IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**:**	**No. CR-304-2015**
	:	
vs.	**:**	**Partial Notice of Intent to Dismiss PCRA and**
	:	**Order Directing Counsel to File Either Amended**
TY KINNEY,	**:**	**PCRA or Supplemental No Merit Letter Re**
Defendant	**:**	**Photographic Lineup and Failure to Request**
	:	**Accomplice Corrupt and Polluted Source**
	:	**Jury Instruction**

OPINION AND ORDER

On or about July 16, 2018, Petitioner filed a pro se Post-Conviction Relief Act (PCRA) Petition. Because this was Petitioner's first PCRA Petition, counsel was appointed. On October 23, 2018, counsel filed a Motion to Withdraw as Counsel and a "no merit" letter pursuant to *Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley,* 379 Pa. Super. 390 (1988)(en banc) (hereinafter "*Turner/Finley*"). Appointed counsel conducted an independent review of the record as well as Petitioner's claims and determined that there were no issues of merit which would entitle the petitioner to PCRA relief. After an independent review of the record, the court agrees with most of counsel's no merit letter but disagrees with or needs further information regarding counsel's assessment of the issues asserted in Petitioner's PCRA petition and accompanying brief related to the photographic array and the failure of counsel to request a jury instruction regarding an accomplice as a corrupt and polluted source.

On January 26, 2015, Matthew Alexander and Daniel Pepperman, who are brothers, were walking on High Street when three individuals turned onto High Street from Rose Street. Alexander and Pepperman moved over so these individuals could pass by them.

Two of the individuals passed but the third individual, who both Alexander and Pepperman subsequently identified as Petitioner, hit Alexander in the head with brass knuckles and shoved him to the ground. Petitioner then kicked Alexander in the side and hit him in the head. One of the other individuals also started kicking Alexander until Pepperman started running away to get help. Petitioner demanded that Alexander give him everything he had. Alexander gave Petitioner a pack of cigarettes, his wallet and an orange Taurus lighter.

The other individuals chased Pepperman, tripped him and then began kicking and punching Pepperman in the side and the face. Petitioner, who was wearing a dark coat with fur on it and Timberland boots, got off of Alexander and participated in the assault of Pepperman.

Pepperman saw a tan boot come towards him and strike his face "nonstop until his eye was swollen shut." He was kicked and punched repeatedly until he lost consciousness. Alexander was afraid his brother was going to die so Alexander yelled for the individuals to stop and "play acted" like he was pulling a gun from his waistband and he would kill all of them if they didn't stop. The individuals then ran away.

When Pepperman regained consciousness, he was spitting blood and his nose felt like it was completely congested but when he attempted to blow his nose, nothing but blood came out. The beanie he had been wearing was missing.

The police were called. The police observed footprints in the snow, which they followed to 655 Wildwood Boulevard. They saw males at different times looking out of the windows of the residence at 655 Wildwood Boulevard. The police knocked on the door

and made contact with Stacy Fillman. The police told Fillman that they were investigating a serious crime scene, but she told them to come back the next day. The police told Fillman that wasn't an option; she could either consent to let them in or they would get a search warrant. Fillman slammed the door in their face.

The police soon obtained a search warrant for the residence. They took three males out of the residence, including Petitioner. The police discovered a soaking wet pair of boots with the same sole or tread pattern as the footprints in the snow. They also found an orange Taurus lighter in the pocket of a long, green coat with fur around the hood, homemade brass knuckles in an upstairs bedroom dresser drawer and a beanie in the dining room.

Petitioner was arrested and charged with eight counts of robbery, two counts of aggravated assault, two counts of simple assault, two counts of theft, two counts of receiving stolen property, two counts of conspiracy and one count of prohibited offensive weapons.

A jury trial was held on November 17, 2015. The jury convicted Petitioner of seven counts of robbery, two counts of aggravated assault, two counts of simple assault, one count of theft, one count of receiving stolen property, and one count of possession of a prohibited offensive weapon.

On February 3, 2016, the court sentenced Petitioner to incarceration in a State Correctional Institution for nine (9) to twenty-five (25) years, consisting of seven and a half (7 ½) to twenty (20) years for aggravated assault, a felony of the first degree, and one and a

half (1 ½) to five (5) years for possessing a prohibitive offense weapon (brass knuckles), a misdemeanor of the first degree. The remaining convictions either merged for sentencing purposes or the court imposed a concurrent sentence.

Petitioner did not file any post-sentence motions. He did, however, file a notice of appeal on February 26, 2016. By Opinion and Order of the Superior Court dated March 13, 2017, the judgment and sentence were affirmed.

To be eligible for relief under the PCRA, a petitioner must prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated circumstances found in 42 Pa. C.S. § 9543 (a) (2). *Commonwealth v. Crispell,* 193 A.3d 919, 927 (Pa. 2018). These circumstances include constitutional violations or instances of ineffective assistance of counsel. *Id.* (citing *Commonwealth v. Blakeney,* 108 A.3d 739, 749 (Pa. 2014)). Petitioner must also demonstrate that the issues included in his PCRA petition have not been previously litigated or waived. *Crispell, id.* (citing 42 Pa. C.S.A. §§ 9543 (a)(3), 9544 (a)-(b) (defining circumstances that lead to waiver and a finding that a claim is previously litigated)).

Counsel is presumed to have rendered effective assistance and the burden is on the PCRA petitioner to prove that counsel was ineffective. *Commonwealth v. Treiber,* 121 A.3d 435, 445 (Pa. 2015). To overcome the presumption that counsel was effective, a petitioner must satisfy a three prong test by demonstrating that: "(1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner

suffered prejudice as a result of counsel's deficient performance." *Crispell*, 193 A.3d at 928 (citing *Commonwealth v. Pierce,* 786 A.2d 203, 213 (Pa. 2001)). "A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim." *Crispell, id.* (citing *Commonwealth v. Daniels,* 104 A.3d 267, 281 (Pa. 2014)).

Petitioner has raised numerous claims in support of his petition for PCRA relief.

First, Petitioner alleges that his counsel was ineffective in failing to present at trial exculpatory evidence including EMT reports, medical records, a photograph of a beanie hat, and an email that Officer Eric Derr of the Williamsport Police Department testified about. This issue is similar to two additional issues that Petitioner raises, all of which can be addressed through a single analysis. Petitioner claims that his trial counsel was ineffective for failing to subpoena and introduce medical records and ineffective for failing to employ and utilize a medical expert at trial.

Petitioner's claims, however, are without arguable merit. Petitioner has not set forth how or why these records would have assisted in his defense. In addition to testimony from both victims, the Commonwealth introduced photographs of Pepperman's injuries that a police officer took while Pepperman was at the hospital. N.T., 11/17/15 at 64-66; Commonwealth's Exhibits 1 and 2. The officer also described the injuries and blood she observed on Pepperman at the scene, prior to Pepperman "being cleaned up at the hospital." N.T., 11/17/15 at 66-67.

As the Superior Court noted in its Opinion, the trial court found and the

record confirms that one of the victim's teeth were chipped and cracked and that he ended up losing four teeth as a result of the incident. The Superior Court noted as well that the evidence was sufficient to prove that Petitioner intentionally caused the protracted loss or impairment of the function of the victim's teeth by repeatedly striking and kicking him in the head. Superior Court Opinion, 3/13/17, at 8. With respect to the other victim, the Superior Court noted that the trial court found and the record confirmed that as a result of this incident, that victim lost consciousness, his right eye was swollen and bulging and his lips were swollen to two to three times the original size. Id. The Superior Court specifically held that the evidence was sufficient to prove that Petitioner attempted to cause serious bodily injury to the victims by repeatedly kicking and punching them. Id. Therefore, regardless whether the victims suffered serious bodily injury, the evidence was sufficient to prove Petitioner guilty of aggravated assault based on his attempt to cause serious bodily injury to them.

With respect to the photograph of the beanie hat, the issues surrounding the appearance of the beanie hat in question were addressed in cross-examination by trial counsel. The issue regarding the email from Officer Derr also relates to the beanie hat and was addressed at trial. Moreover, Petitioner was acquitted of the theft and receiving stolen property charges related to Pepperman's beanie (or knit) hat. Therefore, he could not possibly have suffered any prejudice.

The next issue involves the photographic lineup. This is one of the issues where the court disagrees with PCRA counsel. Based on a side bar discussion during trial, it

appears that photographic lineups were conducted and that Petitioner might not have been identified by the victims but that the co-defendants may have been so identified. See N.T., 11/17/15, at 53-54. PCRA counsel does not directly address any photographic lineup. While PCRA counsel notes that trial counsel cross-examined the victims regarding positioning during the assault, lighting, an article in the paper, and information on Facebook, it is clear that no evidence was presented to the jury regarding any photographic lineup. The court directs PCRA counsel to file either an amended PCRA petition or a supplemental no merit letter which states whether a photographic array with Petitioner's photograph was presented to the victims; whether the victims were able to identify Petitioner in any such array; and if there was such an array and the victims could not identify Petitioner, an analysis of whether counsel had any reasonable basis for her failure to introduce such evidence at trial, and whether Petitioner suffered any prejudice as a result.

The next group of issues raised by Petitioner are the following: (1) the prosecution committed misconduct by allowing a witness to present perjured testimony; (2) the prosecution committed misconduct by lying to the court regarding DNA evidence on a pair of brass knuckles; and (3) the prosecution committed misconduct by introducing evidence that did not belong to the victims or Petitioner. Along with this group of issues is another issue raising trial counsel's ineffectiveness for failing to object to fabricated and misleading testimony from Officer Derr as well as failing to object to the introduction of DNA evidence.

There is no basis whatsoever for relief with respect to the alleged misconduct

by the prosecution. Not only is there no factual basis for such but Petitioner's claims do not constitute any of the enumerated circumstances found in the PCRA Act that may establish a basis for relief.

Perhaps Petitioner's claim can be interpreted as an ineffectiveness claim against his trial counsel for failing to object to the DNA evidence. Petitioner does not indicate on what basis counsel should have objected to the DNA evidence. Petitioner's DNA was found on a dark coat with a fur-lined hood. N.T., 11/17/15 at 144-146. There is nothing in the record to suggest that this DNA evidence was objectionable.

The brass knuckles and boots were tested for DNA but there was an insufficient quantity of DNA such that no interpretable results were obtained. N.T., 11/17/15, at 131-136 (swabs taken), 146 (no interpretable results from the other items). This testimony only showed that the police attempted to tie the brass knuckles and the boots to the alleged perpetrators but were unable to do so. It showed a complete, rather than a partial, investigation for forensic evidence related to the crimes.

Furthermore, trial counsel clearly addressed the identification of the brass knuckles on cross-examination of both Mr. Alexander and Officer Derr. (N.T, 11/17/15, at 35, 85-86). Moreover, and perhaps determinatively, since no DNA results were obtained from the brass knuckles or the boots such that Petitioner could be identified through it, Petitioner clearly was not prejudiced by counsel's failure to object to this DNA evidence. As PCRA counsel cogently notes in his *Turner/Finley* letter, "There is nothing in the record to suggest that the Commonwealth did anything wrong or misleading regarding the evidence

and more importantly, nothing in the record suggests…[that] trial counsel addressed this evidence in an ineffective manner."

With respect to the fabricated or misleading testimony from Officer Derr, trial counsel very effectively showed that the Commonwealth could not connect the boots directly to the Petitioner. While cross-examining Officer Derr, he acknowledged that he couldn't say for sure that the boots were Petitioner's and that he couldn't "say whose boots they are." (N.T., 11/17/15, at 99). The same can be said about the dark green or black coat and the brass knuckles. Officer Derr could not definitively identify either of these items as belonging to the Petitioner. (N.T, 11/17/15, at 100). Again, and as PCRA counsel noted: "This is not ineffective assistance or evidence of wrongdoing. In fact, it is evidence that your trial counsel correctly cross-examined the Commonwealth's witnesses." To add to this, your attorney called your brother as a witness. He specifically testified that the boots obtained by the police were not yours. (N.T., 11/17/15, at 167-68).

Again, the court must agree with PCRA counsel who concludes as follows: "The record simply does not suggest that any error occurred regarding the admission of evidence, the identification of evidence or evidence being attributed to you that occurred in some manner that prejudiced your right to a fair trial due to your trial counsel's error."

The next issue raised by Petitioner concerns his trial counsel being allegedly ineffective for failing to call two witnesses at trial, namely Stacy Fillman and Charles Kaelin. When a PCRA petitioner argues that trial counsel was ineffective for failing to call a witness, the petitioner must demonstrate that the absence of the testimony of the witness was so

prejudicial as to have denied the petitioner a fair trial. *Commonwealth v. Washington,* 927 A.2d 586, 599 (Pa. 2007). It is the petitioner's burden to demonstrate that trial counsel had no reasonable basis for declining to call a particular witness. *Id.* The defendant must prove that the witness existed and was available to testify for the defense, counsel knew or should have known the witness existed, the witness was willing to cooperate and the proffered testimony's absence denied him a fair trial. *Commonwealth v. Small,* 980 A.2d 849 (Pa. 2009).

With respect to Ms. Fillman, she was charged with hindering apprehension of a suspect and those charges were pending at the time of Petitioner's trial. She was cooperating with the police and apparently told them that she knew Petitioner and his co-defendants were in the home at the time the police arrived, that she knew Petitioner and his co-defendants were hiding in the house but that she was not aware of specifically what they had done. Her attorney conveyed to Petitioner's PCRA counsel that he would not have allowed Ms. Fillman to testify on Petitioner's behalf at trial. Accordingly, trial counsel was not ineffective in that Ms. Fillman was not available as a witness. Moreover and perhaps more importantly, her testimony would have been harmful to Petitioner.

Regarding Charles Kaelin, he pled guilty to two counts of robbery on August 18, 2015 before the Honorable Nancy L. Butts. He pled guilty before Petitioner proceeded to trial. He admitted that he and two co-defendants approached the two victims and attacked them, taking items from their persons. See Commonwealth v. Charles Kaelin, CP-41-CR-0000310-2015, Guilty Plea Transcript, 8/18/15, at 3-4. Although Mr. Kaelin did not mention

Petitioner by name, Petitioner and Jeffrey Randolph were named in the affidavit of probable cause, the criminal complaint and the Information as Mr. Kaelin's co-defendants.

The certification provided by Petitioner indicates that Mr. Kaelin would testify that Jeffrey Randolph "possessed the brass knuckles and was the main actor[/] the initial aggressor." Notably, the certification does not state that Mr. Kaelin would testify that Petitioner was not involved in the incident. The court cannot possibly see any benefit to having Mr. Kaelin testify on Petitioner's behalf. The defense presented at trial by Petitioner was that he was not involved in the assault. Mr. Kaelin indirectly implicated Petitioner as being involved in the assault. Absent a witness certification that Mr. Kaelin would testify that Petitioner was not involved in the assault, the claim that Petitioner's attorney was ineffective in not calling him lacks arguable merit.

The next issues raised by Petitioner are that his trial counsel was ineffective for failing to request false in one, false in all jury instruction as well as an accomplice testimony jury instruction.

A false in one, false in all jury instruction states as follows: "If you decide that a witness deliberately testified falsely about a material point [that is, about a matter that could affect the outcome of this trial], you may for that reason alone choose to disbelieve the rest of his or her testimony. But you are not required to do so. You should consider not only the deliberate falsehood but also other facts bearing on the witness's credibility in deciding to believe other parts of his or her testimony." Pennsylvania Suggested Standard Jury Instruction (Crim) 4.15. In this case, while the court did not specifically give the false in one,

false in all charge, it did give a charge on credibility, which included the following: "If you believe some part of the testimony of a witness to be inaccurate, consider whether that inaccuracy casts doubts upon the rest of her or her own testimony. This may depend on whether he or she has been inaccurate in an important matter or a not so important matter. For example, did the witness make an honest mistake or simply forget or did they purposefully falsify something?" N.T., 11/1715 at 188. This was only a portion of an extensive charge on credibility. N.T., 11/17/15 at 187-189. When a full and complete charge is given on credibility there is no error in failing to give the specific false in one, false in all charge. *Commonwealth v. Vicens-Rodriguez*, 911 A.2d 116 (Pa. Super. 2006). Accordingly, Petitioner's claim with respect to the false in one, false in all charge is without merit.

Counsel did not request and the court did not give a specific instruction regarding an accomplice as a corrupt and polluted source. PCRA counsel did not address this specific issue in his no merit letter. Instead, counsel addressed how an accomplice liability instruction would have been detrimental to Petitioner. The court directs PCRA counsel to file either an amended PCRA petition or a supplemental no merit letter to address trial counsel's failure to request a jury instruction regarding an accomplice as a corrupt and polluted source.

Petitioner next argues that his trial counsel was ineffective for failing to fully and extensively explain the opportunity of plea offers to Petitioner. Petitioner's argument is somewhat confusing. Petitioner admits that he was provided with two different plea offers, one of which may have been rescinded but the latter of which was not accepted. Petitioner

does not assert that he was given erroneous advice that lead to him rejecting a plea offer that would have been more favorable to him. See for example, *Commonwealth v. Steckley*, 2015 Pa. Super. 250, 128 A.3d 826 (Pa. Super. 2015). Additionally, it is clear from Petitioner's "brief" that trial counsel was not his attorney when the plea offers were made, Mr. Frankenburger was. Accordingly, there is no basis for Petitioner's claim.

Petitioner also claims that his appellate attorney was ineffective in failing to properly raise certain issues on appeal which resulted in the loss of his appellate rights and violated the Sixth Amendment to the United States Constitution and Article 1, §9 of the Pennsylvania Constitution. The court cannot agree.

On appeal, Petitioner challenged the weight and sufficiency of the evidence, as well as claims concerning the plea agreement between the Commonwealth and Petitioner's cooperating co-defendant, Jeffrey Randolph. The Superior Court rejected Petitioner's sufficiency claims and found that the claims regarding the weight of the evidence and Jeffrey Randolph's plea deal were waived. However, the Superior Court also found that even if the claims had been properly preserved, they would have failed on the merits. Therefore, Petitioner was not prejudiced by counsel's failure to properly preserve his weight of the evidence claim or his claims related to Jeffrey Randolph's false testimony regarding his plea deal.[1]

Petitioner does not mention any issues that he believes appellate counsel

[1] Appellate counsel did not represent Petitioner during the time period when post-sentence motions were required to be filed. Trial counsel still represented Petitioner at that time. Regardless of which counsel failed to properly preserve these claims, Petitioner was not prejudiced as the Superior Court found these claims, even if properly preserved, would not entitle Petitioner to relief.

should have raised on appeal but failed to do so. Moreover, as Petitioner's PCRA counsel notes, "the record does not suggest any issues that would have had a greater chance of success than sufficiency and weight or the other issues raised and as such, this issue lacks merit under the requirements of the Post-Conviction Relief Act." There is no support for a contention that appellate counsel ignored issues that were clearly stronger than those presented.

ORDER

AND NOW, this ___ day of March 2019, it is hereby ORDERED and DIRECTED as follows:

1. With respect to the issues regarding the photographic array and the failure to request a jury instruction regarding an accomplice as a corrupt and polluted source, PCRA counsel is directed to file either an amended PCRA petition or a supplemental no merit letter within 30 days of the date of this Order. A conference is scheduled for **May 3, 2019 at 9:00 a.m. in the undersigned's chambers.**

2. With respect to all other issues, Petitioner is hereby notified pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure that it is the intention of the court to dismiss the remainder of his PCRA Petition without holding an evidentiary hearing unless he files an objection or objections to that dismissal within twenty (20) days of today's date. If objections are filed, the court will review the

objections and determine if anything changes the court's analysis of Petitioner's claims.

By The Court,

_____
Marc F. Lovecchio, Judge

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