

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CP-41-CR-0001495-2014
v.	:	
	:	
NAFIS FAISON,	:	
Defendant	:	PCRA

OPINION AND ORDER

On July 22, 2016, Nafis Faison (Defendant) filed a petition for relief under the Post-Conviction Relief Act (PCRA). On July 25, 2016, this Court appointed PCRA counsel. On December 29, 2016, new counsel was appointed to represent Defendant due to the expiration of prior counsel’s contract with the Court. At the preliminary conference on the petition on March 13, 2017, new counsel requested a continuance of thirty (30) days, which was unopposed by the Commonwealth. On April 18, 2017, PCRA counsel filed a petition to withdraw from representation and a “no merit letter” pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super.1988). A court conference was scheduled for July 11, 2017, but neither PCRA counsel nor the Commonwealth believed discussion beyond the “no merit letter” was needed.

In his petition, Defendant argues that he is entitled to relief because counsel was ineffective for failing to 1) investigate the GPS technology which was presented at trial to establish the Defendant’s location on the date in question; 2) failed to file a Motion to Suppress alleging false information in the affidavit of probable cause and information about the GPS tracking device; 3) failing to subpoena the confidential informant (CI) to establish that the Defendant was not at the scene of the crime. For

the reasons set forth in this opinion, the Court finds that Defendant's petition lacks merit and will be dismissed.

Background

On April 20, 2015, Defendant was convicted by a jury of the offenses of Possession of a Controlled Substance with the Intent to Deliver¹, an ungraded felony; Possession of a Controlled Substance (cocaine)², an ungraded misdemeanor and, Possession of Drug Paraphernalia³, an ungraded misdemeanor. He was sentenced by the Court on April 27, 2015, on the Possession with the Intent to Deliver count to a split sentence of twenty two (22) to forty four (44) months to be served in a State Correctional Institution with a consecutive 5 years probation under the supervision of the Pennsylvania Board of Probation and Parole. Defendant filed timely a post sentence motion on May 7, 2015 which was denied by the Court on August 14, 2015. Timely notice of appeal was filed to the Superior Court of Pennsylvania on August 19, 2015. The Superior Court denied the appeal in an unpublished memorandum dated May 9, 2016. No. 1442 MDA 2015. Defendant filed a Petition for Allowance of appeal to the Supreme Court on June 15, 2016, which was denied by order on June 17, 2016. No other appeals were taken. Therefore Defendant's judgment of sentence became final 90 days after his denial of appeal to the Superior Court or September 17, 2016. In the interim, Defendant filed a Motion for Relief Pursuant to the Post Conviction Relief Act with the Court on July 22, 2016, after his petition for allowance of appeal to the Supreme Court was denied.

¹ 35 P.S. 780-113 (a)30.

² 35 P.S. 780-113(a)16.

³ 35 P.S. 780-113(a)32.

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).

Was trial counsel ineffective for failing to present exculpatory evidence challenging the GPS technology which was presented at trial to establish the Defendant's location on the date in question

In order to prevail on a claim of ineffective assistance of counsel, a Defendant must demonstrate that that underlying claim is of arguable merit, and that counsel's actions had not reasonable basis designed to effectuate the Defendant's interests and that counsel's actions prejudiced the Defendant. Commonwealth v. Correa, 664 A.2d 607 (Pa. Super. 1995). Counsel will not be deemed ineffective for failing to raise a meritless claim. Commonwealth v. Jones, 912 A.2d 268, 278 (Pa. 2006 (citing Commonwealth v. Darrick Hall, 701 A.2d 190, 203 (Pa. 1997))). 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). "It is well established that counsel is presumed effective and the defendant bears the burden of proving ineffectiveness." Commonwealth v. Cooper, 941 A.2d 655 (Pa. 2007).

Defendant alleges that trial counsel was ineffective for his failure to present exculpatory evidence at the trial to identify his location the time the crime was to have been committed. The Court finds that this issue lacks merit therefore trial counsel cannot be deemed ineffective for not having raised it.

Defendant was charged with crimes as a result of a search which was performed outside the area of Bridge Street in the City of Williamsport. Commonwealth's testimony presented at trial established that the Defendant was stopped and identified, searched and charged with these offenses. The issue raised by the Defendant addresses activities which allegedly would have been taking place inside the 326 Bridge Street location.

The record does not establish that Defendant was determined to be present at that apartment or outside the apartment utilizing GPS data. The only reference to GPS is at the opening of Defendant's trial. Jury Trial, 4/20/2015, at 6-8. The Court advised Defendant that at an off the record hearing the Friday evening before trial it was determined by the Court that the official that electronically monitors supervisees for the County via GPS technology would not be allowed to testify as it was not relevant to the issues to be determined at trial. Id. at 7. GPS data would have shown that Petitioner was not in the apartment at the time a drug transaction orchestrated by the Narcotics Enforcement Unit (NEU) had occurred earlier in the day. Petitioner was observed coming from the apartment later in the day by NEU officers who were surveilling the apartment after the time of the controlled buy. Petitioner was apprehended in the parking lot of the Family Dollar. Jury Trial, 4/20/2015, at 27 and 29.

Defense Counsel, in a motion to suppress, alleged that the officers did not have the requisite probable cause to stop Petitioner in the parking lot. The Court determined as a matter of law that the quantum of suspicion required to detain Petitioner was reasonable suspicion and the officers had the reasonable suspicion to detain Petitioner. As such any evidence collected from that detention would be admissible at trial. The evidence collected from Petitioner was admitted at trial and Petitioner was found guilty, with no reference as to the activities that occurred in the apartment that gave rise to officers observing him depart the apartment.

The Court has reviewed the Affidavit of Probable Cause to determine if there is any mention that Petitioner's location was determined via GPS technology. There

is no mention and for counsel to have argued as such would have been baseless. The issue raised by Petitioner is entirely without merit.

Was trial counsel ineffective for failing to file a Motion to Suppress alleging false information in the affidavit of probable cause and information about the GPS tracking device

Having reviewed the Affidavit of Probable Cause, there does not appear to be any material and intentional false statements present to the issuing authority such that warrant would not issue. Petitioner appears to believe that because the officer said he was in the apartment and he was not in the apartment that in some way exonerates him. Even if the Court were to take what Defendant said as true, it is immaterial. "Misstatements of fact will invalidate a search warrant if they are deliberate and material. See, e.g., Commonwealth v. Baker, 24 A.3d 1006, 1017 (Pa. Super. 2011), aff'd, 621 Pa. 401, 78 A.3d 1044 (Pa. 2013). "A material fact is one without which probable cause to search would not exist." Id. (quoting Commonwealth v. Tucker, 384 A.2d 938, 941 (Pa. Super. 1978)). Whether Petitioner was ever inside or outside of the apartment is immaterial because he was charged with evidence that was found on his person, not in the apartment.

Trial Counsel did present a motion to suppress that was denied by the Court on January 13, 2015. Trial Counsel argued that the search warrant to search the apartment was insufficient to include Defendant; however, the Court determined that the officers did have reasonable suspicion to detain Petitioner in the Family Dollar parking lot outside any authority granted by the search warrant. Petitioner appears to recognize that he was outside the apartment and all of the charges against him in this docket number are related to cocaine and money found on his person

subsequent to a search of him personally, and not related to any illegal substances found inside the apartment. Furthermore to the extent that Petitioner alleges that the GPS data provides an alibi, which it does not, it is also has been previously litigated, not brought on appeal, and thus waived as described *supra*.

Was trial counsel ineffective for failing to subpoena the confidential informant (CI) to establish that the Defendant was not at the scene of the crime

Petitioner believes that the fact that he was never in the apartment at the same time as the confidential informant is relevant and exculpatory information. As mentioned *supra*, an off the record motion in limine occurred whereby Trial Counsel presented evidence that if called to testify, the Supervised Bail Manager would testify that Petitioner was not in the apartment at the time of a controlled buy conducted early in the afternoon. Rather than present the testimony, the Commonwealth agreed not to present any testimony regarding the confidential informant. It was a strategic decision on the part of Trial Counsel to not call the confidential informant, as Trial Counsel did not want the jury to associate Petitioner with any illegal drug activity that had occurred in the apartment earlier that day before Defendant was seen leaving the apartment. Motion in Limine, 3/18/2015. Though the issue has apparent merit, Trial Counsel did have a strategy in not presenting it. Moreover, the Superior Court affirmed that the evidence that was presented at trial was sufficient to convict Petitioner. Therefore, even had the confidential informant testified, it would not have changed the outcome of the trial. In other words, if the evidence was sufficient to convict without testimony of the confidential informant, it certainly would have been sufficient to convict with it. Therefore, the Petitioner was not prejudiced by the lack of

testimony on the part of the confidential informant and thus Trial Counsel cannot be deemed to have been ineffective.

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 29th day of January, 2018, 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 his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The **application for leave to withdraw appearance** filed **April 18, 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: DA (KO)
Ryan C. Gardner, Esq.
Nafis Faison LZ1119
SCI Smithfield
1120 Pike Street
Huntingdon, PA 16652
Law Clerk, PJ Butts