

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR- 877-2010
	:
vs.	: CRIMINAL DIVISION
	:
ROBERT GRAHAM,	: Notice of Intent to Dismiss PCRA
Defendant	: Without Holding An Evidentiary
	: Hearing and Order Granting Counsel's
	: Motion to Withdraw

OPINION AND ORDER

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

On June 22, 2009 at approximately 2:20 a.m., an individual wearing sunglasses and a camouflaged sweatshirt with the hood pulled up entered the Uni-Mart on West Fourth Street in Williamsport and approached the clerk, who was behind the counter doing some paperwork. The clerk asked, "Can I help you?" The individual pulled out a handgun and demanded that the clerk open the register. The clerk opened the register and placed the cash drawer on the counter. The robber grabbed the back of the cash drawer with his left hand and removed \$117 in cash, but no coins. The robber then told the clerk to open the safe. When the clerk told him that she couldn't, the robber threatened to shoot her. Again, the clerk told the robber that she couldn't open the safe. The robber then demanded cigarettes. When the clerk started to grab packs of cigarettes, the robber said, "No, cartons." The clerk placed 10 cartons of cigarettes on the counter. The robber went through them and took 5 cartons of Newport cigarettes and left. The clerk immediately called the police. According to the store's surveillance videotape, the entire incident lasted approximately one minute and eleven seconds.

The police responded to the Uni-Mart. As part of their investigation, the police dusted for fingerprints. Latent fingerprints were obtained from the cash drawer and two cartons of cigarettes. The latent prints were sent to the Pennsylvania State Police Wyoming Regional Laboratory for analysis. Sergeant Floyd Bowen, who analyzed the latent prints, determined that the latent fingerprint on the back of the cash drawer matched Defendant's left thumb print.

About ten months after the incident, the clerk saw a photograph in a newspaper article and recognized the person in the photograph as the individual who robbed her.

Defendant was arrested and charged with robbery by threatening to inflict serious bodily injury, robbery by threatening to inflict bodily injury, theft by unlawful taking, receiving stolen property, terroristic threats, and possessing an instrument of crime.

On November 23, 2010, Defendant filed an omnibus pre-trial motion which included a request for a Frye hearing to challenge the admissibility of the Commonwealth's expert testimony on the application of latent fingerprint analysis in this case. The court denied this motion in an Opinion and Order dated February 4, 2011. A jury trial was held March 5, 7 and 8 of 2012. Following his conviction on all counts, Defendant was sentenced to an aggregate term of 11 – 22 years of incarceration. Defendant filed post-sentence motions, which the court denied on September 11, 2012.

Defendant appealed his conviction on September 24, 2012. He asserted the following issues in his direct appeal: (1) whether the Commonwealth failed to provide sufficient evidence to prove his guilt since the cash drawer was never sent for proper

fingerprint analysis and one witness at the scene was never called to testify; (2) whether the verdict was against the weight of the evidence since the clerk was inconsistent in her testimony and based her identification on a newspaper story; (3) whether the court erred in failing to allow testimony that Defendant was employed at the time of the robbery and allowing the affiant to use inexact methods to calculate the height of the robber; (4) whether the court erred in the denial of a Frye hearing regarding expert testimony in fingerprinting; and (5) whether the court erred in determining that no Batson claim existed after the Commonwealth struck the only African-American juror in the jury panel. The Pennsylvania Superior Court affirmed Defendant's judgment of sentence in a memorandum decision on October 30, 2013.

Defendant filed a Post Conviction Relief Act (PCRA) petition on January 8, 2014. The court appointed counsel to represent Defendant and gave counsel the opportunity to file either 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 a motion to withdraw, which included a Turner/Finley "no merit" letter. Following an independent review of the record, the court agrees that Defendant's claims lack merit.

Defendant first asserts that trial counsel was ineffective for failing to request a proper identification procedure such as a line-up and/or for failing to file a suppression motion to preclude the clerk's identification of him based on the single photograph published in the newspaper and her inconsistent testimony.

To establish ineffective assistance of trial counsel, a defendant must plead and

prove that the underlying claim is of arguable merit, counsel's performance lacked a reasonable basis designed to effectuate the defendant's interests, and prejudice.

Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203 (2001); Commonwealth v. Correa, 444 Pa. Super. 621, 664 A.2d 607 (1995). Prejudice in this context means that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. Commonwealth v. King, 618 Pa. 405, 57 A.3d 607, 613 (2012). Counsel is presumed effective and the defendant bears the burden of proving otherwise. Commonwealth v. Fears, 86 A.3d 795, 804 (Pa. 2014).

A defendant does not have a constitutional right to a line-up. Commonwealth v. Davis, 293 Pa. Super. 447, 439 A.2d 195, 200 (1981). Furthermore, "counsel's failure to request a line-up or failure to object to identification testimony is not per se ineffective assistance." Id.

Here, before the preliminary hearing, counsel made a request for a line-up, which the court granted in an Order dated June 24, 2010. Counsel, however, withdrew the request and the court vacated the June 24 Order. See Order dated August 3, 2010.

Defendant has neither alleged that trial counsel lacked a reasonable basis for failing to pursue the request for a line-up nor provided a witness certification from trial counsel offering a reason why the request for a line-up was withdrawn. Pa.R.Cr.P. 902(A)(15); 42 Pa.C.S. §9545(d).¹ In this case, though, a line-up was a risky proposition. There was no way to know whether the clerk

¹ The Court notes that Defendant has failed to provide witness certifications or attach documents or other evidence in support of his claims as required by Rule 902.

would have identified Defendant in a line-up. If the clerk had identified Defendant during a pre-trial line-up, it would have been devastating to Defendant's misidentification defense. Without a line-up, trial counsel could, and did, cross-examine the clerk about her inability to see portions of the perpetrator's face during the incident due to the hooded sweatshirt and the large sunglasses that the perpetrator was wearing, the suggestive circumstances under which the identifications were made (single photograph in the newspaper and Defendant being the only black person present at the preliminary hearing other than the assistant district attorney), and the lack of certainty in her preliminary hearing identification despite the suggestive circumstances. N.T., 3/5/2012, at 69-76, 79-82.

Defendant also cannot show prejudice, because it is sheer speculation what the results of a line-up would have been.

Defendant's claim that trial counsel was ineffective for failing to file a suppression motion to preclude the clerk's identification also lacks merit.² Relying on Commonwealth v. O'Bryant, 467 A.2d 14 (Pa. Super. 1983), the Pennsylvania Superior Court reiterated in Commonwealth v. Sanders, 42 A.3d 325, 330 (Pa. Super. 2012) that the purpose of a suppression order regarding exclusion of identification is to prevent improper police action. "Thus, where a defendant does not show that improper police conduct resulted in a suggestive identification, suppression is not warranted." Id. Defendant has not alleged any improper police conduct. Therefore, Defendant's arguments concerning the

² The court also notes that trial counsel filed a motion in limine to preclude the clerk from making an in-court identification of Defendant at trial. At the argument on the motion, however, when the court questioned what illegality existed that would taint any in-court identification and whether the motion was really a suppression issue, defense counsel withdrew the motion. N.T., 2/28/2012 at 3-5.

circumstances in which the clerk made her identifications and any alleged inconsistencies between her testimony at the preliminary hearing and her testimony at trial go to the weight of the evidence and not its admissibility.

Even if Defendant's claims could be construed as a challenge to the sufficiency or weight of the evidence based on the alleged suggestiveness of the clerk's identification and the purported inconsistencies in her testimony, as they were by PCRA counsel based on Defendant's letters, such claims are barred as previously litigated or waived.

To be eligible for relief under the PCRA, a defendant must plead and prove that the allegation of error has not been previously litigated or waived. 42 Pa.C.S. §9543(a)(3). An issue is previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. §9544(a)(2). An issue is waived if "the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. §9543(b).

Defendant challenged the weight of the identity evidence on this basis in his direct appeal. His claim was rejected by the Pennsylvania Superior Court. Commonwealth v. Graham, 1714 MDA 2012 at 7-10 (Pa. Super. 10/30/2103)(mem.).

Defendant did not specifically claim on appeal that the evidence was insufficient based on the circumstances surrounding the clerk's identification and inconsistencies in her testimony, but he could have. Therefore, this claim is waived. Moreover, although the sufficiency claim was directed toward the fingerprint evidence and

the fact that Shawn Neupauer was never called as a witness, the Superior Court specifically found that the combination of the fingerprint evidence, the clerk's identification and the additional circumstantial evidence linking Defendant to a vehicle seen near the store just after the robbery was sufficient to establish his identity as the perpetrator. 1714 MDA 2012 at 5. Therefore, the sufficiency claim lacks merit and counsel was not ineffective for failing to assert it.

Defendant also claims that trial counsel was ineffective for failing to file a motion to suppress with respect to the Commonwealth's fingerprint analysis. Again, the court cannot agree.

Suppression motions seek the exclusion of "evidence alleged to have been obtained in violation of the defendant's rights." Pa.R.Cr.P. 581(A). Neither the latent fingerprint taken from the cash drawer nor Defendant's fingerprints that were in the AFIS and IAFIS computer systems were obtained in violation of Defendant's rights. Therefore, trial counsel was not ineffective for failing to file a suppression motion.

Defendant asserts that the manner in which the Commonwealth's expert compared the fingerprints and reported his results, violated his due process rights and therefore could be the proper subject of a suppression motion. This claim also lacks merit.

Defendant's concerns dealt with the methodology employed by the Commonwealth's fingerprint expert and the recommendations for reporting the results of fingerprint analysis. If the methodology is no longer generally accepted in the relevant scientific community, the way to seek preclusion of such evidence is through a Frye hearing. Trial counsel tried to preclude Commonwealth's fingerprint expert by seeking a Frye

hearing, but the court denied counsel's motion. Counsel then challenged the decision on appeal, but the Superior Court affirmed the trial court's decision. 1714 MDA 2012 at 14-17.

Therefore, this evidence was not subject to preclusion.

The court gave Defendant all the process that he was due. The court permitted Defendant to challenge the fingerprint evidence through cross-examination of the Commonwealth's expert and to present evidence from his own expert. Furthermore, despite Defendant's assertions to the contrary, his expert witness never indicated that the partial thumbprint was not Defendant's. In fact, his expert testified that he was not asked to make such a comparison in this case and he wouldn't make such a comparison because he didn't have enough experience. N.T., 3/7/2012, at 150-151, 154.

Although not asserted in his pro se PCRA petition, several additional issues are addressed in PCRA counsel's "no merit" letters. These issues are: (1) the Commonwealth violated Defendant's rights by compelling Ann Folly, his former girlfriend, to testify against him at trial; (2) the trial court erred by sentencing inconsistent or outside the applicable guideline range; (3) trial counsel was ineffective in failing to explain the potential application of a mandatory sentence to his case; (4) the evidence presented at trial was insufficient to support a conviction; (5) trial counsel provided ineffective assistance of counsel by violating his right to a speedy trial; (6) trial counsel was ineffective for failing to call Stafford Ley, who could have been qualified as the custodian of records and who could have testified about Defendant's employment and employment records; (7) trial counsel was ineffective in failing to request the trial court to strike the testimony of Laura Robson because she was drinking on the night in question, her testimony was inconsistent and her

boyfriend, Shawn Neupauer, was never called as a witness; and (8) trial counsel was ineffective for failing to object to Agent Eric Delker's testimony about measurements he took at the convenience store.

Defendant asserts that the Commonwealth violated his rights by compelling Ann Folly, his former girlfriend, to testify against him at trial. This issue is frivolous. The Commonwealth is permitted to subpoena witnesses and compel them to testify. "The function of a trial is to determine the truth and, absent some affirmative right or privilege, every person's evidence is fair game." Commonwealth v. Pagan, 597 Pa. 69, 950 A.2d 270, 282 (2008). "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." 950 A.2d at 282-83, quoting United States v. Nixon, 418 U.S. 683, 709 (1974). Defendant has not identified any right or privilege that was violated by Ann Folly testifying against him at trial. Therefore, this issue lacks merit.

Defendant also claims the court erred by sentencing outside the guidelines. Again, the court cannot agree. Defendant had a prior conviction for a crime of violence, and the Commonwealth gave notice of its intent to seek a ten-year mandatory minimum sentence pursuant to 42 Pa.C.S. §9714. Therefore, the sentencing guidelines did not apply and the court was required to impose a ten-year minimum sentence for Defendant's robbery conviction. 42 Pa.C.S. §9714(e).

PCRA counsel questioned whether trial counsel made Defendant aware of the

potential application of the mandatory sentence or his potential sentencing exposure in the event of conviction. According to PCRA counsel's no merit letter, although he did not see the potential mandatory sentence specifically discussed in the correspondence between trial counsel and Defendant, he did find correspondence discussing potential greater sentences than Defendant actually received and correspondence from Defendant acknowledging the potential exposure to greater sentences. While it certainly would have been advisable for trial counsel to discuss any potential mandatory sentence in this case, Defendant cannot show that he was prejudiced by any failure to do so. He was advised of potential sentencing exposure greater than the mandatory sentence for his robbery conviction and greater than the aggregate sentence imposed by the court. If Defendant would not plead guilty when faced with potential greater sentencing exposure, knowledge of the ten-year mandatory minimum for robbery likely would not have altered his decision to proceed to trial. In fact, Defendant has not submitted any affidavit or witness certification claiming that if he had known of the ten-year mandatory minimum sentence he would have entered a guilty plea instead of proceeding to trial and, despite the jury's verdict, Defendant still proclaims his innocence.

Defendant also contends that his speedy trial rights were violated. The court cannot agree. A review of the file shows that the vast majority of the delays in this case were attributable to Defendant or his attorney. The defense requested and received an extension to file an omnibus pretrial motion. There were defense delays related to the litigation of the omnibus pretrial motion and a motion for funds for an expert. There also were seven defense continuance requests that were granted. Without determining who was responsible for the numerous continuances of the preliminary hearing, at a minimum the time from October 19,

2010 through December 6, 2011 and from January 10, 2012 to January 31, 2012 is excludable due to defense delays. When this time is excluded as required by Rule 600 of the Pennsylvania Rules of Criminal Procedure, less than 365 days elapsed between the filing of the criminal complaint on May 3, 2010 and Defendant's jury selection on February 14, 2012.³

Defendant also avers that trial counsel was ineffective for failing to call Stafford Ley as a witness at trial. According to Defendant, Mr. Ley could have been qualified as the custodian of records and could have testified about Defendant's employment and employment records.⁴ Trial counsel wanted to call Defendant's employer as a witness at trial to show that Defendant did not have a motive to commit the robbery. The Commonwealth filed a motion in limine to preclude this evidence, which the court granted. Trial counsel litigated this issue on appeal, but the Pennsylvania Superior Court found that this evidence was irrelevant and inadmissible. 1714 MDA 2012, at 10-12. Therefore, this issue was previously litigated and cannot be asserted in a PCRA petition. 42 Pa.C.S. §§9543(a)(3), 9544(a).

Even if Mr. Ley could provide relevant testimony on a topic other than lack of motive so that this issue would not be considered previously litigated, Defendant has not alleged sufficient facts to establish an ineffective assistance of counsel claim for failure to call a witness. Where a claim is made of counsel's ineffectiveness for failing to call a witness, a defendant must show that the witness existed and was available; counsel was

³ According to the court's calculations, at most there were 220 days between the filing of the complaint and jury selection, which is considered the commencement of trial for Rule 600 purposes.

⁴ Defendant has failed to submit a witness certification signed by Mr. Ley in violation of Pa.R.Cr.P. 902(A)(15) and 42 Pa.C.S. §9545(d).

aware of, or had a duty to know of the witness; the witness was willing and able to appear and testify on the defendant's behalf; and the proposed testimony was necessary to avoid prejudice to the defendant. Commonwealth v. Chmiel, 612 Pa. 333, 30 A.3d 1111, 1143 (2011); Commonwealth v. Wayne, 553 Pa. 614, 720 A.2d 456, 470 (1998). Defendant has failed to allege any facts to show that Mr. Ley was able to appear at Defendant's trial, that he had any relevant and admissible testimony, or that with Mr. Ley's testimony there would be a reasonable probability that the outcome of the trial would have been different.

Defendant also contends trial counsel was ineffective for failing to have Laura Robson's testimony stricken because she was drinking on the night of the robbery, her testimony was inconsistent, and her boyfriend, Shawn Neupauer, never testified. None of the complaints are a basis to have Ms. Robson's testimony stricken.

The court never should have permitted trial counsel to introduce any evidence that Ms. Robson had been drinking, because there was insufficient evidence to prove that she was intoxicated. In the Interest of M.M., 547 Pa. 237, 690 A.2d 175, 178 (1997)(“While evidence of intoxication may be admissible to challenge a witness' ability to perceive the events to which he is testifying, evidence that the witness was simply drinking prior to the observations is not); Commonwealth v. McGuire, 302 Pa. Super. 226, 448 A.2d 609, 613 (1982). The court acknowledged its error during a sidebar conference with the attorneys. N.T., 3/7/2012, at 2. Moreover, even if Ms. Robson had been intoxicated, such evidence would only be admissible to challenge her credibility; it would not render her testimony inadmissible.

Defendant's complaints regarding Shawn Neupauer's failure to testify at trial

were raised and rejected on appeal. 1714 MDA 2012, at 6-7. As the Superior Court noted, there was nothing to indicate that Mr. Neupauer would have testified contrary to Ms. Robson's account. Moreover, even if Mr. Neupauer's testimony would have differed from Ms. Robson's, it would merely call into question the weight of Ms. Robson's testimony; it would not affect the admissibility of her testimony.

Similarly, any alleged inconsistencies in Ms. Robson's testimony only affect the weight of her testimony, not its admissibility.

Finally, Defendant contends trial counsel was ineffective for failing to object to Agent Eric Delker's testimony about measurements he took at the convenience store. Trial counsel did challenge the admissibility of Agent Delker's testimony, but not on the basis of the timeliness of the Commonwealth's disclosure. 1714 MDA 2012, at 12-14. Since such an issue could have been raised at trial and on appeal, this issue was waived. Trial counsel, however, was not ineffective for failing to raise this issue, because ultimately it lacks merit. The Commonwealth is permitted to continue to investigate a case up to and during trial, but it has a continuing duty to disclose any discoverable information. See Pa.R.Cr.P. 573(D). Agent Delker took the measurements between the first and second day of trial and the Commonwealth notified the defense before the trial resumed. Therefore, even if trial counsel had objected to the timeliness of the Commonwealth's disclosure, the court would have overruled the objection and permitted Agent Delker's testimony. At most, the court would have given the defense the opportunity to respond to Agent Delker's testimony by conducting its own measurements.

Since the court agrees that Defendant's PCRA petition lacks merit, the court

will grant PCRA counsel's motion to withdraw as counsel in this matter.

ORDER

AND NOW, this 14th day of July 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 this 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 no response is received within that time period, the Court will enter an order dismissing the petition.

The court also grants PCRA counsel's motion to withdraw. Defendant may represent himself or hire private counsel, but the court will not appoint an attorney to represent him unless Defendant's response to this proposed dismissal discloses a meritorious claim which would require an evidentiary hearing.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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Work file