

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No. CR-304-2015  
:   
vs. :   
TY KINNEY, : Notice of Intent to Dismiss PCRA  
: Without Holding an Evidentiary Hearing  
Defendant :

**OPINION AND ORDER**

By Opinion and Order filed on March 15, 2019, the court notified Petitioner pursuant to Rule 907 (1) of the Pennsylvania Rules of Criminal Procedure that it intended to dismiss the vast majority of Petitioner’s PCRA petition without holding an evidentiary hearing unless Petitioner filed an objection or objections to that dismissal within twenty (20) days.

Additionally, with respect to issues regarding the photographic array and the failure to request a jury instruction regarding an accomplice as a corrupt or polluted source, PCRA counsel was directed to either file an amended PCRA petition or a supplemental no merit letter.

Petitioner filed a pro se response to the court’s notice on April 5, 2019 asserting that his previously raised issues were of arguable merit. Petitioner addressed issues relating to direct appeal counsel’s alleged ineffectiveness, trial counsel’s failure to present the testimony of Charles Kaelin, trial counsel’s failure to request an accomplice instruction and trial counsel’s failure to give appropriate advice during the plea bargaining process.

On April 10, 2019, Petitioner’s PCRA counsel in response to this court’s Order of March 15, 2019, filed a supplemental motion to withdraw as counsel which

included a Turner/Finley letter in connection with the two remaining issues. A conference was held on May 3, 2019.

With respect to the photographic lineup issue and as the court noted in its prior opinion, based on a sidebar discussion during trial, it appeared 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. While PCRA counsel noted that trial counsel cross-examined the victims regarding positioning during the assault, lighting, an article in the paper and information on Facebook, it was clear that no evidence was presented to the jury regarding any photographic lineup.

It is clear, further, that there is no evidence in the police reports to indicate any witness was shown photographs of Petitioner, no witness testified at any point that they were shown photographs of Petitioner and given the evidence and information obtained by the police on the date of the offense, it is highly unlikely that any witness would have been shown any photographs of Petitioner. PCRA counsel indicated that he is “certain” that “no in-person lineup was conducted with either witness.” Contrary to what Petitioner claims, the only photographic lineup involved Charles Kaelin and not Petitioner.

Moreover, even if there were such evidence, Petitioner has not suffered prejudice as a result of trial counsel’s alleged deficient performance. As this court noted in its 1925 (a) Opinion dated September 30, 2016, the victim “knew it was [Petitioner] that punched him because he looked right in his face and there was a streetlamp above where the incident happened.” The victim “could say without hesitation that [Petitioner] was the one

that hit him.” Further, Daniel Pepperman also identified [Petitioner] as the person who struck [the victim]. Mr. Pepperman indicated that he “got a good look” at Petitioner. Moreover, on appeal, Petitioner raised the sufficiency of the evidence identifying him as the assailant. Although concluding that Petitioner waived this claim, the Superior Court concluded that the jury “obviously credited the victims’ testimony despite cross-examination designed to undermine their versions of the assault.”

Accordingly, Petitioner’s claim with respect to the photographic array is without merit.

The final issue as set forth in this court’s opinion and order filed on March 15, 2019 concerns trial counsel’s alleged ineffectiveness for failure to request the court to give a specific instruction regarding an accomplice as a corrupt and polluted source.

As Petitioner’s counsel noted in his supplemental motion to withdraw, this issue references the testimony of witness Jeff Randolph. Mr. Randolph was charged as a co-defendant and testified on behalf of the Commonwealth. During direct examination, the Commonwealth’s attorney made the jury aware through questioning that Mr. Randolph was a cooperating witness, that he was Petitioner’s co-defendant and Mr. Randolph specifically testified, “what made me decide to cooperate was a chance for leniency and to tell you what happened that night.” (Supplemental Motion to Withdraw, paragraph 36). Further, the testimony of Mr. Randolph was corroborated by Commonwealth witnesses Matthew Alexander and Daniel Pepperman.

With respect to the corrupt source charge, it is well established that, in any

case in which an accomplice implicates the defendant, the trial court should instruct the jury that the accomplice is a corrupt and polluted source whose testimony should be considered with caution. *Commonwealth v. Chmiel*, 536 Pa. 234, 251, 639 A.2d 9, 13 (1994). The charge is indicated in cases in which the evidence is sufficient to present a jury question with respect to whether the Commonwealth's witness is an accomplice. *Id.*; *Commonwealth v. Spence*, 534 Pa. 233, 247-48, 627 A.2d 1176, 1183 (1993). Such a jury question is present when the witness could be indicted for the crime for which the defendant is charged. *Commonwealth v. Sisak*, 436 Pa. 262, 268, 259 A.2d 428, 431 (1969).

In *Commonwealth v. Derk*, 553 Pa. 325, 719 A.2d 262 (1998), the Pennsylvania Supreme Court addressed the limited issue of whether Defendant's trial counsel was ineffective for failing to request a "corrupt source" jury instruction. The Court noted that the failure to request a discretionary accomplice instruction is within the realm of counsel's trial strategy. 719 A.2d at 265-266. Furthermore, trial counsel is not ineffective for failing to request such a jury instruction where, as here, the defendant's defense is that he was not involved in the perpetration of the crime. *Id.* at 265.

PCRA counsel submits that the Pennsylvania Supreme Court's decision in *Commonwealth v. Wholaver*, 177 A.3d 136 (Pa. 2018) is controlling.

In *Wholaver*, the defendant appealed the dismissal of his petition for post-conviction relief. Defendant was convicted of three counts of first degree murder. The court concluded that trial counsel was not ineffective for failing to request a corrupt and polluted source instruction because Wholaver's brother was an accomplice to the murders. The

brother's testimony on both direct and cross-examination fully apprised the jury that he had an interest in testifying for the Commonwealth. The brother testified he hoped for leniency and that to obtain this leniency, he had to testify in a manner that satisfied the prosecutor. As a result, the *Wholaver* Court found that the appellant failed to establish the prejudice prong.

The court agrees that *Wholaver* is controlling. Here, as in *Wholaver*, the jury was aware that Mr. Randolph had pending charges and was testifying to try to obtain leniency in his own case. The court also gave the jury credibility instructions regarding bias and interest in the outcome of the case. Moreover, Mr. Randolph's testimony was corroborated by the testimony of the victims and the presence of Petitioner's DNA on a coat that matched the victim's description of the clothing Petitioner was wearing on the night in question. In light of the *Wholaver* decision which is factually similar, if not virtually identical, to the allegations in this case, the court finds Petitioner is unable to establish the prejudice prong of the test for ineffective assistance of counsel.

### **ORDER**

**AND NOW**, this \_\_\_ day of June 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, 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 these issues with respect to Petitioner's PCRA petition without holding an evidentiary hearing unless Petitioner 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.

2. With respect to all other issues, the court has reviewed Petitioner's objections and disagrees. Petitioner's PCRA petition with respect to those issues will be dismissed after the court reviews any objections filed pursuant to paragraph 1 of this Order.

3. The court GRANTS counsel's petition to withdraw. Petitioner may represent himself or hire private counsel, but the court will not appoint counsel to represent him unless he raises an issue or issues in his objections that the court determines would require an evidentiary hearing.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
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