IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-866-2011**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	**Notice of Intent to Dismiss**
SHAKOOR TRAPP,	:	**Without Holding An Evidentiary Hearing**
Defendant	:	

OPINION AND ORDER

This matter came before the court on the Post Conviction Relief Act (PCRA) petition filed by Shakoor Trapp (hereinafter Petitioner).

On May 29, 2011, an individual entered a residence at 606 Maple Street in Williamsport, Pennsylvania and assaulted a 23-year old African American female in an upstairs bedroom by stabbing, choking, and shooting her. Fortunately, she survived the attack and sought help at a neighbor's residence. After receiving medical treatment for her injuries, the victim identified Petitioner as her attacker through photographs shown to her by family members and a photo array conducted by the police. The police obtained a warrant for Petitioner's arrest, as well as a warrant to search his residence. When the police executed the search warrant, they found a pair of bloody socks near a couch in Petitioner's living room.

Petitioner was arrested and charged with attempted homicide, two counts of aggravated assault, burglary, criminal trespass, persons not to possess a firearm, possessing instruments of crime, recklessly endangering another person and simple assault. Upon motion of the defense, the person not to possess charge was severed for trial purposes.

The parties stipulated that the severed firearm charge would proceed at the same proceeding to a non-jury trial and the other charges would proceed to a jury trial. The

trial was held June 5-7, 2012. The jury trial ended in a mistrial, but the court convicted Petitioner of the firearm charge.

Petitioner filed an appeal, claiming that re-trial of the remaining charges was barred by double jeopardy. This claim, however, was rejected by the appellate courts, and the case was placed back on the trial list.

Jury selection was scheduled for August 27, 2014. The day before jury selection defense counsel requested a continuance to seek leave to hire an expert witness regarding eyewitness identification. The court denied the continuance request and a jury was selected.

Following a jury trial held September 10-12, 2014, Petitioner was found guilty of attempted homicide, aggravated assault, burglary, criminal trespass, possession of instrument of a crime, recklessly endangering another person and simple assault.

On April 8, 2015, the court sentenced Petitioner to an aggregate period of state incarceration, the minimum of which was 32 ½ years and the maximum of which was 65 years. The aggregate sentence consisted of 20 to 40 years for attempted homicide, a felony of the first degree; 6 ½ to 13 years for Count 4, burglary, a felony of the first degree; 5 to 10 years for Count 6, persons not to possess, a felony of the second degree; and 1 to 2 years for Count 7, possessing instruments of a crime, a misdemeanor of the first degree. The sentence was effective April 8, 2015 although Petitioner had credit for time served from June 1, 2011 to April 7, 2015.

Petitioner filed a post-sentence motion on April 17, 2015, which was argued before the court on May 26, 2015. The court issued an opinion and order denying

Petitioner's post sentence motion on August 21, 2015.

On September 2, 2015, Petitioner filed his direct appeal, in which he challenged the weight and sufficiency of the evidence, the court's ruling on a motion in limine precluding expert testimony regarding witness identification, and discretionary aspects of sentencing. The Superior Court rejected Petitioner's claims and affirmed his judgment of sentence.

Petitioner filed a timely pro se form PCRA petition, in which he checked the boxes related to a violation of constitutional rights, ineffective assistance of counsel, and obstruction by government officials of his right to appeal, but which did not contain any factual allegations whatsoever. Several extensions were granted to allow counsel to file an amended petition and to explore DNA issues. Petitioner's counseled PCRA petition contains four claims of ineffective assistance of counsel: (1) counsel was ineffective for failing to retain the services of an expert to review the findings and conclusions of the Pennsylvania State Police (PSP) Bureau of Forensic Services, testify on behalf of Petitioner, and/or conduct an independent analysis of the materials submitted to the PSP for analysis;[1] (2) counsel was ineffective for failing to retain the services of an expert to otherwise investigate and conduct a forensic analysis of potentially exculpatory evidence that the defendant knew to be in possession of the Commonwealth that the Commonwealth chose not to submit for testing;[2] (3) counsel was ineffective for failing to file a motion with the trial court seeking to

[1] The items submitted to the PSP were a pair of Timberland boots and two cuttings from a sock found in Petitioner's residence – one from a blood stain on the sock and the other from the cuff and leg of the same sock. These items were compared to known DNA samples from the victim and Petitioner. The blood stain matched the victim's DNA and the DNA found on the cuff/leg of the sock and a DNA swab of the laces and back of the boots matched Petitioner's DNA.

[2] This claim is referring to hairs that were found on the bloody sock and on the pair of boots.

compel production of potentially exculpatory DNA samples from third parties who law enforcement elected not to investigate further following the victim's identification of Petitioner; and (4) counsel was ineffective for failing to object to the introduction of testimony concerning the DNA analysis of Timberland boots found in Petitioner's bedroom where the testimony offered by the Commonwealth was wholly irrelevant, cumulative and prejudicial.

Counsel is presumed to be effective and the burden is on a petitioner to show otherwise. *Commonwealth v. Brown*, 196 A.3d 130, 150 (Pa. 2018). In order to establish ineffective assistance of counsel, a petitioner must plead and prove the following three elements: (1) the claim has arguable merit; (2) there was no rational or strategic reason for counsel's act or omission; and (3) prejudice, i.e. but for counsel's act or omission there is a reasonable probability that the outcome of the proceedings would have been different. *Id*. at 150-151.

When a claim of ineffectiveness relates to the failure of counsel to call a witness, the petitioner must show 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 was so prejudicial as to have denied the defendant a fair trial.

Id. at 167, quoting *Commonwealth v. Washington*, 927 A.2d 586, 599 (Pa. 2007).

Petitioner first claims that counsel was ineffective for failing to retain the services of an expert to review the findings and conclusions of the PSP Bureau of Forensic Services, testify on behalf of the defense and/or conduct an independent analysis of the

materials submitted to the PSP Bureau of Forensic Services. The court intends to dismiss this claim without holding an evidentiary hearing for several reasons. First, Petitioner has not submitted any witness certifications to support this claim. Petitioner has not submitted a witness certification from trial counsel or from any expert who could dispute the PSP's finding or conclusions. Failure to submit a witness certification that substantially complies with the requirements that the certification must provide the proposed witness's name, address, and a summary of the witness's proposed testimony renders the witness's testimony inadmissible at any PCRA hearing. As there are no witness certifications, there is no need for an evidentiary hearing because there are no witnesses whose testimony would be admissible at such a hearing.

Second, Petitioner has not stated any basis to question the PSP's findings or conclusions. Merely because the Commonwealth presents expert testimony does not entitle a petitioner to his own expert at public expense. "[T]here is no constitutional mandate, either federal or state, that experts be appointed at public expense to assist in the preparation of a defense whenever requested by one accused of crime." *Commonwealth v. Gelormo*, 475 A.2d 765, 770 (Pa. Super. 1984). "Additionally, trial counsel will not be deemed ineffective for failing to call a medical, forensic or scientific expert merely to critically evaluate expert testimony which was presented by the prosecution." *Commonwealth v. Marinelli*, 810 A.2d 1257, 1269 (Pa. Super. 2002). The appointment of an expert witness to assist in the preparation of a defense is vested in the discretion of the trial court, which generally will not be found to have abused its discretion in the absence of a clear showing as to the content, relevancy and materiality of the testimony of the potential witness. *Commonwealth v. Bell*,

706 A.2d 855, 862 (Pa. Super. 1998); see also *Commonwealth v. Tighe*, 184 A.3d 560, 580 (Pa. Super. 2018).

Third, PCRA counsel submitted the PSP's data from its DNA testing to Cybergenetics for a free screening and preliminary report. The preliminary report indicated that the victim's DNA was present in the blood stain on the sock with a DNA match statistic of 19 zeroes after the 1 (i.e., ten quintillion) and Petitioner's DNA was present on the cutting from the cuff/leg of the sock with a match statistic of 23 zeroes after the 1 (i.e., 100 sextillion). While the preliminary report also indicated the presence of DNA from an unknown person in the blood stain and on the cuff/leg cutting of the sock, the match statistics were much lower –only 5 zeroes after the one (100,000) for the blood stain and 8 zeroes after the 1 (100 million) for the cuff/leg area.

Timothy Gavel, a forensic scientist at the PSP DNA laboratory testified at trial that the blood on the sock matched the victim's DNA, the chance of a coincidental match in the African American population is one in 320 quintillion, and a quintillion has 18 zeroes in it. N.T., 9-11-14, at 107. He also testified that DNA from the elastic portion of the cuff and leg of the sock matched Petitioner's DNA and the chance of a coincidental match in the African American population would be approximately one in 25 septillion, which has 24 zeroes. N.T., 9-11-14, at 111. Furthermore, the PSP findings and conclusions acknowledged that there was a DNA mixture but that Petitioner was the "major contributor." N.T., 9-11-14, at 110.

In other words, the preliminary report from Cybergenetics did not refute the PSP's analysis, but rather was consistent with it, as both found the victim's blood and

Petitioner's DNA on the sock recovered from Petitioner's bedroom with similar match statistics.

Petitioner next asserts trial counsel was ineffective for failing to retain the services of an expert to investigate and conduct forensic analysis of potentially exculpatory evidence that counsel knew to be in the possession of the Commonwealth that the Commonwealth chose not to submit for testing. This claim relates to two hairs recovered from the bloody sock and two hairs recovered from the exterior of the Timberland boots recovered from Petitioner's bedroom. The court intends to dismiss this claim without holding an evidentiary hearing.

First, Petitioner has not submitted any witness certifications to support this claim. Petitioner has not submitted a witness certification from trial counsel or from any potential expert witness. Failure to submit a witness certification that substantially complies with the requirements that the certification must provide the proposed witness's name, address, and a summary of the witness's proposed testimony renders the witness's testimony inadmissible at any PCRA hearing. As there are no witness certifications, there is no need for an evidentiary hearing because there are no witnesses whose testimony would be admissible at such a hearing.

Second, Petitioner has not offered any information to indicate that the testing would have yielded any results. Brunee Coolbaugh, a forensic scientist with the PSP Wyoming Lab, testified that the hairs were not submitted for DNA testing because there were no roots or follicular tissue on the hairs, which made them unsuitable for nuclear DNA testing. N.T., 9-11-14, at 82, 88. Without follicular tissue, "the chance of getting results is

very slim." Id. at 88.

Third, Petitioner did not suffer prejudice. Under these circumstances, even if trial counsel had requested funds for an expert to conduct DNA testing of the hairs, the court would not have granted it. The court would not waste public funds to conduct DNA testing on hairs that were not suitable for such testing.

Petitioner next asserts that trial counsel was ineffective for failing to file a motion with the trial court seeking to compel production of potentially exculpatory DNA samples from third parties who law enforcement elected not to investigate further following the victim's identification of Petitioner.

Petitioner contends trial counsel should have filed a motion to compel the production and testing of DNA samples from Shakeem Taylor, Antoine Pollard, Alfonso Batten, and Maurice Jones. Petitioner contends these individuals were potential suspects and could have been the contributor of the unknown DNA from the DNA mixtures on the sock. Petitioner alleges that: Shakeem Taylor was the victim's paramour, who voluntarily provided samples to the police which the police never sent for testing; Antoine Pollard, was an individual for whom the police found indicia of occupancy in Petitioner's residence; Alfonso Batten was the father of one of the victim's children and was allegedly involved in an "active" domestic relations case with the victim; and Maurice Jones was an individual who allegedly placed .22 caliber ammunition under couch cushions where he was sitting when the police entered the residence at 523 High Street, the location where Petitioner was arrested.

The court intends to dismiss this claim without holding an evidentiary hearing. First, Petitioner has not included any witness certifications or any other

documentation in support of this claim.

Second, Petitioner has not cited any Pennsylvania authority to compel the production of DNA samples from third parties. Assuming for the sake of argument that the court would have the authority to order a third party to provide a DNA sample, Petitioner has not made an adequate showing for the court to do so. Absent consent, the police cannot obtain a DNA sample from an individual unless they establish probable cause to obtain a search warrant. Petitioner should be required to make a similar showing. To permit a defendant to obtain DNA samples of third parties through the authority of the court without such a showing would arguably violate the third parties' constitutional rights against unreasonable searches and seizures. The court recognizes that these rights do not apply to private parties, but Petitioner is not acting on his own; he is invoking the aid of the state.

Third, Petitioner has not explained how these individuals would be considered potential suspects. Petitioner's claim that these four individuals were potential suspects is nothing more than mere speculation. It appears that Petitioner named Mr. Taylor and Mr. Batten based solely on their current or former relationship to the victim, he named Mr. Pollard simply because he left an item of mail at Petitioner's residence, and he named Mr. Jones because he either controlled or was in close proximity to .22 caliber ammunition.

The victim did not identify any of these individuals as her attacker. With respect to Shakeem Taylor and Alfonso Batten, one would expect, as the victim's boyfriend and the father of one of the victim's children, respectively, that the victim would be familiar enough with these individuals that she could easily recognize them and report their identity as her attacker to the police. That did not occur. Additionally, the police testified at trial that

they "ruled out" Mr. Taylor. N.T., 9-10-14, at 205-206. Furthermore, unlike the evidence with respect to Petitioner, there is nothing to show that any of these individuals were even in the vicinity of the victim's residence on the night in question. The court recognizes that the victim was shot with a .22 caliber bullet; however, lots of .22 caliber bullets are manufactured and sold each year by numerous different manufacturers. The court finds that Petitioner's request to compel DNA samples from these individuals is a fishing expedition.

Petitioner's final assertion is that counsel was ineffective for failing to object to the introduction of testimony concerning the DNA analysis of Timberland boots found in Petitioner's bedroom where the testimony offered by the Commonwealth was wholly irrelevant, cumulative and prejudicial.

The police collected the boots from Petitioner's residence because there was a reddish spot on the insoles. N.T., 9/10/2014, at 192. The police did not know if the reddish spot was "blood or something with the insole itself." Id. The boots were sent to the PSP lab for testing.

Ms. Coolbaugh tested the boots. No blood was detected on the boots. N.T., 9/11/2014, at 82. Ms. Coolbaugh collected debris from the boots, which included hair fragments, and she swabbed the laces and the back of the boots for DNA analysis. The hairs were not suitable for DNA analysis. Id.

Mr. Gavel analyzed the swab. It contained a mixture of DNA. The "major component" of the DNA was a match to Petitioner. There could have been more than one contributor's DNA on the boots, and DNA could have accumulated on the laces and back of the boots by being on Petitioner's floor. Furthermore, Mr. Gavel could not say that the last

person who touched those boots was Petitioner. N.T., 9/11/2014, at 111-112, 118-119.

Petitioner has failed to include any witness certifications from trial counsel or provide any explanation for the lack thereof. 42 Pa. C.S. §9545(d); Pa. R. Crim. P. 902(A)(15), (D).

The court also does not believe DNA evidence from the Timberland boots was prejudicial to Petitioner. The police were trying to determine if the victim's blood was on the insole, but it wasn't. The reddish spot was not blood, and the victim's DNA was not found anywhere on the boots. Additionally, there were no shoe or boot prints found at the victim's residence. N.T., 9/10/2014, at 183. One would expect Petitioner's DNA to be found on his own boots. There is nothing incriminatory or prejudicial about that finding. Furthermore, the fact that there was unidentified DNA on the boot may have helped the defense, as beginning in his opening statement defense counsel argued that Petitioner's door was kicked in, there were numerous pieces of evidence that contained unidentified DNA, and there were numerous individuals whose names or faces were not included in the photo array and whose names were provided to the police but not investigated. N.T., 9/10/2014, at 30-32. In other words, the presence of unidentified DNA on the boot and other items was consistent with the defense presented at trial.

ORDER

AND NOW, this ___ day of July 2019, the parties are hereby notified of this Court's intention to dismiss the Petition without holding an evidentiary hearing. Petitioner 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,

____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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