

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**DEMETRIUS LAWRENCE WILLIAMS,
Defendant**

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CR-681-2014

PCRA

OPINION AND ORDER

On May 16, 2017, Counsel for the Petitioner, Demetrius Williams filed a Motion to Withdraw as Counsel along with a Motion to Dismiss 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 Petitioner has failed to raise any meritorious issues in his PCRA Petition, his petition should be dismissed and counsel's request to withdraw granted.

Background

On October 30, 2014, Demetrius Williams (Petitioner) was convicted after a jury trial of the offenses of Statutory Sexual Assault¹, a felony of the second degree; Aggravated Indecent Assault² (without consent), a felony of the second degree; Aggravated Indecent Assault³ (person under the age of 16 and the Petitioner being four or more years older), a felony of the second degree; Indecent Assault⁴ (without

¹ 18 Pa. C.S.A. Section 3122.1(a).

² 18 Pa. C.S.A. Section 3125(a)(1).

³ 18 Pa. C.S.A. Section 3125(a)(8).

⁴ 18 Pa. C.S.A. Section 3126(a)(1).

consent), a misdemeanor of the second degree; Indecent Assault⁵ (person under 16 and the defendant being for or more years older), misdemeanor of the second degree; Intimidation of a Witness or Victim⁶, a felony of the second degree; and, Sexual Assault⁷ a felony of the second degree. On April 9, 2015, Petitioner was sentenced to an aggregate sentence of seven and one half (7 1/2) to sixteen (16) years to be served in a state correctional facility. Petitioner filed timely post sentence motions which were denied by this Court on August 14, 2015. Petitioner filed a timely appeal to the Superior Court. By an opinion and order the Superior Court affirmed the judgment of sentence in the memorandum opinion filed on April 26, 2016. No further appeals were taken. Therefore, the Petitioner's sentence became final on May 26, 2016.

On December 9, 2016, the Petitioner filed a timely *pro se* Post-Conviction Relief Act (PCRA) Petition. Petitioner alleges that his trial counsel was ineffective for multiple reasons including failing to impeach witnesses and present evidence at trial. Julian Allatt, Esquire was appointed to represent the Petitioner for the PCRA Petition on December 12, 2016. At the time set for a conference on the Petition on March 2, 2017, Attorney Allatt filed a request for extension of time which was granted. On March 5, 2017, Attorney Allatt filed a Petition to Withdraw from Representation of PCRA and a Memorandum Pursuant to Turner/Finley. After an independent review of the record and an additional PCRA conference on June 27, 2017, the Court agrees

⁵ 18 Pa. C.S.A. Section 3126(a)(8).

⁶ 18 Pa. C.S.A. Section 4953(a).

⁷ 18 Pa. C.S.A. Section 3124.1.

with Attorney Allatt that Petitioner failed to raise any meritorious issues in his PCRA Petition.

Discussion

To be eligible for relief under 42 Pa C.S. Section 9543, the petitioner must plead and prove by a preponderance of the evidence all of the following:

- 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).

To make a claim for ineffective assistance of counsel, a Petitioner must prove the following: (1) an underlying claim of arguable merit; (2) no reasonable basis for counsel's act or omission; and (3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007) (citing Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper, 941 A.2d at 664 (citing Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)). Further, Counsel is presumed to have been effective. Id.

Was trial counsel was ineffective for failing to impeach the Commonwealth's witnesses specifically M.M.'s motive to lie; and, did the jury fail to follow the jury instructions regarding reasonable doubt?

In his Turner/Finley petition, PCRA counsel alleges that these issues are sufficiency of the evidence issues and not those which are eligible for relief under the PCRA statute.

In the Court's review of the evidence presented during trial and the argument of counsel, trial counsel's entire defense challenged the credibility of the witnesses presented by the Commonwealth. Petitioner does not allege the existence of any additional witnesses or testimony that he would have presented to impeach the Commonwealth witnesses generally or M.M.'s testimony specifically. In fact, PCRA counsel sets forth in his Turner/Finley brief that trial counsel did in fact raise the issue of M.M.'s motive to lie during trial. It is up to the jury whether to believe some, part or all of the evidence presented by the Commonwealth, which is the finding shared by the Superior Court in its review of the evidence on direct appeal. Therefore, these issues have no merit.

On the subject of the jury failing to follow the Courts instruction on the issue of reasonable doubt, the Petitioner does not allege the existence of any evidence to show that the jury used any additional or different standard. The Superior Court found that the verdict was not against the weight of the evidence⁸. This issue then has no merit.

Did the trial court illegally apply certain portions of mandatory minimum sentencing?

In the next issue, Petitioner alleges that the Court improperly sentenced him after trial. Petitioner in his *pro-se* PCRA petition alleges that the Court's sentence violated the law set forth in Alleyne v. United States, 133 S.Ct. 215 (U.S. 2013).

Initially, the Court notes that Petitioner in his direct appeal to the Superior Court alleged that the Court abused its discretion in the imposition of sentence. The Superior Court found in its review of the case that Petitioner did not raise a substantial question concerning the discretionary aspects of sentence and dismissed his appeal on that issue. The Court could agree with PCRA counsel and find that the issue was not eligible for PCRA relief as it has been waived.⁹ In its discussion of the Petitioner's sentence the Court specifically took note of both his prior record score and the sentencing guidelines. No mention of a mandatory minimum sentence was found in the record of his sentencing. Therefore, since no portion of the Petitioner's sentence was pursuant to a mandatory sentencing provision made unconstitutional by Alleyne, this issue has no merit. Moreover, Alleyne relief is not available on collateral review.

⁸ Superior Court Opinion (4/26/16 at p.7).

⁹ 42 Pa. C.S.A. Sections 9543 (a)(3) and 9544 (a)(2).

Commonwealth v. Washington, 142 A.3d 810, 820 (Pa. 2016) (holding that Alleyne does not apply retroactively to cases pending on collateral review).

Was trial counsel ineffective for failing to call an expert on the lack of physical evidence, failing to properly manage the rape kit evidence, and for not objecting to the Court's admission of improper medical testimony?

During trial, all counsel stipulated to the DNA evidence which would have been presented by the Commonwealth indicating that after testing the victim's underwear, no identifiable DNA was found. Petitioner challenges that tactical decision made by trial counsel to stipulate to the lack of DNA evidence.

As stated previously, in order to make a claim for ineffective assistance of counsel, a petitioner must prove the following: (1) an underlying claim of arguable merit; (2) no reasonable basis for counsel's act or omission; and (3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Cooper, *supra*, at 664. On this issue, Petitioner's claim fails as trial counsel had a reasonable basis for the decision to stipulate. No evidence incriminating his client was found on the victim's underwear. No expert would have been required to interpret the lack of evidence found or challenge the collection or preservation of evidence tested. To allow trial counsel to argue anything other than that fact would have potentially been a violation of the Rape Shield Law¹⁰ and inadmissible.

If Petitioner is alleging that trial counsel failed to present medical evidence that the alleged offenses could not have occurred since there was no physical evidence presented by the Commonwealth that is not current Pennsylvania law. The

¹⁰ 18 Pa. C.S.A. Section 3104.

uncorroborated testimony of a sexual assault victim, if believed by the trier of fact, is sufficient to convict a defendant. Commonwealth v. Wall, 953 A.2d 581, 584 (Pa. Super. 2008). Therefore, trial counsel's decision not to introduce such testimony was the result of a rational, strategic or tactical decision by counsel and Petitioner is ineligible for relief on this issue.

Was trial counsel ineffective for failing to object to evidence of text messages or Facebook messages without proper authentication?

During Petitioner's trial, the Commonwealth sought to introduce Facebook and text messages purportedly exchanged between the Petitioner and the victim. During the admission of this evidence, trial counsel objected to the admissibility of the evidence. In his PCRA claim, Petitioner alleges that trial counsel was ineffective for allowing or not challenging improperly authenticated messages.

Pennsylvania Rule of Evidence 901 establishes the ways in which evidence may be authenticated:

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be...

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances....

Pa.R.E. 901(a) and (b).

In addition, evidence that cannot be authenticated directly pursuant to subsection (1) may be authenticated by other parts of section (b) of the Rule,

including circumstantial evidence pursuant to subsection (4). In the context of a communication, subsection (4)'s "distinctive characteristics" may include information tending to specify an author-sender, reference to or correspondence with relevant events that precede or follow the communication in question, or any other facts or aspects of the communication that signify it to be what its proponent claims. Commonwealth v. Collins, 957 A.2d 237, 265-66 (Pa. 2008). Authentication generally entails a relatively low burden of proof; in the words of Rule 901 itself, simply "evidence sufficient to support a finding that the item is what the proponent claims." Commonwealth v. Koch, 106 A.3d 705 (Pa. 2014).

During trial, the victim, S.S. testified that she knew that Petitioner was the sender of the messages both through Facebook and by text because of the specific way in which he spoke. She also referenced particular abbreviations that Petitioner used when he communicated with her. Despite the fact that the Court allowed the admission of this information over trial counsel's objection, he still was able to raise a question through cross examination as to her belief that the Petitioner did in fact send the messages to her. Therefore, Petitioner has failed to establish the second prong that trial counsel had no reasonable basis for his act or omission. No witness was able to be called so there was no omission and trial counsel did act to challenge the messages the Court found were sufficiently authenticated.

Was Defendant denied Due Process of law due to a racial imbalance in the jury?

Petitioner next alleges that he was deprived of Due Process due to a racial imbalance of the jury panel. Petitioner does not specifically set forth the way in which he was prejudiced by this claim. PCRA counsel characterizes the claim in two parts: a

general challenge to the racial makeup of the jury; and, 2) ineffective assistance of counsel for failing to raise a Batson¹¹ challenge at jury selection.

In Petitioner's first claim, he alleges that he was prejudiced generally by the racial makeup of the jury. Petitioner also makes reference to Codaphone "confusion" as the way he may have been prejudiced at trial. The Court surmises that because all of the jurors appeared to be of only one race who were selected for the trial, that this in some way, without alleging what way, prejudiced him.

"Mere underrepresentation of any given group on a jury does not constitute unconstitutional discrimination per se. The United States Supreme Court in Swain v. Alabama, stated: [A] defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. Virginia v. Rives, 100 U.S. 313, 322-323, 25 L.Ed. 667, 670-671; Gibson v. Mississippi, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075; Thomas v. Texas, 212 U.S. 278, 282, 29 S.Ct. 393 [394], 53 L.Ed. 512, 513; Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation."

Commonwealth v. Henderson, 438 A.2d 951, 953 (Pa. 1981) (quoting Swain v. Alabama, 85 S.Ct. 824, 829 (U.S. 1965)).

The Codaphone "confusion" referenced by the Petitioner and as set forth in the record of trial had nothing to do with the process of the jury selection. Jurors in Lycoming County are notified when to appear for both jury selection and the start of trial by messages left for them on a phone recording system known as the Codaphone. The message on the date in question was omitted for the jurors as to when they should report for the start of trial and not jury selection, so that "confusion"

¹¹ Batson v. Kentucky, 476 U.S. 79 (1986).

had nothing to do with the racial balance of the jury. The jury had already been selected at an earlier time.

Where an appellant has failed to raise or preserve a Batson claim at trial, the claim is unavailable under the PCRA. Commonwealth v. (Damon) Jones, 802 A.2d 1232 (Pa. 2002) and Commonwealth v. Jones, 951 A.2d 294 (Pa. 2008). There is no evidence that trial counsel raised this issue at the time of jury selection, the issue is waived and Petitioner is not eligible for PCRA relief.

Was trial counsel ineffective for filing a defective appeal to the Superior Court?

Petitioner alleges that his trial counsel was ineffective for filing a defective brief. The Court must assume that Petitioner is referring to the fact that the Superior Court failed to consider the challenge to the discretionary aspects of sentence as the defect.

Pennsylvania Rule of Appellate Procedure 2119(f) states:

(f) Discretionary aspects of sentence. An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in a separate section of the brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of the sentence.

In the statement Petitioner must satisfy a four-part test:

(1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Griffin, 65 A.3d 932 (Pa. Super. 2013).

The Superior Court determined the first three prongs were satisfied by trial counsel and examined the statement provided by counsel on the issue of the substantial question raised. A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." Griffin, *supra* at 936. Where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code. Commonwealth v Moury, 992 A.2d 162, 171 (Pa. Super. 2010).

The Superior Court found on direct appeal that trial counsel failed to comply with Rule 2119(f) in that only a bald assertion that the sentence was excessive was alleged which does not present a substantial question. Superior Court Opinion 4/26/16 at p.8. In fact the sentences imposed by this Court were within the respective guideline ranges. Since trial counsel could not articulate how this Court violated either a specific provision of the sentencing scheme of the Code or a particular fundamental norm underlying the the sentencing process, no substantial question was raised.

Trial counsel is presumed to have rendered effective assistance and appellant has the burden of proving otherwise. Commonwealth v. March, 598 A.2d 961 (Pa. 1991); Commonwealth v. Marshall, 633 A.2d 1100, 1104 (Pa. 1993). Counsel cannot be deemed ineffective for failing to raise a meritless claim. Commonwealth v. Pursell, 495 A.2d 183,189 (Pa. 1985). Commonwealth v. Travaglia, 661 A.2d 352, 358 (1995).

In applying the three-factor approach requires a petitioner to prove with respect to the alleged ineffectiveness of counsel that: (1) the underlying legal claim -- i.e., that

which the petitioner charges was not pursued, or was pursued improperly -- has "arguable merit;" the Superior Court found none. Therefore, the Court need make no further analysis and the claim shall be dismissed.

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 deny 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 _____ day of October, 2017, it is hereby ORDERED and DIRECTED as follows:

1. Petitioner is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The **Petition to Withdraw/Turner Finley** filed **May 16, 2017** is hereby **GRANTED** and Julian Allatt, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, President Judge

cc: DA (KO)
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