IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	**No. 342-2003**
v.	:	
	:	**CRIMINAL DIVISION**
JOSEPH JENNINGS,	:	
Defendant	:	**PCRA**

OPINION AND ORDER

On March 15, 2012, the Defendant filed a *Pro Se* Post Conviction Relief Act (PCRA) Petition. On November 14, 2013, Peter Campana, Esq., filed a Final Amended Petition for Post-Conviction Collateral Relief. For the following reasons, the Court finds that the Defendant does not raise a genuine issue concerning any material fact and therefore no purpose would be served by holding any further proceedings.

Background

Joseph Jennings (Defendant) was charged with Rape – By Forcible Compulsion, a felony of the first degree;[1] Sexual Assault, a felony of the second degree;[2] and two counts of Indecent Assault, misdemeanors of the second degree.[3] After a jury trial, the Defendant was found guilty of Sexual Assault and two counts of Indecent Assault. The Defendant, however, was found not guilty of Rape.

On September 27, 2004, the Defendant filed a direct appeal to the Superior Court of Pennsylvania. The appeal was dismissed for failure to file a docketing statement in compliance with Pa.R.A.P. 3517. The appeal was reinstated by the Superior Court but it was found that Defendant's issues were waived for failure to file a 1925(b) statement. Subsequently, the

[1] 18 Pa.C.S. § 3121(1).
[2] 18 Pa.C.S. § 3124.1.
[3] 18 Pa.C.S. § 3126(a)(1); 18 Pa.C.S. § 3126(a)(2).

Defendant filed a Post-Conviction Relief Act (PCRA) Petition and on June 13, 2007, this court granted the PCRA Petition and allowed the Defendant to file an appeal *nunc pro tunc*. On September 28, 2008, the Superior Court found that the Defendant's appeal was without merit. The Defendant filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied on April 1, 2011.

On March 15, 2012, the Defendant filed a second *pro se* PCRA Petition. The Court appointed the Public Defendant's Office of Lycoming County to represent the Defendant. After two court conferences, Kirsten Gardner, Esquire of the Public Defendant's Office filed an Amended PCRA Petition on February 5, 2013.[4] The Amended PCRA Petition alleged the single issue of whether trial counsel was ineffective for failing to request a "prompt complaint" jury instruction.

On May 14, 2013, this Court had a Grazier hearing as the Defendant had requested the withdrawal of counsel and Attorney Gardner did not file a Turner/Finley letter. Following the hearing, this Court found that the Defendant knowingly, intelligently, and voluntarily waived his right to counsel and continued the case for a PCRA Conference. On July 30, 2013, the Defendant hired Peter Campana, Esquire to represent him in his PCRA Petition. At the time of the conference, the Court granted Attorney Campana's request for a continuance in order to file another amended PCRA Petition.

On November 14, 2013, Attorney Campana filed a Final Amended Petition for Post-Conviction Collateral Relief, which was the third amended PCRA petition filed in this case. At the conference on the Petition, Attorney Campana argued only two (2) issues in the Petition: 1) that trial counsel was ineffective for failing to file a motion to preserve the victim's blood sample

[4] Attorney Gardner filed an initial Amended PCRA Petition on September 13, 2012. After a PCRA conference, this Court ordered Attorney Gardner to include signed certifications of each intended witness.

so that it could have been tested for the presence of controlled substances; and 2) that trial counsel was ineffective for failing to call Mary Ungard and Robert Donato, D.O. as witnesses. In addition, the PCRA Petition alleged that trial counsel was also ineffective for failing to call additional witnesses at trial and for failing to object to prosecutorial misconduct.

A rendition of the facts is needed to address the claim raised by the Defendant. The Superior Court of Pennsylvania addressed the relevant facts as follows:

> Appellant and the victim initially met while helping Appellant's uncle and aunt move into their new home. After developing a friendship through several phone conversations, Appellant and the victim decided to go out together on the evening of April 13, 2002. The victim picked Appellant up at his home and they decided to go to several different bars where they consumed alcohol and met with friends.
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> Appellant claims that the victim had too much to drink and smoked marijuana with him. N.T., 1/23/04, at 389, 392. However, while the victim testified that she did have several drinks that evening, she reported feeling fine and in control. N.T., 1/22/04, at 73, 82. The victim explained that she became "annoyed" when Appellant teased her for not smoking marijuana with him. ***Id.*** at 77. Near the end of the evening, as she had become bored and anxious to end the date, the victim claimed that she poured her drink out in the bathroom sink. ***Id.*** at 78-79. The victim testified Appellant spent most of the evening socializing with his friends, as she sat by herself at the bar, and claimed "mostly the whole evening… [I] pretty much knew that I wasn't going to go out with him again." ***Id.*** at 63, 76-80.
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> The victim and Appellant also gave conflicting stories about their romantic conduct that night. Appellant claimed the victim had previously promised to give him a "full body massage" and was affectionate with him that evening, kissing and dancing closely. N.T., 1/23/04, at 381. While the victim admitted that Appellant kissed her a few times during the evening, she denied that she or Appellant ever made sexually suggestive comments or conducted themselves in a like manner. N.T., 1/22/04, at 65, 69-73, 80-81, 83.
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> At the end of the date, Appellant asked to borrow a movie and followed the victim into her apartment although she had never invited him to come in. ***Id.*** at 83-84. While the victim went to go check her phone messages, Appellant started watching the DVD in the living room. ***Id.*** at 84. When the victim returned, she noticed that Appellant was more intoxicated than she though, observing him swaying to the music and talking in a jumbled manner. ***Id.*** at 85-86. When Appellant mumbled that the victim wanted to see him naked all night, the victim became angry and told Appellant to leave. ***Id.*** at 86. Appellant ignored the victim's response and tried to dance with her. ***Id.*** After the victim pushed herself away, Appellant walked into the victim's bedroom and collapsed on her bed. ***Id.*** at 89-90.
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> After the victim checked to make sure that Appellant was asleep, she left him on the bed, reasoning that it would be best if he could "sleep it off." ***Id.*** at 90. The victim

changed into her strapless nightgown and admitted she was not wearing underwear at the time. ***Id.*** at 90, 153. As the victim saw that it was raining and Appellant would have to walk home, the victim nudged Appellant's shoulder and told him to sleep on the futon in her living room. ***Id.*** at 92-93.

After Appellant got out of the bed, the victim climbed under the covers from the opposite side of her bed. Appellant got back into the bed, kissing the victim's neck and shoulder. As she tried to pull away and told him to stop, Appellant continued and grabbed her left hip and breast. ***Id.*** at 95. The victim struggled to get away and told Appellant "this is me saying no." ***Id.*** at 96. Appellant pulled down the covers, pulled the victim's nightgown up, and undid his pants. ***Id.*** at 98. The victim testified that as Appellant was laying on top of her, he was able to penetrate her vagina with his penis. ***Id.*** Appellant proceeded to turn the victim over and had sexual intercourse in another position. ***Id.*** at 100. Appellant testified at trial that the victim consented to the sexual intercourse. N.T., 1/23/04, at 398.

After Appellant left, the victim sought comfort in her best friend, who testified at trial that the victim looked "disturbing…[as] her hair was a mess, her face was white, pale she looked like a deer in the headlights…[and] she looked like she had been crying." ***Id.*** at 306. The following morning, the victim told her mother what had happened and they subsequently went to the emergency room. N.T., 1/22/04, at 112-13. Nurse Cathy Brendle, a sexual assault nurse examiner (SANE), performed a rape kit on the victim and submitted her observations and findings to the police.

Commonwealth v. Jennings, 958 A.2d 536 (Pa. Super. 2008).

Whether trial counsel was ineffective for failing to file a motion to preserve the victim's blood sample to determine if she had taken any controlled substances

The Defendant contends that his trial counsel was ineffective for failing to file a motion to preserve the victim's blood, which was taken during the course of the victim's rape kit the day following the sexual assault. In this instance, the Defendant is not making an allegation that the blood sample was destroyed in bad faith, but that trial counsel was ineffective for failing to preserve it and have it tested for controlled substances. To make a claim for ineffective assistance of counsel, a defendant must prove the following: (1) an underlying claim of arguable merit; (2) no reasonable basis for counsel's act or omission; and (3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007) (citing

Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper, 941 A.2d at 664 (citing Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)). Further, Counsel is presumed to have been effective. Id.

First, the PCRA Petition does not sufficiently allege that trial counsel was ineffective. The Petition states that the blood sample was destroyed before counsel requested that it be tested, however, there is no indication that trial counsel was in a position to make a timely request. The Court is unaware when the sample was destroyed. Further, there is no indication when counsel was retained in this case and when he should have been aware of the blood sample before it was destroyed. Without more information the PCRA Petition does not sufficiently allege that trial counsel was even in a position to request the blood before it was destroyed.

Further, it is the responsibility of the Defendant to establish the substantial burden of prejudice. Commonwealth v. Dennis, 950 A.2d 945, 962 (Pa. 2009). Here, there is no evidence in the PCRA Petition that the results of the blood sample would show the presence of a controlled substance. At trial, the victim testified that she did not consume marijuana while the Defendant testified that she did. Whether the victim consumed marijuana was at issue at trial, however, this Court has no way of knowing what the results of the blood sample would entail and therefore cannot determine prejudice.

Similarly, even assuming that the blood sample would contain a controlled substance, this Court does not believe that it would have changed the outcome of the proceeding. The evidence at issue would merely go towards the credibility of the victim and does not relate to physical evidence against the Defendant. The testimony of the victim had already been questioned on cross-examination and by different accounts of other witnesses called at trial. This Court does not find that the PCRA Petition has sufficiently established that trial counsel was in a position to

have the blood sample tested before it was destroyed, that the blood sample contained evidence that would go against the credibility of the victim, and that even if the blood sample contained controlled substances and trial counsel was ineffective, that such evidence would have changed the outcome of the proceeding.

Whether trial counsel was ineffective for failing to investigate and take statements from witnesses provided by the Defendant

The Defendant alleges that trial counsel was ineffective for failing to call various witnesses to testify. At the time of the PCRA Hearing, PCRA counsel focused on Mary Ungard and Robert Donato, D.O. To make a claim for ineffective assistance of counsel, a defendant must prove the following: (1) an underlying claim of arguable merit; (2) no reasonable basis for counsel's act or omission; and (3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007) (citing Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper, 941 A.2d at 664 (citing Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)). Further, Counsel is presumed to have been effective. Id.

In Hall, the defendant alleges that his trial counsel was ineffective for failing to present evidence that a witness was mentally ill. Commonwealth v. Hall, 867 A.2d 619 (Pa. Super. 2005). The Superior Court stated that in order to prevail on an ineffectiveness claim for "failure to call a witness," a defendant must demonstrate five (5) factors: 1) the witness existed; 2) the witness was available; 3) trial counsel was informed of the existence of the witness or should have known of the witness's existence; 4) the witness was prepared to cooperate and would have testified on defendant's behalf; and 5) the absence of the testimony prejudiced defendant. Id. at

629. In that case, the defendant had not submitted an affidavit and there was no information whether the witness would have testified for the defense, what the witness would have testified to, or whether the absence of her testimony prejudiced the defendant. Therefore, the Superior Court found that the defendant failed to make out a *prima facie* ineffectiveness claim.

In addition, to establish a successful ineffectiveness claim against trial counsel for failing to call a witness the Defendant must prove that the outcome of the case would have been different had the testimony been heard. In Pursell, the defendant properly satisfied factors one (1) through four (4), listed above. Commonwealth v. Pursell, 724 A.2d 293 (Pa. 1999). The defendant, however, failed to establish how the absence of the testimony was prejudicial, or more specifically that the outcome would have been different. "Failure of trial counsel to conduct a more intensive investigation or to interview potential witnesses does not constitute ineffective assistance of counsel, unless there is some showing that such investigation or interview would have been helpful in establishing the asserted defense." Id. at 306.

Here, the Defendant did not file affidavits/certifications signed by the witnesses, which the Defendant alleges should have been called at his trial. The PCRA Petition states:

i. May Ungard. Ms. Ungard would have testified regarding a phone conversation which she had with the victim, wherein the victim admitted coercion was used to obtain her statement and that the police falsified her statement which was supplied to the defendant in discovery.

ii. Amber Carrey. Ms. Carrey would have stated that she saw the Defendant entering his house shortly after the alleged rape and that he was dry. This statement would have impeached the victim's statement that the Defendant walked home in the rain.

iii. Scott Morgret. Mr. Morgret observed the victim and the Defendant at Peach's Bar prior to the alleged rape and he would have testified that the victim appeared intoxicated and was acting in a friendly and [intimate] fashion with the Defendant.

iv. Robert A. Donato, D.O., F.A.C.G. who would have testified consistently with the report marked as exhibit "A" attached.

The Defendant does not establish that the witnesses were available or that they were prepared to cooperate on the Defendant's behalf. PCRA Counsel notified the Court that he would submit certifications within ten (10) days of the PCRA conference if he was able, and if not, the Court was to proceed with deciding the Petition. Based on the PCRA Petition and lack of certifications, this Court finds that the Defendant did not establish a *prima facie* ineffectiveness claim.

Further, the PCRA Petition did not sufficiently allege prejudice against the Defendant's case. First, Amber Carrey, Scott Morgret, and Keith Spong merely impeached the credibility of the victim by questioning her recollection of details before or after the sexual assault. Testimony had already been provided that differed from the victim's recollection. Second, the testimony that Dr. Robert Donato is alleged to make is just cumulative evidence of Cathy Brendle's testimony. Both would have testified regarding the medial injuries to the victim and what may have caused them. Finally, trial counsel may have had a reasonable basis for not calling Mary Ungard because she was the Defendant's sister and may not have been credible. "Where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." Commonwealth v. Colavita, 993 A.2d 874, 887 (Pa. 2010).[5]

[5] "A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." Id. "A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued." Commonwealth v. Sneed, 45 A.3d 1096 (Pa. 2012).

Whether trial counsel was ineffective for failing to file motions for dismissal based upon prosecutorial misconduct

The Defendant alleges that trial counsel was ineffective for failing to file motions for dismissal based upon prosecutorial misconduct. At the time of the PCRA conference, PCRA counsel did not argue these issues and indicated that the issues above were the focus. This Court will still address these issues as they were placed in the PCRA Petition. The Defendant specifically alleges that Jill Nelly and Miranda Butters were told not to appear at trial; however, the PCRA Petition does not have any signed certifications from these witnesses. In fact, the PCRA Petition did not file any signed certifications of any intended witness. See Pa.R.Crim.P. 902(A)(15).

In addition, the PCRA Petition alleges that the blood sample discussed was destroyed in bad faith. When DNA evidence is destroyed, a court is to determine whether it had been destroyed in bad faith. See Commonwealth v. Brison, 618 A.2d 420 (Pa. Super 1992) (finding that the judgment of sentence must be reinstated if there is no hint of bad faith in the Commonwealth's failure to preserve evidence). In Moss, a hair sample taken from the scene of an alleged rape was destroyed by police five (5) years after the defendant's trial. Commonwealth v. Moss, 689 A.2d 259 (Pa. Super. 1997). Besides testimony taken from the police department on their destruction of evidence procedures, the Superior Court found that destroying evidence five (5) years after trial and three (3) years after the direct appeal was sufficient to show no bad faith on the part of the police.

Here, the record shows that the blood sample was not destroyed in bad faith but as a part of common practice. Further, at the time of the rape kit there was no concern regarding the mental state of the victim to believe further testing was necessary.

> DEFENSE: In regards to the rape kit, that was done and tested. I see a notation that the whole blood samples from – basically that sample from 19 which would have been blood samples of the alleged victim destroyed. Is that – that is correct information to your –
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> WEBER: It's my understanding that's common practice, that that's what happens after they test the blood. It's destroyed.
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> DEFENSE: Was a sample of not only blood but any other type of substance tested such as for marijuana or any other drug usage perhaps by the victim?
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> WEBER: No, there was no need to test the victim for any drugs or marijuana or anything.
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> DEFENSE: Why do you say there was no need to do that?
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> WEBER: There was no need to test the victim to see if she was under the influence of anything at the time. She was the victim of a rape. There was no indication that she had done anything.

N.T., October 16, 2003, p.30-31. The record makes clear that the blood was not destroyed in bad faith. Further, the blood sample did not contain exculpatory evidence against the sexual assault but merely went to the credibility of the victim. Based on the PCRA Petition, this Court is unable to find that the Defendant's issues of prosecutorial misconduct have merit.

As the Court finds there are no meritorious issues with Defendant's PCRA Petition, it intends to dismiss the Petition unless the Defendant files an objection within twenty (20) days. "[A] PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only where the petition presents genuine issues of material fact. . . . A PCRA court's decision denying a claim without a hearing may only be reversed upon a finding of an abuse of discretion." Commonwealth v. McLaurin, 45 A.3d 1131, 1135-1136 (Pa. Super. 2012) (citations omitted). Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified of this Court's intention to deny the Defendant's PCRA Petition.

ORDER

AND NOW, this _____ day of December, 2013, the Defendant is notified that it is the intention of the Court to dismiss the Defendant's PCRA petition because it does not raise a genuine issue concerning any material fact. The Court will dismiss Defendant's claim unless Defendant 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.
Peter Campana, Esq.