IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-627-2005**
v.	:	
	:	
JOSEPH E. MCCLOSKEY,	:	**PCRA**
Defendant	:	

OPINION AND ORDER

On August 4, 2016, PCRA Counsel for the Defendant filed a petition for relief under the Post-Conviction Relief Act (PCRA).[1] In the petition, Defendant contends that he is entitled to relief because his trial counsel interfered with his right to testify and denied his right to make a knowing, intelligent, and voluntary decision on whether or not to testify, and that his trial counsel was therefore ineffective. He cites, in large part, Commonwealth v. Neal[2] and Commonwealth v. Breisch.[3]

Procedural History

Defendant was charged with Murder of the First Degree[4] and Persons not to Possess a Firearm[5]. Defendant was found guilty by a jury on both counts and was sentenced on August 15, 2006, to a life sentence with a consecutive sentence of two (2) years incarceration on the Possession of Firearms charge. On December 22, 2006, Defendant filed a timely Notice of Appeal to the Superior Court of Pennsylvania, and the appeal was denied on May 14, 2008. Defendant then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on June 10, 2008, which was denied on January 9, 2009.

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[1] 42 Pa.C.S. § 9541 *et seq.*
[2] 618 A.2d 438 (Pa. Super. 1992).
[3] 719 A.2d 352 (Pa. Super. 1998).
[4] 18 Pa.C.S. § 2502(a).
[5] 18 Pa.C.S. § 6105.

On February 19, 2010, Defendant filed a *pro se* PCRA petition, and several attorneys were appointed to represent him. After Attorneys Edward Rymsza and Ryan Gardner were unable to represent Defendant, Attorney James Protasio was assigned to represent Defendant. Defendant then filed several *pro se* Amended PCRA petitions which were denied because he was represented by counsel. This Court then entered an order on June 22, 2010, which granted Attorney Protasio thirty (30) days to file an Amended PCRA petition or a Motion to Withdraw as Counsel pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988).

No action was taken until February 19, 2016, when Defendant filed what he titled, "Amended Petition for Post Conviction Collateral Relief," which indicated that he had been abandoned by Attorney Protasio. Attorney Donald Martino was then appointed by Court Order on March 8, 2016, and was given until May 27, 2016, to file an Amended PCRA petition. On June 6, 2016, this Court granted Attorney Martino an extension of twenty (20) days from the receipt of requested transcripts. In the interim, an initial PCRA conference with counsel took place on July 1, 2016.

Attorney Martino received the requested transcripts on July 18, 2016, and filed an Amended PCRA petition, along with witness certifications pursuant to 42 Pa.C.S. § 9545(d)(1), on August 4, 2016. Evidentiary hearings were then held on January 10, 2017, and February 24, 2017, during which Defendant; Defendant's sister, Karen Neylon; Defendant's brother, Michael McCloskey; and Defendant's trial and appellate counsel, Attorney William Miele testified.

Discussion

1) Timeliness of Amended PCRA Petition

Under the Post Conviction Relief Act, a defendant has one (1) year after his judgment of sentence becomes final to request Post Conviction Relief unless circumstances exist that prevented the defendant from filing within one year, in which case he must file within sixty (60) days of when his claim could have been presented. 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii). In the present case, Defendant was sentenced on August 15, 2006, but he filed a Notice of Appeal to the Superior Court of Pennsylvania on December 22, 2006—which was denied on May 14, 2008—and a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on June 10, 2008—which was denied on January 9, 2009. Defendant did not file a petition for a writ of certiorari from the United States Supreme Court within the ninety-day time for petitioning[6], and therefore the judgment of sentence became final on April 9, 2009. Defendant's PCRA petition was filed on February 19, 2010, and is therefore timely pursuant to the PCRA's statutory timeframe. 42 Pa.C.S. § 9545(b).

2) Eligibility for Relief Under the PCRA

The PCRA provides, in relevant part, that in order to be eligible for relief, a petitioner must plead and prove by a preponderance of the evidence all of the following:

> (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
>
> (i) Currently serving a sentence of imprisonment, probation, or parole for the crime . . . .

[6] USCS Supreme Ct. R. 13(1).

(2) That the conviction or sentence resulted from one or more of the following:

. . . (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 . . . .

(3) That the allegation of error has not been previously litigated or waived.

(4) That the 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.[7]

Here, the Defendant avers that his trial and appellate counsel, Attorney Miele, by denying Defendant the right to testify on his own behalf, provided assistance of counsel which was so ineffective that the truth-determining process was undermined such that no reliable adjudication of guilt could have taken place. Defendant contends that the ineffectiveness of his counsel at trial was in violation of the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.

3) Ineffective Assistance of Counsel – Interference with Defendant's Right to Testify on His Own Behalf.

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). First, it must be determined whether there is arguable merit to the issue underlying the claim; if there is no merit to the issue, the analysis ceases, "as counsel will not be deemed ineffective for failing to pursue a baseless or meritless issue."

[7] 41 Pa.C.S. § 9543.

Commonwealth v. Johnson, 588 A.2d 1303, 1305 (Pa. 1991) (citing Commonwealth v. Nelson, 523 A.2d 728 (Pa. 1987)). If the claim is found to have merit, "the appellant still must establish that the course of action chosen by counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial." Commonwealth v. Breisch, 719 A.2d 352, 354 (Pa. Super. 1998) (citations omitted.) See also Commonwealth v. Neal, 618 A.2d 438, 440 (Pa. Super 1992). Trial counsel is presumed effective, and the burden of proving otherwise is on the defendant. Commonwealth v. Williams, 570 A.2d 75, 81 (Pa. 1990).

4) Merit of the Claim.

Implicit in the holdings that assistance of counsel was ineffective in Breisch and Neal is that there was merit to the claims in both cases. Breisch, 719 A.2d at 355; Neal, 618 A.2d at 441. The primary distinction between Breisch and Neal in terms of the merit of their claims is that in Breisch, the defendant was made aware of her right to testify, but "contend[ed] that she led counsel to believe at all times that she wished to testify" and was not given the ultimate decision on whether or not to testify. Breisch, 719 A.2d at 355. In Neal, however, the defendant testified that his trial counsel never discussed with the defendant his right to testify, and trial counsel even conceded that it was possible that the discussion about the defendant testifying on his own behalf had never taken place. Neal, 618 A.2d at 441.

In finding that the claims had merit in either case, the Superior Court in both Breisch and Neal employed explicit definitional language from Commonwealth v. Bazabe for what constitutes a merited claim of ineffective assistance of counsel for

failing to call an appellant to the stand. Id. at 440; Breisch, 719 A.2d at 355; Commonwealth v. Bazabe, 590 A.2d 1298, 1301 (Pa. Super. 1991). The Superior Court in Bazabe held in relevant part:

> In order to support a claim that counsel was ineffective for 'failing to call the appellant to the stand', [appellant] must demonstrate that either
>
> (1) counsel interfered with his client's freedom to testify, or
>
> (2) counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf.

Bazabe, 590 A.2d at 1301. As identified in Breisch, despite the fact that the defendant was advised of the right to testify, counsel's failure to provide the defendant with the ultimate choice effectively prevented the defendant from testifying. Breisch, 719 A.2d at 355. The defendant claimed that "she did not know until the defense rested that she was not going to be called to the stand" and was so unfamiliar with the court system that she "immediately reached up and tugged [on counsel's] shirt and asked him what ['the defense rests'] means." Id.

In the present case, testimony reflects that the Defendant was made aware of his right to testify on his own behalf. Trial counsel neither interfered with the Defendant's freedom to testify nor did he give unreasonable advice that vitiated a knowing and intelligent decision by the Defendant on whether to testify. Therefore, the ineffectiveness claim does not have arguable merit under either prong of the test articulated in Bazabe. Bazabe, 590 A.2d at 1301.

During the Defendant's PCRA hearing, Defendant's sister indicated that Attorney Miele was present during the discussion between the Defendant and his sister during which she mentioned that she would "stand . . . by him" no matter what

"*his* decision" was regarding whether or not to testify. N.T., 1/10/2017, at 23 (emphasis added). Attorney Miele also testified that he specifically recalled discussing with the Defendant whether or not the Defendant would be testifying in his own defense, going so far as to testify, "He would have been told on multiple occasions it's his decision, it's not ours . . . . I often use the phrase I'm the one . . . going home for dinner no matter what happens, you're not, you need to make this decision." Id. at 51, 87.

Although the Defendant posits that he was not aware that the decision was ultimately his, the trial record makes clear that on May 17, 2006, the Defendant had a colloquy with the Court that contained the following set of exchanges:

Q Now, you understand as part of the reason why we're in here is I have a responsibility to on the record ask you questions about just the decision about whether or not to testify in a trial, you understand that?

A Yes, ma'am

Q . . . we gave a break if Mr. Miele or Miss Spring needed more time to speak with you about this that you've had the opportunity to explore those issues with Mr. Miele, yes?

A Yes.

Q And whose-and was it your decision not to testify?

A Pretty much all of ours.

Q All of ours meaning your defense team, the people that have been sitting in court with you?

A Yeah.

Jury Trial, 5/16/2006, at 267-68.

Q Okay. Is that something you want to do meaning not testify?

A Yes, ma'am.

Q Okay. Now, you understand you have an absolute right to remain silent. You also have the right to testify in this criminal trial?

A Yes, ma'am.

Q And knowing that you have chosen to remain silent?

A Yes, ma'am.

Id. at 268.

MR. MIELE: Just point out to the court that we did advise him it was our opinion not to testify and I think it was unanimous as a Defense team and we also discussed it with family members who had an opportunity to discuss it themselves with Mr. McCloskey and they informed him and all of that had an impact or influenced our decision.

THE COURT: That's correct, Mr. McCloskey?

THE DEFENDANT: Yes, ma'am.

Id. at 269.

The Defendant, without any leading inquiry, used inclusive language by indicating that the decision not to testify was "all of *ours*," rather than "all of *theirs*." Id. at 267 (emphasis added). If the Defendant meant that the decision belonged to the defense team exclusively, his answer would have been "all of theirs."

Due to the testimony that indicates that the Defendant was made aware of his rights, along with jury trial testimony in which the Defendant openly professes that, despite the fact that the defense team as a whole was involved, the Defendant understood that it was his right to testify and that it was his choice to remain silent, this Court finds that the Defendant has satisfied neither prong of the merit test for ineffective assistance of counsel, and that the claim has no merit. Bazabe, 590 A.2d at 1301.

5) Reasonable Basis Designed to Effectuate Client's Interests.

As indicated *supra*, in a PCRA petition based on ineffective assistance of counsel in which merit is found, "the appellant still must establish that the course of action chosen by counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial." Breisch, 719 A.2d at 354. While counsel in Neal offered no reason why his client should not testify on his own behalf and the court could not identify any reason for the choice, Neal, 618 A.2d at 484, counsel in Breisch pointed to a few factors which he identified as his strategy for not having his client take the stand. Breisch, 719 A.2d at 356. Specifically, counsel testified that he thought "the defense was in a good position," and that effective cross-examination of Commonwealth witnesses would be sufficient to create reasonable doubt. Id. The court rejected this argument on the basis that the defendant's testimony in the case would have been the "sole opportunity to rebut the prosecution's incriminating testimony." Id. Counsel also posited that the defendant would be a poor witness, as she tended to stray from questions. Id. The court rejected this argument as well, holding that a "singular character flaw and counsel's 'hunch'" are insufficient to constitute a "convincingly reasonable strategy." Id.

In contrast, in the present case, Attorney Miele testified in regards to the multifaceted strategy he was employing in the Defendant's case and why he didn't call the Defendant to the stand, and it is clear that this strategy was "reasonably designed" to serve the Defendant's interests. Breisch, 719 A.2d at 356 (citing Johnson, 588 A.2d at 1305). Both Breisch and the instant matter contain counsel concerned about

a characteristic of their client, and how that characteristic will impact the trial. Breisch, 719 A.2d at 356; N.T., 1/10/2017, at 54 (Attorney Miele's concern that Defendant is verbally attacking those who planned to testify against him, including calling his own children liars, mentally ill, and not credible). Further, in both cases, the defendant is the defense's "sole opportunity to rebut the prosecution's incriminating testimony" if not by cross-examination. Breisch, 719 A.2d at 356; N.T., 1/10/2017, at 59 (establishing that Attorney Miele's defense plan was to cross-examine Commonwealth witnesses to establish the elements of manslaughter because there were only two witnesses: Defendant, and his friend Jeffrey English, who testified for the Commonwealth.)

The distinction between the present case and Breisch is that in Breisch, the defendant's testimony at her own trial had a reasonable chance of serving as exculpatory. Breisch, 719 A.2d at 356. In the present case, Attorney Miele recognized that, character flaws notwithstanding, putting the Defendant on the stand had a much higher likelihood of getting the Defendant convicted of a more serious charge of homicide than it did of being exculpatory in any way. N.T., 1/10/2017, at 68.

The Defendant posits that his inability to get his story out and that, as in Breisch, he "was the only potential witness who could explain an alternate theory and articulate his defense to the jury." Breisch, 719 A.2d at 356; Amended PCRA Petition, 8/4/16, at 53. It is of note, however, that the responsibility of defense counsel is to develop a defense with a "reasonable basis designed to effectuate the client's interests," Breisch, 719 A.2d at 354, not to develop a defense that ensures that the Defendant's side of the story is heard. Where, as in Breisch, the defendant's

testimony rebutting the Commonwealth's case is not to the detriment of the defendant, Id. at 356, it is not unreasonable to anticipate that an effective strategy for counsel involves the defendant testifying. However, in other cases such as this, where counsel reasonably finds that effectuating the client's interests and allowing the Defendant to share his story are mutually exclusive results, N.T., 1/10/2017, at 68, it is a convincingly reasonable strategy for counsel to advise the Defendant not to testify on his own behalf.

In his testimony, Attorney Miele explained his strategy regarding jury instructions: this Court did not grant a jury instruction for Homicide by Misadventure due to the illegal nature of the conduct leading up to the fatal event. N.T., 1/10/2017, at 57. The Court also did not grant a jury instruction for Voluntary Manslaughter. Id. Attorney Miele recognized that the remaining available jury instructions were for Murder of the First Degree, Murder of the Third Degree, and Involuntary Manslaughter. Id. Attorney Miele's strategy was to show Involuntary Manslaughter through cross-examination of Commonwealth witnesses, which he reasonably thought would become impossible if the Defendant testified on his own behalf. Id. at 58-59. Attorney Miele's concern came primarily not from the Defendant's "singular character flaw," Breisch, 719 A.2d at 356, but from the inculpatory taped interview confession that was taken at the hospital. N.T., 1/10/2017, at 45.

Attorney Miele recognized that if the Defendant were given the opportunity to testify, the taped interview between the Defendant and investigators that occurred shortly after the Defendant was found hiding after having fled the scene of the crime would come to light for the jury as evidence for the Commonwealth. Id. at 68.

Attorney Miele knew that the interview was so compelling that it was likely to guarantee that his client would be found guilty of at least Murder of the Third Degree, if not Murder of the First Degree. Id. Knowing that his client refused on several occasions to accept a plea for Murder of the Third Degree, Id. at 78, and justifiably positing that the only serious prospect of receiving a lesser charge was by having his client not take the stand, Id. at 68, Attorney Miele had a "reasonable basis designed to effectuate his client's interests" by not having his client testify. Breisch, 719 A.2d at 354. Therefore, the Defendant's claim also fails as trial counsel had a reasonable basis for advising the Defendant not to take the stand.

6) Prejudice of the Defendant's Right to a Fair Trial.

Finally, the inquiry turns to whether refraining from putting the Defendant on the stand prejudiced his right to a fair trial. Neal, 618 A.2d at 440. The Supreme Court held in Strickland that "the appropriate test for prejudice . . . [is that] the defendant must show that there is a reasonably probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

In Neal, the defendant was found to have been prejudiced by not having been put on the stand because the defendant was "deprived of the opportunity to deny the charges directly and the jury was denied essential defense testimony that would have negated a key part of the Commonwealth's case." Neal, 618 A.2d at 441. Similarly, in the present case, the Defendant's intent in testifying was to assert to the jury that the shooting and killing of his girlfriend was an accident. N.T., 1/10/2017, at 57.

The difference between Neal and the present case, however, is that in Neal, there was cognizable and important testimony that the defendant sought to share with the jury, such as the fact that he had never seen the complainant before, and that the defendant therefore could not have been guilty of the involuntary deviate sexual intercourse for which he was charged. Neal, 618 A.2d at 441. In the present case, however, the Defendant's testifying did not have a strong likelihood of changing the result of the proceeding, given the taped interviews between the Defendant and investigators in which the Defendant made inculpatory statements, which would have been included as evidence if the Defendant took the stand.

Here, as in Neal, testimony by the Defendant in the present case that the killing was an accident would have "negated a key part of the Commonwealth's case." Id. Namely, the Defendant's testimony would negate the essential *mens rea* required for the Commonwealth's charge. However, in the present case there is no "probability sufficient to undermine confidence in the outcome" that the result would have been different if the Defendant had testified on his own behalf. Although determining whether the result would have been different in another scenario is necessarily speculative, it is not unrealistic to anticipate that the admittance of a taped interview between the Defendant and investigators in which the Defendant makes strongly inculpatory statements would not lead to a different result than the actual result of this Defendant's trial. As such, this Court finds that the Defendant was not prejudiced by his counsel's refraining from putting the Defendant on the stand.

Conclusion

The Court finds that the Defendant's Amended PCRA petition does not demonstrate merit, lack of reasonable strategy, or prejudice necessary for PCRA relief due to ineffective assistance of counsel pursuant to 41 Pa.C.S. Section 9543. Based upon the foregoing, this Court finds no basis upon which to grant the Defendant's PCRA petition.

ORDER

AND NOW, this 19th day of June, 2017, after an evidentiary hearing and argument on Defendant's Amended PCRA Petition, the Petition for Post-Conviction Relief is hereby DENIED.

The Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter, and the prosecutor. The Notice of Appeal shall be in the form and have the content required by Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa. R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Court's office within the thirty (30) day time period, the Defendant may lose his right to appeal this order.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Donald Martino, Esq.
DA
Gary Weber, Esq.