

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA	:	No. CR-1002-2008
	:	
v.	:	
	:	CRIMINAL DIVISION
LARRY EUGENE RIGGLE,	:	
Defendant	:	PCRA

**OPINION AND ORDER**

On March 17, 2014, Counsel for Petitioner (PCRA Counsel) filed a Petition to Withdraw from Representation and a Turner / Finley “No Merit Letter” 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 Petitioner has failed to raise any meritorious issues in his Petition for Post-Conviction Collateral Relief (PCRA Petition).

**I. Background**

On April 28, 2009, a jury found Petitioner guilty of one count of aggravated indecent assault,<sup>1</sup> one count of corruption of a minor,<sup>2</sup> two counts of involuntary deviate sexual intercourse,<sup>3</sup> and three counts of indecent assault.<sup>4</sup> On December 18, 2012, Petitioner filed a timely *pro se* PCRA petition. In the PCRA Petition, Petitioner argued that his trial counsel (Trial Counsel) was ineffective. Counsel for Petitioner was appointed.

**II. Discussion**

A petitioner can properly argue ineffective assistance of counsel in a PCRA petition. 42 Pa. C.S. § 9543(a)(2)(ii). As PCRA Counsel notes, a petitioner is entitled to relief pursuant to

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<sup>1</sup> 18 Pa. C.S.A. § 3125(a)(8)

<sup>2</sup> 18 Pa. C.S.A. § 6301(a)(1)

<sup>3</sup> 18 Pa. C.S.A. § 3123(a)(7)

<sup>4</sup> 18 Pa. C.S.A. § 3126(a)(1)

the Post Conviction Relief Act for ineffective assistance of counsel only if he or she can show (1) that the argument has merit, (2) that trial counsel had no reasonable basis for course of action, and (3) reasonable probability that but for the act or omission being challenged, the outcome would have been different. Commonwealth v. Kimball, 724 A.2d. 326, 333 (Pa. 1999). If a petitioner cannot show all three prongs of the aforementioned test, the petitioner's claim for relief will be rejected. Commonwealth v. Busanet, 817 A.2d. 1060, 1066 (Pa. 2002).

*A. Petitioner Fails to Show that Trial Counsel was Ineffective for Not Calling Motive Witnesses*

As PCRA Counsel notes, when a petitioner argues that trial counsel was ineffective for failing to call a witness, the petitioner must demonstrate that "the absence of the testimony of the witness was so prejudicial as to have denied the [petitioner] a fair trial." Commonwealth v. Washington, 927 A.2d 586, 599 (Pa. 2007). It is the petitioner's burden to demonstrate that trial counsel had no reasonable basis for declining to call a particular witness. Id.

In Commonwealth v. Matias, there was an eyewitness to the defendant's alleged molestation of the victim. 63 A.3d 807, 811 (Pa. Super. 2013). Trial counsel for the defendant failed to call the eyewitness even though the eyewitness's testimony would have contradicted the alleged victim's testimony. Id. The court found that there was no reasonable basis for the trial counsel's failure to call the eyewitness, and the absence of the eyewitness's testimony was so prejudicial as to deny the defendant a fair trial. Id. at 811-12.

Here, Petitioner argued that Trial Counsel should have called certain people to testify because their testimonies would have shown that the alleged victim, M.B., had motive to lie. Unlike the witness in Matias, Petitioner's desired witnesses were not present during the events

described by M.B. at trial. Moreover, unlike the witness's testimony in Matias, the testimonies of the Petitioner's desired witnesses would not have contradicted M.B.'s testimony.

Trial Counsel could have adequately defended Petitioner without addressing the alleged motive for M.B. to lie. Even so, Trial Counsel offered a motive for M.B. to lie. Trial Counsel argued that M.B. created a story involving Petitioner as an excuse for getting in trouble. Because Trial Counsel offered a motive for M.B. to lie, the absence of the testimony of the motive witnesses was not so prejudicial as to have denied Petitioner a fair trial.

Additionally, Trial Counsel's actions did not demonstrate ineffectiveness when applied to the second or third prong of the test. As noted above, it is the petitioner's burden to demonstrate that trial counsel had no reasonable basis for the course of action. Washington, 927 A.2d 599. Petitioner has not met this burden because it is reasonable to believe that the motive that Trial Counsel offered was stronger than the motive that Petitioner argued should have been offered. Furthermore, there is no reasonable probability that but for the omission of the testimony, the outcome would have been different. Trial Counsel offered a motive for M.B. to lie. Even though the jurors were aware of this motive, they had no reasonable doubt that Petitioner committed the offenses.

*B. Petitioner Fails to Show that Trial Counsel was Ineffective for Not Objecting during the Assistant District Attorney's Closing Argument*

Petitioner argued that Trial Counsel was ineffective because Trial Counsel did not object during the Assistant District Attorney's (Prosecutor's) closing argument. "In the context of prosecutorial misconduct during closing arguments, [a petitioner] must demonstrate that there is merit to the contention that trial counsel should have objected or requested a cautionary instruction due to the prosecutor's misconduct. [A petitioner] can only do so if he can show that

the prosecutor was, in fact, engaging in misconduct. Otherwise, there is no merit in the contention of trial counsel ineffectiveness.” Commonwealth v. Chmiel, 889 A.2d 501, 543 (Pa. 2005).

“In determining whether the prosecutor engaged in misconduct, [a court] must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel’s conduct. It is well settled that the prosecutor may fairly respond to points made in the defense closing.” Id. “A prosecutor’s contention that a defendant lied is neither unfair nor prejudicial when the outcome of the case is controlled by credibility, the accounts of the victim and the defendant conflict, and defense counsel suggests that the victim is fabricating.” Commonwealth v. Judy, 978 A.2d 1015, 1024 (Pa. Super. 2009).

Here, Prosecutor did not engage in misconduct. As noted by PCRA Counsel, Trial Counsel argued that M.B. lied. Therefore, Prosecutor’s contention that Petitioner lied is neither unfair nor prejudicial, and Prosecutor did not engage in misconduct. Accordingly, there is no merit to the contention that Trial Counsel should have objected. Because there is no merit to the contention, Petitioner’s argument fails the first prong of the test in the first paragraph of the Discussion.

*C. Petitioner Fails to Show that Trial Counsel was Ineffective for Not Rebutting Prosecutor’s Expert Witness who Testified that M.B. had Central Auditory Processing Disorder (CAPD)*

Petitioner argued that Trial Counsel was ineffective because Trial Counsel did not rebut Prosecutor’s expert witness who testified that M.B. had CAPD. Petitioner’s argument again fails to satisfy the second and third prong of the ineffectiveness standard. Petitioner has failed to show that Trial Counsel had no reasonable basis for declining to rebut the testimony of

Prosecutor's expert witness. As PCRA Counsel notes, Trial Counsel could have reasonably believed that such a rebuttal would have distracted the jury from other arguments deemed stronger. As PCRA Counsel wrote, "[T]he victim's ability to process, recollect and recount incidents [described during trial] did not turn on [whether he had CAPD]." Additionally, because rebuttal evidence would not have changed the content of M.B.'s testimony, Petitioner has failed to show reasonable probability that but for the omission of rebuttal testimony, the trial's outcome would have been different.

*D. Petitioner Fails to Show that Trial Counsel was Ineffective for Not Introducing M.B.'s Medical Record Showing that the M.B. was Uninjured*

Petitioner argued that Trial Counsel was ineffective because Trial Counsel did not introduce M.B.'s medical record showing that M.B. was uninjured. Petitioner's argument fails. First, the argument has no merit as an injury to M.B. was not required for Petitioner to have committed the offenses. Injury is not an element of the offenses of which Petitioner was convicted. *See* 18 Pa. C.S. § 3123(a)(7); § 3125(a)(8); § 3126(a)(1); § 6301(a)(1). Second, Petitioner failed to show that Trial Counsel did not have a reasonable basis for declining to introduce M.B.'s medical record. Third, there is no reasonable probability that but for the omission of M.B.'s medical record, the trial's outcome would have been different. As noted above, injury is not an element of the offenses of which Petitioner was convicted. Additionally, as PCRA Counsel notes, the introduction of M.B.'s medical record by Trial Counsel would not have weakened Prosecutor's arguments.

### **III. Conclusion**

The Court finds no basis on which to grant Petitioner's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting further hearing. As such, no further

hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified that this Court proposes to deny Petitioner's PCRA petition.

Petitioner may respond to the proposed dismissal within twenty (20) days. If no response is received within twenty (20) days, the Court will enter an order dismissing the PCRA Petition.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of April, 2014, it is hereby ORDERED and DIRECTED as follows:

1. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), Petitioner is hereby notified that the Court intends to dismiss his PCRA petition unless he files an objection to the intended dismissal within twenty (20) days of this order's date.
2. The Petition to Withdraw from Representation, filed March 17, 2014, is hereby GRANTED, and Julian G. Allatt, Esq. may withdraw from the above captioned matter.

By the Court,

Nancy L. Butts, President Judge

cc: DA  
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