IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1619-2008**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
KEITH SNOOK,	:	
Defendant	:	

OPINION AND ORDER

Before the court is Defendant's amended PCRA petition. The relevant facts follow.

Defendant was charged with two counts of driving under the influence of alcohol (DUI) and driving while his operating privilege was suspended with a blood alcohol content (BAC) of .02% or greater. These charges arose from an incident on July 5, 2008 when Defendant was driving on Antler's Lane in Williamsport to go to a friend's or family member's river lot but he turned into the lot belonging to William Kemp's family and struck a tree stump and a lawn tractor. Mr. Kemp and his family members confronted Defendant, who said he was looking for his brother's lot and repeatedly asked the Kemp family not to call the police. He told them he had a lot of money and offered to hand it over. When he heard that someone was calling the police, he walked down Antler's 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 a minute at most.

Defendant was not cooperative with the police. Trooper McGee called out for Defendant to stop but he refused 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 saw 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%.

On October 14, 2009, a nonjury trial was held before the Honorable William S. Kieser, who found Defendant guilty of all the charges.

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. The Superior Court affirmed Defendant's DUI conviction, but found that his driving under suspension conviction should have been graded as a summary offense and remanded the case for re-sentencing. Following re-sentencing, Defendant made an oral post sentence motion, which the court denied, but he did not file any further appeal.

Within a year after the denial of his oral post sentence motion, Defendant filed his PCRA petition alleging various claims of ineffective assistance of counsel. The court

rejected some of Defendant's claims in an Opinion and Order dated March 18, 2013, but granted an evidentiary hearing on his claims that counsel was ineffective for: (1) failing to call witnesses who would have testified that the road Defendant drove on was a private road not open to the public as a matter of right or custom; (2) failing to present photographs showing "No Trespassing" signs, as well as posts and a chain that allegedly limited access to the road; and (3) failing to call Defendant as a witness.

The defense called three witnesses in support of Defendant's claims: Deborah Lohman, Defendant, and John Chambliss.

Ms. Lohman testified that Defendant was her best friend and she has known him for 25 years. Her daughter had a river lot along Antler's Lane, which Ms. Lohman regularly visited between May and September. The lot was one of about twenty lots along Anter's Lane.

Ms. Lohman invited Defendant to her daughter's river lot on July 5, 2008. She admitted there were a lot of people at the river lots because it was Fourth of July weekend. Nevertheless, she claimed that the dirt portion of Anter's Lane where Defendant drove was private property. She testified that there were two posts on either side of the dirt road, to which a cable or wire would be put across the road around October 15. There also were "No Trespassing" signs along the road as depicted in the photographs that were admitted as Defendant's exhibits 1, 2, and 6. Those signs are no longer there due to a flood that occurred in 2011.

Defendant testified that a friend took the photographs that were introduced as Defendant's exhibits 1 and 2 around September 2009, before his trial commenced on October

14, 2009. There is no date stamp on the front of the pictures to indicate when they were taken. However, there is typing on the back of the photographs which indicates that Defendant's Exhibits 1 and 2 were printed at Wal-Mart on May 8, 2013. While Defendant initially argued that these exhibits depicted two different signs, he admitted on cross-examination that he was confused and upon closer inspection it appeared that the same no trespassing sign was shown in both exhibit 1 and exhibit 2. Defendant stated that he showed the pictures of the "No Trespassing" signs to his attorney moments before the trial started, but she did not introduce them at his trial.

Defendant also testified that five minutes before his trial began the Commonwealth gave his attorney the photographs that Defendant introduced at the PCRA hearing as Defendant's Exhibits 3 through 5. Exhibits 3 and 4 depict the posts on either side of the dirt road. Exhibit 5 shows a "No Trespassing" sign on a tree located on one of the river lots. Defendant testified that he thought Exhibit 6 was just a black and white copy of Exhibits 1 and 2 that he provided to his PCRA attorney. His attorney also did not introduce any of these photographs at trial.

Defendant also testified that he consumed alcohol after he drove and before the police arrived. He stated that about an hour went by before the police arrived. During that time he went to his friend Rick's river lot and consumed three or four rather large cups of rum and coke. He claimed that he did not have anything to drink earlier and that he did not hit a stump or anything else. He just pulled into the Kemp lot to turn around because he drove past the Lohman's lot. He indicated that the passenger side of the truck he was driving was damaged long before this incident. He also claimed that he never made any of the

statements that Mr. Kemp attributed to him at trial, including statements that he offered to pay for any damage if Mr. Kemp did not call the police, or that he was asking Kemp to keep quiet because he had been in trouble in the past. On cross-examination, he admitted that he had never seen Mr. Kemp before this incident and that he had been in trouble in the past for a DUI in 2002.

John Chambliss testified that he has been Defendant's friend for 15 to 20 years. He stated that he damaged the truck about a week before this incident. He drove the truck on a small road to go fishing, but he slid off the road, put the truck in a ditch or culvert and hit a stump. The damage was on the passenger door and right front fender.

On cross-examination, the prosecutor showed Mr. Chambliss a photograph (Commonwealth's Exhibit 2) which showed red or pink scrape marks on the left front bumper. Mr. Chambliss acknowledged that this was damage to the driver's side bumper. He stated that was not the area that he damaged. He also said that the marks looked like pink or red paint, and he did not run into anything pink or red. Mr. Chambliss was then shown Commonwealth's exhibit 3, a photograph of a lawn tractor. Mr. Chambliss said that the paint from the lawn tractor appeared to be the same red or pink paint on the bumper of the truck.

The Commonwealth called Defendant's trial counsel, Karen Muir, as a witness. Ms. Muir testified that she met Defendant at the Centre County Correctional Facility on December 16, 2008. She also spoke with and wrote to Defendant several times in 2009. Defendant's issue was primarily whether the area where he drove was a highway or trafficway. Defendant faxed a sketch of Antler's Lane and the river lots to her, and he told

her about gates or posts that were on each side of the dirt portion of the roadway, but she did not recall Defendant mentioning anything about "No Trespassing" signs. If Defendant had told her that there were no trespassing signs along the roadway, she would have verified that information. Similarly, if Defendant had given her pictures of no trespassing signs along the roadway she would have used them at trial. Ms. Muir said she only had Defendant's diagram/sketch and the photographs the Commonwealth provided.

At the request of Defendant's family members, the township manager Jack Coleman faxed a letter to Ms. Muir that included an aerial map, which showed where the township stopped paving the road. Ms. Muir testified that the paving wasn't as important as whether the public used or had access to the road.

Ms. Muir also testified that she spoke to Defendant both before and during trail about Defendant testifying at his trial. Before trial, Defendant told her that: there was a gate or posts at the dirt portion of the road; he drank after the crash; a gentleman followed him while waiting for the police to arrive; and the damage to the truck did not occur that day. He did not talk about any "No Trespassing" signs. During trial, Ms. Muir turned and talked to Defendant about testifying either while the judge was considering her motion for judgment of acquittal or after he came back on the bench. Defendant said he did not feel the need to testify. If Defendant had wanted to testify, Ms. Muir said she would have called him as a witness to testify about drinking after the incident but before the police arrived. Ms. Muir noted, however, that Defendant never told her that he didn't drink before the accident. Ms. Muir also did not think this testimony would have made a difference at trial, because Mr. Kemp testified that he only lost sight of Defendant for a minute or two; the trooper arrived a

short time after the accident; Defendant's blood alcohol content (BAC) was .20%; and it would have been very difficult to get to that BAC level within a short period of time.

Ms. Muir recalled seeing the photographs that Defendant introduced as exhibits 3, 4 and 5, but she did not recall seeing the other photographs that Defendant introduced at the PCRA hearing. She also recalled Defendant talking about making arrangements with his friend for her to go see the area. Defendant, however, never mentioned the "no trespassing" signs. Instead, the reason he wanted her to go to the scene was so she could familiarize herself with the area, which Defendant had already done with his detailed sketch of the area.

The defense recalled Defendant to the witness stand to address certain aspects of Ms. Muir's testimony. He stated that he was continuously incarcerated from his first meeting with Ms. Muir through trial. He talked to her about going to the scene. He told her he could get a friend to meet her or take pictures so she could familiarize herself with the scene. Ms. Muir told him to make the arrangements. Defendant then spoke to his friend, who said he would be home all weekend and told Defendant to give his phone number to the attorney. Defendant testified that he gave his friend's phone number to Ms. Muir, but she never contacted his friend to view the scene.

Defendant also testified that he thought Ms. Muir would call Mr. Coleman as a witness at trial. He said that, just prior to trial, he asked Ms. Muir where Mr. Coleman was. Ms. Muir allegedly said she did not need him. Similarly, Defendant testified that he wanted to testify in his own defense, but Ms. Muir told him she had enough for an appeal and she didn't think it would help him to testify.

DISCUSSION

Counsel is presumed effective and the burden is on a PCRA petitioner to prove that counsel's performance was deficient. Commonwealth v. Busanet, 56 A.3d 35, 45 (Pa. 2012). To prove trial counsel ineffective, "the petitioner must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) the petitioner was prejudiced by counsel's act or omission." Id., citing Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975 (1987). If the petitioner fails to plead or prove any of these elements, his claim must fail. Commonwealth v. Steele, 599 Pa. 341, 961 A.2d 786, 797 (2008); Commonwealth v. Burkett, 5 A.3d 1260, 1272 (Pa. Super. 2010).

A claim lacks arguable merit when the allegations, even if true, do not establish the underlying claim. Commonwealth v. Jones, 583 Pa. 130, 876 A.2d 380, 385 (2005).

With respect to the reasonable basis prong, counsel's acts or omissions lack a reasonable basis if the particular course chosen is not designed to effectuate the client's interest, or the alternative not chosen offered a significantly greater potential chance of success than the course actually pursued. Commonwealth v. Koehler, 614 Pa. 159, 36 A.3d 121, 132 (2012).

To establish prejudice, a petitioner must show there is a reasonable probability that, but for counsel's acts or omissions, the result of the proceeding would have been different. Commonwealth v. Meadows, 567 Pa. 344, 787 A.2d 312, 319 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Commonwealth v. Rathfon, 899 A.2d 365, 370 (Pa. Super. 2006), quoting Nix v. Whiteside, 475 U.S. 157, 175, 106 S.Ct. 988 (1986).

Where, as here, a petitioner asserts a claim of ineffectiveness for failing to call witnesses, the petitioner must establish that: the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary to avoid prejudice. Commonwealth v. Chmiel, 612 Pa. 333, 30 A.3d 1111, 1143 (2011).

Defendant first claims trial counsel was ineffective for failing to call Ms. Lohman as a witness at trial. Defendant, however, has failed to meet his burden of proof. He has not presented any evidence to show that Ms. Lohman was available to testify at his nonjury trial or that his trial counsel was aware of or had a duty to know that Ms. Lohman was a potential witness. For example, Ms. Lohman never testified that she was available and willing to testify at Defendant's nonjury trial on October 14, 2009. Similarly, Defendant never testified that he told trial counsel that Ms. Lohman could provide testimony that the road was private, there were posts and a chain that limited access, and there were "No Trespassing" signs along the roadway.

Furthermore, Ms. Lohman's testimony that the road was private and there were posts and a chain that limited access clearly would not have changed the outcome in this case.[1] Ms. Lohman testified that she visited her daughter's river lots between May and September, and the chain was only placed across the road between the two posts on or after October 15 each year. This testimony was consistent with Mr. Kemp's trial testimony that

[1] The court will address the evidence regarding the "No Trespassing" signs in a later portion of this opinion.

there is only a chain across the road after the 15th of October through the wintertime. Trial Transcript, p. 14. Ms. Lohman also testified that it was Fourth of July weekend and there were a lot of people at the river lots that weekend. This testimony was consistent with Trooper McGee's trial testimony that it was one of the busier times on the river lots and there was a lot of traffic and pedestrians. Trial Transcript, pp. 27-28. A reasonable inference from this testimony as a whole is that the dirt portion of the roadway was open to the public as a matter or right or custom during the summertime, including July 5, 2008. In fact, at Defendant's nonjury trial, the Honorable William S. Kieser made a specific finding that the roadway was **private** property but it was open to the public as a matter of right or custom. Trial Transcript, pp. 52-54.

Defendant also contends that trial counsel was ineffective for failing to introduce photographs and testimony about "No Trespassing" signs that allegedly were along the roadway on the day in question. Considering the testimony as a whole, the court accepts the credibility of Ms. Muir's testimony over Defendant's and Ms. Lohman's.

Ms. Muir testified that Defendant never mentioned any "No Trespassing" signs to her, and she never saw the photographs that were introduced as Defendant's Exhibits 1, 2 and 6.

Defendant's exhibits 1, 2 and 6 also clearly depict the same "No Trespassing" sign, because the sign in each photograph has what appears to be curling, peeling or other damage in the same spot on the edges of each sign. It looks like the pictures were just taken from slightly different angles and distances.

Ms. Lohman did not know when the photographs were taken, but the signs are

no longer there due to a flood in 2011. Although Defendant testified that a friend took the photographs in September 2009 and he provided them to trial counsel just before trial started, he did not draw or note any "No Trespassing" signs on the detailed drawing/sketch that he sent to Ms. Muir in April 2009 (see Commonwealth's Exhibit 4) or mention the photographs of the signs in his letter to Ms. Muir dated June 30, 2010, in which he discusses evidence (including other photographs) that he asserted should be presented and argued in his appeal (see Commonwealth's Exhibit 5). The defense also did not present any evidence from the individual who took the photographs to establish when they were taken. The date these photographs were scanned and printed, however, was May 8, 2013. Furthermore, Defendant testified that he was continuously incarcerated from sometime in 2008 through November 2012. Therefore, unless the photographs were taken in November 2012 or thereafter, Defendant would not have any personal knowledge regarding when the photographs were taken.

Ms. Lohman testified that the signs were "at the beginning of where the road becomes dirt" and a few feet from the posts. Defendant and his counsel agreed that Defendant's exhibits 3, 4 and 5 were photographs that the defense received from the Commonwealth immediately prior to trial. Exhibits 3 and 4 depict the posts along either side of the dirt road, but the "No Trespassing" sign in Exhibits 1 and 2 cannot be seen anywhere in those pictures.[2] Trooper McGee testified at trial that the road was open to the public and there weren't any "No Trespassing" signs or anything like that. Trial Transcript, p. 28.

Based on the testimony as a whole, the court is not convinced that the

[2] There is a sign on a tree in Defendant's exhibit 5, but it clearly is on one of the river lots, and the only word that is legible is the word "Notice". Therefore, the court cannot tell whether this really is a "No Trespassing"

photographs were taken before trial or provided to Ms. Muir. In fact, the court suspects the photographs were not taken until sometime after Defendant wrote the June 30, 2010 letter to Ms. Muir. Ms. Muir was not aware of any evidence –either photographs or witness testimony – concerning "No Trespassing" signs at or before Defendant's nonjury trial. Therefore, she was not ineffective for failing to introduce such evidence.

Defendant's final assertion is that his attorney was ineffective for failing to call him as a witness. Again, the court cannot agree.

As with the previous issue, the court finds Ms. Muir's testimony more credible than Defendant's. Ms. Muir testified that Defendant did not wish to testify at his trial. He told her that he drank after the crash. If he wanted to testify she would have asked him about that topic, but he never told her that he did not drink at all before he mistakenly arrived at the Kemp river lot.

Defendant claimed that if counsel had not refused to call him as a witness, he would have testified that: he drank afterwards, the truck was damaged previously, and he did not hit anything.

Defendant's testimony simply was not credible. If Defendant did not drink anything before he arrived at the Kemp river lot or hit anything at that lot, then why did he do the following: drive past Ms. Lohman's daughter's lot, which he had visited numerous times before July 5, 2008; leave the truck at the Kemp lot and walk around other river lots when he heard that the police had been called; and refuse to provide his name or identification to Trooper McGee until the trooper told him he would be taken into custody

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sign, and even it was, it governs the river lot, not the road.

and fingerprinted to determine his identity. Furthermore, if he didn't hit anything then how did the red or pink scrape marks get on the left front bumper of the truck?

Mr. Chambliss clearly testified that he did not cause that damage to the truck. He also noted that the red or pink paint on the lawn tractor depicted in Commonwealth's exhibit 3 appeared to be the same paint that was on the truck's left front bumper.

At trial, Mr. Kemp testified that Defendant ran into a big stump with the side of the truck. He backed up and then pulled forward and hit their lawn tractor. When he backed away from the lawn tractor, he hit the stump again. Trial Transcript, pp.14-15.

From Mr. Kemp's testimony, Mr. Chambliss' testimony and the photographs that the Commonwealth introduced as Exhibits 2 and 3, it is patently obvious that Defendant was not being entirely truthful when he testified that he never hit anything with the truck on July 5, 2008.

The court also agrees with Ms. Muir's testimony that it would have been difficult or unlikely for Defendant's BAC to have been a .20% if he had only consumed alcohol between the time he left the Kemp river lot and he came in contact with Trooper McGee. The incident occurred at the Kemp river lot around 8:00 p.m. and Defendant's blood sample was drawn at 9:00 p.m. Mr. Kemp testified that they engaged Defendant in conversation for a while, trying to keep him there until the police arrived. Trial Transcript, p. 18. He also testified Defendant walked a quarter mile to the end of the dirt road before doubling back to other river lots and Defendant was not moving very quickly. Trial Transcript, p. 18, 23.

Under all the facts and circumstances of this case, Defendant's proposed

testimony would not have changed the outcome of this case.

Accordingly, the following order is entered:

ORDER

AND NOW, this ___ day of December 2013, the court DENIES Defendant's PCRA petition.

Defendant is hereby notified that he 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 requirements 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 his right to raise these issues.

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

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
George Lepley, Esquire
Keith Snook
45 Balschi Rd, Danville PA 17821
Work file
Gary Weber, Esquire (Lycoming Reporter)