

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH | : No. CR-375-2010 |
| | : |
| vs. | : CRIMINAL DIVISION |
| | : |
| JHALIL K. MOORE, | : Notice of Intent to Dismiss PCRA |
| Defendant | : Petition and Order Granting |
| | : Counsel's Petition to Withdraw |
| | : From Representation |

OPINION AND ORDER

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

On January 15, 2010, D.W. was visiting a friend and the friend's residence in Williamsport. Where there, she was drinking alcohol and became intoxicated. Several other individuals also were at the residence, including Moore, who also had been drinking that night.

According to D.W., she remembered being in the bedroom, but she did not remember how she got there. She denied being passed out, but she was in and out of awareness. She realized that Moore was on top of her having sex with her. She could not breathe, could not push him off of her and was getting scared. She started calling for her friend, apparently "passed out again" and then woke up when the light went on in the room. She could not remember if she gave permission to Moore or anyone else to have sex with her that night.

D.W. was upset and crying. Moore and several other boys quickly left the residence.

The police charged Moore with rape by forcible compulsion,¹ rape of an unconscious or unaware person,² and sexual assault.³

On January 28, 2011, following a jury trial, Moore was found guilty of rape of an unconscious or unaware person, and sexual assault.

Subsequent to the jury's verdict, but prior to sentencing, Moore filed a motion for a new trial based on after-discovered evidence, which ultimately was denied on September 8, 2011.

On October 31, 2011, the court sentenced Moore to undergo incarceration in a state correctional institution for an indeterminate period of time, the minimum of which was three (3) years and the maximum of which was six (6) years.

Moore filed post sentence motions which were denied. He then filed a timely appeal to the Pennsylvania Superior Court, which affirmed Moore's judgment of sentence on October 3, 2012. The Pennsylvania Supreme Court denied Moore's petition for allowance of appeal on April 9, 2013.

Moore filed a timely Post Conviction Relief Act (PCRA) petition. The court appointed counsel to represent Moore and gave counsel an opportunity to file an amended PCRA petition or a no merit letter pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1998) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). Counsel filed a Turner/Finley no merit letter and a petition to withdraw from representation.

After an independent review of the record, the court agrees with counsel's no merit letter.

¹ 18 Pa.C.S.A. §3121(a)(1).

² 18 Pa.C.S.A. §3121 (a)(3).

In his petition Moore asserts that trial counsel was ineffective for failing to mention the statement D.W.'s mother made to Moore a few months before trial to the effect that D.W. told her the sexual intercourse between D.W. and Moore was consensual and she (D.W.'s mother) would drop the charges against Moore if he told her what happened between D.W. and the other two boys that were there. Moore, however, did not include a witness certification for himself or D.W.'s mother. Instead, he indicated that he intended to call the following individuals as witnesses: (1) De'Andre Morrison, who would testify that he was in the room before the intercourse occurred, D.W. touched Moore's private parts and consented to sexual intercourse with Moore, and he (Morrison) was the one who had sexual contact with D.W. without her consent; (2) Kadeem Alford, who would testify that he was present before and while the intercourse was occurring and that D.W. consented to and was conscious during the intercourse; and (3) Sharrief Thompson, who would testify that from what he observed the sexual intercourse was consensual and that D.W.'s mother pressured her to say that Moore raped her. Moore does not state that any of these individuals were present for or a party to the alleged exchange between D.W.'s mother and Moore.

In order to prevail on an ineffective assistance of counsel claim, a petitioner must plead and prove that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his course of action; and (3) there is a reasonable probability that, but for counsel's deficient performance, the outcome would have been different. Commonwealth v. Hanible, 30 A.3d 426, 439 (Pa. 2011); Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999). If any prong of the test for ineffectiveness is not satisfied, the claim will be rejected.

³ 18 Pa.C.S.A §3124.1.

Commonwealth v. Sneed, 45 A.3d 1096, 1106 (Pa. 2012); Commonwealth v. Busanet, 817 A.2d 1060, 1066 (Pa. 2002).

Moore is not entitled to relief on this claim. Defense counsel could not “mention” this conversation during closing arguments because none of the witnesses at trial testified regarding the alleged exchange between D.W.’s mother and Moore. See Commonwealth v. Bishop, 413 A.2d 1031, 1033-34 (Pa. 1980)(“Any representation of fact...which is made by [counsel] in the argument must ...be based solely upon those matters of fact of which evidence has already been introduced....”); Commonwealth v. Adkins, 364 A.2d 287 (Pa. 1976)(defendant awarded new trial because prejudicial remarks made by prosecutor were not based on facts in evidence). Furthermore, Moore has not identified any witness who was a party to that conversation, submitted a witness certification for any such witness, or even alleged that trial counsel was aware of the statements allegedly made by D.W.’s mother. Although Moore may have been able to testify about the conversation with D.W.’s mother, he knowingly, intelligently and voluntarily waived his right to testify at trial. N.T., January 27-28, 2011, at 263-266.

Even if the court would construe Moore’s petition as raising a claim of ineffective assistance of counsel for failure to call a witness at trial, Moore would not be entitled to relief. Where a claim is made of counsel’s ineffectiveness for failing to call a witness, the petitioner must show 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 absence of the witness’ testimony prejudiced petitioner and denied him a fair trial. Commonwealth v. Chmiel, 30 A.3d 1111, 1143 (Pa. 2011); Commonwealth v. Luster, 71

A.3d 1019, 1047 (Pa. Super. 2013). Failure to call a witness is not per se ineffective assistance of counsel, because such a decision implicates matters of trial strategy.

Commonwealth v. Auker, 681 A.2d 1305, 1319 (Pa. 1996). It is the petitioner's burden to demonstrate trial counsel had no reasonable basis for failing to call a particular witness.

Commonwealth v. Washington, 927 A.2d 586, 599 (Pa. 2007).

Moore has not pleaded any facts to show that he could meet this standard.

There is nothing in the petition to show that counsel was aware that D.W.'s mother made such a statement, that she was available to testify at trial, or that she would have been willing to testify for the defense. If the victim was being pressured by her mother into making false allegations against him as Moore claims, it is unlikely that she would have been willing to take the stand as a defense witness and admit such. She would likely be a hostile witness, and it is doubtful that a reasonable defense attorney would take the risk of calling her as a witness.⁴ The court also notes that defense counsel called other witnesses who testified that D.W. made statements that she did not want to go through with the charges but her mother was making her. N.T., January 27-28, 2011, at 145, 242-43. Despite that testimony, the jury convicted Moore. Therefore, under the facts and circumstances of this case, the court does not believe Moore could satisfy the requirements for an ineffective assistance of counsel claim with respect to failing to call D.W.'s mother as a witness.

Counsel also was not ineffective for failing to call the witnesses listed in Moore's petition, because they testified at trial. Kadeem Alford testified that D.W. was "coming at" Moore like she wanted him to have sexual intercourse and when Alford asked

⁴ The court also notes that the victim testified at the after-discovered evidence hearing that she was not pressured by her mother or her grandmother and the statements made in the letter were not true. N.T., July 1,

her if the case was still going on D.W. said yes but she really didn't want to do it, her mom was making her. N.T., January 27-28, 2011 at 123, 145. Sharrief Thompson also testified that D.W. said she let Moore have intercourse with her and she didn't want to go through with this, her mom was making her. Id. at 242-43.

De'Andre Morrison testified that he, Moore and Alford were in a bedroom, laying down and listening to music when D.W. came into the room. She was dancing and jumping around saying, "wake up, there is a party." Id. at 213-14. She started touching Moore's private parts. Id. at 214. Then he heard Moore say to D.W. "you gonna let me hit it," which meant have sex. D.W. said "yeah" and they started to have intercourse. Id. at 214-15. D.W. was awake, moving around and moaning and stuff. Id. at 215. She did not do or say anything that made Morrison think that the intercourse was not consensual. Id. at 216.

Since trial counsel called these individuals as witnesses and they testified to the information Moore listed in his witness certifications, any claim that trial counsel was ineffective with respect to these witnesses is meritless.

In light of the foregoing, the court will grant PCRA counsel's petition to withdraw from representation.

ORDER

AND NOW, this ____ day of December 2014, upon review of the record and the lack of any witness certifications related to the statement allegedly made by D.W.'s mother, the court is satisfied that there are no genuine issues concerning any material fact.

As no purpose would be served by conducting any further hearing, none will be scheduled and the parties are hereby notified of this Court's intention to dismiss the petition. Moore 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 counsel's petition to withdraw from representation. Moore has the right to represent himself or to hire a private attorney to pursue his issues. The court, however, will not appoint another attorney to represent Moore.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Julian Allatt, Esquire
Jhalil Moore, KM0095
SCI Coal Township, 1 Kelley Drive, Coal Township PA 17866
Work File