a cautionary instruction to give the jury guidance as to the proper scope of the firearm evidence. The testimony to which the Defendant refers is Derr's testimony that she saw the Defendant with a silver gun with a black handle which he kept under the passenger's side seat of the vehicle when the two drove to Philadelphia to get heroin. N.T., 6/15/09, p. 47-50.

A review of the transcripts establishes that the Commonwealth did not develop testimony establishing that the Defendant possessed a firearm on either July 16 or 18, 2008, and the possession of a firearm was not relevant to the crimes for which the Defendant was convicted. For these reasons, the Court finds that charging the jury with a cautionary instruction on the testimony concerning the firearm would not have changed the outcome of the trial. As the Defendant cannot prove all of the elements needed to establish ineffective assistance of counsel, the Court finds this argument to be without merit.

Cautionary instruction and/or jury charge concerning guilty plea of Tricia Derr

The Defendant contends that trial counsel was ineffective for failing to request a cautionary instruction or jury charge concerning the guilty plea of Derr. In his brief in support of his PCRA Petition, the Defendant stated that the jury was made aware that Derr was the

Defendant's co-conspirator and co-defendant charged in the same episode, and that a cautionary instruction was critical to ensure that the Defendant's guilt or innocence was determined by the evidence presented against him and not by Derr's plea. The testimony to which the Defendant refers is Derr's statement that she was in fact charged for her part in the drug deals involving Koch. N.T., 6/15/09, p. 51-52.

As the Commonwealth correctly pointed out in its brief in opposition to the Defendant's PCRA Petition, no evidence was presented at trial establishing that Derr had in fact pled guilty to any charges. While Derr did admit that she planned to enter a plea of guilty, the record clearly shows that as of the date of trial in this case, Derr had not yet entered a plea. N.T., 6/15/09, p. 55. Furthermore, the case law on which the Defendant relies in support of his argument concerns situations where evidence of a co-defendants guilty plea is used to infer "guilt by association." See Commonwealth v. Geho, 302 A.2d 463 (Pa. Super. 1973). In such situations, the Geho Court iterated the fact that "[g]uilty pleas of co-defendants cannot be considered as evidence against those on trial...because the defendant has a right to have his guilt or innocence determined on the evidence presented against him..." Quoting U.S. v. Restaino, 369 F.2d 544 (3d Cir. 1966). In this case, Derr testified against the Defendant; therefore, the jury was not considering Derr's potential plea as evidence against the Defendant, but rather Derr's testimony. Therefore, the Court again finds that even if a cautionary instruction had been given, the outcome of the trial would not have changed.

Corrupt source instruction regarding Derr's testimony

The Defendant contends that trial counsel was ineffective for failing to request a corrupt source instruction regarding Derr's testimony as Derr was a cooperating accomplice whose

testimony was highly significant and prejudicial to the Defendant. In support of this argument, in his brief in support of his PCRA Petition the Defendant cited to Commonwealth v. Chimeh, 639 A.2d 9 (Pa. 1994), stating that when an accomplice testifies against a defendant, the jury should be instructed that the accomplice is a corrupt and polluted source whose testimony should be viewed with caution. The Defendant argued that the corrupt source instruction was designed to address situations where an accomplice testifies against a defendant in order to obtain favorable treatment. See Commonwealth v. Derk, 719 A.2d 262 (Pa. 1998).

While the Court does agree with the Defendant that trial counsel could have requested a corrupt source instruction in this case, the Defendant still must prove all of the elements of ineffective assistance of counsel to prevail on this claim. Based on the testimony of trial counsel presented at the PCRA hearing, although the underlying claim maybe have arguable merit, the Court finds that the Defendant fails on the second element of ineffective assistance of counsel, namely that no reasonable basis existed for trial counsel's action or failure to act. Trial counsel testified that his strategy at trial was to prove that Derr was lying in her testimony and that Derr and Koch collaborated together to formulate their testimony: trial counsel's closing argument evidences this strategy. N.T., 6/16/09, p. 9-12. Since it is clear that failing to request a corrupt source instruction was within the ambit of trial counsel's strategy, the Court believes the Defendant's claim of ineffectiveness fails. See Commonwealth v. Johnson, 437 A.2d 1175 (Pa. 1981). The Court further finds that even had a corrupt source instruction been given, reviewing the amount of testimony the Commonwealth presented, it is unlikely the outcome of the proceeding would have been different. Derr's testimony was corroborated by Koch, Mayes, and Heckman, providing sufficient evidence to establish the Defendant's guilt.

Cumulative effect of ineffectiveness claims

The Defendant claims that the cumulative effect of trial counsel's ineffectiveness denied him the right to a fair trial. As the Court determined that none of the claims, taken separately, amounted to ineffective assistance of counsel, the Court must find that trial counsel was effective, and that the cumulative effect of said claims did not amount to ineffective assistance. See Commonwealth v. Jones, 537 A.2d 32 (Pa. Super. 1988).

DATE: _____

By the Court,

Nancy L. Butts, President Judge

xc: DA
Edward J. Rymysza, Esq.
Amanda Browning, Esq. (Law Clerk)
Gary L. Weber, Esq. (LLA)