IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**CR: 1226-2013**
	:	
JERET S. HARVEY,	**:**	**PCRA- FIRST**
Defendant	**:**	

OPINION AND ORDER

On February 24, 2014, Defendant, Jeret S. Harvey was found guilty after jury trial on February 24, 2014 of the offenses of Theft by Unlawful Taking[1] and Receiving Stolen Property[2]. On the charge of Persons not to Possess a Firearm[3] severed from the information, a jury convicted him of the offense on June 9, 2014.

On August 14, 2014, this Court sentenced Petitioner on all charges to an aggregate sentence of sixty (60) months to one hundred twenty (120) months in a State Correctional Facility followed by 24 months of probation. On August 22, 2014, Petitioner filed a timely post sentence motion challenging the sufficiency of the evidence on the theft charge and that the Court's sentence was excessive. On November 18, 2014 the Court denied Petitioner's post sentence motion. Petitioner filed a timely appeal to the Superior Court which was denied on July 15, 2015. No further appeals were taken.

Petitioner filed a *pro se* motion for Post Conviction Relief and motion for evidentiary hearing on August 1, 2016 and PCRA counsel was appointed to represent

[1] 18 Pa.C.S. § 3921(a)
[2] 18 Pa C.S. § 3925(a)
[3] 18 Pa C.S.A. Section 6105(a)1

Petitioner. Subsequently, Ryan Gardner, Esquire was appointed on December 29, 2016.

An initial PCRA conference was scheduled for January 30, 2017 to discuss the amended PCRA petition. The only issue for the Court to determine was that involving the discovery of new evidence. Petitioner alleges that his brother, Jesse Vaughn, brought to his attention that a juror on the Petitioner's case told Vaughn and other employees at their place of employment that he would find the Petitioner guilty just based upon his race.

Initially, the Court needed to determine to which jury trial the remarks of the juror applied since there were two trials held from the one information. After investigation by the Court, this particular juror was impaneled on the theft case decided in February, 2015.

The Court scheduled a hearing on the allegation of new evidence on February 20, 2018. Testimony was taken from two witnesses; Vaughn, the brother of the Petitioner and the juror himself. During the testimony, since it was discovered the statements of the juror were made the presence of others, PCRA counsel was given time to investigate the existence of the other witnesses and a continuance was granted. No additional witnesses were presented at the May 4, 2018 hearing.

Upon consideration of the evidence presented, the Court finds that the Defendant has failed to raise any meritorious issues in his PCRA Petition, and his petition will be dismissed.

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).

Petitioner is currently incarcerated at SCI Laurel Highlands. Petitioner has not raised or litigated this issue on any prior appeals; the information presented was new evidence so that trial counsel did not fail to litigate this issue. After the Petitioner's appeal was dismissed his sentence became final on August 15, 2015. Petitioner filed his *prose* petition on August 1, 2016; therefore his filing was timely. *See* 42 Pa. C.S. A. Section 9545(b)1.

Was the evidence presented of a juror's bias sufficient to justify the grant of a new trial

PCRA counsel alleges that Petitioner should be awarded a new trial based upon the allegedly prejudicial remarks made by one of the juror's in Petitioner's case.

Jesse Vaughn, brother of Petitioner was called as a witness. Vaughn testified by phone from Texas where he currently resides. He testified that back in June 2014 he would have lived in Pennsylvania and worked at Quality Carriers in Williamsport, Lycoming County, Pennsylvania. He stated that at that employer he worked with the juror who was a dispatcher while the witness was a mechanic "downstairs".

Vaughn testified that the juror talked about his jury service in the presence of other employees. Vaughn believed that he didn't realize that Petitioner was his brother. The one statement he specifically remembers the juror saying was that "I don't like saying it, he's a nigger, and he's guilty anyway". Vaughn claimed that he tried to call trial counsel to let him know about the statement he heard, but that no one would get back to him. Ultimately, he sent a letter to his brother after his brother went to jail to let him know that he had this information.

On cross-examination, Vaughn he admitted that he wasn't sure when the conversation happened, although he worked at the business between 2012 and 2013. He indicated he didn't have a problem with the juror, but also said "he didn't think it was the time or place to react immediately."

Eugene Kieser, the juror in question, was called by the Commonwealth to testify. He recalled being on jury duty in May of 2014; it was a trial about a stolen gun. He didn't remember the Petitioner's name but found out after he went back to work that it was the brother of Vaughn. He thought that it was his boss that told him who it was.

Kieser then testified that once he learned of the connection, he called his cousin a retired Common Pleas Judge.[4] He talked to him about not wanting to serve as a juror but he was unable to "get ahold of the guy here" at the courthouse. He did serve but spoke to no one about the case other than to tell them they had arrived at a guilty verdict. Kieser specifically denied making the statement and never spoke with Vaughn about the case at all. He testified that if he ever spoke with him it would have been about work related things. Kieser was asked about the other employee who Vaughn said he thought heard the comment and he said that he still worked at the location with him. He was surprised that Vaughn would say he said this statement.

Both Counsel agree that the issue for the Court to decide is who is telling the truth about what happened. PCRA counsel argues that no one would knowingly take the stand and admit to making the statement; the Petitioner's brother was willing to provide a written statement and swear to what he heard. Kieser testifies that he did not have any conversations about the trial with Petitioner's brother and found out about the connection between the Petitioner and Vaughn from his boss.

[4] Judge William S. Kieser served as a Common Pleas Judge in Lycoming County from 1992-2008

Credibility determination is within the PCRA court's fact-finding authority and is entitled to great deference. ***Commonwealth v. Philistin***, 617 Pa. 358, 53 A.3d 1, 25 (2012),***Commonwealth v. Spotz***, 624 Pa. 4, 36, 84 A.3d 294, 313 (Pa.,2014).

In reviewing the evidence, Petitioner's testimony has some challenges. One, Vaughn's timeline appears to be off. Initially the Court believed that the juror's statements came before the trial was held in May of 2014. Vaughan testified that he would have heard Kieser talk about the case in 2014. However, on questioning by the Court, Vaughn admitted he worked at the company from 2012-2013. He also acknowledged that when he heard about the information, he didn't realize that his brother was on trial. Vaughn believed that he told Petitioner after he was sentenced but thought that it was in late 2016. Vaughn is the half-brother of Petitioner and would have a motive to support him. He would have known about the information in February 2015 but chose to write his brother in August only after he had been sentenced. Vaughn testified by telephone depriving the Court of the opportunity to observe his demeanor, making it more difficult to determine his truthfulness.

Additionally, there was at least one other witness to the alleged conversation that Vaughn had with Kieser. Although PCRA counsel attempted to reach out to him, he did not respond to requests to participate. This could have several meanings: either the statements were not made or that the witness, who would presumably be neutral, did not want to become involved.

Finally, if Kieser was troubled enough to communicate with a family member with knowledge of the criminal justice system about his concern about participating on a trial for a member of a coworkers family, the Court finds it highly unlikely he would have

spoken to Vaughn in the manner which was described. The Court finds Kieser more credible in his description of the facts, and because of his concern about the potential conflict, finds that he would not have made the statement that he was alleged to have made to Vaughn.

ORDER

AND NOW, this day of May, 2018, 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.

By the Court,

Nancy L. Butts, President Judge

xc: DA (JR)
Ryan Gardner, Esq.