

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : NO. CR-1226-2014
:
vs. :
DAVID BEAN, : Notice of Intent to Dismiss PCRA
Defendant : Without Holding an Evidentiary Hearing

OPINION AND ORDER

Before the court is Petitioner’s Amended Post Conviction Relief Act (PCRA) petition in connection with case 1226-2014 (the rape case). Following a jury trial held on September 12, 2016 and September 13, 2016, Petitioner was convicted of, among other offenses, rape, involuntary deviate sexual intercourse and aggravated indecent assault. He ultimately was sentenced to an aggregate period of state incarceration, the minimum of which was 18 years and the maximum of which was 36 years.

Petitioner appealed. The Pennsylvania Superior Court affirmed his judgment of sentence on July 31, 2018, and the Pennsylvania Supreme Court denied his petition for allowance of appeal on January 31, 2019.

Petitioner subsequently filed a pro se petition for relief under the PCRA. Counsel was appointed and filed amended petitions which are now before the court.

A conference and argument on Petitioner’s amended PCRA petition was held before the court on December 17, 2019.

Petitioner asserts that his trial counsel was ineffective in failing to request a failure to make a prompt complaint jury instruction with respect to the two victims, J.D. and L.K. Petitioner also asserts that trial counsel was ineffective in failing to appeal the denial of the

severance of the charges related to the two victims.

To prevail on an ineffectiveness claim pursuant to the PCRA, “the petitioner must prove by a preponderance of the evidence that (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis in support of the action or inaction; and (3) the petitioner suffered prejudice, i.e. the outcome of the proceeding in question would have been different but for counsel’s error.” *Commonwealth v. Isaac*, 205 A.3d 358, 362-363 (Pa. Super. 2019)(citing *Commonwealth v. Reyes-Rodriguez*, 111 A.3d 775, 780 (Pa. Super. 2015) (en banc)).

Counsel is presumed effective, and a PCRA petitioner asserting otherwise bears the burden of proof. *Isaac*, 205 A.3d at 362. A petitioner’s failure to prove any one of these three prongs is fatal to the claim. *Id.* at 363.

The right to an evidentiary hearing on a PCRA is not absolute. “A petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court may decline to hold a hearing if there is no genuine issue concerning any material fact, the petitioner is not entitled to PCRA relief, and no purpose would be served by any further proceedings.” *Commonwealth v. Postie*, 200 A.3d 1015, 1022 (Pa. Super. 2018).

“A claim has arguable merit where the factual averments, if accurate, could establish cause for relief.” *Id.* at 1023. “The ultimate decision of whether facts rise to the level of arguable merit is a legal determination.” *Id.* (citing *Commonwealth v. Saranchak*, 581 Pa. 490, 511 n.14, 866 A.2d 292, 304 n.14 (2005)).

Regarding the second prong, an evidentiary hearing on counsel’s strategy is

generally preferred before the PCRA court decides if counsel lacked a reasonable basis for his actions, except in those cases where the reasons for counsel’s conduct were clear and apparent from the record. *Id.* (citing *Commonwealth v. Hanible*, 612 Pa. 183, 30 A.3d 426 (2011), *cert. denied*, 568 U.S. 1091, 133 S. Ct. 835 (2013)).

Finally, with respect to the prejudice prong, a reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding. *Postie*, *Id.* (citing *Commonwealth v. Ali*, 608 Pa. 71, 86-87, 10 A.3d 282, 291 (2010)).

Petitioner first argues that counsel was ineffective in failing to request a jury instruction on the failure of the two victims to make a prompt complaint. Petitioner argues that the instruction would have been appropriate given the facts and would have had “evidentiary value” as to the consent of the victims “which was the heart of [Petitioner’s] defense in this matter.” Petitioner argues that he was prejudiced as a result of said failure.

The statute governing the subject of prompt complaints, 18 Pa. C.S.A. § 3105, provides as follows:

- (1) Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant’s failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.

It is well established that the lack of a prompt complaint is a factor to be considered by jurors in cases involving sexual offenses. Unquestionably, a prompt complaint is a

factor which must be assessed with all of the other pertinent evidence bearing upon the question of credibility of complaining witnesses. The question of the sincerity of the complaint is raised if it is established that the delay under all of the factors present, was either unreasonable or unexplained. The inference of insincerity is justified where the facts of the case fail to disclose a reasonable explanation for the challenged time lapse prior to the complaint. *Commonwealth v. Lane*, 555 A.2d 1246, 1250 (Pa. 1989). The lack of a prompt complaint by a victim of a crime, although not dispositive of the merits of the case, may justifiably produce a doubt as to whether the offense indeed occurred or whether it was a recent fabrication by the complaining witness. *Id.* “Whatever the scenario, the victim’s motive in making a complaint following a considerable period of silence is relevant in affecting the witness’ veracity.” *Id.* at 1251.

Unfortunately for Petitioner, however, he cannot show prejudice. His counsel was still able to cross-examine the witnesses on their failure to promptly report the assaults, counsel argued to the jury that they were not credible, and the trial court gave a general instruction on how to evaluate witness’ credibility. The conduct of the trial and the court’s instructions as a whole, prevent Petitioner from carrying his burden on prejudice. See *Commonwealth v. Sandusky*, 77 A.3d 663, 669 (Pa. Super. 2013)(no prejudice where court’s general credibility instruction and vigorous cross-examination of victims and arguments by defense counsel clearly defined the issues for the jury).

Furthermore, this was not a typical “he said/she said” rape case. Petitioner videotaped himself performing sexual acts on the victims. These videos were played for the jury. Transcript, Sept. 12, 2016, at 133-137. The victims were unconscious during the sexual acts.

Transcript, Sept. 12, 2016, at 137-138, 142, 144-145. Unconscious persons are incapable of consent. *See Commonwealth v. Erney*, 548 Pa. 467, 698 A.2d 56, 59 (1997)(the obvious legislative intent behind the statute prohibiting rape of an unconscious or unaware person is to punish sexual intercourse performed upon an individual physically or mentally incapable of consent); *Commonwealth v. Price*, 420 Pa. Super. 256, 616 A.2d 681, 684 (Pa. Super. 1992)(the subsection proscribing intercourse with unconscious persons was enacted to proscribe intercourse with persons unable to consent because of their physical condition).

For these reasons, the lack of a prompt complaint instruction does not undermine the court's confidence in the jury's verdict in this case.

Petitioner's final claim of ineffectiveness relates to counsel's alleged failure to appeal the denial of the severance of the charges related to the two victims. A motion to sever was filed on June 3, 2016. The motion was subsequently denied but on direct appeal said denial was not raised. Petitioner argues that the issue of consent should have been decided as to both victims in separate trials especially in light of the "significant" differences in the testimony of the witnesses.

The lower court, utilizing its discretion, denied Petitioner's request for severance both pretrial and post-trial. Appellate counsel included other issues on appeal but failed to raise this issue.

Is this claim of arguable merit? Rule 583 of the Pennsylvania Rules of Criminal Procedure permits a court to order separate trials of offenses if it appears that any party may be prejudiced by the offenses being tried together. Pa.R.Crim.P. 583.

The decision to sever is within the sound discretion of the trial court. *Commonwealth v. Travers*, 768 A.2d 845 (Pa. 2001). The courts utilize a three-part test to guide their discretion. First, would the evidence of the offenses be admissible in separate trials? Second, is the evidence capable of separation by the jury so as to avoid the danger of confusion? Lastly, and only if the answers to the preceding questions are in the affirmative, will the defendant be unduly prejudiced by consolidation? *Commonwealth v. Torres*, 177 A.3d 263 (Pa. Super. 2017), *appeal denied*, 189 A.3d 375 (Pa. 2018).

This court cannot conclude that the claim is of arguable merit. First, the evidence was admissible to prove absence of mistake or lack of accident. Pa. R. E. 404(b)(2). The manner and circumstances of the acts were sufficiently similar. While there were minor distinctions, each incident followed the same script. Petitioner established a relationship with each victim, garnered their trust, assisted them in obtaining controlled substances, sexually assaulted them while they were incapacitated and unable to resist as a result of their use of the controlled substances, and videotaped each encounter.

The crimes need not be identical in all respects; they need only to be similar in ways relevant to the defense of mistake or accident. *Commonwealth v. Tyson*, 119 A.3d 353, 363 (Pa. 2015). The few differences were not essential to the question of whether Petitioner mistakenly believed that the victims consented to the sexual intercourse. *Id.*

Second, the evidence was admissible to prove a common plan, common scheme or design. Pa. R. E. 404(b)(2). The criminal conduct was distinctive and revealed a pattern of conduct undertaken by Petitioner to commit the crimes. *Commonwealth v. Cosby*, 2019 PA

Super 354, 2019 WL 6711477, *16 (December 10, 2019). There were unique factual circumstances in the commission of the crimes so as to effectively eliminate the possibility that it could have been committed by anyone else. *Id.* As well, it was admissible as a common scheme to counter Petitioner's defense of consent. *Id.*, citing, *Tyson*, 119 A.3d at 361 (defendant engaged in a pattern of non-consensual intercourse with acquaintances who were in an unconscious or diminished mental state); see also, *Commonwealth v. Elliott*, 700 A.2d 1243, 1250 (Pa. 1997) (admission of three prior sexual assaults to address defendant's claim that the sex was consensual).

Third, the courts have obviously recognized many relevant purposes other than criminal propensity, for which evidence of prior bad acts may be introduced. As indicated above, absence of mistake is one such example. The "doctrine of chances" permits the admission of similar acts within the same general category as the charged crime to establish the objective improbability of so many "accidents" befalling the defendant or the defendant becoming innocently enmeshed in suspicious circumstances so frequently. *Commonwealth v. Hicks*, 156 A.3d 1114, 1132-33 (Pa. 2017) (Chief Justice Saylor, concurring). There is a consensus that similar act evidence may be introduced in a doctrine of chances rationale to prove that a defendant committed an actus reus when defendant asserts that he did not cause the harm. *Id.*

Lastly, appellate counsel is not required to raise all non-frivolous claims on appeal. *Commonwealth v. Lambert*, 797 A.2d 232, 244 (Pa. 2001). Rather, counsel may select to raise those issues that maximize the likelihood of success on appeal. *Id.* Arguably meritorious claims may be omitted in favor of pursuing claims which, in the exercise of counsel's reasonable

professional judgment, offer a greater prospect of success and relief. *Id.*

Indeed, in this case, a joint trial may have offered Petitioner a better chance of acquittal. Not only was there a delay in reporting but the victims willingly were with Petitioner and willingly used controlled substances. These facts could be used to not only attack the credibility of the victims but could also be used to prove that the victims purposefully fabricated their stories to deflect blame for their indiscretions. Furthermore, Petitioner's consent defense might have held more sway by demonstrating to the jurors his sexual preferences with more than one partner on more than one occasion.

Petitioner also failed to plead and is unable to establish prejudice. There are no factual averments supporting the conclusion that but for counsel's alleged ineffectiveness, there is a reasonable probability that the outcome of the appeal would have been different. Petitioner cannot prove that if counsel had raised the severance issue on appeal, his conviction would have been overturned. Unsupported speculation does not establish a reasonable probability that the outcome of the appeal would have been different. *Commonwealth v. Charleston*, 94 A.3d 1012, 1026 (Pa. 2014).

ORDER

AND NOW, this ___ day of April 2020, upon review of the record and pursuant to Rule 907 (1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this court's intention to dismiss Petitioner's PCRA petition without holding an evidentiary hearing. Petitioner may respond to this proposed dismissal within twenty (20) days from the date of this Order. 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

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