

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-743-2009

:

vs.

:

: Notice of Intent to Dismiss Defendant's

: PCRA petition without holding an

LEON D. BODLE,

: evidentiary hearing

Defendant

:

**OPINION AND ORDER**

This matter came before the court on Defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

Defendant was charged with one count of criminal solicitation of involuntary deviate sexual intercourse, four counts of unlawful contact with a minor, four counts of displaying explicit sexual material to a minor, twenty-nine counts of sexual abuse of children, four counts of criminal use of a communication facility, and eight counts of corruption of minors. These charges arose out of inappropriate comments and offers he made to his teenaged female students via the telephone and internet, explicit videos he showed or forwarded to these teenaged girls, and child pornography that was found on his computer.

A jury trial was held March 2-4, 2010. The jury found Defendant guilty of criminal solicitation of involuntary deviate sexual intercourse, one count of unlawful contact with a minor, two counts of displaying explicit sexual material to a minor, twenty-five counts of sexual abuse of children (possession of child pornography), four counts of criminal use of a communication facility, and five counts of corruption of minors. The court imposed an aggregate sentence of 10-20 years of incarceration in a state correctional institution followed

by 10 years of consecutive supervision.

Defendant appealed his conviction to the Pennsylvania Superior Court, which denied Defendant's claims and affirmed his conviction in a memorandum opinion and order filed on July 29, 2011. The Pennsylvania Supreme Court denied his petition for allowance of appeal on May 20, 2013.<sup>1</sup>

Defendant filed a PCRA petition in which he asserted claims of ineffective assistance of counsel. The court appointed counsel to represent Defendant and gave counsel an opportunity to file an amended PCRA petition or a "no merit" letter pursuant to **Commonwealth v. Turner**, 518 Pa. 491, 544 A.2d 927 (1988) and **Commonwealth v. Finley**, 379 Pa. Super. 390, 550 A.2d 213 (1988).

Counsel filed an amended petition which raised three issues: (1) trial counsel was ineffective for failing to call character witnesses or to discuss the importance of calling character witnesses with Defendant; (2) trial counsel was ineffective for failing to subpoena phone records for J.E.'s home and failing to subpoena J.E.'s disciplinary records from the Sugar Valley Charter School; and (3) trial counsel was ineffective for failing to employ and utilize an expert witness that would refute the Commonwealth's evidence regarding the age of the children depicted in the images and that would analyze Defendant's computer to determine if the material present was related to a computer virus or spyware.

As the Pennsylvania Supreme Court recently stated in **Commonwealth v. Spatz**, 84 A.3d 294 (Pa. 2014):

Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient

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<sup>1</sup> Trial counsel failed to file a petition for allowance of appeal, but Defendant's right to file such a petition was reinstated on May 29, 2012.

and that such deficiency prejudiced him. In Pennsylvania, we have refined the Strickland performance and prejudice test into a three-part inquiry. Thus, to prove counsel ineffective, the petitioner must show that: (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result. If a petitioner fails to prove any of these prongs, his claim fails. Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. Where matters of strategy and tactics are concerned, a finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

84 A.3d at 311-12 (quotations, quotation marks, and citations omitted). With this legal framework in mind, the court will address Defendant's claims.

Defendant first avers that trial counsel was ineffective for failing to call character witnesses or to discuss the importance of calling character witnesses with Defendant. Defendant alleges that Karen Bodle (his mother), Ronald Weigle (his uncle) and Reverend James Behrens could have testified as character witnesses on his behalf regarding his good reputation in the community for being a law abiding, truthful, and nonviolent person who comports himself appropriately around children. After a thorough review of the record, the court finds that this claim lacks merit.

Evidence regarding Defendant's reputation for truthfulness and nonviolence would not have been relevant or admissible in this case. The admission of character evidence is governed by the Pennsylvania Rules of Evidence and the case law interpreting those rules. Only evidence of a "pertinent" character trait is admissible. Pa.R.Cr.P.

404(a)(2)(A); **Commonwealth v. Minich**, 4 A.3d 1063, 1069-70 (Pa. Super. 2010).

“Character evidence of the defendant’s truthfulness is admissible only if: (1) the character trait of truthfulness is implicated by the elements of the charged offenses; or (2) the defendant’s character for truthfulness was attacked by evidence of bad reputation.” **Minich**, 4 A.3d at 1070, quoting **Commonwealth v. Constant**, 925 A.2d 810, 822-23 (Pa. Super. 2007). Neither situation is present in this case. None of the elements of the offenses charged involves dishonesty, and the Commonwealth did not introduce any evidence of Defendant’s reputation for being untruthful. Similarly, despite Defendant’s protestations to the contrary, none of the charged offenses involve violence. This is not a case where Defendant was charged with committing sexual offenses by force or forcible compulsion. The charges involved possession of child pornography, the dissemination of explicit materials to minors and having conversations of a sexual nature with minors. While Defendant’s actions were repugnant, they were not violent. The Commonwealth also did not introduce any evidence to suggest Defendant had a reputation for being violent. Therefore, Defendant’s alleged reputation for truthfulness and nonviolence were not “pertinent” character traits in this case.

Defendant alleges that the Commonwealth put Defendant’s reputation for truthfulness at issue when one of the Commonwealth witnesses, Officer Samar, testified, “During the interview Mr. Bodle in speaking like that to me, it appeared to me Mr. Bodle though his intelligence was more than our’s, in other words that he was smarter than us. And he was going to skate around this interview and make us believe what he wanted us to believe.” The court cannot agree.

In **Commonwealth v. Fulton**, 574 Pa. 282, 830 A.2d 567 (Pa.

2003)(plurality), the Pennsylvania Supreme Court stated:

One's character for truthfulness refers not to suggestions of particular instances of honesty or dishonesty, but rather to one's general reputation in the community for telling the truth. Thus, where the prosecution has merely introduced evidence denying or contradicting the facts to which the defendant testified, but has not assailed the defendant's community reputation for truthfulness generally, evidence of the defendant's alleged reputation for truthfulness is not admissible. Similarly, cross-examination of the defendant that challenges the veracity of his testimony in the particular case, but does not touch upon his general reputation in the community for being truthful, does not open the door to the introduction of good character evidence concerning reputation for truthfulness.

830 A.2d at 572 (citations omitted).

Although Officer Samar may have suggested that Defendant was not being truthful during his interview with the police, Officer Samar never referred to Defendant's community reputation for truthfulness generally.

While evidence of Defendant's reputation for being law abiding likely would have been admissible in this case, trial counsel was not ineffective for failing to introduce this character evidence, because there is not a reasonable probability that Defendant's character witnesses would have resulted in a different outcome in this case. Initially, the court notes that Defendant has failed to provide a witness certification or an affidavit from Reverend Behrens, which renders his testimony inadmissible at any PCRA hearing. 42 Pa.C.S. §9545(d)(1). Therefore, the only potential character witnesses were Defendant's mother and uncle.

Testimony from these witnesses, however, would not likely result in a different outcome. Clearly, Defendant's mother and his uncle have a bias in favor of Defendant. Moreover, there was documentary evidence to support most of the charges in

this case, such as numerous images of child pornography and various America Online instant message chats that were retrieved from Defendant's computer. Defendant also made some statements in his interview with the police where he admitted that he was talking with girls between the ages of 13 and 19 in online chats and instant messages and he would tell them that he was 18 or 19, but he claimed that they would start talking dirty and would send him pictures of themselves. Given the other evidence in this case, character evidence from Defendant's mother and uncle would not have affected the outcome.

Defendant next asserts that trial counsel was ineffective for failing to subpoena phone records for J.E.'s home and failing to subpoena J.E.'s disciplinary records from the Sugar Valley Charter School. Again, the court finds that these claims lack merit.

Defendant claims that trial counsel was ineffective by failing to investigate whether J.E.'s phone would have contradicted her statements that Defendant called her four times and during these phone calls he asked her to go to an amusement park with him and ultimately asked her to perform oral sex on him. There are several problems with this claim.

First, this assertion appears to be little more than a fishing expedition.

Second, Pennsylvania Rule of Criminal Procedure 902 states, if the facts underlying a PCRA claim do not appear in the record, the petitioner must identify any documents or other evidence showing such facts and attach them to the PCRA petition or state why the evidence is not attached. Pa.R.Cr.P. 902(A)(12)(b) and (D). Defendant has not attached the documents or stated why the evidence is not attached. The court understands that trial counsel did not subpoena these records, but there is nothing in the amended PCRA petition to indicate what efforts, if any, Defendant or PCRA counsel took to try to obtain

these records. Defendant has not even alleged what he believes the phone records would establish. Therefore, this claim has no “arguable merit” and the court can properly dismiss it without holding an evidentiary hearing. See **Commonwealth v. Hall**, 867 A.2d 619, 629 (Pa. Super. 2005).

Third, when Defendant was interviewed by the police, he admitted that he had conversations with J.E. about going to an amusement park, telling her to bring a swimsuit and asking her if she wanted to party, but Defendant claimed that “do you want to party” just meant they were going out to eat afterwards.<sup>2</sup>

Fourth, the phone records would only establish the number of phone calls; they would not reveal anything about the **content** of the phone calls.

Defendant contends the disciplinary records would show that J.E. had a reputation for making false assertions about staff and students. As with the phone records, Defendant has failed to comply with Rule 902 and this assertion seems little more than a fishing expedition. More importantly, however, the disciplinary records would not be admissible at trial to impeach J.E.’s credibility. See **Commonwealth v. Minich**, 4 A.3d 1063, 1072-73 (Pa. Super. 2010).

In **Minich**, the defendant was charged with sexually assaulting two minor boys and sought to introduce evidence that one of the boys was caught lying in school about

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<sup>2</sup> This conversation between Defendant and J.E. may have occurred via instant messaging or some other online computer chat, however, rather than by telephone.

matters wholly unrelated to the allegations against Minich. The Commonwealth filed a motion in limine to preclude Minich from introducing this evidence. The trial court denied the Commonwealth's motion, and the Commonwealth appealed. The Superior Court reversed and held "whenever the accused seeks to offer character evidence for purposes of attacking or supporting the credibility of a victim who testifies, the admissibility of such evidence is governed by Pa.R.E. 608 and proof of specific incidents of conduct by either cross-examination or extrinsic evidence is prohibited." 4 A.3d at 1072.

Since J.E.'s disciplinary records would constitute extrinsic evidence of specific incidents of conduct unrelated to this case, these records would not have been admissible.<sup>3</sup> Therefore, his claim that counsel was ineffective for failing to subpoena these records both lacks arguable merit and was not prejudicial to Defendant's case.

Defendant's third and final claim is that counsel was ineffective for failing to employ and utilize an expert witness that would refute the Commonwealth's evidence regarding the age of the children depicted in the images and that would analyze Defendant's computer to determine if the material present was related to a computer virus or spyware. This claim also lacks merit

In order to prevail on an effectiveness claim for failure to call a witness, the petitioner must demonstrate that: (1) the witness existed; (2) the witness was available; (3)

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<sup>3</sup> The court disagrees with Defendant's characterization that the records would show J.E. had a "reputation" for making false assertions against staff and students. The records would show specific instances where J.E. was disciplined. Instead, reputation evidence is generally presented by offering testimony from witnesses who are familiar with the witness's reputation in the community. Defendant, however, has neither named any witness who was aware of J.E.'s alleged reputation for untruthfulness and was willing to testify at Defendant's trial nor alleged that trial counsel was aware of any such witness.

trial counsel was informed of the existence of the witness or should have known of the witness's existence; (4) the witness was prepared to cooperate and would have testified on petitioner's behalf; and the absence of the testimony prejudiced petitioner. **Commonwealth v. Hall**, 867 A.2d 619, 629 (Pa. Super. 2005).

There are additional considerations when the failure relates to an expert witness. As the Superior Court recently stated in **Commonwealth v. Luster**, 71 A.3d 1029 (Pa. Super. 2013):

In particular, when challenging trial counsel's failure to produce expert testimony, the defendant must articulate what evidence was available and identify the witness who was willing to offer such evidence. Also, trial counsel need not introduce expert testimony on his client's behalf if he is able to effectively cross-examine prosecution witnesses and elicit helpful testimony. Finally, trial counsel will not be deemed ineffective for failing to call a medical, forensic, or scientific expert merely to critically evaluate expert testimony which was presented by the prosecution.

71 A.3d at 1047 (internal quotations, quotation marks and citations omitted).

Defendant is on a fishing expedition for experts to critically evaluate the testimony presented by Dr. Bruno regarding the age of the children depicted in the child pornography and Trooper Trusal's testimony about finding the child pornography on Defendant's computer. Defendant has failed to identify any expert witness in his PCRA petition, and failed to include a signed witness certification stating the witness's name, address, date of birth, and the substance of the witness's testimony as required by Rule 902(A)(15) of the Pennsylvania Rules of Criminal Procedure. The lack of a witness certification means that no expert witness could be called to testify at a PCRA hearing. 42 Pa.C.S. §9545(d)(1). Therefore, scheduling an evidentiary hearing in this matter would be

pointless.

Trial counsel also effectively cross-examined Dr. Bruno and Trooper Trusal.

Defense counsel got Dr. Bruno to admit during cross-examination that there are people who have delayed puberty, there are people who have endocrinological diseases that can affect the onset of puberty, and really good athletes, like female gymnasts, can have delayed development due to the physical strain they endure. N.T., March 2-3, 2010 at 145-146. Dr. Bruno also admitted that his testimony about the ages of the children in the photographs assumed that it was an accurate photo of the child that was not doctored in any way. *Id.* at 147.

Defense counsel extensively cross-examined Trooper Trusal about zip files, Lime Wire and other file sharing programs, and viruses such a Trojan Horse where others can take control of a person's computer. Defense counsel also elicited the following helpful admissions: the photographs were found in unallocated space, he did not check for viruses, he did not check to see if the fire wall was down and he had no way of knowing who actually downloaded the child pornography. *Id.* at 283-297.

For the foregoing reasons, the court finds that the issues asserted in Defendant's amended PCRA petition lack merit and an evidentiary hearing is not warranted in this case. Accordingly, the following order is entered:

### **ORDER**

**AND NOW**, this \_\_\_ day of May 2014, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of the court's intention to dismiss Defendant's PCRA petition without

holding an evidentiary hearing. Defendant may respond to this proposed dismissal within twenty (20) days. If the court does not receive a response within the twenty-day period, the court will enter an order dismissing the petition.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Donald F. Martino, Esquire  
Leon D. Bodle, JV 4596  
SCI Houtzdale, PO Box 1000, Houtzdale PA 16698-1000  
Gary Weber, Esquire (Lycoming Reporter)  
Work file