

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-548-2009
Appellant :
vs. : CRIMINAL DIVISION
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 : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's order entered on January 21, 2015, which granted Gary Segraves' Post Conviction Relief Act (PCRA) petition and awarded him a new trial on all of the charges except endangering the welfare of a child.

In 2009, the Pennsylvania State Police charged Segraves with multiple counts of sexually related criminal offenses involving the alleged sexual assault of his stepdaughter. The child's mother was charged with corruption of a minor and endangering the welfare of a child for failing to take measures to protect the child from Segraves after she learned of the sexual assault allegations. A jury trial was held in September 2010. The jury convicted Segraves and the child's mother of endangering the welfare of a child, but could not reach a verdict on any of the other charges. As a result, a mistrial was granted on those remaining charges.

A second jury trial was held in January 2011. After jury selection but prior to the commencement of trial, the Commonwealth nol prossed the remaining corruption charge against the child's mother. The jury convicted Segraves of the remaining charges.

On June 30, 2011, the court sentenced Segraves to an aggregate period of 71 to 142 years of incarceration in a state correctional institution.

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

Segraves filed a timely PCRA petition in which he alleged that trial counsel was ineffective for failing to call Mikayla Miller as a witness during the second trial. PCRA counsel filed witness certifications for Mikayla Miller; trial counsel, Kyle Rude; and mother's counsel, G. Scott Gardner. The witness certifications indicated that: Mikayla Miller would have testified that the victim never told her about any such abuse; Mr. Gardner had subpoenaed Ms. Miller; and Mr. Rude was aware of Ms. Miller's proposed testimony and the fact that Mr. Gardner had subpoenaed her to testify at the second trial, but he never called her as a witness.

The court held a hearing on December 9, 2014. At the hearing, Mr. Gardner testified that the victim stated during the first trial that she told her best friend, Mikayla Miller, about Segraves' sexual abuse of her. Prior to the second trial, Mr. Gardner interviewed Ms. Miller, who informed him that the victim never told her anything about any abuse by Segraves. Deeming this testimony to be critical, Mr. Gardner subpoenaed Ms. Miller for the second trial. Mr. Gardner informed Mr. Rude about Ms. Miller's expected testimony and that she was under subpoena. After the Commonwealth nol prossed the remaining corruption charge against the victim's mother, Mr. Gardner reminded Mr. Rude that Ms. Miller was under subpoena and recommended that he use her as a witness.

Mr. Rude acknowledged that Mr. Gardner made him aware he had

subpoenaed Ms. Miller and that she would testify contrary to the victim's prior testimony and statements, offering that the victim had never spoken to her or disclosed in any way that Segraves had abused her or was abusing her. Mr. Rude believed that Ms. Miller's testimony was significant and would impeach the victim. In addressing why he did not call Ms. Miller, Mr. Rude indicated that he made a mistake. He believed that he was out-maneuvered by the prosecutor on the day of trial. 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.

Ms. Miller testified that the victim never indicated to her that she suffered any physical or sexual abuse at the hands of Segraves. She did not recall talking to the victim about anything to do with such allegations. She recalled getting subpoenaed to testify at trial following her meeting with Mr. Gardner. She was available to testify at trial and willing to comply with the subpoena, but she was never called as a witness.

In an Opinion and Order dated January 21, 2015, the court granted Segraves' PCRA petition and awarded him a new trial on all of the charges that he was convicted of during the second trial. The Commonwealth filed a timely appeal.

The Commonwealth first asserts that the court erred in finding that counsel lacked a reasonable basis for his actions when similar testimony was presented at trial and where counsel's strategy was not affected.

Initially, the court believes that the Commonwealth waived this argument. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.App.P. 302(a).

The Commonwealth's attorney never argued that counsel had a reasonable basis for failing to call Ms. Miller as a witness at trial; it only argued that Segraves was not

prejudiced. In fact, the prosecuting attorney's argument began as follows: "Your Honor, first, assuming for a moment, and I'm not going to dispute that there may be an issue or there may or may not be an issue, depending on how you view things, of arguable demurrer [sic] and no reasonable basis. There is no prejudice in this case." N.T., December 9, 2014, at 37.

The Commonwealth's attorney then proceeded to argue only that Segraves failed to establish prejudice. In light of the Commonwealth's apparent concession of the first two prongs of an ineffective assistance of counsel claim, the court only addressed the issue of prejudice in its decision.

Even if the Commonwealth did not waive this issue, trial counsel never testified that he had a reasonable basis for failing to call Ms. Miller as a witness at the second trial. Quite the contrary, trial counsel specifically stated: "I have no good reason why I did not call Mikayla Miller, strategic or otherwise. ...I think the reason was Mr. Gardner interviewed Mikayla Miller; and frankly, I was out-maneuvered on the morning of trial; and I wasn't prepared to call Mikayla Miller.And, frankly, I made a mistake." N.T., December 9, 2014, at 20-21.

Although trial counsel admitted that Trooper Barnhart testified that the victim told her aunt around the same time frame, the court does not construe this testimony as similar to that of Ms. Miller. The victim testified that she told Ms. Miller about the abuse and then her aunt. Trooper Barnhart testified that the victim said she told her aunt, and the aunt testified that the victim told her about the alleged abuse. Trooper Barnhart's and the aunt's testimony corroborated the victim's testimony; it did not impeach it.

The Commonwealth argued that Trooper Barnhart testified that the only person that the victim initially told about the abuse was her aunt. Based on this testimony,

the jury could have concluded that the victim was not being truthful when she testified that she told Ms. Miller, rendering Ms. Miller's testimony cumulative. The court rejected 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. N.T., January 19, 2011, at 157-159. Furthermore, trial counsel never made such an argument to the jury or asked the jury to take such an inference. Under these circumstances, it is unlikely that the jury would have noticed any discrepancy between the victim's and Trooper Barnhart's testimony or found that Trooper Barnhart's testimony impeached the victim's credibility. Moreover, trial counsel never testified that he failed to call Ms. Miller as a witness at trial because he felt he adequately impeached the victim's credibility with Trooper Barnhart's testimony or any other inconsistencies in the victim's testimony. Instead, trial counsel testified: "I don't think this it's just another inconsistency. You have the victim saying she told people this occurred. And if I had called Mikayla Miller and she testified that she never told me, I think that is more than just an inconsistency. I think that's a big one that the jury could have hung their hat on." N.T., December 9, 2014, at 22. For these reasons, the court does not believe it erred in finding that trial counsel lacked a reasonable basis for failing to call Ms. Miller as a witness at the second trial.

The Commonwealth also contends the court erred in finding that Segraves was prejudiced by trial counsel's failure to call Ms. Miller, because the victim reported the abuse to another person (her aunt) around the same time, the impeachment by Ms. Miller did not relate to the substantive facts of the case, the defense received a lack of prompt complaint instruction, the defense was able to establish through cross-examination of the victim that she

had a strong motive to fabricate against Segraves, and the victim had given inconsistent statements.

The court addressed these issues in its Opinion and Order dated January 21, 2015. The court would rely on pages 6 through 10 of that Opinion and supplement it with the following. PCRA counsel and the current Commonwealth's attorney were not involved in either trial in this case. They were not present to see the witnesses testify at either trial or to observe the juries when they reported that they were deadlocked. Therefore, the court is in the best position to determine whether there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's failure to call Ms. Miller as a witness at trial.

In the typical case, impeachment evidence that did not relate to the substantive facts of the case probably would not undermine the court's confidence in the jury's verdict. This, however, was not the typical case. This case hinged on the credibility of the victim. Two separate juries had difficulties reaching a verdict in this case. The first jury deadlocked, and a mistrial was granted. The second jury also reported that it was deadlocked, but it eventually reached a verdict after receiving a deadlocked jury instruction and having the testimony of Segraves and the victim's aunt read back to them. In light of the difficulties that the jury had in reaching a verdict in this case, Ms. Miller's testimony, which the jury could view as directly contradicting the victim's testimony, undermines the court's confidence in the jury's verdict. The court imposed a 71 to 142 year sentence based on that verdict. While the court is not saying that Segraves will definitely be acquitted based on Ms. Miller's testimony, the court believes that there is at least a reasonable probability that the jury would have either reached a different verdict or been unable to reach a unanimous

verdict if it had heard Ms. Miller's testimony.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Donald Martino, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)