

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-525-2012
 :
 WILLIAM J. KEMP, : Opinion and Order Granting Limited
 Defendant : Evidentiary Hearing on Defendant's PCRA

OPINION AND ORDER

In the evening of February 13, 2012, Kirsten Radcliffe, Michael Updegraff, and Thomas Schmitt were drinking at the Fifth Avenue Tavern in Williamsport. Updegraff and Radcliffe, who were boyfriend and girlfriend, got into a disagreement. Radcliffe left the Tavern and walked away down Fifth Avenue, ending up outside of Defendant William Kemp's apartment.

Twenty to thirty minutes later, Kemp gave Radcliffe a ride to the residence she shared with Updegraff at 1017 Franklin Street.

Kemp entered the residence with Radcliffe. Updegraff was upstairs and Schmitt was on a couch downstairs. When Updegraff came downstairs and saw Kemp, he asked Schmitt who the hell Kemp was. Schmitt responded that he did not know and that Ms. Radcliffe had brought him. Radcliffe explained that Kemp had given her a ride home. Updegraff told Kemp to get out of his house but Kemp refused to leave. Radcliffe apologized for Updegraff's behavior and told Kemp that he should just leave.

Updegraff grabbed Kemp and pushed or shoved him into a wall and then out the door. Updegraff and Schmitt followed Kemp outside and part way down the driveway. Updegraff stopped at the end his van (which was parked in the driveway) and Schmitt

continued walking for several feet so that he was approximately midway between the end of the van and Kemp's vehicle, which was parked on Franklin Street. Throughout, Updegraff and Schmitt continued yelling at Kemp to keep going, get off the property and leave.

Kemp continued walking quickly down the driveway to his vehicle. Instead of leaving, however, Kemp opened the door of his vehicle and grabbed his handgun. He turned back towards Updegraff and Schmitt and began firing shots as he moved towards them. One shot struck Schmitt in the neck and another was a contact or near contact shot to the back of his head.

Updegraff and Radcliffe tried to wrestle the firearm away from Kemp. While doing so, they punched and kicked Kemp repeatedly. Various neighbors saw and/or heard the gunshots and commotion and called 911. Within minutes, the police arrived and took Kemp into custody. Schmitt died as a result of his gunshot wounds.

Kemp was charged with, among other things, third degree murder, two counts of aggravated assault, possession of instrument of crime, and two counts of recklessly endangering another person. A jury trial commenced on September 9, 2013. On September 17, 2013, the jury returned verdicts of guilty on all charges.

Following a hearing on January 29, 2014, the trial court sentenced Kemp to a term of imprisonment of 20 to 40 years. Kemp filed a timely post-sentence motion on February 7, 2014, which the trial court denied on June 9, 2014.

Kemp filed a timely appeal. The Pennsylvania Superior Court affirmed Kemp's judgment of sentence in a decision filed on June 8, 2015. Subsequently, Kemp filed

a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on February 10, 2016.

On February 29, 2016, Kemp filed a pro se Post Conviction Relief Act (PCRA) petition. Counsel was appointed and filed an amended PCRA petition on June 7, 2016. The court held an argument on the amended petition on June 27, 2016.

This Opinion shall address whether Kemp shall be entitled to a hearing on any of the issues raised in his petition.

The amended PCRA petition raises five issues: (1) trial counsel was ineffective for failing to call character witnesses on Kemp's behalf; (2) trial counsel was ineffective for failing to employ and utilize an expert witness to offer a fingerprint and trace evidence analysis on the knife found at the crime scene by Corporal Dustin Reeder of the Williamsport Police Department; (3) appellate counsel was ineffective for failing to appeal to the Superior Court of Pennsylvania this court's prohibition on introducing Michael Updegraff's statements that he was concerned about ending up in prison for his role in the events of February 13, 2012; (4) trial counsel was ineffective for failing to object to the Commonwealth's questions to several witnesses which shifted the burden of proof to Kemp thus denying him a fair trial; and (5) trial counsel provided ineffective assistance by opening the door through questioning of defense witness Kristen Smith, allowing the Commonwealth to introduce rebuttal testimony concerning Kemp's statements made during a December 2009 dependency hearing.

Counsel is presumed to have rendered effective assistance, and the burden is

on a PCRA petitioner to prove otherwise. *Commonwealth v. Treiber*, 121 A.3d 435, 445 (Pa. 2015); *Commonwealth v. Philistin*, 53 A.3d 1, 10 (Pa. 2012). To do so, the petitioner must show that “(1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result.”

Commonwealth v. Spotts, 84 A.3d 294, 311 (Pa. 2014).

With respect to Kemp’s claim that trial counsel was ineffective for failing to call character witnesses on Kemp’s behalf, the court will conduct an evidentiary hearing. Failing to call character witnesses may have arguable merit because character evidence in and of itself can raise reasonable doubt in a jury’s mind, and may be the only evidence available to a defendant in some cases. *Commonwealth v. Luther*, 463 A.2d 1073, 1077 (Pa. Super. 1983).

With respect to the character witnesses named in Kemp’s amended PCRA petition, certifications are attached to the amended petition not only meeting the requirements of Pa. R. Crim. P. 902 (A) (15), but also demonstrating that the witness existed, the witness was available to testify for the defense, counsel knew or should have known of the existence of the witness, and the witness was willing to testify for the defense. See, *Commonwealth v. Walls*, 993 A.2d 289, 302 (Pa. Super. 2010) (quoting *Commonwealth v. Wright*, 961 A.2d 119, 155 (Pa. 2008)).

Moreover, with respect to whether counsel had a reasonable basis in failing to call these witnesses, this court will not speculate about said reasons in the absence of an evidentiary hearing. This is not the “clearest of cases.” *Commonwealth v. Perry*, 959 A.2d

932, 937 (Pa. Super. 2008). Finally, without understanding trial counsel's strategy, this court is unable to review whether Kemp was prejudiced by the trial counsel's purported failure to call character witnesses. "To properly determine whether prejudice resulted from the quality of counsel's representation, [the court] must focus on counsel's overall trial strategy and view his performance as a whole." *Commonwealth v. Weiss*, 606 A.2d 439, 443 (Pa. 1992).

The court will also grant an evidentiary hearing with respect to Kemp's fifth issue. Kemp contends that trial counsel provided ineffective assistance by opening the door through questioning of defense witness Kristin Smith, which allowed the Commonwealth to introduce rebuttal testimony concerning Kemp's statements made during a December 2009 dependency hearing.

Kristin Smith testified on September 16, 2013. Kemp had previously been her boyfriend. They were together for three years, including on the date of the incident on February 13, 2012. (Trial Transcript, September 16, 2013, at 3).

During her testimony, she was asked by defense counsel whether she was aware that there was a firearm in Kemp's SUV. She indicated that she was so aware. She was then asked specifically: "Do you know why he kept it in the SUV?" She answered "I didn't want it in my house." (Trial Transcript, September 16, 2013, at 9 -10). She elaborated further that Kemp "always had the firearm" and that "it had been in the vehicle for quite a while." (Trial Transcript, September 16, 2013, at 10).

Upon cross-examination, the Commonwealth asked Ms. Smith: "Okay now you had indicated that the only reason why the gun is not in the house is because you

wouldn't let the gun in the house, and he never did anything that would lead you to believe that he would use it in the commission of a crime; is that right"? To which Ms. Smith answered "correct." (Trial Transcript, September 16, 2013, at 14).

Subsequently, over Kemp's objection, the court held that the defense opened the door to Kemp's prior statements from a dependency hearing. The court permitted the Commonwealth to present through rebuttal testimony that when asked why he carried a gun, Kemp stated that he did not have any desire to get into a fight that he could not win and what was the point of having guns and the permit to carry if you are not going to use it.

More specifically, the Commonwealth was permitted to introduce statements Kemp made at a September 2009 dependency hearing on a petition filed by the Clarion County Children & Youth Services, at which Kemp, explaining why he carries a gun and knife, stated: "Well, honestly, because I have a right to; and I feel like I should exercise. And what's the point in having the guns and the permit to carry if you are not going to make use of it. ...if I don't have the .45 on my hip, I would have a knife in my pocket at almost all times."

The court specifically permitted the Commonwealth to introduce the challenged statements as rebuttal. Ms. Smith testified that Kemp kept a gun in his car because the weapon was not permitted in her residence. The court reasoned that this testimony opened the door for the Commonwealth to rebut this evidence with Kemp's own statements about why he kept guns in his vehicle. The Superior Court on appeal found no abuse of discretion in this court's determination that Kemp's prior statements were

permissible to rebut the inference that if Ms. Smith had permitted Kemp's gun to be kept in her house, Kemp would not have had the gun with him in the car. (Superior Court Opinion at 15).

The admitted statements were particularly damaging to Kemp. Indeed, the court had previously precluded said statements. The underlying substantive claim has arguable merit.

Again, the court cannot speculate as to the reasons for counsel's actions. Counsel will need to explain in an evidentiary hearing his basis for asking the question that opened the door. Moreover, without understanding trial counsel's strategy, the court is unable to determine whether Kemp was prejudiced. Kemp "must demonstrate that the alternative not selected by counsel offered a substantially greater chance of success than the tactic chosen." *Weiss*, supra. at 443.

The court will next address Kemp's claim that trial counsel was ineffective for failing to employ and utilize an expert witness to offer a fingerprint and trace evidence analysis on the knife found at the crime scene by Corporal Dustin Reeder of the Williamsport Police Department.

Kemp argues that the knife found near the victim should have been tested by a defense expert to determine whether the knife had the victim's fingerprints and "trace evidence." Kemp asserts that there was a dispute at trial as to whether the victim displayed and/or attempted to use deadly force by possessing and displaying a weapon just prior to the shooting.

Kemp's factual assertions are incorrect. No witness whatsoever testified about the victim possessing or displaying a knife just prior to the shooting.

Kemp testified that once he was outside the door and on the porch, he heard someone say something about a gun. (Trial Transcript, September 16, 2013, at 65, 66, 141, 142). However, he did not see any gun or any knife. (*Id.* at 141). He ran to his vehicle, opened the door, retrieved his gun, unholstered the gun, laid the holster on the seat, turned around, ascertained the situation to see what he was dealing with and then fired the weapon. (*Id.* at 88, 146, 147). The victim was rushing toward Kemp like he was going to tackle him. (*Id.* at 71, 74, 148). Kemp did not see any weapon in the victim's hands. (*Id.* at 73). As a matter of law, this claim lacks arguable merit. Given the fact that no witness, not even Kemp, saw a knife in the victim's hands at any time either prior or during the shooting, there was no reason for defense counsel to hire an expert to test the knife.

Moreover, Kemp has not demonstrated that such a witness was available, willing and able to appear or that any proposed testimony would be beneficial to him. *Commonwealth v. Wayne*, 553 Pa. 614, 720 A.2d 456, 470 (Pa. 1998). The mere failure to obtain an expert witness is not ineffectiveness. Instead, the petitioner must demonstrate that an expert witness was available who would have offered testimony designed to advance the petitioner's cause. *Id.* at 470-71.

Finally, Kemp's claim with respect to funding for such an expert puts the cart before the horse. While it is certainly within the discretion of a court to enable an indigent defendant to obtain experts necessary to prepare a defense, there is no evidence to establish

how a fingerprint expert would have provided evidence in favor of the Kemp. In fact, Kemp has not pointed to any evidence which would even suggest that there were any fingerprints on the knife, let alone usable prints that could be compared to the victim's fingerprints. Indeed, Kemp's request is nothing more than a fishing expedition.

Kemp next claims that appellate counsel was ineffective for failing to appeal to the Superior Court the lower court's prohibition on introducing Michael Updegraff's statements that he was concerned about ending up in prison for his role in the events of February 13, 2012.

Appellate counsel is not required to raise all non-frivolous claims on appeal. Rather, appellate counsel may select to raise those issues that maximize the likelihood of success on appeal. Thus, "arguably meritorious claims may be omitted in favor of pursuing claims which, in the exercise of appellate counsel's objectively reasonable professional judgment, offer a greater prospect of securing relief." *Commonwealth v. Lambert*, 797 A.2d 232, 244 (Pa. 2001). "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome." *Commonwealth v. Jones*, 815 A.2d 598, 367-368 (Pa. 2002)(quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986), which was quoted with approval in *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Kemp has not made any allegations or arguments to show this issue was stronger or had a greater chance for success than the issues raised by appellate counsel.

Furthermore, the court precluded Mr. Updegraff's statement, because trial counsel was misconstruing it and taking it out of context. N.T., September 10, 2013, at 55-

57. Kemp's current argument is still misconstruing the statement and taking it out of context. Mr. Updegraff's statement did not express concern about ending up in prison for his role in the events of that evening but about whom Kemp may be "running with" and what Mr. Updegraff might have to do to protect himself. The full context of Mr. Updegraff's statement is as follows:

MICHAEL UPDEGRAFF: So I don't understand here, here's what – see I got a couple of things to look at here. First of all to make sure you guys don't twist this thing wrong and I got a f—ing problem, which I don't see happening, but whatever. Also I got to worry about his dumb a— and who he is. You know what I'm saying? I mean for him to jump off the band wagon like that and do something like that.

DETECTIVE STEVEN SORAGE: You're talking about the guy with the gun?

MICHAEL UPDEGRAFF: Yeah.

DETECTIVE STEVEN SORAGE: Okay.

MICHAEL UPDEGRAFF: I don't know where he's from, I know he's from Fifth Avenue area, apparently, I don't know sh-t about him.

DETECTIVE STEVEN SORAGE: How do you know he's from the Fifth Avenue area?

MICHAEL UPDEGRAFF: Because that's where she walked from there so apparently she picked this dumb a— up somewhere along the line. I know nothing about this mother f—er.

DETECTIVE STEVEN SORAGE: Okay.

MICHAEL UPDEGRAFF: You understand? But I imagine it's from there –

DETECTIVE STEVEN SORAGE: All I've heard is his first name's [B]ill, that's all I know right now, I don't know a last name, I don't know anything else about him.

MICHAEL UPDEGRAFF: Well we'll all find that out later, but I don't know nothing (sic) about this guy. So you know, I mean if he has enough balls to do some stupid a— moron bullsh— like this, then you know, I got to look at my avenue like, you know, who's he running with? And you know – so whatever. But, you know, I'm 51 years old and I kept my a— out of any penitentiary. Did a lot of county, but I'm not going penitentiary bound, so I don't expect to sit my a— in a f—ing cage somewhere the rest of my entire life.

DETECTIVE STEVEN SORAGE: No.

MICHAEL UPDEGRAFF: So I'm not going to f—ing go after these mother f—ers, but they step on my land I want to make sure that I'm covered here, you understand what I'm saying.

DETECTIVE STEVEN SORAGE: I understand.

MICHAEL UPDEGRAFF: I don't know who these guys are, you know what I mean? I mean he's got nothing else to do something like this, who's he running with? You following me?

DETECTIVE STEVEN SORAGE: Yep.

MICHAEL UPDEGRAFF: Which I'm going to find out, and I'll slap that on down the line who he's running with, because apparently these mother f—ers are nuts. That's crazy what he did.

Transcript of videotaped interview of Michael Updegraff on February 14, 2012, at 59-60.

Kemp also has failed to establish the third prong of the ineffectiveness test.

Kemp has not made any allegations or arguments to even suggest that there is a reasonable probability that the outcome of the appeal would have been different, i.e. that his conviction would have been overturned, but for counsel's alleged ineffectiveness. Unsupported speculation, which is what Kemp has presented here, does not establish a reasonable probability that the outcome of the appeal would have been different, as required to establish the prejudice prong of a claim of ineffective assistance of counsel. *Commonwealth v. Charleston*, 94 A.3d 1012, 1026 (Pa. Super. 2014).

Kemp's final claim is that trial counsel was ineffective for failing to object to the Commonwealth's questions to several witnesses which shifted the burden of proof to the Defendant thus denying him a fair trial. This claim fails as well.

The admissibility of evidence is a matter for the discretion of the trial court.

“An abuse of discretion may not be found merely because an appellate court might have

reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias or ill will, or such lack of support so as to be clearly erroneous.” *Commonwealth v. Poplawski*, 130 A.3d 697, 716 (Pa. 2015), *Commonwealth v. McClure*, 2016 Pa. Super. 171 (August 8, 2016).

Kemp claims that the Commonwealth’s questioning of certain witnesses shifted the burden of proof by allegedly implying to the jury that Kemp had the burden to prove that he was innocent of the crimes charged. (Amended PCRA Petition, paragraph 137).

Kemp’s claim in this regard, however, has no arguable merit whatsoever.

Kemp has failed to develop this claim. There is no support for a claim that the questions infringed on the Defendant’s fifth amendment rights, that the Defendant was compelled to give evidence against himself, that the Defendant was compelled to produce incriminating evidence or that the Defendant had the burden of proving innocence. Indeed, the Court’s instructions to the jury during jury selection, prior to evidence being taken and final instructions all made it crystal clear that the Commonwealth had the burden of proof and Defendant had no burden whatsoever.

All of the questions to which Kemp objects were clearly admissible as rebuttal evidence to Defendant’s claim of self-defense. Kemp raised the claim during his opening statement and the entire defense was premised on self-defense. The questioning did not shift any burden of proof. The questioning was utilized to attack Kemp’s credibility which was clearly within the province of the Commonwealth.

ORDER

AND NOW, this ___ day of October 2016, upon consideration of Defendant's Amended Petition for Post-Conviction Relief and for the reasons set forth above, an evidentiary hearing is scheduled for **November 29, 2016 at 1:30 p.m. in Courtroom No. 4** of the Lycoming County Courthouse. The Court shall address at said hearing Kemp's claims as follows:

(1) Trial counsel was ineffective for failing to call character witnesses on Kemp's behalf; and (2) Trial counsel provided ineffective assistance by opening the door through questioning of defense witness Kristin Smith allowing the Commonwealth to introduce rebuttal testimony concerning William Kemp's statements made during a December 2009 dependency hearing.

By The Court,

Marc F. Lovecchio, Judge

cc: Eric Linhardt/Kenneth Osokow, Esquire
Donald F. Martino, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file