

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 1036 - 2011
:
vs. :
:
HEATHER HOUSEWEART, :
Defendant :

OPINION IN SUPPORT OF ORDER OF MARCH 4, 2015,
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Defendant has appealed this court’s Order of March 4, 2015, which dismissed her Petition for Post Conviction Collateral Relief. In her Statement of Matters Complained of on Appeal, Defendant contends the court should have granted Defendant a new trial for two reasons: trial counsel was ineffective for failing to call as a witness one John Bailey, M.D. and for failing to request a continuance when one Gregory Frailey, M.D. failed to respond to the subpoena which had been issued to secure his testimony.

Defendant was convicted on March 1, 2012, of aggravated and simple assault in connection with injuries inflicted on one Jill Kinley in the bathroom of a bar on March 26, 2011. At trial, Ms. Kinley testified that while standing in the bathroom she was “slammed with the door multiple times”, “hit[] the floor”, and “got back up and [] started to be slammed with the door again and [] was knocked unconscious.” N.T., March 1, 2012 at 26. She further testified that the “bones were sticking out of [her] arm and [she] couldn’t get up because [she] couldn’t move [her] leg.” Medical evidence was introduced to show that Ms. Kinley suffered a fracture of her left ulna and radius as well as ligament tears in her left knee. The Commonwealth presented testimony that Defendant inflicted the injuries on Ms. Kinley. Defendant testified, however, that although there was some pushing back and forth with the bathroom door, Ms. Kinley was still standing when Defendant left the bathroom and had not been injured. Defendant asserted that the injuries were the result of a fall.

In her petition, Defendant asserted that trial counsel was ineffective for failing to call as a witness John Bailey, M.D., who performed the surgery on Ms. Kinley’s arm. The court found no ineffectiveness as it believed Dr. Bailey’s testimony, as contained in the witness certification filed January 6, 2015, would have been more favorable to the prosecution than the

defense. According to the certification, Dr. Bailey would have testified that “it is certainly not outside of the realm of possibility” that the victim’s injuries were caused by a fall rather than from the alleged assault, but that “it is unlikely that a simple fall would result in this severity of injuries to both the knee and forearm”. The court believed such testimony to be too speculative to support Defendant’s request for a hearing.

With respect to the claim that trial counsel was ineffective for not having requested a continuance when Dr. Frailey did not appear although subpoenaed, Defendant never filed a witness certification by Dr. Frailey although required to do so by 42 Pa.C.S. Section 9545(d)(1).¹ If a defendant fails to file a certification, there is no record on which to base a finding that a claim might have merit. If a defendant’s claims are without support in the record, he is not entitled to a hearing. Commonwealth v. Jordan, 772 A.2d 1101 (Pa. Super. 2001). The court therefore dismissed the petition without hearing.²

Dated: _____

Respectfully submitted,

Dudley N. Anderson, Judge

cc: DA
Donald Martino, Esq.
Heather Housewert, OS 9713, 451 Fullerton Avenue, Cambridge Springs, PA 16403
Hon. Dudley N. Anderson

1 At trial, it was shown that Dr. Frailey was the emergency room doctor who initially treated Ms. Kinley. In a witness certification made by trial counsel, filed October 6, 2014, trial counsel explains that she had subpoenaed Dr. Frailey to offer his testimony “on the issue of causation and the issue of Ms. Kinley’s intoxication and how said intoxication might affect Ms. Kinley’s ability to physically control herself and remember and recount events at a later time.”

2 Although Defendant contends the court should have granted a new trial, since the PCRA proceedings were only at the conference level, had the court found Defendant’s claims potentially meritorious, it would have simply directed the scheduling of a hearing, rather than at that time granting a new trial.