

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	CR-394-2010
v.	:	OTN:
	:	CRIMINAL DIVISION
ANTWINE JACKSON,	:	PCRA HEARING

ORDER

This matter is currently before the Court on a remand from the Pennsylvania Superior Court for a PCRA hearing on Antwine Jackson's claim that trial counsel was ineffective by not objecting to testimony about defendant's prior alleged drug activity. That claim was raised by an amended petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546 on September 7, 2012 and denied without a hearing on January 25, 2013.¹ Pursuant to the remand, an evidentiary hearing was held. After a hearing and upon consideration of the testimony, arguments and case-law, and for the reasons provided below, the Court DENIES the petition for relief.

I. Factual and Procedural Background

Procedural Background

On March 2, 2010, a criminal complaint was filed charging the defendant with two counts of possession with intent to deliver, two counts of criminal use of a communication facility and criminal conspiracy to deliver a controlled substance on January 21 and January 28, 2010. On October 13, 2010, following trial, a jury convicted the defendant of all charges. On December 15, 2010, the Court sentenced Defendant to an aggregate sentence of three (3) to six (6) years. After filing post-sentence motions and a subsequent direct appeal, our Superior Court

¹ Defendant filed a pro se PCRA petition on February 21, 2012. After the transcripts were lodged of record, appointed counsel filed an Amended PCRA petition on September 7, 2012. The PCRA petition was denied without a hearing on the grounds that the ineffective assistance of counsel claims lacked merit. The Superior Court affirmed the denial of two of Mr. Jackson's claims for ineffective assistance of counsel, concluding those claims were meritless and therefore did not require a PCRA hearing.

affirmed this Court's sentence on November 22, 2011. *See, Commonwealth v. Jackson*, 38 A.3d 929 (Pa. Super. 2011).

On February 21, 2012, Defendant filed a pro se PRCA petition. His attorney filed an amended PCRA petition on September 7, 2012, raising three claims for ineffective assistance of counsel and ineffective assistance of counsel stemming from the cumulative effect of those errors. The PCRA Court denied relief on all claims on January 25, 2013 without a hearing on the grounds that they lacked merit. Defendant filed an appeal to the Superior Court on January 30, 2013. On October 22, 2013, the Superior Court affirmed the denial of two of Mr. Jackson's claims for ineffective assistance of counsel, concluding those claims were meritless and therefore did not require a PCRA hearing. In addition, the Superior Court also concluded that the theory of cumulative prejudice was inapplicable because the court rejected two of the ineffective assistance claims. However, the Superior Court remanded the matter for a hearing on defendant's ineffective assistance of counsel claim that was based upon trial counsel's failure to object to testimony about defendant's prior drug activity. Pursuant to the remand, an evidentiary hearing was held on that claim on May 13, 2014.

Factual Background Underlying the Charges

The factual background underlying the charges was developed at the jury trial on October 13, 2010. Agent Gary Heckman testified about working with a confidential informant named Cedric Williams in setting up controlled purchases on January 21 and 28, 2010 involving the defendant, Mr. Jackson. In January 2010, Mr. Williams contacted the Drug Task Force Office to assist law enforcement and agreed to work as a confidential informant for Agent Heckman. Notes of Testimony (N.T.) 10/13/10, at 13-14. Mr. Williams had a crack cocaine problem wanted help from the Commonwealth in paying off his debt to Mr. Jackson by assisting law

enforcement with controlled buys targeting Mr. Jackson and others. N.T. 10/13/10, at 14. Mr. Williams identified Mr. Jackson as someone who Williams had purchased drugs from in the past and identified residences where suspected drug activity occurred.

Agent Heckman requested that Mr. Williams assist him as a confidential informant to make a controlled buy from Mr. Jackson on January 21, 2010. In Agent Heckman's presence, Mr. Williams contacted Mr. Jackson and arranged a meeting. Agent Heckman and others followed Mr. Williams to the designated site where Agent Heckman saw Mr. Jackson approach Mr. Williams' vehicle. Agent Heckman observed Mr. Jackson get into the passenger seat of Mr. Williams' vehicle and ride around the block. Agent Heckman maintained surveillance on the vehicle as it went around the block. Afterwards, Mr. Williams contacted Agent Heckman and stated that the deal was good and turned over one clear baggy containing crack cocaine. N.T. 10/13/10, at 16-24.

On January 28, 2010, Agent Heckman had Mr. Williams contact Mr. Jackson again to set up another purchase. Agent Heckman and others followed Mr. Williams to a designated location. This time another individual approached the vehicle and made the transaction with Mr. Williams.² That person was taken into custody and had the "buy money" on him. Mr. Jackson was charged with conspiracy related to the January 28, 2010 buy arising out of the telephone contact that had been made. N.T. 10/13/10, at 24-35.

Testimony Regarding Alleged Prior Drug Activity

At the jury trial, both Agent Heckman and Mr. Williams testified about Mr. Jackson's previously selling drugs to Mr. Williams and the locations where drug deals took place in the context of explaining how Mr. Williams became an informant and why Mr. Jackson was targeted

² That individual was William Colon. Mr. Colon was charged as a co-conspirator and entered a guilty plea in this case.

for the two controlled buys that were the subject of this case. N.T. 10/13/10, 13-16. Agent Heckman testified about prior purchases of crack cocaine from Mr. Jackson in the context of explaining how Mr. Williams had his cell phone number. N.T. 10/13/10, at 18.

Trial Counsel Strategy

At the PCRA hearing, Trial Counsel testified that she did not object to the testimony about the prior history because she wanted the jury to hear the testimony as part of her trial strategy. Trial Counsel has been an assistant public defender since 2007. Trial Counsel believed the testimony of these witnesses undermined Cedric Williams's credibility because it portrayed Mr. Williams as an addict who would not have turned in his dealer but instead would essentially fabricate claims against someone else to get the benefits of being an informant without the costs of turning in his true dealer. Discrediting Mr. Williams was key to the defense because Mr. Williams testified that he purchased drugs from Mr. Jackson on January 21 and that Mr. Jackson facilitated his purchase of drugs via cell phone on January 28, 2010. Trial Counsel also testified that she did not object to the 404b evidence for lack of notice because the evidence had been provided in discovery.

II. Issues Raised

At issue is first whether the evidence of prior drug activity was admissible for a permitted purpose in accordance with Pa. R.E. 404(b)(2) and whether the testimony was inadmissible for lack of notice under Pa. R.E. 404(b)(3). If the evidence was inadmissible, the next issue is whether Trial Counsel had a reasonable basis for failing to object to the evidence. If the evidence was admissible and there was no reasonable basis for failing to object to the evidence, the final issue is whether the defendant suffered prejudice.

III. Eligibility for Post-Conviction Relief

The PCRA provides specific requirements for eligibility for post-conviction relief. 42 Pa. C.S. § 9543. Section 9543(a) provides that in order to be eligible for relief, a Defendant must be convicted and serving a sentence of imprisonment, probation or parole for the crime; *Id.* In this matter, it is uncontested that Defendant is currently on parole. However, section 9543(a) also lists three (3) other eligibility requirements; these requirements include:

- (2) That the conviction or sentence resulted from one or more of the following:

* * *

- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

* * *

- (3) That the allegation of error has not been previously litigated or waived.
- (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel. *Id.*

IV. Legal Standards

Ineffective Assistance of Counsel

In order to succeed on a claim for ineffective assistance of counsel, Defendant must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Defendant's underlying claim has arguable merit, (2) trial counsel had no reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Defendant.

Commonwealth v. Chmiel, 612 Pa. 333, ___, 30 A.3d 1111, 1127 (Pa. 2011); *Commonwealth v.*

Pierce, 527 A.2d 973, 975-76 (Pa. 1987)). *See also*, *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. Ct. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (citing *Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003)). A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs. *Commonwealth v. Busanet*, 618 Pa. 1 54 A.3d 35, 45 (Pa. 2012).

Admissibility of Evidence Pursuant to 404b

Pa.R.E. 404(b) provides as follows.

(b) Crimes, Wrongs or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

(3) Notice in a Criminal Case. In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial. Pa.R.E. 404(b).

Evidence of prior bad acts is inadmissible to prove the character of a person as evidence that the person acted in conformity with that character on particular occasion. However, the evidence “may be admissible when offered to prove some other relevant fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident.”

Commonwealth v. Busanet, 618 Pa. 1, 56-57, (Pa. 2012), *citing*, *Commonwealth v. Sherwood*, 603 Pa. 92, 982 A.2d 483, 497 (Pa. 2009); Pa.R.E. 404(b)(2). Pa.R.E. 404(b)(2) “contains a non-

exhaustive list of purposes, other than proving character, for which a person's other crimes wrongs or acts may be admissible.” *Comment*, Pa.R.E. 404.

Pennsylvania Courts have recognized a “res gestae” exception to allow prior bad act evidence “when relevant to furnish the context or complete story of the events surrounding a crime.” *Commonwealth v. Dillon*, 925 A.2d 131, 137 (Pa. 2007), *citing*, *Commonwealth v. Williams*, 586 Pa. 553, 896 A.2d 523, 539 (Pa. 2006); *Commonwealth v. Paddy*, 569 Pa. 47, 800 A.2d 294, 307-08 (Pa. 2002); *see also* *Commonwealth v. Lark*, 518 Pa. 290, 543 A.2d 491, 497 (Pa. 1988) (evidence of other crimes may be relevant and admissible to show "part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts"); *see, also*, *Commonwealth v. Rose*, No. 200817880, (C.P. Allegheny September 21, 2012) LEXIS 359 (Counsel not ineffective because Court would overrule objection to bad acts testimony because it was not elicited to show propensities but “was a relevant part of a greater narrative necessary for the jury to understand the context of the crimes committed and the basis for the eyewitness identification.”); *Commonwealth v. Stringer*, No. 200401070 (C.P. Allegheny July 6, 2011) LEXIS 195 (prior carjacking, robbery and drug activity considered admissible as part of the history of the case and motive for the crime.)

Reasonable Basis for Trial Strategy

To succeed in an ineffective assistance of counsel claim, Trial Counsel must not have had a reasonable basis for the act or omission at issue. *Chmiel, supra*, 30 A.3d at 1127. The Pennsylvania Supreme Court has concluded that “counsel's chosen strategy lacked a reasonable basis **only if** the petitioner proves that the alternative strategy not selected offered a potential for success **substantially greater than the course actually pursued**. *Commonwealth v. Koehler*, 614 Pa. 159, 36 A.3d 121, 132 (Pa. 2012)(emphasis added).

“Where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests.” *Commonwealth v. Colavita*, 606 Pa. 1, 993 A.2d 874, 887 (Pa. 2010) (quoting *Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 237 (Pa. 1998)). “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.” *Id.*

Prejudice

“Prejudice in the context of ineffective assistance of counsel means demonstrating there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different.” *Commonwealth v. Champney*, 65 A.3d 386, 396 (Pa. 2013), citing, *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 332 (Pa. 1999).

With these standards in mind, the Court will address Mr. Jackson’s PCRA claims.

VI. Discussion

The Court believes Mr. Jackson has not overcome the presumption of counsel effectiveness by proving all, or even one, of the three factors required. A claim of ineffectiveness will be denied when defendant fails to establish any one of the three factors. *Busanet, supra*, 54 A.3d at 45.

The first factor requires that Mr. Jackson show that the evidence was not admissible. However, the evidence of defendant’s prior drug history could be admitted as part of the factual narrative to explain why Mr. Jackson was targeted for the controlled purchases and how Mr. Williams knew that he contacted Mr. Jackson’s cell phone which connected Mr. Jackson to the purchases. The evidence was not offered for an impermissible purpose.

Mr. Jackson has not established the second factor - that Trial Counsel had no reasonable basis for not objecting to the evidence. Trial Counsel testified at the PCRA hearing that she did not object to the testimony about the alleged drug sales by Mr. Jackson to Mr. Williams as part of her trial strategy. Even had that evidence been excluded, Mr. Williams would still have been permitted to testify to all of the facts that connected Mr. Jackson to the two controlled buys at issue in this case. Mr. Williams testified that he gave money to Mr. Jackson in exchange for drugs. Mr. Williams testified that he set up a second drug deal by speaking with Mr. Jackson. Therefore, the defense had to attack Mr. Williams's credibility. Since Mr. Williams was admittedly an addict and cooperating with law enforcement in part to reduce a debt arising from drugs, the defense strategy was to imply that Mr. Williams was fabricating claims against Mr. Jackson instead of going after Mr. Williams's actual drug dealer. The disputed testimony revealed that Mr. Williams purchased drugs numerous times. Without the disputed testimony, Mr. Williams's full drug history would not have come out and there would be little evidence for the jury to think about when assessing Mr. Williams's credibility. Given the witness who testified at trial and all of the evidence presented, this Court concludes that Trial Counsel had a reasonable basis for the trial strategy.

The Court also concludes that the failure to object to the 404b evidence for lack of notice was not ineffective because the evidence had been provided in discovery. The evidence was not a surprise. At the PCRA hearing, counsel for Mr. Jackson appeared to withdraw that claim for that reason.

Lastly, Mr. Jackson has not established prejudice. Given the overwhelming evidence of the defendant's guilt presented at trial, this Court concludes that the Mr. Jackson did not suffer prejudice from the failure to exclude the prior bad acts evidence. The evidence at trial showed that - in Agent Heckman's presence - Mr. Williams contacted Mr. Jackson and arranged a

controlled buy for January 21, 2010. Agent Heckman and others followed and observed Mr. Jackson get into Mr. Williams' vehicle at the designated location, kept the vehicle in surveillance, and collected the purchased drugs from Mr. Williams shortly after Mr. Jackson left the vehicle. Moreover, Agent Heckman was present when Mr. Williams spoke with Mr. Jackson and arranged the purchase of drugs on January 28, 2010. N.T. 10/13/10, at 25, 64-65. At the arranged place and time, Mr. Williams exchanged buy money for crack cocaine. N.T. 10/13/10, at 66. Agent Heckman testified that the Mr. Williams gave him the drugs purchased and the buy money was found on the person who physically conducted the exchange. N.T. 10/13/10, at 24-35. In light of this evidence, this Court does not believe that the outcome of the proceedings would have been different had the disputed evidence been excluded.

VII. Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA Petition.

Pursuant to Pennsylvania Rules of Criminal Procedure 907(1), the parties are hereby notified of the Court's intention to deny the 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 1st day of August, 2014, Defendant is hereby notified that it is the Court's intention to dismiss his PCRA Petition, unless he files an objection to that dismissal *within twenty days (20) of today's date*. This Opinion and Order will be served on Defendant as set forth in Pa.R.Crim.P. 907(1).

BY THE COURT,

August 1, 2014
Date

Richard A. Gray, J.

cc: DA (KO)
Trisha Hoover, Esq.