

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	DOCKET NO. 671-2008
	:	
vs.	:	1157 MDA 2013
	:	
JAMES BRICKER.	:	PCRA

OPINION

Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

On July 1, 2013, James Bricker (Appellant) appealed the Court’s June 17, 2013 dismissal of his October 2, 2012 PCRA petition. On July 19, 2013, the Court received Appellant’s Concise Statement of Matters Complained of on Appeal. In his statement, Appellant raises one (1) issue:

Did the PCRA court err by dismissing the Post Conviction Relief Act petition pursuant to PCRA counsel’s “no-merit” letter, which is defective, because it does not comport with the provisions set forth in *Finley/Turner*?

Statement, 2. Specifically, Appellant believes that court-appointed counsel failed to comply with *Turner/Finley* because counsel allegedly failed to review issues that Appellant raised in a January 9, 2013 letter to counsel. *See* Obj. to Dismissal, 1. Specifically, Appellant wanted his court-appointed counsel to address the following issues:

1. Ineffectiveness of counsel for failure to raise an alibi defense;
2. Ineffectiveness of counsel for failure to include Appellant in plea bargaining process;
3. Ineffectiveness of counsel for failure to file a Rule 600 motion to dismiss;
4. Ineffectiveness of counsel for failure to appeal motion to suppress;
5. Ineffectiveness of counsel for failure to appeal motion of prior bad acts;
6. Ineffectiveness of counsel for not calling all character witnesses; and
7. Ineffectiveness of counsel for not sequestering witnesses.

Id. at 4. These issues were also raised by Appellant in his objection to the Court's notice of dismissal of Appellant's PCRA petition. For the following reasons, the Court believes that it properly dismissed Appellant's PCRA petition.

Instantly, Appellant argues that his PCRA counsel was ineffective. Appellant expressly complied with the mandates set forth in *Commonwealth v. Pitts*, 981 A.2d 875 (Pa. 2009), and *Commonwealth v. Rykard*, 55 A.3d 1177 (Pa. Super. Ct. 2012), *appeal denied*, 64 A.3d 631 (Pa. 2013), by raising this ineffectiveness claim in his response to the Court's pre-dismissal notice. Thus, Appellant's claims regarding PCRA counsel's ineffectiveness were properly preserved for appellate review.

Appellant's argues that his *PCRA* counsel was ineffective for failing to investigate, raise and address issues that were presented to his counsel in a January 9, 2013 letter.

To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act. Where the defendant asserts a layered ineffectiveness claim he must properly argue each prong of the three-prong ineffectiveness each separate attorney.

Rykard, 55 A.3d at 1189-90 (citations omitted). However,

[w]here the defendant asserts a layered ineffectiveness claim he must properly argue each prong of the three-prong ineffectiveness test for each separate attorney.

Layered claims of ineffectiveness are not wholly distinct from the underlying claims, because proof of the underlying claim is an essential element of the derivative ineffectiveness claim. In determining a layered claim for ineffectiveness, the critical inquiry is whether the first attorney that the defendant asserts was ineffective did, in fact, render ineffective assistance of counsel. If that

attorney was effective, then subsequent counsel cannot be deemed ineffective for failing to raise the underlying issue.

Id. at 1190 (citations omitted). With this standard in mind, the Court will address Appellant's ineffectiveness claims against his PCRA counsel in turn.

I. Alibi Defense and Character Witnesses

Initially, Appellant argues PCRA counsel was ineffective for failing to raise the issue that trial counsel was ineffective for failing to raise an alibi defense. Likewise, Appellant argues that PCRA counsel was ineffective for failing to raise the issue that trial counsel was ineffective for failing to call all character witnesses. The Court believes that Appellant's claims cannot stand against his PCRA counsel because these issues lack arguable merit and did not prejudice Appellant. An attorney's failure to call a witness, in and of itself, does not equate to *per se* ineffectiveness. *Commonwealth v. Johnson*, 966 A.2d 523, 536 (Pa. 2009); *Commonwealth v. Cox*, 938 A.2d 666, 693 (Pa. 2009). "In establishing whether defense counsel was ineffective for failing to call witnesses, [Appellant] must prove the witnesses existed, the witnesses were ready and willing to testify, and the absence of the witnesses' testimony prejudiced petitioner and denied him a fair trial." 938 A.2d at 639. In this instance, Appellant cannot prove these ineffectiveness claims against PCRA counsel because, as in most cases, the choice and/or failure to call a witness to testify during trial are matters of trial strategy. *See Commonwealth v. Lauro*, 819 A.2d 100, 105 (Pa. Super. Ct. 2003). Additionally, as noted in PCRA counsel's *Turner/Finley* letter, any shortcomings regarding trial counsel's strategy cannot be deemed to prejudice Appellant because the main evidence against Appellant admitted at trial consisted of his victims' testimony. Therefore, Appellant's ineffectiveness claim cannot stand.

II. Plea Bargaining Process

Next, Appellant argues PCRA counsel was ineffective for failing to raise the issue that trial counsel was ineffective for failing to include Appellant in the plea bargaining process. The Court believes that Appellant's claim cannot stand because PCRA counsel did address this issue in his *Turner/Finley* letter to Appellant. In his *Turner/Finley* letter, PCRA counsel addressed Appellant's argument that trial counsel was ineffective for failing to provide appropriate representation during plea discussions. PCRA counsel addressed *Lafler v. Cooper*, 132 S.Ct. 1376 (U.S. 2012) and its application to the facts of Appellant's case. Specifically, PCRA counsel advised Appellant that this claim had no merit under *Lafler* because trial counsel did not incorrectly advise Appellant of a plea offer from the Commonwealth which resulted in Appellant proceeding to trial. Thus, PCRA counsel told Appellant that this claim lacked merit and that it cannot be shown trial counsel lacked a reasonable basis for the advice he provided. This Court agrees with PCRA counsel's conclusions.

III. Rule 600

The Court addressed this issue in its May 22, 2013 Opinion and Order and relies upon its conclusions in that order for the purpose of this appeal.

IV. Appeals

Appellant also argues that PCRA counsel was ineffective for failing to raise the issue that trial counsel was ineffective for failing to appeal the Court's decision regarding his prior bad acts and his suppression motions. Appellant raised similar issues in his initial PCRA petition, which this Court addressed in its May 22, 2013 Opinion and Order. The Court relies on its conclusions in that order for the purpose of this appeal.

V. Sequestration of Rebuttal Witness

Lastly, Appellant argues that PCRA counsel was ineffective for failing to raise the issue that trial counsel was ineffective for failing to request sequestration of a rebuttal witnesses during trial. The Court believes Appellant's claim cannot stand against his PCRA counsel because this issue lacks arguable merit. In *Commonwealth v. Henry*, 706 A.2d 313 (Pa. 1997), our Supreme Court addressed a sequestration issue within a PCRA action; that Court provided:

[t]he purpose of sequestration is to prevent a witness from shaping his testimony with evidence presented by other witnesses. However, in nearly every criminal case, one side or the other would like to have some or all of the witnesses of his opponent sequestered. The lack of adequate room space, the long delays which would inevitably be caused by sequestration and other practical considerations, make sequestration of witnesses ordinarily impractical or inadvisable, except in unusual circumstances. For the foregoing reasons the question of sequestration of witnesses is left largely to the discretion of the trial Judge and his decision thereon will be reversed only for a clear abuse of discretion. A request for sequestration of a witness should be specific and should be supported by a showing that the interests of justice require it.

Id. at 320 (citations omitted). In this instance, Appellant's claim against PCRA counsel lacks merit. Additionally, as stated previously, the failure of trial counsel to sequester this rebuttal witness did not prejudice Appellant because the crucial testimony in this matter was delivered by Appellant's victims.

For the reasons stated above, the Court respectfully requests our Superior Court affirm its June 17, 2013 Order, dismissing Appellant's PCRA petition.

BY THE COURT,

Date

Richard A. Gray, J.

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