

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

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	<b>CR-1686-2012</b>
	:	
<b>v.</b>	:	
	:	<b>CRIMINAL DIVISION</b>
<b>CHARLES MATTHEW SHAFFER,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

On November 6, 2014, Defendant’s Counsel (PCRA Counsel) filed a timely Post-Conviction Relief Act (PCRA) petition. On December 11, 2014, the Court held a conference to discuss the petition. During the conference, the Court granted PCRA Counsel’s request for time to file an amended PCRA petition. On December 12, 2014, the Court gave PCRA Counsel 30 days to file an amended petition. On January 2, 2015, the Defendant himself filed an amended PCRA petition. On January 13, 2015, the Court gave PCRA Counsel an additional 20 days to file an amended petition. PCRA Counsel did not file an amended petition within this 20-day period. On February 24, 2015, PCRA Counsel filed an amended petition. During a conference on March 12, 2015, the Court granted PCRA Counsel’s request for 30 days to file a certification in accordance with Pa.R.Crim.P. 902(A)(15). On April 21, 2015, PCRA Counsel filed another amended petition. The Petition includes a certified statement of what the Defendant would have testified to if he had testified at trial.

## **I. Background**

On March 1, 2013, a jury found the Defendant guilty of Attempted Rape,<sup>1</sup> Attempted Involuntary Deviate Sexual Intercourse,<sup>2</sup> and Indecent Assault.<sup>3</sup> On November 14, 2013, the Defendant was sentenced to incarceration for a minimum of 10 years and a maximum of 20 years. The Defendant did not file a post-sentence motion or an appeal.

## **II. Discussion**

The Defendant argues that trial counsel was ineffective because “trial counsel failed to question the victim concerning her mental health problems and whether she was taking her medications.” He contends that trial counsel was ineffective because “trial counsel never filed a motion for an expert to testify about the effects that not taking medication has on someone who is bipolar.” “To be eligible for relief based on a claim of ineffective assistance of counsel, a PCRA Defendant must demonstrate, by a preponderance of the evidence, that (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel’s action or omission; and (3) there is a reasonable probability that the result of the proceeding would have been different absent such error.” Commonwealth v. Matias, 63 A.3d 807, 810 (Pa. Super. 2013). The Court finds that the arguments regarding the victim’s alleged bipolar disorder are without merit because the alleged disorder was not at all relevant.

The Defendant argues that trial counsel was ineffective because trial counsel met with him only twice before trial and was “unprepared to adequately defend [him] at trial.” The Court finds that the Defendant has not met his burden with this argument. “[T]o establish a layered

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<sup>1</sup> 18 Pa. C.S. §§ 901(a), 3121(a).

<sup>2</sup> 18 Pa. C.S. §§ 901(a), 3123(a).

<sup>3</sup> 18 Pa. C.S. § 3126(a)(2).

claim of [ineffective assistance of counsel], a PCRA Defendant must demonstrate each prong of the [ineffective assistance] measure with particularity.” Commonwealth v. Pitts, 884 A.2d 251, 254 (Pa. Super. 2005). Because the Defendant has not shown specifically how trial counsel was unprepared, he has failed to meet his burden.

The Defendant argues that trial counsel was ineffective because “trial counsel effectively prevented the Defendant from testifying by telling him that he could not mention that the victim was bipolar and by telling him that his prior record could be used against him.” According to the Defendant, trial counsel “never told him that they could only use convictions within the past 10 years and only those involving crim in [sic] falsi.” These arguments are without merit. As mentioned above, the victim’s alleged bipolar disorder was not at all relevant. The statement that the Defendant’s prior record “could be used against him” is not incorrect. A defendant could be questioned about convictions if he “gives evidence tending to prove his own good character or reputation.” See 42 Pa.C.S. § 5918(1); Commonwealth v. Hernandez, 862 A.2d 647, 651-52 (Pa. Super. 2004) (holding that the defendant’s unsolicited attestation of good character opened the door for questioning about his prior convictions); Commonwealth v. Days, 784 A.2d 817, 821 (Pa. Super. 2001) (allowing Commonwealth to introduce evidence of defendant’s prior convictions to negate his “poor me” testimony); Commonwealth v. Bullock, 948 A.2d 818, 828 (Pa. Super. 2008) (holding that evidence of the defendant’s prior robbery conviction was admissible because defendant brought into question his good character and reputation during his testimony).

The assertion that the Commonwealth “could only use convictions within the past 10 years” is incorrect. “[I]f more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later, [e]vidence of the conviction is admissible

only if (1) its probative value substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.” Pa.R.E. 609(b); *see Commonwealth v. Rivera*, 983 A.2d 1211, 1227 (Pa. 2009) (listing the factors that should be considered in determining whether a defendant’s prior convictions, which are outside the ten-year time frame, are admissible for purposes of impeachment). In addition, the Defendant has not shown that Pa.R.E. 609(b) would have been applicable. In his petition filed on February 24, 2015, PCRA Counsel notes a 2002 unknown disposition for a theft charge, a 2003 unknown disposition for a theft charge, a 2003 unknown disposition for a burglary charge, and a 2006 unknown disposition for a theft charge. Without more information, the Court cannot say that Pa.R.E. 609(b) would have been applicable.

The Defendant argues that trial counsel was ineffective because “trial counsel failed to obtain a copy of the Protection from Abuse hearing transcript so that she could impeach the victim as to contradictions that she made in comparison to her trial testimony.” The Defendant has not met his burden because he has not shown how the victim’s trial testimony contradicted her testimony during the protection from abuse hearing.

The Defendant argues that trial counsel was ineffective because “trial counsel failed to use the Preliminary Hearing transcript to impeach the victim at trial.” According to the Defendant, “at the Preliminary Hearing, the victim indicated that her wrist was injured and never mentioned a knife being used. At trial she stated that her rib was injured and a knife was used.” This argument is without merit because there is nothing inconsistent about the statements that the Defendant provided. The Defendant did not provide the transcript of the preliminary hearing, so the Court does not know the context in which the statements were made. In addition, trial counsel questioned the victim about her delay in reporting the knife to the police.

**Trial Counsel:** And when you went to the police station that night you told the police everything that happened, right?

**Victim:** Yes.

**Trial Counsel:** And you wrote down everything that happened and yet you didn't mention the knife?

**Victim:** I don't remember.

N.T., 3/1/13, at 57.

The Defendant argues that trial counsel was ineffective because "trial counsel failed to question the victim as to why she delayed in filing a Protection from Abuse Petition." This argument is without merit because the victim's delay in filing a petition for protection from abuse was not relevant. In addition, trial counsel could have made the reasonable decision that mentioning the petition for protection of abuse could harm the Defendant more than it could have helped him.

The Defendant argues that trial counsel was ineffective because "trial counsel failed to question the victim as to the lack of bruises or marks given the violent nature of the incident as described by the victim." The argument is without merit because the Commonwealth presented evidence of injuries to the victim. The victim testified that she had "pain in her side" after the attempted rape. N.T., 3/1/13, at 34. She testified that she had black and blue marks on her legs after the attempted rape. Id. at 55. She testified that her ribs were injured as a result of the attempted rape. Id. at 56-57. In addition, the victim told police that she had "pain in her ribs and some pain in her face." Id. at 73. Pennsylvania State Police (PSP) Trooper Angela Bieber testified that the victim had scratches on her leg. Id.

The Defendant argues that trial counsel was ineffective because "trial counsel failed to call the witnesses that the Defendant indicated that he wanted to testify at trial." "[W]hen raising

a claim of ineffectiveness for the failure to call a potential witness, a Defendant satisfies the performance and prejudice requirements of the [ineffective assistance] test by establishing 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 . . . .” Matias, 63 A.3d at 810-11 (quoting Commonwealth v. Sneed, 45 A.3d 1096, 1108-09 (Pa. 2012)). The Defendant has not provided the names of the witnesses or whether the witnesses were willing to testify. Therefore, the Defendant has not met his burden.

The Defendant filed an amended petition on January 2, 2015. In the amended petition, the Defendant argued that trial counsel was ineffective for not asking that the victim’s underwear be suppressed. “In order to prevail on . . . a [suppression] motion . . . a defendant is required to separately demonstrate a personal privacy interest in the area searched or effects seized . . . . Such a legitimate expectation of privacy is absent where an owner or possessor meaningfully abdicates his control, ownership or possessory interest. [A] person must maintain the privacy of his possession in such a fashion that his expectations of freedom from intrusion are recognized as reasonable.” Commonwealth v. Whiting, 767 A.2d 1083, 1089 (Pa. Super. 2001) (quoting Commonwealth v. Hawkins, 718 A.2d 265, 267 (Pa. 1998)). The Defendant had no personal privacy interest in the victim’s underwear. Therefore, the argument is without merit.

The Defendant argued that trial counsel was ineffective because trial counsel did not ask for a knife to be suppressed. This argument is without merit. The knife was found in the victim’s car. N.T., 3/1/13, at 58. Therefore, the Defendant did not maintain the privacy of his possession.

The Defendant argues that members of the jury were biased. “To be eligible for relief under [the Post Conviction Relief Act], the Defendant must plead and prove by a preponderance of the evidence . . . [t]hat the allegation of error has not been previously litigated or waived.” 42 Pa.C.S. § 9543(a)(3). “[A]n issue is waived if the Defendant could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” 42 Pa.C.S. § 9544(b). The Defendant could have raised the jury issue on appeal. Therefore, the issue is waived.

The Defendant argues that the Court erred in “sentencing him to Megan’s Law for life” because he never had an assessment by the state board. The Defendant was convicted of Attempted Rape, Attempted Involuntary Deviate Sexual Intercourse, and Indecent Assault. Attempted Rape is a Tier III sexual offense. *See* 42 Pa.C.S. § 9799.14(d)(14). A person convicted of a Tier III sexual offense must register with the PSP for life. 42 Pa.C.S. § 9799.15(a)(3). Because Defendant was convicted of a Tier III sexual offense, he must register for life.

The Defendant filed a certified statement of what he would have testified to at trial. The statement does not provide ground for post-conviction relief. The Defendant voluntarily chose not to testify at trial:

**Court:** [Trial counsel], do you want to advise Mr. Shaffer why I want to talk to him, please. Sir, you are the individual charged in this case, Charles Matthew Shaffer?

**Defendant:** Yes, ma’am.

**Court:** And at sidebar off the record your attorney advised me that you did not intend to testify in this particular trial. It’s my responsibility as a trial judge to inquire as to that decision, not any other information or any other conversations you had with your attorney, but I just want to establish that in fact is the case and some other issues. Okay?

**Defendant:** Yes, ma’am.

**Court:** So have you had – so you're aware that you're not going to be called to testify?

**Defendant:** Yes, ma'am.

**Court:** Is that the discussion that you had with your lawyer?

**Defendant:** Yes, ma'am.

**Court:** And you listened to [trial counsel's] pros and cons as you make that determination as to whether or not you should testify?

**Defendant:** Yes, ma'am.

**Court:** And who ultimately made the decision not to testify?

**Defendant:** It was a joint decision, ma'am.

**Court:** Okay. So your attorney made some recommendations, but who has the final say in deciding?

**Defendant:** I had the final say.

**Court:** I'm sorry?

**Defendant:** Myself, ma'am.

**Court:** Okay. So was anybody forcing you or threatening you to give up your right to testify if you chose to?

**Defendant:** No, ma'am.

**Court:** You're doing that – you're making that choice not to testify of your own free will?

**Defendant:** Yes, ma'am.

**Court:** And you feel as though you had sufficient time to speak with [trial counsel] about that decision?

**Defendant:** Yes, ma'am.

**Court:** And that [trial counsel] provided you with all the information that you needed in order to arrive at a decision that you could live with?

**Defendant:** Yes, ma'am.

N.T., 3/1/13, at 81-83.

### **III. Conclusion**

The Defendant has not met his burden of demonstrating that trial counsel was ineffective. The Defendant's issues regarding juror bias could have been raised on appeal. The Defendant is required to register with the PSP for life because he was convicted of Attempted Rape, a Tier III offense. The Defendant voluntarily chose not to testify.

### **ORDER**

**AND NOW**, this \_\_\_\_\_ day of April, 2015, it ORDERED and DIRECTED that pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the Defendant is hereby notified that the Court intends to dismiss his PCRA petition for the reasons 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