

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1619-2008
vs. :
KEITH SNOOK, : Opinion and Order Granting an
Defendant : Evidentiary Hearing on Certain Claims
: Asserted in Defendant's PCRA Petition
:

OPINION AND ORDER

This matter came before the court for a conference on Defendant's post conviction relief act (PCRA) petition, at which counsel for both parties discussed their respective positions regarding the timeliness of the petition and whether Defendant was entitled to an evidentiary hearing on any of the claims asserted therein. The relevant facts follow.

On July 5, 2008 at around 8:00 p.m., William Kemp and his family were at their river lot off of Antlers Lane when a truck pulled into their lot and struck a tree stump. The truck pulled forward and struck a lawn tractor then backed up and struck the tree stump again. Defendant was the driver and sole occupant of the truck. Mr. Kemp and his family members confronted Defendant. Defendant said he was looking for his brother's lot and he repeatedly asked the Kemp family not to call the police. He told them he had a lot of money and offered to just hand it over. When he heard that someone was calling the police, he walked down Antlers Lane and doubled back through several river lots. Mr. Kemp and another relative followed Defendant and pointed him out to the police when they arrived. Mr. Kemp testified at trial that Defendant was only out of his sight for at most a minute.

Defendant was not cooperative with the police. Trooper McGee called out for Defendant to stop but he did not stop until Trooper McGee caught up to him and grabbed

him by the arm. Defendant did not want to provide identification to Trooper McGee or tell him who he was. Trooper McGee told Defendant if he did not tell him who he was he would have to take him to be fingerprinted to determine his identity. Eventually, Defendant provided his name. Trooper McGee confirmed Defendant's identity when he looked up the name in JNET and pulled up Defendant's photograph, as well as information that Defendant's driving privileges were suspended.

Trooper McGee noticed an odor of alcohol emitting from Defendant. Defendant's speech was slurred and he seemed confused. Trooper McGee believed Defendant was under the influence of alcohol to a degree which rendered him incapable of safely driving. Defendant was arrested and transported to the DUI Processing Center. Defendant's blood was drawn at approximately 9:00 p.m. His blood alcohol content was .20%.

Defendant was charged with two counts of driving under the influence of alcohol (DUI) and driving while his operating privilege was suspended with a BAC of .02% or greater. Defendant waived his right to a jury trial and proceeded to a bench trial before the Honorable William S. Kieser, who found Defendant guilty of all the charges.

On December 14, 2009, Defendant was sentenced to nineteen months to five years of incarceration for DUI and a consecutive six months to one year for DUS-DUI related.

Defendant appealed his judgment of sentence. On appeal, he claimed that the Commonwealth failed to produce sufficient evidence that he drove on a highway or trafficway and that his DUS conviction should not have been graded as a misdemeanor of the

third degree, because he did not have a prior conviction for DUS with a BAC of .02% or greater pursuant to 75 Pa.C.S. §1543(b)(1.1).

On March 16, 2011, the Superior Court affirmed Defendant's DUI conviction, but remanded the case for resentencing on the DUS conviction. After several continuances of the re-sentencing hearing, the court sentenced Defendant on September 8, 2011 to a mandatory 90 days of incarceration and a \$1,000 fine on his DUS conviction. Defendant made an oral post sentence motion, which the court denied in an Opinion and Order entered on September 28, 2011. Defendant did not file any further appeal.

On September 11, 2012, Defendant filed a counseled PCRA petition. The court directed counsel to file an amended petition that complied with Pa.R.Cr.P. 902 (relating to content of petition for post-conviction collateral relief). Counsel filed an amended petition on October 19, 2012.

The court held a conference with counsel for both parties. At the conference, counsel for the Commonwealth argued that the petition was untimely. Since the claims in Defendant's petition related to his convictions and not his DUS sentence, the prosecutor argued that Defendant's petition had to be filed on or before April 16, 2012 to be considered timely. The prosecutor cited Commowearth v. Dehart, 730 A.2d 991 (Pa. Super. 1999) in support of his position. Defense counsel was not familiar with Dehart, but asserted that the petition was timely, because Defendant's judgment of sentence in this case did not become final until thirty (30) days after the court denied his oral post sentence motion with respect to his re-sentencing for DUS. The court gave counsel thirty (30) days to submit any citations on the issue. The court indicated that it would review the timeliness issue and, if it found the

petition was timely, it would determine what, if any, issues on which Defendant would receive an evidentiary hearing.

DISCUSSION

Unless the petitioner pleads and proves one of the statutory exceptions, a PCRA petition must be filed within one year of the date the judgment becomes final. 42 Pa.C.S. §9545(b)(1). A judgment becomes final under the PCRA at the conclusion of direct review, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review. 42 Pa.C.S. §9545(b)(3).

The Court finds Dehart distinguishable. In Dehart, the appellant was convicted of murder and sentenced to death. Both his conviction and sentence were affirmed on direct appeal. Through a PCRA petition, the appellant's death sentence was overturned and he was re-sentenced to imprisonment for life. The appellant then filed a second PCRA petition in which he challenged both his conviction and sentence. The Superior Court found that the second PCRA was untimely and that obtaining relief in the first PCRA petition did not reset the one-year time period for filing a timely PCRA.

This case is in a different procedural posture than Dehart. Defendant did not obtain relief through the PCRA, but rather through a direct appeal. Although the Superior Court affirmed Defendant's convictions, it did not affirm his judgment of sentence. Instead, the Superior Court vacated Defendant's sentence for driving under suspension and remanded the matter to the trial court for re-sentencing. Appeals are not taken from the order entering the conviction; they are taken from the judgment of sentence. See Commonwealth v. Rojas,

874 A.2d 638, 642 (Pa. Super. 2005). Since Defendant's sentence was not final due to the remand by the Superior Court, the direct review of the judgment of sentence was not yet complete. Defendant had a constitutional right to appeal from the sentence imposed after remand. Pa. Const. Art. V, §9. If Defendant had exercised that right, his case still would have been on a direct appeal. Defendant would not have been able to file a PCRA petition on any of the charges during the pendency of that appeal, because such a petition would be considered premature. Commonwealth v. Seay, 814 A.2d 1240, 1241 (Pa. Super. 2003); Commonwealth v. Leslie, 757 A.2d 984, 986-87 (Pa. Super. 2000)(per curiam). While the Court acknowledges that Defendant did not file an appeal from the sentence imposed after remand, the Court finds that Defendant's judgment did not become final until the Court held a hearing and re-sentenced Defendant in accordance with the Superior Court's remand and the time for filing an appeal from the re-sentencing had elapsed.

It is unclear to the Court whether the Commonwealth is also arguing that the DUI conviction was final because the Superior Court decision affirmed both the conviction and sentence for that charge. If so, the Court would reject the Commonwealth's attempt to consider the timeliness of the PCRA petition separately for each charge. Such a position is unpersuasive for several reasons. First, such a position would create different finality dates for different charges, which would create confusion and uncertainty in an area of the law where most initial petitions are being filed by incarcerated, pro se defendants. Second, adopting the Commonwealth's position would create situations where the one-year time period for filing a PCRA petition could expire for a conviction on one charge while an appeal is still pending on the conviction for another offense in the same case. As noted supra, a

defendant is not permitted to file a PCRA petition while his case is on direct appeal. Furthermore, while a case is on appeal, the record would be unavailable for the trial court to litigate a PCRA petition. Finally, the claims and assertions Defendant makes regarding ineffective assistance of counsel in this case would affect both his DUI and his DUS convictions. If Defendant's claims have any merit, Defendant would be able to obtain relief on his DUS charge, but not on the DUI offense.

Although the Court finds Defendant's petition is timely, the Court finds that Defendant is not entitled to an evidentiary hearing on some of the ineffective assistance of counsel claims asserted in his petition.

Counsel is presumed effective. Commonwealth v. Hunsberger, 58 A.3d 32, 36 (Pa. 2012). To prevail on an ineffective assistance of counsel claim, a petitioner must **plead and prove** by a preponderance of the evidence that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for her action or inaction; and (3) prejudice, i.e., but for counsel's action or inaction there is a reasonable probability that the outcome of the proceedings would have been different. Commonwealth v. King, 57 A.3d 607, 613 (Pa. 2012); Hunsberger, supra. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." King, supra, citing Commonwealth v. Ali, 608 Pa. 71, 86-87, 10 A.3d 282, 291 (2010). Where it is clear that a petitioner has failed to meet any one of these elements, the claim may be disposed of on that basis alone without a determination whether the other two elements have been met. Commonwealth v. Steele, 599 Pa. 341, 961 A.2d 786, 797 (2008).

Defendant's first claim is that counsel was ineffective for waiving

Defendant's preliminary hearing. The Court finds this allegation lacks merit and/or Defendant has not suffered any prejudice as a result of counsel's waiver of his preliminary hearing.

The purpose of a preliminary hearing is to determine whether there is sufficient evidence to require a defendant to stand trial. At the preliminary hearing, the Commonwealth only needs to establish a prima facie case. Commonwealth v. Landis, 48 A.3d 432, 444 (Pa. Super. 2012) When there has been an adjudication of guilt, however, it renders moot any allegation that the Commonwealth failed to establish a prima facie case at the preliminary hearing. Commonwealth v. Lee, 541 Pa. 260, 662 A.2d 645, 650 (1995). The trial court found Defendant guilty and the Superior Court affirmed the adjudications of guilt, rendering moot any alleged ineffectiveness at the preliminary hearing stage.

Defendant next asserts that trial counsel was ineffective for failing to file a pretrial motion to suppress Defendant's statements because they were taken in violation of Miranda and his constitutional rights. Miranda safeguards only apply when a suspect has been taken into custody and interrogated. Commonwealth v. Briggs, 608 Pa. 430, 12 A.3d 291, 321-322 (2011), citing Rhode Island v. Innis, 446 U.S. 291, 300 (1980). The Commonwealth introduced evidence through the testimony of Mr. Kemp that Defendant made statements to him before the police were arrived.

Evidence also was presented that Defendant initially was not cooperative when the police responded to the scene and asked him for identification. Miranda warnings, however, do not apply to requests for biographical information such as one's name. Commonwealth v. Jasper, 526 Pa. 497, 587 A.2d 705, 708-09 (1991).

Defendant also was not in custody at the time. The Court has reviewed the trial transcript and did not see any evidence that Defendant made statements to the police after he was taken into custody. Therefore, Defendant cannot establish that he suffered any prejudice as a result of counsel's failure to file a motion to suppress Defendant's statements.

Defendant also alleges that trial counsel was ineffective for failing to file a pretrial motion to challenge whether Defendant was driving on a roadway or trafficway. At trial, defense counsel made a motion for a judgment of acquittal. Trial Transcript, p. 40. The trial court denied this motion, finding that sufficient evidence was presented to infer that the lane was open to the public for purposes of vehicular travel as a matter of right or custom. Trial Transcript, pp. 51-55. In light of this finding, it is clear that any pretrial motion would not have been successful.

Defendant next asserts counsel was ineffective for waiving his right to a jury trial. Defendant knowingly and voluntarily waived his right to a trial by jury, as is evidenced by the colloquy that occurred at trial. N.T. at pp. 3-6. Therefore, this claim lacks merit.

Defendant next avers counsel was ineffective by failing to acknowledge that petitioner was an invited guest to the property and to secure witnesses to testify to that fact. The Court assumes Defendant has raised this issue because the trial court made a comment when it found Defendant guilty that the fact Defendant felt free to go and look for his brother's lot without any evidence that he was invited by his brother in some ways supported his finding that the lane was commonly used by the public. N.T. at 56-57. Defendant has attached an affidavit from Deborah Lohman that she invited Defendant to the private party on July 5, 2008. Although the Court does not think this fact in isolation would create a

probability that the outcome would be different, the Court will allow Defendant to present this evidence at an evidentiary hearing because it is one of many facts that Defendant claims would have shown the roadway was not open to the public if trial counsel had presented this evidence at trial.

Defendant next asserts counsel was ineffective for failing to call witnesses that would have testified that the road allegedly driven on by Defendant was a private road not a public road. The Court notes that the main issue in this case was whether Defendant drove on a trafficway as that term is defined in the Vehicle Code, 75 Pa.C.S. § 102.¹ In finding Defendant guilty, the trial court found that the lane was a private road, but that it was open to the public as a matter of right or custom; therefore, it met the Vehicle Code definition of a trafficway. N.T. at pp. 52-55. Although Defendant's allegation is that counsel was ineffective for failing to call witnesses to establish that the lane was a "private road," when one considers his petition as a whole, including the exhibits attached thereto, it appears that Defendant's claim also encompasses the real issue of the case, which was whether the road was open to the public as a matter of right or custom, despite being a private road. Defendant has provided his own affidavit as well as an affidavit from Deborah Lohman, which assert or infer that: (1) the road is a private road with no public access (Exhibit B, affidavit of Deborah Lohman, para. 3); (2) there were gates, posts and chains blocking the roadway, preventing people from having public access to the private road (Exhibit C, affidavit of Defendant, para. d); there were "No Trespassing" signs posted on the roadway

¹ The Court notes that the trial judge found the Commonwealth did not produce sufficient evidence to prove that the lane was a highway, because there was no evidence that it was publicly maintained. Trial Transcript, p. 52.

(Exhibit C, affidavit of Defendant, para. e). Therefore, the Court will grant Defendant an evidentiary hearing on this issue and the issue set forth in paragraph 13(k) of the petition, but the only witnesses that may testify at the evidentiary hearing are Defendant and Ms. Lohman.

The claims set forth in paragraphs 13(f) and (g) are similar to the preceding issue except those paragraphs allege counsel was ineffective for failing to present photographs showing the gates, posts, chains and no trespassing signs. Defendant, however, has not attached any photographs to his petition or stated why they are not attached in violation of Rule 902(D) and this Court's order dated September 13, 2012, which ordered defense counsel to file an amended petition that conformed to the requirements set forth in that Rule. Defendant indicates in his petition that he provided photographs depicting the gates, posts, chains and signs. Though he does not specify to whom he provided the photographs, it is reasonable to infer from the allegations in his petition and his affidavit that he provided them to trial counsel. Therefore, the Court will permit Defendant to testify about such photographs at the evidentiary hearing, but it will only permit introduction of photographs on this issue if one of the following is met: (1) Defendant provides copies of any photographs he intends to use at the evidentiary hearing to counsel for the Commonwealth at least one week prior to the evidentiary hearing; or (2) he notifies the Commonwealth and the Court in writing at least one week prior to the hearing why he is unable to produce copies of the photographs. If the reason he is unable to provide the photographs is because he believes they are in trial counsel's possession, he must issue a subpoena on trial counsel to bring the photographs to the hearing.²

² The Court notes that the allegations regarding photographs in paragraphs (d) and (e) of Defendant's affidavit are somewhat inconsistent with his statement in paragraph (g) which reads: "I requested my Attorney schedule

In paragraphs 13(h) and 13(j) of his petition, Defendant alleges trial counsel was ineffective for failing to address the fact that petitioner walked up to the property and consumed alcohol after the alleged driving and failing to call witnesses who would have testified that Defendant drank after his alleged driving. Defendant's affidavit does not specifically address these allegations. Nevertheless, the Court will permit Defendant to testify regarding these allegations because he has submitted a signed verification with his petition attesting, subject to the penalties relating to unsworn falsifications, that the facts contained in the petition were true and correct, which under the facts and circumstances would be substantially similar to a signed witness certification. The Court will not permit Defendant to call any other witness on this subject, because Defendant has not named any other witness who could provide testimony on this subject and has not submitted a witness certification or any other document or information that would substantially comply with the certification requirement. 42 Pa.C.S. §9545(d)(1).

Defendant also contends trial counsel was ineffective for failing to establish a timeline of the night of petitioner's arrest to present during trial. The Court will grant an evidentiary hearing on this issue to the extent the timeline would show that Defendant drank after his alleged driving and the testimony to support the timeline would be provided by Defendant. The Court will not permit Defendant to establish his timeline through any other witness, because Defendant has not provided a witness certification for any witness on this subject.

Defendant next alleges trial counsel was ineffective for failing to cross

an appointment [sic] set up to take pictures at the scene to establish that the road allegedly driven on was private not public.”

examine the state policeman as to why he did not perform any field sobriety tests. Trooper Paul McGee testified on direct examination why he did not perform any field sobriety tests. Trial Transcript, pp. 30-31. Defendant has not specified any information with which his counsel could have impeached or refuted this testimony. Therefore, this issue lacks arguable merit.

Defendant also avers that trial counsel was ineffective for failing to cross examine Trooper McGee as to why no accident report was filed when the reason he was called to the scene was to respond to an accident. The reason why an accident report was not filed is irrelevant to Defendant's guilt or innocence and would not impact the outcome of Defendant's trial. Therefore, Defendant cannot establish the prejudice prong and the Court will not grant an evidentiary hearing on this issue.

Defendant also claims counsel's stewardship was defective because she failed to cross examine Trooper McGee to determine if petitioner was seen driving on any public road, highway or trafficway on the night of the alleged charges. There was no reason for counsel to ask such a question, because it was clear from the testimony presented at trial that Trooper McGee did not arrive until after Defendant got out of the truck and was walking around the other river lots. Trial Transcript, pp. 18, 25-27. Trooper McGee, though, did not have to personally observe Defendant driving. Mr. Kemp testified that Defendant drove a truck down Antlers Lane into his family's river lot, striking a tree stump and a lawn mower. Trial Transcript, pp. 13-14. Trooper McGee testified the roadway was open to the public, and there were no signs or barriers which would prevent the public from coming in that evening. Trial Transcript, p. 28. Therefore, Defendant cannot establish any of the prongs of the test

for ineffective assistance of counsel.

Defendant alleges trial counsel was ineffective by failing to cross examine William Kemp as to Defendant's identity on the night of the arrest. Mr. Kemp clearly identified Defendant as the driver of the truck at trial. Mr. Kemp testified that: he clearly saw someone in the driver's seat of the truck; there was no one else in the truck; Defendant was the person he saw in the truck; and he had face-to-face contact with Defendant from a distance of about three feet. Trial Transcript, pp. 15-17. Defendant fails to allege any facts or circumstances with which trial counsel could have impeached or refuted this testimony through cross-examination. Therefore, the claim lacks merit and/or Defendant was not prejudiced by counsel's failure.

Defendant next asserts that counsel was ineffective for failing to allow Defendant to testify on his own behalf. The trial court did not conduct a colloquy with Defendant on the record concerning his right to testify.³ Defendant also made allegations in his affidavit regarding factual matters to which he could have testified that could have had a bearing on the issue of whether the trafficway was open to the public and whether Defendant consumed alcohol after he stopped driving. Therefore, the Court will grant Defendant an evidentiary hearing on this issue.

Defendant also contends trial counsel's performance was deficient because she failed to address Judge Kieser when he stated in reference to the photograph that whether he

³ Although such a colloquy is not required, it could have shown that Defendant knowingly and voluntarily waived his right to testify on his own behalf and belied his claim that counsel refused to permit him to do so.

saw a “gate or cable” he saw it to be insignificant. The Court believes Defendant has somewhat misstated or misconstrued Judge Kieser’s statement and the evidence presented at trial.

Judge Kieser was not referring to what could be seen in a photograph, but rather a dispute between trial counsel and the prosecutor about whether Mr. Kemp testified there was a gate or a chain that was ever put up across the dirt portion of Antler’s Lane.⁴ Mr. Kemp was asked during direct examination if there was any kind of gate that would restrict access to the road. Trial Transcript, p. 14. Mr. Kemp replied, “Not during the summertime. After I think it’s the 15th of October, there’s supposed to be a chain put up. Sometimes it is. Sometimes it isn’t.” Trial Transcript, p. 14. In response to trial counsel’s cross examination, Mr. Kemp testified that their lot was a quarter mile from where the chain gets put up in the wintertime. Trial Transcript, p. 19. Mr. Kemp also indicated that the road was paved leading up to where the chain was and he didn’t know if the paved portion was maintained by the township but he wouldn’t disagree with defense counsel if she said the township maintained that portion of the road. Then defense counsel asked, “The township does not maintain that dirt road after the gate, correct?” Mr. Kemp answered, “Again, I don’t know. I don’t go up there in the wintertime. It’s a campground.” Trial Transcript, p. 21.

During the argument on Defendant’s motion for judgment of acquittal, trial counsel argued that Mr. Kemp testified there was gate and that fact was important in light of the McFadden case. Trial Transcript, p. 49. The prosecutor commented that it was not her recollection that Mr. Kemp said there was a gate. Instead, she argued that Mr. Kemp stated

⁴ A photograph was admitted as Commonwealth’s Exhibit 1 and, according to the trial transcript, it depicted Mr. Kemp’s family’s river lot and the objects that were on it, such as a tree stump and a camper. Trial

occasionally someone would put up a chain. Trial Transcript, pp. 50-51. Judge Kieser then indicated that it was insignificant whether the limitation on the use of the road was by a chain or a gate. Trial Transcript, p. 51.

It is readily apparent when one considers the record as a whole that Mr. Kemp never testified that there was a gate on Antler's Lane. Although both attorneys, at one time or another in their questioning, used the term "gate," Mr. Kemp consistently used the term "chain." It is answers that are evidence, not the questions. See Commonwealth v. O'Hannon, 557 Pa. 256, 732 A.2d 1193, 1195-96 (1999); Pa.SSJI (Crim) 2.07.

The issue in this case was whether the dirt portion of Antler's Lane was open to the public for vehicular travel as a matter of right or custom on the date this incident occurred. It did not matter whether the alleged barrier was a gate or a chain. Trooper McGee testified that there was no barrier on the night in question, and Mr. Kemp testified that the only time there was a chain preventing use of the road was occasionally during the wintertime. Since the testimony did not support trial counsel's argument that there was a gate and whether the barrier was a gate or a chain was irrelevant, Defendant cannot satisfy any of the prongs for an ineffective assistance of counsel claim on this issue.

Defendant's final assertion is trial counsel was ineffective by "failing to address the 'reversible error' then failing to address same on appeal." Defendant has waived this claim by failing to specifically state the content of the allegedly reversible error.

ORDER

AND NOW, this ____ day of March 2013, the Court rejects the Commonwealth's argument that Defendant's PCRA petition is untimely. The Court will hold an evidentiary hearing on **May 20, 2013 at 9:00 a.m. in courtroom #4**. As explained more fully in the body of the Opinion, the issues will be limited and the only witnesses Defendant will be permitted to call in support of his petition are himself, Deborah Lohman, and perhaps trial counsel. Unless Defendant complies with the conditions set forth on page 10 of this Opinion, he will not be permitted to admit any photographs at the hearing.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
George E. Lepley, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file