

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-548-2009
vs.	:	
	:	Opinion and Order Re: Defendant's
GARY SEGRAVES,	:	Post-Conviction Relief Act (PCRA) petition
Defendant	:	

OPINION AND ORDER

Before the Court is Defendant's Post Conviction Relief Act (PCRA) petition. On March 12, 2014 Defendant filed a pro se petition for Relief under the PCRA. By Order of Court dated March 19, 2014, the Court appointed counsel for Defendant. On June 26, 2014, Defendant filed a counseled amended petition.

In 2009, Defendant was charged with multiple counts of sexually related criminal offenses involving the alleged sexual assault of his stepdaughter. The charges were heard before a jury in September 2010. The jury convicted Defendant of endangering the welfare of a child, but could not reach a verdict on any of the other numerous sexual assault charges. As a result, a mistrial was granted on those remaining charges. A second jury trial was held in January 2011, and Defendant was convicted of the remaining charges. On June 30, 2011, the Court sentenced Defendant to an aggregate period of state incarceration, the minimum of which was 71 years and the maximum of which was 142 years.

Defendant appealed his convictions to the Pennsylvania Superior Court, which rejected his claims and affirmed his judgment of sentence. Defendant's petition for allowance of appeal to the Pennsylvania Supreme Court was denied on or about October 23, 2013.

During both trials, Defendant was represented by Attorney Kyle Rude,

Esquire. Defendant alleges in his PCRA petition that he is entitled to a new trial because Attorney Rude was ineffective in failing to call a witness who was present at the trial and who would have offered testimony directly contradicting the Commonwealth's "sole material witness against the Defendant." As a result of the alleged ineffectiveness, Defendant claims he was prejudiced.

A hearing on the petition was held before the Court on December 9, 2014.

Defendant first presented the testimony of G. Scott Gardner. Mr. Gardner has been licensed to practice law in the Commonwealth of Pennsylvania for over 32 years. During the first trial in 2010, he represented Defendant's wife and co-defendant, Melissa Segraves, who was also convicted of endangering the welfare of a child. The jury could not, however, reach a verdict on the additional corruption charge filed against her.

During the first trial, the victim testified that she told her best friend Mikayla Miller about the alleged abuse. As a result, and prior to the second trial, Mr. Gardner decided to contact Ms. Miller and to interview her. When he met with Ms. Miller, she informed him that the victim never told her anything about any alleged abuse by Defendant. Deeming this testimony to be critical, Mr. Gardner subpoenaed Ms. Miller for the second trial.

In preparation for the second trial, Mr. Gardner and Attorney Rude had "split up the work" and "talked strategy." Mr. Gardner specifically informed Attorney Rude about Ms. Miller's expected testimony and that she was under subpoena. Immediately prior to the second trial, however, the Commonwealth nol prossed the remaining corruption charge against Melissa Segraves. Mr. Gardner reminded Attorney Rude that Ms. Miller was under

subpoena and recommended that he use her as a witness in light of the fact that she would testify contrary to the victim's prior statements and testimony, by testifying that the victim had never disclosed in any way to her that Defendant had abused or was abusing her.

Attorney Rude also testified at the PCRA hearing on behalf of Defendant. Mr. Rude has been licensed as an attorney for over 21 years and represented Defendant during both prior trials.

Prior to the second trial in 2011, he communicated with Mr. Gardner. After Mr. Gardner became aware that the charges against Melissa Segraves would be nol prossed, Mr. Gardner made Mr. Rude aware that he had subpoenaed Mikayla Miller and that she would testify contrary to the victim's prior statements and testimony, offering that the victim had never spoken to her or disclosed in any way to her that Defendant had or was abusing her. Mr. Gardner gave him the information he had on Ms. Miller and made him aware that Ms. Miller was present at trial pursuant to his subpoena and was willing and able to testify.

Attorney Rude recalled specifically discussing Mikayla Miller with Attorney Gardner and the fact that she would refute the testimony of the victim. He believed that this testimony was significant and would impeach the victim, along with the other items of testimony.

During the second trial in January 2011, the Commonwealth questioned the victim regarding her telling anyone what happened with respect to the alleged abuse. The victim testified that she told her best friend in 6th grade that Defendant was touching and molesting her. She identified her best friend as Mikayla Miller. During cross-examination,

Attorney Rude had the victim confirm that the first time she said anything about the alleged abuse was to Ms. Miller when they were on the bus.

During this trial, Attorney Rude also presented defense witnesses and cross-examined Commonwealth witnesses for the purpose of attempting to convince the jury that the victim was not telling the truth and had a motive to make false accusations against Defendant in order that she could be removed from Defendant's home. Attorney Rude argued to the jury that the victim did not like the school district and did not like the chores she had to complete while living with Defendant and her mother.

In addressing why he did not call Ms. Miller, he indicated that he made a mistake. He believed that he was out maneuvered by the prosecutor on the day of trial. He simply forgot or did not think of calling her. He had no strategic reason for not calling her. In fact, he admitted that if he had called her, it would have been consistent with his trial strategy.

On cross-examination, Attorney Rude conceded that Trooper Barnhart may have testified that the victim told Trooper Barnhart that the only person that she told about the sexual abuse was her aunt. Her aunt happened to be a few years younger than the victim. Furthermore, Attorney Rude conceded that the victim allegedly told her aunt around the same time period that she allegedly told Ms. Miller.

Mikayla Miller also testified on behalf of Defendant. She indicated that she knew the victim in middle school. They rode the bus together for a couple of years. According to Ms. Miller, the victim never said "anything out of the ordinary" with respect to

her stepfather, Defendant. The victim never indicated to her that there was any physical or sexual abuse. She did not recall talking to the victim about anything to do with such allegations. She did recall, however, getting subpoenaed to testify at trial following her meeting with Attorney Gardner in which she told Attorney Gardner that the victim never said anything to her about being abused by her stepfather. She was available to testify at trial and willing to comply with the subpoena but she was never called as a witness.

On cross-examination, Ms. Miller conceded that the bus tended to be noisy and loud and they had multiple conversations about multiple people. She also conceded that it was possible that the victim said something but that she did not hear her. She indicated, however, that something like that would have caught her attention and it would have been something that she would have certainly told her mother about and would have not kept to herself.

As our Supreme Court recently noted: in order to obtain relief pursuant to the PCRA, a petitioner must establish by a preponderance of the evidence that his or conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa. C.S. § 9543 (a) (2). Commonwealth v. Reid, 99 A.3d 427, 435 (Pa. 2014). One of the enumerated circumstances is “[i]neffectiveness 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.” 42 Pa. C.S. § 9543 (a) (2) (ii).

To succeed on an ineffectiveness claim, a petitioner must prove that (1) the underlying legal claim has arguable merit; (2) that counsel had no reasonable basis for his act

or omission; and (3) that the petitioner suffered prejudice as a result. Commonwealth v. Baumhammers, 92 A.3d 708, 719 (Pa. 2014), citing Commonwealth v. Pierce, 527 A.2d 973, 975-76 (Pa. 1987). In the context of ineffective assistance of counsel for failure to call a witness, a petitioner must specifically prove that (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial. Commonwealth v. Washington, 592 Pa. 698, 927 A.2d 586, 599 (2007).

In this particular case, the Commonwealth does not dispute that the underlying legal claim has arguable merit or that counsel had no reasonable basis for his failure to call Ms. Miller. Further, the Commonwealth does not dispute that the first four Washington factors were met. The Commonwealth does, however, contend that Defendant has failed to establish prejudice.

To establish prejudice, the petitioner must show that there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's action or inaction. Commonwealth v. Roney, 79 A.3d 595, 604 (Pa. 2013). A "reasonable probability" is a probability sufficient to undermine confidence in the verdict returned to the jury. Bardo, 2014 Pa. LEXIS 3364 (December 16, 2014), citing Commonwealth v. Gibson, 951 A.2d 1110, 1120 (Pa. 2008).

The Commonwealth's argument regarding prejudice is multifaceted. First, the Commonwealth argues that Defendant was able to attack the credibility of the victim through

the testimony of Trooper Barnhart. Specifically, the Commonwealth contends that the victim told Trooper Barnhart that the first and only person she told about the incident was her aunt. The Commonwealth argues that the victim's testimony that she first told Ms. Miller could adequately be impeached in this manner.

The Court rejects this argument. Although Trooper Barnhart did not mention Ms. Miller in her testimony during the second trial, she never said that the **only** person the victim told about the abuse was her aunt. See N.T., January 19, 2011, at 157-159. In fact, during her testimony in the first trial Trooper Barnhart indicated that the victim told her she first disclosed to Mikayla and her aunt about six months after the abuse started. N.T., August 31, 2010, at 209. The disclosure to the aunt resulted in the victim's mother learning about the alleged abuse, but the mother did not believe the victim. See id.; N.T., January 19, 2011, at 158. A year or two later the victim disclosed to other individuals which ultimately led to an investigation by law enforcement and criminal charges being filed against Defendant and the victim's mother.

Regardless of whether the defense could have impeached the victim with Trooper Barnhart's testimony at the second trial, the fact of the matter is that Attorney Rude did not utilize Trooper Barnhart's testimony in this manner. Instead, he argued that Trooper Barnhart did her job, but could not find any evidence to corroborate the victim's allegations. He also asked the jury to infer that Ms. Miller's testimony would not support the victim because the Commonwealth failed to call Ms. Miller as a witness.

The Commonwealth next argues that the testimony presented at trial

established that the victim told her aunt, who was a few years younger than the victim, during the same time period. The Commonwealth asserts that any argument of delay or ulterior motive by the victim could not significantly be bolstered by simply adding another person who she might have told around the same timeframe.

This argument misses the point. The defense argument with respect to Ms. Miller's testimony is it shows that the victim lied in her trial testimony.

The Commonwealth further argues that Ms. Miller's testimony was not and would not have been entirely persuasive. The Commonwealth argues it was possible that Ms. Miller simply did not hear the victim in light of the fact that the bus was noisy and the subject matter would have been something that would have not been shouted or exclaimed such that others could hear it. As well, the Commonwealth asserts that the defense requested and was granted a lack of prompt complaint instruction and that Defendant more than sufficiently attacked the credibility of the victim through inconsistencies and a motive to fabricate. In essence, the Commonwealth argues that any testimony by Ms. Miller would have been cumulative and of little effect.

The Court cannot agree with the Commonwealth. The essence of a trial is a determination of the truth through an evaluation of each witness's testimony. Indeed, the factfinder must assess the credibility of each witness and decide what weight to give to said testimony.

Under the facts of this case, the credibility of the victim was directly at issue

and determinative to Defendant's guilt. There was little or no physical evidence in this case.¹ Defendant's guilt rested on whether the victim was to be believed. While the defense presented witnesses, cross-examined other witnesses and argued why the victim should not be believed, the jury chose otherwise. Unfortunately, no one knows or will ever know why the scales tipped against Defendant. It cannot be said, however, that those scales would have tipped against Defendant if Ms. Miller testified. Indeed, this Court questions whether the scales would have tipped entirely the other way had she testified. Given the failure to call Ms. Miller, the Court's confidence in the jury's verdict is undermined.

This case was not a "slam dunk." The first trial resulted in a deadlocked jury on all of the charges except endangering the welfare of a child. At the second trial, the jury also reported that it could not reach a unanimous verdict. N.T., January 20, 2011, at 158. The court gave a deadlocked jury instruction and sent the jurors back out to deliberate but asked them to first consider whether they would like to stop for the evening and return in the morning. Id. at 159-162. The jury chose to return the next morning. The next day, the Court told the jurors that it was there to help them and if there was any confusion or questions about the law or the testimony, jury instructions or witness testimony could be reread to them. N.T., January 21, 2011, at 2-3. The Court also read the deadlocked jury instruction again. Id. at 3-4. The jury deliberated for about an hour, and then they asked to have the testimony of Defendant and the victim's aunt read to them.

In light of the fact that the credibility of the victim was determinative, it

¹ Dr. Kathleen Lewis testified that she observed a cleft or abnormality in the victim's hymenal ring which was indicative of trauma.. N.T., January 19, 2011, at 198-199. The doctor's opinion regarding the cause of that

cannot be said that the Defendant received a fair second trial without Ms. Miller's testimony. The victim was adamant that she told her best friend about the abuse. Such a communication would have been expected and certainly would have made a difference to the jury. Evidence that said communication never took the place and that the victim never confided in her best friend about the alleged abuse could have affected the outcome of the trial, especially in light of the fact that the jury at one point indicated it could not reach a unanimous verdict and specifically requested read back of testimony from Defendant and the victim's aunt.

After considering all the facts and circumstances of this case, the Court finds that there is a reasonable probability that the outcome would have been different had Ms. Miller testified. Accordingly, the following Order is entered.

trauma, however, was dependent upon the victim's statements in her medical history. Id. at 199-200, 214.

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ORDER

AND NOW, this ____ day of January 2015, following a hearing and based on the reasons set forth herein, the Court **GRANTS** Defendant's PCRA petition and awards Defendant a new trial on all of the charges, except endangering the welfare of a child which Defendant was convicted of at the first trial.

In light of the grant of a new trial, the Lycoming County Sheriff's Department is directed to proceed to SCI-Houtzdale and take into custody **Gary Segraves, inmate no. KC 4396**, and transport him to the Lycoming County Prison.

This matter is placed on the May 5, 2015 pretrial with call of the list scheduled for **May 19, 2015 at 8:30 a.m. in Courtroom No. 1** of the Lycoming County Courthouse.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Don Martino, Esquire
Gary Segraves, KC 4396
SCI Houtzdale, PO Box 1000, Houtzdale PA 16698-1000
Record Department, SCI Houtzdale
Sheriff (2)

Warden – Lycoming County Prison
Gary Weber, Esquire
Work File