

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 :
 v. : **No. 1776-CR-2009**
 : **CRIMINAL DIVISION**
 :
 BRIAN D. NEWTON, JR., :
 Defendant : **PCRA**

OPINION AND ORDER

On March 18, 2013, Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Motion to Dismiss pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his Petition should be dismissed.

Background

Brian D. Newton, Jr. (Defendant) was charged with fifteen (15) counts of various drug related offenses including three counts of Delivery of a Controlled Substance,¹ three counts of Possession with Intent to Deliver,² three counts of Criminal Use of a Communication Facility,³ three counts of Possession of a Controlled Substance,⁴ one count of Criminal Attempt,⁵ one count of Theft by Unlawful Taking,⁶ and one count of Receiving Stolen Property.⁷ On April 28, 2010, following a jury trial before this Court, the Defendant was found guilty of all fifteen (15) counts. After the jury verdict, trial counsel made a Motion for Judgment of Acquittal for counts 11 and 15, Criminal Use of a Communication Facility, which was denied in an order dated May

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(30).

³ 35 Pa.C.S. § 7512.

⁴ 35 P.S. § 780-113(a)(16).

⁵ 35 P.S. § 901(a).

⁶ 35 Pa.C.S. § 3921(a).

⁷ 35 Pa.C.S. § 3925(a).

5, 2010. On August 3, 2010, the Defendant was sentenced by this Court to an aggregate sentence of three (3) to six (6) years in a state Correctional Institution with a consecutive period of one (1) year supervision.

On August 13, 2010, the Defendant filed Post-Sentence Motions, which were denied by this Court on January 12, 2011. On January 18, 2011, a Notice of Appeal was filed with the Superior Court of Pennsylvania, which was granted in part and remanded for resentencing. On December 2, 2011, this Court resentenced the Defendant to two (2) years and nine (9) months to six (6) years with a consecutive period of one (1) year of supervision. No additional appeals were filed by the Defendant.

On December 6, 2012, the Defendant filed a *pro se* Post Conviction Relief Act (PCRA) Petition. The Defendant alleged three (3) issues: 1) trial counsel was ineffective for failing to give proper representation; 2) trial counsel was ineffective for failing to object to false and incorrect statements made by the prosecutor during closing arguments to the jury; and 3) trial counsel was ineffective for failing to object to the prosecutors attempt to inflame the jury during closing arguments. On December 13, 2012, Donald Martino, Esquire was appointed to represent the Defendant for the PCRA Petition. On February 28, 2013, Attorney Martino filed a Motion to Withdraw as Counsel and a Memorandum Pursuant to Turner/Finley. After an independent review of the record and an additional PCRA conference, the Court agrees with Attorney Martino that Defendant failed to raise any meritorious issues in his PCRA Petition.

Whether trial counsel was ineffective for failing to give proper representation

The Defendant alleges that trial counsel was ineffective for not giving proper representation. 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.

As cited in Attorney Martino's Turner/Finley Letter, "[i]t is well settled that the amount of time an attorney spends consulting with his client before trial is not, by itself, a legitimate basis for inferring the total extent of counsel's pretrial preparation, much less the adequacy of counsel's preparation." Commonwealth v. Bundy, 421 A.2d 1050 (Pa. 1980). The defendant must "establish that counsel inexcusably failed to raise issues that, had they been raised, would have entitled him to relief." Commonwealth v. Porter, 728 A.2d 890 (Pa. 1999).

Here, the Defendant has failed to state any grounds for his allegation of improper representation. The PCRA Petition merely states that counsel "neglected to give me proper representation." Pa.R.Crim.P. 902(A) states that the PCRA Petition is to contain the relief requested, the grounds for the relief requested, and the facts supporting each ground. Without a specific allegation or any grounds to support it, this Court must find that this issue is without merit.

Whether trial counsel was ineffective for failing to object to false and incorrect statements made by the prosecution during closing arguments

The Defendant contends that his trial counsel was ineffective for failing to object to false and incorrect statements made by the prosecution during closing arguments. 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 defining what constitutes impermissible conduct during closing arguments, Pennsylvania follows Section 5.8 of the American Bar Association (ABA) standards.”

Commonwealth v. Sampson, 900 A.2d 887, 890 (Pa. Super. 2006). The ABA standards state:

Argument to the Jury.

- (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
- (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
- (c) The prosecutor should not use arguments calculated to inflame the passions or prejudice of the jury.
- (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

Id. “Generally, comments by the District Attorney do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the defendant so that they could not weigh the evidence

objectively and render a true verdict.” Id. (citing Commonwealth v. Correa, 664 A.2d 607, 609 (Pa. Super. 1995).

During the Defendant’s closing arguments in this case, trial counsel argued the facts of the case and the credibility of witnesses. N.T., 4/28/2010, p. 2-12. The Commonwealth, during their closing argument, gave a rendition of the facts for all the charges, argued that inferences could be made to convict the Defendant, and alleged that the testimony given by police and confidential informants were credible.⁸ Id. at 12-22. The Court is unable view in the record any false or incorrect statements made by the Commonwealth during closing. As the Defendant did not raise in his PCRA Petition what the Commonwealth stated was false, this Court must find that this issue is without merit.

Whether trial counsel was ineffective for failing to object to the prosecutors attempt to inflame the jury during closing arguments

The Defendant alleges that trial counsel was ineffective for not objecting to the Commonwealth’s attempt to inflame the jury during closing arguments. The issue of whether counsel was ineffective for failing to object to a prosecutor’s closing argument has been addressed by the Supreme Court of Pennsylvania. See Commonwealth v. Busanet, 54 A.3d 35 (Pa. 2012); Commonwealth v. Hanible, 30 A.3d 426, 464 (Pa. 2011); Commonwealth v. Hutchinson, 25 A.3d 277, 306 (Pa. 2011). “To succeed on a claim of ineffective assistance of counsel based on trial counsel’s failure to object to prosecutorial misconduct, the defendant must demonstrate that the prosecutor’s actions violated a constitutionally or statutorily protected right such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth

⁸ “[A] prosecutor’s remark regarding the credibility of a witness for the Commonwealth does not constitute reversible error if it is a reasonable response to a prior attack on the credibility of a witness by the defense.” Commonwealth v. Hanible, 30 A.3d 436, 469 (Pa. 2011). A prosecutor may also make all reasonable inferences that find support in the evidence. Commonwealth v. Rios, 920 A.2d 790, 808 (Pa. 2007).

Amendment right to a fair trial, or a constitutional interest such as due process.” Busanet, 54 A.3d at 64.

Once again, the Defendant has not stated exactly what the Commonwealth said that attempted to inflame the jury. After reviewing the record, however, the Court agrees with Attorney Martino that the most inflammatory statements were about the locations of the offenses:

COMMONWEALTH: On the 28th that one was over there at the parking lot at Faxon Bowling Lane. Think about the locations of these places one in a park, one by Sheridan School. I believe there is a preschool over there by Faxon Bowling Lanes. Think of that these transactions going on in places like that.

N.T., 4/28/2010, p. 22. While giving jury instructions, this Court stated that “speeches of the attorneys are not part of the evidence and you shouldn’t consider them as such.” N.T., 4/28/2010, p. 214.

While the locations of the offenses were established during the course of the trial, the areas surrounding the offenses were not relevant to the charges. After reviewing the case law, however, the Court does not believe that any improper statements caused the jury to form a “fixed bias and hostility towards the defendant so that they could not weigh the evidence objectively and render a true verdict.” See Commonwealth v. Cox, 983 A.2d 666, 688 (Pa. 2009) (finding that trial counsel’s failure to object to a prosecutor’s reference to the defendant not testifying was not ineffective); Commonwealth v. Chmiel, 777 A.2d 459 (Pa. Super. 2001) (determining that injecting religious law, insinuating a sexual assault when it was not charged, and giving personal opinions was prosecutorial misconduct but did not deprive the defendant of a fair trial); Commonwealth v. Spotz, 47 A.3d 63 (Pa. 2012) (ruling that a short improper statement of rhetorical flair did not prejudice jurors). The comment was relatively short compared to the entire closing argument and was not nearly prejudicial enough to inflame the

jury. Further, after the Commonwealth's closing argument the Court informed the jury that any speeches by the attorneys were not evidence and were not to be considered during deliberations. Therefore, the Court finds that trial counsel was not ineffective and that this issue is without merit.

Conclusion

Based upon the foregoing, 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 _____ day of April, 2013, 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 filed March 18, 2013, is hereby GRANTED and Donald Martino, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

xc: DA (KO)
Donald Martino, Esq.
Brian Newton #JR-6914
SCI Rockview
Box A
Bellefonte, PA 16823-0820