

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. CR-1459-2011  
:   
v. :   
: PCRA  
ROGER MITCHELL RIERA, :   
Petitioner :

**OPINION AND ORDER**

After a jury trial held from August 13, 2012 to August 17, 2012, Roger Mitchell Riera (Petitioner) was convicted of Murder of the Third Degree, a felony of the first degree;<sup>1</sup> Voluntary Manslaughter, a felony of the first degree;<sup>2</sup> and Aggravated Assault, a felony of the first degree.<sup>3</sup> Petitioner filed a timely petition for Post Conviction Relief (PCRA) in which eight (8) issues were presented. On April 4, 2018, by opinion and order this Court dismissed six (6) issues and granted a hearing on two (2) of the issues presented: was trial counsel ineffective for failing to question Petitioner during trial about his medical concerns which would have been in existence during the time of the murder; and, was trial counsel ineffective for failing to discuss Petitioner’s testimony with him before he was called to the stand during trial or have a conversation with Petitioner about whether in fact he should testify at trial. The Court held a hearing on both these issues on July 20, 2018. For the reasons stated in this opinion, Petitioner’s petition for PCRA relief shall be denied.

In evaluating claims of ineffective assistance of counsel, we presume that counsel is effective. *Commonwealth v. Rollins*, 738 A.2d 435, 441 (Pa. 1999). To overcome this

---

<sup>1</sup> 18 Pa.C.S. § 2502(c).

<sup>2</sup> 18 Pa.C.S. § 2503(b).

<sup>3</sup> 18 Pa.C.S. § 2702(a)(1).

presumption, Appellant must establish three factors. First, Appellant must demonstrate that the underlying claim has arguable merit. *Commonwealth v. Travaglia*, 661 A.2d 352, 356 (Pa. 1995). Second, Appellant must establish that counsel had no reasonable basis for his action or inaction. *Id.* In determining whether counsel's action was reasonable, we do not question whether there were superior courses of action which counsel could have pursued; rather, we examine whether counsel's decisions had any reasonable basis. *See Rollins*, 738 A.2d at 441; *Commonwealth v. (Charles) Pierce*, 527 A.2d 973, 975 (Pa. 1987). Finally, “Appellant must establish that he has been prejudiced by counsel's ineffectiveness; in order to meet this burden, he must show that ‘but for the act or omission in question, the outcome of the proceedings would have been different.’” *Rollins*, 738 A.2d at 441 (quoting *Travaglia*, 661 A.2d at 357). A claim of ineffectiveness may be denied by a showing that the petitioner's evidence fails to meet any of these prongs. *See Commonwealth v. (Michael) Pierce*, 786 A.2d 203, 221–22 (Pa. 2001); *Commonwealth v. Basemore*, 744 A.2d 717, 738 n. 23 (Pa. 2000); *Commonwealth v. Albrecht*, 720 A.2d 693, 701 (Pa. 1998) (“If it is clear that Appellant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met.”). In the context of a PCRA proceeding, Appellant must establish that the ineffective assistance of counsel was of the type “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.” 42 Pa.C.S. § 9543(a)(2)(ii); *see also (Michael) Pierce*, 786 A.2d at 221–22; *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999).

***Was trial counsel ineffective for failing to discuss Petitioner's testimony with him before he was called to the stand during trial or have a conversation with Petitioner about whether in fact he should testify at trial***

Petitioner testified that he was represented at trial by Jeana Longo, Esq. of the Lycoming County Public Defender's office. William J. Miele, Esq. Chief Public Defender also participated in several of the meetings where they discussed trial strategy, including which witnesses would be called and whether or not Petitioner would be testifying in the trial. Petitioner further related that the decision as to whether he would be testifying at trial had not been made before the trial started. Once the trial began, after both days one and two Petitioner acknowledged that they had some discussions about him testifying but it was "still unknown at this point."

During day three of the trial, this Court discussed with trial counsel the possibility of Petitioner testifying, which Petitioner claimed that he did not understand. In the weeks leading up to the trial he also claimed that no one had prepared him to testify, no one went over anything with him, and no one answered or reviewed any potential questions which could be asked at trial. So that when the Court did take a recess for Petitioner to speak with Counsel during trial, he claimed they only spoke for about 10-15 minutes and that he did not want to testify. He also told them that he did not feel comfortable testifying and felt that he was not prepared. He also claimed that Ms. Longo responded by saying not to worry about that it was "our decision to make" whether he would be testifying and to "not get mad at the prosecutor." Petitioner claimed that despite their conversation he was in no way prepared to testify and did not realize that he was going to until he was called up to testify in open court. He was of the impression that he did not need to testify and that the statements that he gave to Agent Dincher of the Williamsport Bureau of Police would be "taken into consideration."

On cross examination Petitioner told the Commonwealth that he and counsel only went over his version a few times, “maybe 2 or 3.” Once again he claimed that he did not know they were calling him to testify because he testified that he did not know what anyone would be asking him. In fact he did not even understand why they told him not to get mad, because he says they did not even say anything to him to explain to him why that would be important. Although Petitioner claimed that he was not prepared to testify, he recalls telling the jury how he felt, that he pulled out his gun because he was afraid for his safety, and that he described how he felt mentally not physically. He believed that because he was not prepared properly by Counsel he could not explain how he felt “physically.”

Trial Counsel was called to testify about her contacts with Petitioner during the course of the trial. She stated that she was assigned the case “early on” and believed that she had met with him more than fifteen (15) times. In the first meeting both she and Mr. Miele would have explained to Petitioner that he has the right to make the decision whether or not to testify, and that it was in fact his decision. Each time she would have met with him she would have discussed the trial strategy, discussed the question as to whether he should testify and told him she believed that the final decision should be made during trial. In the meetings with Petitioner, trial counsel explained that she would review expert reports, potential witness testimony and even went so far as to role play with Petitioner. She testified that she would anticipate the types of questions that the Commonwealth would ask and was even more “antagonistic” than the attorney for the Commonwealth to best prepare him for cross examination. She further estimates that she would have participated in such a mock examination role play 4-5 times where it was treated as though the questions were being asked under trial like conditions. Trial Counsel shared that she had been concerned about how Petitioner would react to cross examination so she

intentionally asked questions which were more antagonistic and confrontational so she could point out areas of concern. When told that Petitioner said that he had no idea what to expect when he was called to testify, Counsel responded that he did and “we went over this.”

In consideration of the testimony presented, the Court believes that the issue has no merit. The Court recalls that the Petitioner neither expressed any concerns to the Court at the time that he was scheduled to testify nor brought his concerns to the attention of trial counsel so that the matter could have been addressed during trial. In addition, the Court finds no motive for trial counsel to lie about the nature and quantity of the contacts she had with Petitioner. A claim has arguable merit where the factual averments, if accurate, could establish cause for relief. *See Commonwealth v. Jones*, 876 A.2d 380, 385 (Pa. 2005) (“if a petitioner raises allegations, which, even if accepted as true, do not establish the underlying claim . . . , he or she will have failed to establish the arguable merit prong related to the claim”). Whether the “facts rise to the level of arguable merit is a legal determination.” *Commonwealth v. Saranchak*, 866 A.2d 292, 304 n. 14 (Pa. 2005). Since Petitioner cannot meet the first prong, his claim must be dismissed.

***Was trial counsel ineffective for failing to question Petitioner during trial about his medical concerns or call an expert to testify as to his condition which would have been in existence during the time of the murder***

To establish that counsel was ineffective for failing to call a witness, Appellant must demonstrate that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial. *Commonwealth v. Fletcher*, 750 A.2d 261, 275 (Pa. 2000). Failure to call a witness is not *per se* ineffective assistance of counsel, for such a decision implicates matters of trial strategy. *Commonwealth v. Auken*, 681 A.2d 1305, 1319 (Pa.

1996). It is Petitioner's burden to demonstrate that trial counsel had no reasonable basis for declining to call a particular person as a witness. *See Commonwealth v. Cross*, 634 A.2d 173, 175 (Pa. 1993).

Trial counsel was questioned about Petitioner's claim he had suffered from some type of medical condition on the night of the offense that made him fear for his safety as he knew that the victim carried a knife. PCRA counsel argued that trial counsel was ineffective for failing to present an expert to testify as to the Petitioner's medical condition or in the alternative, question Petitioner to establish how he felt that evening to establish his medical condition.

Trial counsel testified that she believed that for as many times as she spoke with Petitioner about his case, he did not tell her about his condition until during trial. He did not provide her with any additional information other than what he claimed he was told by a doctor. She was not given a name of a doctor so that counsel could investigate the claim. At the hearing on the PCRA claim, neither PCRA counsel nor Petitioner provided the court with the name of an expert witness who could have been called to testify as to his medical condition. Therefore, the Court finds that no such witness existed and trial counsel cannot be deemed ineffective.

On the issue of whether trial counsel should have asked Petitioner about "how he felt" that night, the Court also finds no arguable merit to the claim. During the trial, a conference was held in the presence of Petitioner on the issue of his testimony about how he felt the evening of the incident. *See* N.T. 8/15/2012 at pp. 55-59. The Commonwealth objected to Petitioner being allowed to testify as to what a doctor may have told him about a medical condition he may have had, but that he could testify as to his physical condition the night of the murder. *Id* at p. 56. Trial Counsel when asked during the PCRA hearing why she did not ask Petitioner directly about his medical condition she candidly testified that she had forgotten about it. However, in

reviewing his testimony during the trial, the Court found that there were many times where Petitioner could have testified as to how he was feeling and at one point when asked if he was “terrified,” could have elaborated on the specific reasons why, which could have included testimony about his medical condition. N.T. 8/15/2018 at p. 81. The Court finds that considering the circumstances of this case, and the fact that after testifying, the jury did not believe Petitioner and the reasons that he used to justify his use of a firearm, trial counsel’s failure to ask Petitioner specific questions on this issue does not rise to the level of ineffective assistance. It is clear that given the “circumstances of the particular case” her failure to inquire did not “undermine the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” 42 Pa.C.S. § 9543(a)(2)(ii). The jury chose not to believe Petitioner’s testimony. There is no indication from the evidence presented to this Court that they would have found differently and so Petitioner’s burden has not been met.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of October, 2018, Petitioner and his attorney are notified that it is the intention of the Court to dismiss Petitioner's PCRA petition because it does not raise a genuine issue concerning any material fact. The Court will dismiss Petitioner's claim unless Petitioner files an objection to that dismissal within twenty days (20) of today's date.

**The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.**

By The Court,

Nancy L. Butts, President Judge

Cc: Kenneth A. Osokow, District Attorney  
Kyle Rude, Esq. Counsel for Petitioner.  
Roger Mitchell Riera #KV2520 (**certified mail**)  
Smart Communications/PADOC  
SCI Houtzdale  
P.O. Box 33028  
St. Petersburg, FL 33733