IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**CR-1472-2009**
	:	
v.	**:**	
	:	**CRIMINAL DIVISION**
DAVID PROBST,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

On January 16, 2014, the Defendant filed a timely Post-Conviction Relief Act (PCRA) Petition.

I. Background

On June 3, 2010, a jury found the Defendant guilty of aggravated indecent assault of a child,[1] indecent assault of a child less than 13 years of age,[2] and corruption of a minor.[3] "At sentencing, the trial court determined that [the Defendant] had a prior predicate offense and sentenced him, in accordance with 42 Pa.C.S.A. § 9718.2, to a mandatory term of 25 to 50 years' incarceration on . . . aggravated indecent assault. The trial court imposed an identical concurrent sentence at . . . indecent assault and a consecutive term of five years' probation at . . . corruption of minors." Superior Court Opinion, at 5. On April 19, 2011, the Defendant filed a Notice of Appeal. On January 16, 2013, the Superior Court affirmed the judgment of sentence. The Defendant did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On April 22, 2014, PCRA Counsel filed an Amended Petition for Post Conviction Relief. In a letter dated May 6, 2014, the Defendant requested new PCRA Counsel. On May 14, 2014, PCRA Counsel filed a motion on behalf of the Defendant. In the motion, PCRA Counsel

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[1] 18 Pa.C.S. § 3125(b).
[2] 18 Pa.C.S. § 3126(a)(7).
[3] 18 Pa.C.S. § 6301(a)(1).

requested that the Court permit him to withdraw as counsel and appoint new counsel. On July 18, 2014, PCRA Counsel was granted leave to withdraw as counsel and current counsel was appointed. On July 23, 2014, the Court ordered current PCRA Counsel to file an amended petition or a Turner/Finley letter by October 2, 2014. Current PCRA Counsel did not file an amended petition or a Turner/Finley letter. On January 9, 2015, the Court held a conference, during which current PCRA Counsel raised the arguments that are in the original PCRA Counsel's amended petition.

Original PCRA Counsel made two arguments in his Amended PCRA Petition. First, he argued that trial counsel was ineffective because he failed to advise the Defendant of the potential application of the 25 year mandatory sentence in 42 Pa.C.S. § 9718.2(a)(1) before the Defendant rejected a plea offer of a minimum of five years incarceration. Second, he argued that trial counsel was ineffective because he failed to object to the competency of the child witness, who was nine years old at the time of the offense and ten years old at the time of the trial. PCRA Counsel argued that "[a]t no time prior to or during trial did trial counsel . . . object to the competency of the minor child to testify nor did [trial counsel] request the trial court to conduct even the most basic of competency determinations." In addition, PCRA Counsel argued the inquiry conducted by the trial court "did not rise to the level of that required by the Pennsylvania Supreme Court in either its *Rosche* or *Delbridge* decisions."

During the January 9, 2015 conference, the attorney for the Commonwealth argued that PCRA Counsel's first issue was previously litigated.

II. Discussion

"[A] PCRA petitioner cannot obtain post-conviction review of previously litigated claims by alleging ineffective assistance of prior counsel and presenting new theories of relief on the same facts." Commonwealth v. Tedford, 960 A.2d 1, 14 (Pa. 2008). "[A] reviewing court must 'consider and substantively analyze an ineffectiveness claim as a 'distinct legal ground' for PCRA review' because 'while an ineffectiveness claim may fail for the same reasons that the underlying claim faltered on direct review, the Sixth Amendment basis for ineffectiveness claims technically creates a separate issue for review under the PCRA.'" Id. (quoting Commonwealth v. Carson, 913 A.2d 220, 234 (Pa. 2006)).

"A properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell petitioner from counsel's act or omission." Id. at 12. "A petitioner establishes prejudice when he demonstrates 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

A. PCRA Counsel has not Shown that Trial Counsel was Ineffective for not Advising the Defendant of the Mandatory Minimum Because the Superior Court Determined that the Underlying Issue has no Merit.

With regard to his first argument, PCRA Counsel has not properly pled a claim of ineffectiveness because the underlying issue does not have arguable merit. In its opinion filed January 9, 2015, the Superior Court discussed the failure to provide the Defendant with pretrial notice of the 25 year mandatory sentence:

> We disagree with Appellant that a failure to provide him with a pretrial notice of the applicability of section 9718.2 precludes the trial court from imposing the mandatory sentence. Indeed, the trial court had no discretion to do otherwise. Appellant's remedy, if any, would be in connection with the validity of his pretrial decisions, made in ignorance of the potential application of the Act. In this regard, Appellant suggests that, absent proper pretrial notice under subsection (d), his decision **not** to accept a plea agreement offer was not knowing, intelligent and voluntary. Appellant's Brief at 18-19.
>
> From the testimony at the post-trial motion hearing, the trial court determined that an Assistant District Attorney had made an initial plea offer to Appellant to plead guilty to "a felony three failure to register and a no-contest plea [to] an amended count of indecent assault graded as a misdemeanor of the first degree." Trial Court Opinion, 3/21/11, at 2-3. The felony charge carried a mandatory two-year sentence. The District Attorney rejected the offer, insisting on a plea to the aggravated indecent assault charge, which carried a five-year mandatory sentence. **Id.** at 3. Appellant rejected that plea offer, which was never reduced to writing. **Id.** Appellant testified that had he had proper notice under subsection (d), he would have accepted a plea agreement to the five-year mandatory. **Id.** However, he acknowledged that he maintained his innocence of the indecent assault charges. **Id.** The trial court further noted, "[t]here was no evidence presented that the Commonwealth was ever willing to offer [Appellant] a five-year mandatory sentence in exchange for a no-contest plea to aggravated indecent assault." **Id.**
>
> As noted, the purpose of the subsection (d) notice is to protect a defendant from waiving rights in ignorance of his exposure to a potential 25-year mandatory minimum sentence. Appellant has provided no authority for the proposition that he has a right to accept a plea offer from the Commonwealth. Appellant in this case did not waive his rights. Rather he asserted all his rights in proceeding to a jury trial. For these reasons, we conclude Appellant's second issue is without merit.

Superior Court Opinion, at 18-20.

B. Trial Counsel was not Ineffective for not Objecting to a Child Witness's Competency Because the Court Determined that the Witness was Competent and Her Testimony was Untainted.

Original PCRA Counsel argued that trial counsel was ineffective because he did not object to the competency of the child witness, L.H. With regard to this argument, PCRA Counsel has not properly pled a claim of ineffectiveness because the underlying issue does not have arguable merit. The following is the test for competency of an immature witness:

> There must be (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering *what it is* that she is called to testify about and (3) a consciousness of the duty to speak the truth.

Commonwealth v. Delbridge, 855 A.2d 27, 32 (Pa. 2003) (quoting Rosche v. McCoy, 156 A.2d 307, 310 (Pa. 1959)).

Here, as the Superior Court noted, "the trial court did *voir dire* L.H. to determine her competency prior to her testimony at the February 11, 2010 hearing on pre-trial motions." Superior Court Opinion, at 27. During the hearing, L.H. satisfied the test for competency. First, L.H. displayed a capacity to understand questions and to frame and express intelligent answers as she was able to answer questions about her birthday, school, grade, and favorite subject. *See* N.T., 2/11/10, at 38-39. Second, L.H. displayed a mental capacity to observe the occurrence and the capacity of remembering what it is that she was being called to testify about:

> **Defense Counsel**: Were you able to remember everything that happened? How long after it happened did you get to tell [neighbor] that? Was it a day later? Two days later?
>
> **L.H.**: No, I went over to her house like the day after we apologized and then I just told her.
>
> **Defense Counsel**: Okay. So if you apologized it was the next day you went to [neighbor's] the day after, so it would have been two days later?
>
> **L.H.**: Yes.
>
> **Defense Counsel**: And you still were able to remember everything that happened then pretty good because it just happened to you, right?
>
> **L.H.**: Yes.

N.T., 2/11/10, at 82. Finally, L.H. was conscious of the duty to speak the truth:

> **Court**: Explain to me what you think telling the truth means.
>
> **L.H.**: Not to lie.

Court: What's a lie? Maybe to make it easier on you, give me an example of what a lie is.

L.H.: I'm eating a candy bar.

Court: Right this second?

L.H.: Yes.

Court: Okay. So we know that that's the truth, right?

L.H.: No.

Court: What is it?

L.H.: It's a lie.

Court: Okay. Is it a good thing to tell a lie?

L.H.: No.

Court: Is it a good thing to tell the truth?

L.H.: Yes.

Court: Why is it not a good thing to lie?

L.H.: Because then you don't know what's the truth.

Court: Okay. Does anything happen to you when you tell the truth?

L.H.: You get rewarded.

Court: What do you consider to be a reward? In my household it's my son gets to play on the Wii.

L.H.: I get to play on my DS.

Court: We have a DS also. That is another reward. What happens when you lie?

L.H.: You get your DS taken away from you.

Court: Okay. So is telling the truth something you always want to try and do?

L.H.: Yes.

Court: Is telling a lie something you always want to try and do?

L.H.: No.

Court: Why not?

L.H.: Because then you don't get rewarded with things and you get stuff taken away from you.

N.T., 2/11/10, at 39-41.

Original PCRA Counsel argued that "if trial counsel had effectively requested the trial court to conduct a competency hearing in accordance with Pennsylvania law that the inquiry would have revealed potential taint sufficient to support a further exploration into the child witness's potentially tainted testimony . . . ." "Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify." Delbridge, 855 A.2d at 35. "Taint speaks to the second prong of the competency test . . . 'the mental capacity to observe the occurrence itself and the capacity of remembering what it is that [the witness] is called upon to testify about.'" Id. at 34-35.

"In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some evidence of taint is presented, the competency hearing must be expanded to explore this specific question." Id. at 35.

In Commonwealth v. Moore,[4] the Superior Court of Pennsylvania discussed the test to determine whether some evidence of taint has been presented:

> When determining whether a defendant has presented 'some evidence' of taint, the court must consider the totality of the circumstances surrounding the child's allegations. Some

[4] 980 A.2d 647 (Pa. Super. 2009).

> of the factors that courts have deemed relevant in this analysis include the age of the child, whether the child has been subject to repeated interviews by adults in positions of authority, and the existence of independent evidence regarding the interview techniques utilized.

980 A.2d at 652 (internal citations and quotations omitted).

In Original PCRA Counsel's amended petition, there are allegations of potential taint, but Counsel offered no testimony or evidence that L.H. "was influenced by interested adults or by suggestive, repetitive or coercive interview techniques by police officers." Id. at 658 (holding that there was no evidence demonstrating that the immature witness was tainted). Police first interviewed L.H. two days after the incident that gave rise to the charges. *See* N.T., 2/11/10, at 11. Officer Mark Lindauer testified that L.H. talked freely and did not need any help during the interview. Id. at 16. In addition, L.H. testified that she did not know "anything bad" about the Defendant. Id. at 76. Even though no evidence of taint was presented, the Court questioned L.H. to make sure that her testimony was not tainted:

> **Court**: And you know it's important for you to tell me what you know, not what someone has told you?
>
> **L.H.**: Yes.

N.T., 2/11/10, at 42.

> **Court**: Has anybody promised you a reward to tell me only certain things?
>
> **L.H.**: No.
>
> **Court**: Has anybody, aside from [the prosecutor] talking to you about answering out loud, has anybody told you or asked you to tell me certain things?
>
> **L.H.**: No.
>
> **Court**: So everything that you will tell me is what you remember and not what someone told you?
>
> **L.H.**: Yes.

N.T., 2/11/10, at 43.

> **Court**: You said that [the prosecutor] told you the question she was going to ask you for this hearing, right?
>
> **L.H**. Yes.
>
> **Court**: Did she ever tell you the answers that she expected you to say?
>
> **L.H.**: No. She wanted me to the tell the truth.
>
> **Court**: Okay. Did she ever tell you the answers you gave at an earlier time to remind you what you said in the past?
>
> **L.H.**: No. I was thinking of the questions that she was going to ask and I was going to say them.
>
> **Court**: Okay. But no one – no one reminded you what you had said previously?
>
> **L.H.**: No

N.T., 2/11/10, at 85.

In its opinion, the Superior Court noted that "[h]aving determined L.H. to be competent to testify at a pre-trial hearing, the trial court was not required to conduct a second *voir dire* of L.H. at trial absent some intervening cause to question her continuing competency." Superior Court Opinion, at 28. Because the Court conducted a *voir dire* of L.H., PCRA Counsel's underlying issue is without merit. Therefore, PCRA Counsel has not shown that trial counsel was ineffective.

III. Conclusion

PCRA Counsel has not shown that trial counsel was ineffective for not advising the Defendant of the mandatory minimum because the Superior Court determined that the issue does not have merit. PCRA Counsel has not shown that trial counsel was ineffective for not objecting to the competency of L.H. because the Court conducted a *voir dire* of L.H.

ORDER

AND NOW, this _____ day of March, 2015, pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified that this Court intends to dismiss his PCRA petition for the reason discussed in the foregoing Opinion. The Defendant may respond to the proposed dismissal within 20 days of the date of the notice.

By the Court,

Nancy L. Butts, President Judge

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