

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : NO. CP-41-CR-609-2009
vs. :
 : CRIMINAL DIVISION
 :
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 :
 :
 : PCRA
KATINA ROBINSON,
Defendant

OPINION AND ORDER

Before the Court is Defendant's amended Post Conviction Relief Act (PCRA) petition.

Following a jury trial on January 25, 2011 and January 26, 2011, Defendant was convicted of three counts each of possession of controlled substances and possession of drug paraphernalia, two counts of possession with intent to deliver a controlled substance and one count each of fleeing and eluding, accident resulting in injury, accident causing damage to an attended vehicle, accident involving injury while not properly licensed, recklessly endangering another person and criminal mischief.

By Order of Court dated June 2, 2011, Defendant was sentenced to an aggregate term of incarceration in a state correctional institution, the minimum of which was 5 years and 9 months and the maximum of which was 11 years and 6 months.

Defendant appealed her conviction to the Superior Court of Pennsylvania which by decision filed on June 30, 2012 affirmed the judgment of sentence. Defendant subsequently filed a timely petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on November 28, 2012.

On December 12, 2012, Defendant filed a pro se PCRA petition. Donald Martino, Esquire was appointed to represent Defendant. Attorney Martino filed an amended PCRA petition on January 16, 2013. By Order of Court dated February 13, 2013 following a conference, the Court scheduled the matter for an evidentiary hearing on May 3, 2013.

The amended petition raises one issue. Defendant claims that trial counsel was ineffective by introducing inadmissible prejudicial information to the jury relating to Defendant's prior convictions for access device fraud in 1997 and retail theft in 1998.

The first witness at the PCRA hearing was Defendant's trial counsel, Kyle Rude, who has been licensed to practice law in the Commonwealth of Pennsylvania for approximately twenty years.

At the conclusion of Defendant's direct testimony at trial, Attorney Rude questioned her about the prior convictions for access device fraud in 1997 and retail theft in 1998.

Prior to trial, he became aware that Defendant was convicted of a retail theft charge as well as an access device fraud charge in the late 90's. He was familiar with Rule 609 of the Pennsylvania Rules of Evidence and, given the circumstances of the convictions as well as his understanding of Rule 609, he was of the opinion that the Commonwealth could utilize the convictions against Defendant. He "believed the evidence was admissible" and brought out the convictions on direct in order to preempt the Commonwealth from "doing so." He did not want the jury to think that Defendant was hiding something if the convictions were brought out on cross-examination.¹

¹ While the Commonwealth generally is precluded by statute from utilizing a defendant's *crimen falsi* convictions during cross-examination, 42 Pa.C.S. §5918, the Commonwealth is permitted to introduce evidence of such convictions in rebuttal. Commonwealth v. Garcia, 551 Pa. 616, 712 A.2d 746, 748-49 (1998).

He was aware that the convictions at issue involved dishonesty. He was also aware that Rule 609 precluded utilizing the evidence as convictions for such crimes if more than ten years have passed since Defendant's conviction or release from confinement for it, whichever was later. He noted that the Commonwealth never provided to him written notice of the Commonwealth's intent to use the convictions.

With respect to Defendant's retail theft conviction, he testified that Defendant pled guilty to retail theft and other charges in Montgomery County in November of 1998 and she was sentenced in February of 1999. While she received a one to five year sentence on the retail theft charge, she received a concurrent three to seven year sentence on other charges in that case. Attorney Rude conceded that Defendant wasn't paroled until 2002, within ten years of the date she testified at trial. He was also aware that she received a parole violation on the retail theft in 2005 and was recommitted, but he did not know if Defendant "maxed out."

With respect to the access device fraud conviction, Attorney Rude was aware that Defendant was originally sentenced in Delaware County in May of 1997. He was not aware of the specifics of the sentence but, based on information he received through the Commonwealth or his independent review of Defendant's criminal history, he believed that Defendant had violated her supervision and actually was confined on the charge within the ten years of the date of her trial testimony.

Defendant testified on her own behalf. She recalled being convicted in 1997

for an access device fraud charge out of Delaware County. She was originally sentenced to serve 30 days of incarceration, which was to be served on 15 consecutive weekends, but she admitted that she never served 15 consecutive weekends.

She recalled being committed to the state correctional institution in Muncy in 1999. While she did not know whether Delaware County had lodged a detainer for her as a result of her never having served the sentence on the access device fraud conviction, when she was released from Muncy in 2002 she was taken to Delaware County where she remained incarcerated for “a week or so” and was then released. She was positive that she did not serve the time in Delaware County following her stay at Muncy on any parole violation because she was never on parole in Delaware County and had no other charges out of Delaware County.

With respect to the retail theft conviction out of Montgomery County, Defendant recalled taking an open plea in 1999 to retail theft and other charges, including fleeing and eluding, homicide by vehicle and accidents involving personal injury. Her aggregate sentence was for three to seven years of state incarceration. While she had ten months credit, she recalled serving approximately three years and nine months on her minimum and then being paroled sometime in January 2002.

While the Commonwealth presented no witnesses, it introduced without any objection, Commonwealth Exhibit 1, which was the docket sheet from Defendant’s Delaware County case at 24-1997. The docket sheet reflects that Defendant was sentenced on May 19, 1997, that a bench warrant was issued on June 10, 1997 and that the bench warrant was lodged as a detainer at SCI – Muncy on February 23, 1999. The docket sheet also reflects that the bench warrant was “rescinded” on January 31, 2002.

To establish a claim for ineffective assistance of counsel, a defendant must prove the following: (1) the underlying claim is of arguable merit; (2) there is no reasonable basis for counsel's act or omissions; and (3) the defendant was prejudiced as a result of counsel's acts or omissions; that is, there is a reasonable probability that but for counsel's act or omission, the outcome of the proceedings would have been different. Commonwealth v. Cooper, 596 Pa. 119, 941 A.2d 655, 664 (2007), citing Commonwealth v. Carpenter, 555 Pa. 434, 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, 587 Pa. 318, 899 A.2d 1067, 1076 (2006).

The Court finds that Defendant cannot meet the elements of an ineffective assistance of counsel claim because Defendant's claim is not of arguable merit. Indeed, contrary to what Defendant claims, both the retail theft and access device fraud convictions would have been admissible and defense counsel's strategy in preempting the Commonwealth from introducing evidence regarding these convictions was certainly reasonable.

Rule 609 of the Pennsylvania Rules of Evidence permits a witness's credibility to be attacked on the basis of a conviction of a crime that involves dishonesty. In order to be per se admissible, no more than ten years must have elapsed since the date of the conviction or release from confinement, whichever is later. Rule 609(b). Moreover, if no more than ten years have elapsed since the date of conviction or release from confinement, whichever is later, the Court need not consider the potential prejudicial. Commonwealth v. Trippett, 932 A.2d 188, 199-200 (Pa. Super. 2007).

Defendant does not argue that the access device fraud or retail theft charges

do not involve dishonesty. Instead, Defendant's sole argument is that the convictions occurred more than ten years from the date of trial. The evidence, however, clearly demonstrates that Defendant was not released from confinement on these convictions until within the ten year period. Accordingly, pursuant to the clear language of Rule 609, the convictions were admissible.

If a period of less than ten years has expired, then the *crimen falsi* convictions are *per se* admissible. Trippett, 932 A.2d at 199. Confinement for a conviction includes recommitment for a parole violator. Commonwealth v. Jackson, 526 Pa. 294, 585 A.2d 1001, 1003 (1991). The relevancy of the dishonest act is expiated only by the passage of ten uninterrupted years of freedom, because "time spent in confinement without normal opportunity to commit additional criminal offenses, does not demonstrate rehabilitation." Id.

With respect to Defendant's retail theft conviction, she was given a one to five year sentence. While she was eligible for parole after one year, she was not paroled until 2002. The trial in this case was held in January 2011. Therefore, Defendant remained confined on the charge within ten years of the date of trial.

With respect to Defendant's access device charge, Defendant's own testimony establishes that she never served her sentence. A detainer was lodged against her when she was incarcerated in Muncy, and that detainer was not lifted until January 31, 2002. The evidence is clear that Defendant served time in Delaware County on the access device fraud conviction in 2002 after she was released from Muncy. Thus, Defendant was also confined on this charge within ten years of the date of trial.

Given the fact that Defendant's convictions would have been admissible if the Commonwealth had presented the appropriate documentation to support such, it was clearly

reasonable for defense counsel to question Defendant regarding the convictions on direct to preempt the Commonwealth from utilizing the convictions in rebuttal and as Attorney Rude explained, to convey the impression to the jury that Defendant was not hiding anything. Because Defendant has failed to sustain her burden of proving that the underlying claim was of arguable merit and that there was no reasonable basis for the counsel's action, Defendant's ineffectiveness claim must fail.

ORDER

AND NOW, this ____ day of May 2013 following a hearing and for the reasons set forth in the foregoing Opinion, Defendant's amended PCRA Petition is **DENIED**.

Defendant is hereby notified that she has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever her right to raise these issues.

The Prothonotary shall mail a copy of this order to Defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney (KO)
Don Martino, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Katina Robinson (**certified mail**)
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