

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**DAVID ISAIAH JETT,
Defendant**

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CP-41-CR-0000036-2014

PCRA

OPINION AND ORDER

On May 5, 2017, Counsel for the Defendant filed a Motion to Withdraw as Counsel along with a Turner/Finley letter pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition should be dismissed.

Factual and Procedural Background

On June 20, 2014, David Jett (Defendant) was found guilty by a jury of Robbery¹, a felony of the first degree; Theft By Unlawful Taking², a misdemeanor of the second degree; Simple Assault³, a misdemeanor of the second degree; and Receiving Stolen Property⁴, a misdemeanor of the second degree. Trisha Hoover Jasper, Esquire, represented Defendant at trial, post sentence motions, and direct appeal.

Defendant was sentenced by this Court on the charge of Robbery, a felony of the first degree to undergo incarceration in a state correctional institution for a

¹ 18 Pa.C.S. § 3701(a)(1)(ii) (Robbery-threatens SBI).

² 18 Pa.C.S. § 3921(a),

³ 18 Pa.C.S. § 2701(a)(3).

⁴ 18 Pa.C.S. § 3925(a).

minimum of 72 months to a maximum of 144 months. The Court found that the Simple Assault, Theft by Unlawful Taking, and Receiving Stolen Property convictions merged for sentencing. Order of Sentence, 9/11/2014. The Defendant filed timely Post Sentence Motions that were denied by this Court. The Defendant appealed the Judgment of Sentence to the Superior Court of Pennsylvania. In an unpublished memorandum filed June 26, 2015, the Superior Court affirmed the Judgment of Sentence. No. 14 MDA 2015.

Defendant petitioned the Supreme Court of Pennsylvania for allowance of appeal, which was denied on January 27, 2016. The Defendant had a period of ninety (90) days to file a Notice of Appeal with United States Supreme Court; his Judgment of Sentence became final on April 26, 2016. Defendant's PCRA Petition filed May 9, 2016, is timely .

Trisha Hoover Jasper, Esquire was originally appointed to represent Defendant on his PCRA. The Court, having been advised of its error in assigning trial counsel to the PCRA, reassigned conflict counsel Jerry Lynch, Esquire on May 21, 2016.

Jerry Lynch, Esquire requested a continuance of the court conference scheduled for August 25, 2016. The Court held a court conference on Attorney Lynch's "Amended Petition for Post Conviction Relief" on December 1, 2016. However, Attorney Lynch ended his contract with the county to serve as conflict counsel, so new conflict counsel, Ryan C. Gardner, Esquire, was assigned to Defendant's PCRA on December 31, 2016. The Court scheduled a court conference for April 7, 2017. At the time set for conference, the Court granted PCRA Counsel a 30 day extension to file a Turner Finley letter and a Motion to Withdraw as Counsel.

A court conference on PCRA Counsel's Motion to Withdraw as Counsel was held on August 8, 2017. After an independent review of the record, the Court agrees with Attorney Gardner that Defendant failed to raise any meritorious issues in his PCRA Petition.

Discussion

Incarcerated defendants, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by a preponderance of the evidence the following four components:

- 1) Defendant has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.
- 2) Conviction or sentence resulted from one or more of the following
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States 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.
 - (ii) Ineffective assistance 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.
 - (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
 - (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
 - (v) Deleted.
 - (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
 - (vii) The imposition of a sentence greater than the lawful maximum.
 - (viii) A proceeding in a tribunal without jurisdiction.

- 3) Allegation of the error has not been previously litigated or waived; and
- 4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel.

42 Pa.C.S. § 9543 (eligibility for relief).

Defendant's PCRA petition alleges ineffective assistance of counsel and it was proper for the Defendant to preserve these issues to collateral review. Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002) ("Deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel."). The PCRA Court is left to determine whether trial/appellate counsel was ineffective for the reasons set forth in his petition.

The Court's standard of review when evaluating a claim of ineffective assistance of counsel is unambiguous and has remained relatively unaltered since its promulgation in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987), in which the Supreme Court of Pennsylvania adopted the standard of review developed by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The court in Commonwealth v. Sneed, 899 A.2d 1067, 1076 (Pa. 2006) held, in relevant part:

The constitutional ineffectiveness standard requires the defendant to rebut the presumption of professional competence by demonstrating that:

- (1) his underlying claim is of arguable merit;
- (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and

(3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different.

Id. (citations omitted).

If any of the three prongs necessary to succeed on a claim of ineffective assistance of counsel is not satisfied, the claim must be rejected as a whole. Id. (citing Pierce, 786 A.2d at 221-23). Further, trial counsel is presumed effective, and the burden of proving otherwise is on the defendant. Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999).

The Defendant has raised a number of issues in his petition which the Court will address *seriatim*.

Failure to call an expert regarding eyewitness identification

At the time of trial on June 16, 2014, expert testimony on eyewitness identification was newly admissible at trial. Commonwealth v. Walker 92 A.3d 772 (Pa. [5/28] 2014) (held that the admission of expert testimony regarding eyewitness identification was no longer *per se* impermissible under Pa. R. Evid. 702). It was the intention of the Supreme Court that eyewitness identification expert testimony be used “where the Commonwealth's case is solely or primarily dependent upon eyewitness testimony.” Walker at 787.

It was not the in-court identification of Defendant by the Quick Mart attendant that was the sole or primary evidence in the Commonwealth's case. In fact, her eyewitnesses identification testimony, because it was inconsistent and changed throughout the pretrial proceedings up to and including to the time of trial, was actually detrimental to the Commonwealth's case. Rather it was the Commonwealth's

multiple other witnesses that testified that Defendant had indeed planned the robbery at the Quick Mart that convinced the jury. Eyewitness identification expert testimony would not have been helpful in evaluating the credibility of these other witnesses who all knew Defendant personally and could identify him through their personal knowledge. Because the admission of eyewitness expert identification would not aid the trier of fact in making its determination, the Court would have denied any request for an eyewitness identification expert. It was no error for Trial Counsel not to have requested its admission.

Failing to request Kloiber instruction

In Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954) it was held that a jury should be instructed to view a eyewitness identification with precaution when the eyewitness (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past. Although a Kloiber instruction seems designed for facts as presented in this case, Defense Counsel's failure to request the Court provide the instruction to the jury was ultimately not prejudicial in the jury rendering its verdict.

Here, although conditions (1), (2), and (3) were present in this case, it was part of Trial Counsel's strategy to not request the Kloiber instruction because she did not want the jury to focus on any one particular piece of information but rather the totality of the inconsistent testimony. Therefore, Trial Counsel did have a reasonable basis for not requesting this instruction. Trial Counsel properly determined the Kloiber instruction was not needed. Trial Counsel did a thorough job of cross examination of both the eyewitness as well as the affiant of the varying ability of the eyewitness to

remain consistent in her ability to identify Defendant. **N.T.** 6/16/2015 at 17, 19, 89. The jury was made aware through the testimony Trial Counsel elicited of the weaknesses of the eyewitness testimony (not identifying the Defendant, and identifying someone else, as the criminal at a lineup and before the trial).

Even if Trial Counsel requested the instruction, the Court finds it would not have made the outcome of the trial any different. Since it was not the store clerk's testimony but rather the whole of the testimony considered together that led to the Defendant's conviction,

Failing to call alibi witness

An alibi witness is a witness that places a defendant at a location other than the scene of the crime at a time making it impossible for him or her to have been the perpetrator. Commonwealth v. Mikell, 729 A.2d 566 (1999). Defendant alleges that David Bean should have been called by Trial Counsel because he misidentified the alleged perpetrator.

David Bean was not an alibi witness for Defendant so any failure to call him as a witness at trial is a complaint of error with no merit. Bean's involvement in the above captioned matter was fully explored at trial. Bean had been present at the Quick Mart eight minutes before the robbery and he had identified another perpetrator for the police. **Id.** at 67. Though Bean's tip led to an initial arrest, this individual was not held for trial. Any complaint that Bean could have and should have been presented as an alibi witness has no basis in fact and is entirely meritless as Bean could not testify that Defendant was in another location at the time of the robbery.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to dismiss the Defendant's PCRA Petition. The Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the Petition.

ORDER

AND NOW, this 20th day of October, 2017, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss the PCRA petition unless Defendant files an objection to that dismissal within twenty (20) days of today's date.
2. The **Motion to Withdraw as Counsel** filed **May 5, 2017**, is hereby **GRANTED** and Ryan C. Gardner, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, President Judge

cc: Ryan C. Gardner, PCRA Counsel
DA (KO)
S. Roinick, file
Gary Weber, Esq.