IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	
v.	**:**	**No. 1185-CR-2005**
	:	**CRIMINAL DIVISION**
HAROLD HOSKINS,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

On January 13, 2014, Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Motion to Dismiss pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his Petition should be dismissed.

Background

On July 8, 2005, Harold Hoskins (Defendant) pointed a firearm at two individuals and pulled the trigger twice, but no shots were fired. The facts were summarized by the Superior Court and this Court as follows.

> On July 8, 2005, Appellant was drinking and playing poker at the home of James Drummond and his paramour, Linda Bower, along with Donnie Evans. Appellant "left the game after he became annoyed when he lost all of his money and no one would give him any more." He returned to the residence, waving a gun and stating it "was not an 'f---ing joke.'" Appellant pointed the gun at Evans' head and pulled the trigger twice; no shots were "fired, but the sound of the gun mechanism clicks [were] heard." Bower later testified that Appellant took a bullet from the .38 revolved and laid it on the table, then immediately put the bullet back into the gun, "and pulled the trigger while Evans and Drummond were trying to take it from him." Drummond later testified that Appellant pulled the trigger a third time while the gun was pointed at his, Drummond's, stomach. Appellant pulled the trigger a "fourth time in an unknown direction," Evans and Drummond wrestled the gun away, and police arrived.

Commonwealth v. Hoskins, No. 1438 MDA 2011 (Pa. Super. Filed April 25, 2012) (citations omitted).

On February 5, 2007, following a jury trial before the Honorable William S. Kieser,[1] the Defendant was found guilty of two counts of Robbery, Possession of a Firearm, Firearms not to be Carried Without a License, Possessing Instruments of Crime, Possession of a Controlled Substance, Terroristic Threats and two counts of Attempted Homicide. On April 7, 2011, this Court imposed an aggregate sentence of twenty-seven (27) to sixty (60) years in a State Correctional Institution. The Defendant filed an appeal to the Superior Court of Pennsylvania alleging that there was insufficient evidence to support a conviction of attempted homicide with respect to James Drummond (Drummond). The Defendant's sentence was affirmed by the Superior Court on April 25, 2012.

On November 21, 2012, the Defendant filed a *pro se* Post Conviction Relief Act (PCRA) Petition. The Defendant alleged after discovered evidence; specifically that Donnie Evans and James Drummond had now changed their testimony that the Defendant pointed a gun at them and pulled the trigger. Jerry Lynch, Esquire was appointed to represent the Defendant for the PCRA Petition. Following a conference, a PCRA Hearing was scheduled to address the newly discovered evidence. On November 19, 2013, Attorney Lynch requested a continuance and the Hearing was rescheduled. On December 5, 2013, the Defendant withdrew his previous issue of after discovered evidence and alleged a new issue for the first time.[2] The Defendant contends that he was in possession of a .38 caliber handgun and that his trial counsel was ineffective for failing to cross-examine police firearms instructor, James Douglas (Douglas), when he testified

[1] Judge Kieser retired December 31, 2009.
[2] Attorney Lynch was unable to obtain the testimony alleged to be after discovered evidence.

about a .32 caliber handgun. As this was the first time this issue had been raised, this Court ordered Attorney Lynch to either amend the PCRA Petition or file a Turner/Finley letter.

On January 13, 2014, Attorney Lynch filed a Petition to Withdraw as Counsel and a Memorandum Pursuant to Turner/Finley. After an independent review of the record and an additional PCRA conference, the Court agrees with Attorney Lynch that Defendant failed to raise any meritorious issues in his PCRA Petition.

Whether trial counsel was ineffective for failing to cross-examine a firearms instructor on testing a firearm that was allegedly not in possession of the Defendant

The Defendant alleges that trial counsel should have known that the firearm testified by the firearms instructor was not the firearm in possession by the Defendant at the time of the alleged incident. To make a claim for ineffective assistance of counsel, a defendant must prove the following: (1) an underlying claim of arguable merit; (2) no reasonable basis for counsel's act or omission; and (3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007) (citing Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper, 941 A.2d at 664 (citing Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)). Further, Counsel is presumed to have been effective. Id.

The Defendant's claim is without merit and inconsistent with his own testimony at trial. The Defendant's testimony at trial was that he was never in possession of any firearm:

> PETCAVAGE: Okay. You wanted more than the –
>
> DEFENDANT: Exactly, than just that little bag. I wanted more. That little bag wasn't enough. Then we started arguing. So he looked – he looked over at Donnie, and Donnie looked over at the other guy. They didn't want me interrupting the card game. And then one thing led to another one. And then I hit him.

PETCAVAGE: Who hit who?

DEFENDANT: I hit James.

. . .

DEFENDANT: And then it was a – you know, it was just like a brawl. And then he was like, you know, man, you messing up my card game. You know, you F'in up the money, you know. Get your drugs and, you know, yourself on out of here. And – but at that time, I was mad. And I was just, you know, swinging. And I was fighting. And we was just fighting. A brawl broke out. You know, just like that, a brawl broke out; and once the brawl broke out, a gun hits the floor.

. . .

DEFENDANT: Now, where the gun came from, I don't know.

PETCAVAGE: Okay. Lets back up a little bit. When you came into the house the second time when you came back, were you in possession of a gun?

DEFENDANT: No, I wasn't. I don't own no guns.

PETCAVAGE: Okay. And from what you've just testified – did you at any time walk into the dining room and pull a gun out?

DEFENDANT: No, I didn't.

. . .

DEFENDANT: That time, the whole card game, you know, the table and everything went up, you know, and – you know, a roll, you know, just like boom, boom, like, you know, because thing was, you know, bumping.

PETCAVAGE: Sure.

DEFENDANT: And then all I seen – somebody said gun. And I looked down on the floor, there was the gun, which it had to come from under the table.

N.T., February 2, 2007, p. 234-36. The Defendant is contending that he committed perjury at trial when he stated that he never had a firearm and that he did in fact have a firearm, but just not the one in possession of police.

There are many issues with the Defendant's contention, however, there is no allegation that trial counsel was aware of the firearm or that he should have been aware. In fact, if trial counsel knew that the firearm was wrong he would not have been permitted to allow the Defendant to testify at the trial, as he would have known the Defendant was committing perjury. The Defendant has not alleged or established that the wrong firearm was within his counsel's knowledge; especially since it conflicted with his own testimony at trial. See Commonwealth v. Duffey, 889 A.2d 56 (Pa. 2011).

Additionally, the Defendant has not established that the police collected the wrong firearm and that the firearm he used was inoperable. The Defendant contends that his firearm was a .38 and that Douglas testified regarding a .32. Drummond testified that he was mistaken when he believed the Defendant's firearm was a .38 and that he did not remember the gun. N.T., February 2, 2007, p.132, 147. Drummond testified that he had spent time in the hospital and did not remember the incident. Id. at 82. Donnie Evans, however, testified that Drummond was the last person to have the firearm. Further, Officer Eric Delker (Delker) of the Williamsport Bureau of Police testified that Drummond pointed to a coat after the incident to where the gun was located. Id. at 181. Delker testified that exhibit 1, which was the .32 tested by Douglas, was the firearm retrieved from the coat. Id. at 182. The Commonwealth established that the firearm collected was the one identified by witnesses and that no other firearm was collected.

Finally, the Defendant's issue is without merit because he also was not prejudiced. The record is clear that trial counsel generally attempted to imply that the firearm belonged to another black male in the residence. The Defendant specifically alleges that Douglas, the firearm instructor, should have been cross-examined on whether the firearm was the correct firearm.

Douglas, however, received the firearm from other officers and was never at the scene of the incident.

> PETCAVAGE: Officer Douglas, you had no involvement in this investigation other than with respect to what you've now testified to in analyzing the gun, is that correct?
>
> DOUGLAS: That is correct. And entering the cocaine into the envelope.
>
> PETCAVAGE: Okay. And you got the gun that you've now testified to that you tested from whom?
>
> DOUGLAS: On July 8th, it was given to me by Officer Roy.
>
> PETCAVAGE: Okay. So the only thing you could testify to was that you were given a gun by Officer Roy to test?
>
> DOUGLAS: That is correct.
>
> PETCAVAGE: Okay. So you cannot in any way identify where that gun came from or whose gun it was, can you?
>
> DOUGLAS: That is correct.

Id. at 174-75. Douglas could not have been cross-examined regarding whether the correct firearm was collected. Based on the record, this Court finds that the Defendant's PCRA Petition is without merit.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The 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.

ORDER

AND NOW, this _____ day of March, 2014, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed January 13, 2014, is hereby GRANTED and Jerry Lynch, Esq. may withdraw his appearance in the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

xc: DA (KO)
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