IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**:**	**No. CR-1868-2014**
	:	**CR-2186-2013**
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.

Information 1868-2014 was consolidated with Information No. 2186-2013 for the purposes of trial (the burglary case). Following a jury trial held between May 30, 2017 and June 2, 2017, Petitioner was found guilty of numerous burglaries and related charges. Petitioner was subsequently sentenced to an aggregate period of state incarceration, the minimum of which was 32 years 3 months and the maximum of which was 64 years 6 months.

Petitioner appealed. The Pennsylvania Superior Court affirmed his judgment of sentence on September 7, 2018. Petitioner's direct appeal was concluded when the Pennsylvania Supreme Court denied his petition for allowance of appeal on March 6, 2019.

Petitioner subsequently filed a pro se petition for relief under the PCRA, 42 Pa. C.S.A. §§ 9541-9546. Counsel was appointed and filed an amended petition which is now before the court.

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

In connection with the burglary case, Petitioner claims he is eligible for relief

under the PCRA based on alleged ineffective assistance of counsel, which under 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.A. § 9543(a)(2)(ii).

Petitioner first argues that his trial counsel was ineffective in failing to file a motion to suppress and/or a motion in limine as it related to the location of Petitioner's vehicle by the use of his phone records. Petitioner argues that the utilization of his phone records was a search without a warrant and therefore violated his rights to be free from unreasonable searches and seizures under both the Pennsylvania and the United States constitutions.

Petitioner also argues that his trial counsel was ineffective in failing to request a jury instruction on the voluntariness of his confession "given the fact that [Petitioner] denied he committed a number of the burglary offenses and only admitted to them based upon recommendations from his attorney that he had to admit to something if he wanted something in return."

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)).

As for Petitioner's first claim in the burglary case, Petitioner argues that as a part of its investigation, the Commonwealth applied for and received an Order allowing for the

installation of a GPS device on Petitioner's vehicle. (Paragraph 8(c), Amended PCRA Petition, 1868-14; filed November 13, 2019). Using the real time component of the GPS device, Petitioner's location was determined and he was arrested on November 14, 2019 (Paragraph 8(d), (e), (f)).

Petitioner's phone was seized as a result of his arrest, and the Commonwealth applied for and was granted a search warrant to seize all data in the phone. (Paragraph 24(a) (1), (2)). At the time of trial, the Commonwealth used pie graphs to show Petitioner's location on various dates (Paragraph 24(a) (b)). As argued by Petitioner, the pie graphs depicted his location near the sites of the burglaries at or near the time of said burglaries.

Petitioner submits that the utilization of his phone records for the purpose of the pie charts was an illegal search in violation of his state and federal constitutional rights. He submits that his trial counsel was ineffective in failing to move to suppress or exclude this evidence. He argues that there was no warrant to obtain his phone records to triangulate his whereabouts. (Paragraph 24.a. (5)).

Petitioner, however, misapprehends the evidence. The Commonwealth utilized triangulation to determine the location of the phone at a particular time. Triangulation involves the comparison of the signal strength and time lag for the phone carrier's signal to reach a cell tower. The provider can triangulate the phone's approximate position. One knows the location of cell towers which receives phone signals. One can estimate the distance of the phone from each of the towers based upon the lag time between when the tower sends a ping to the phone and receives the answering ping back. Triangulation does not involve any additional search of the

cell phone. It utilizes the historical call information which not only includes incoming/outgoing calls but also the originating and terminating cell site.

As Petitioner notes, on March 19, 2014, the Commonwealth applied for and was granted a search warrant to seize all the data in his phone. This search warrant permitted the Commonwealth to obtain the historical information utilized for triangulation.

"Historical cell site analysis is the process of analyzing records maintained by cellular service companies to make a general geographic determination of what tower and/or sector a phone used to connect to a provider's network." *Commonwealth v. Nevels,* III, 203 A.3d 229, 241 (Pa. Super. 2019). This analysis is not novel and there is no legitimate dispute regarding its reliability. *Id.* at 241.

In *United States v. Carpenter*, 138 S. Ct. 2206 (2018), the Supreme Court held that law enforcement officers were required to obtain a warrant to access cell site location information (CSLI) from a suspect's cell phone provider. The Court held that the third party doctrine did not apply in these circumstances, and an Order under the Stored Communications Act (SCA) was insufficient as it did not require a probable cause showing.

Assuming for the sake of argument that the search warrants and order that the Commonwealth utilized in this case to obtain data from Petitioner's cell were insufficient under *Carpenter*, Petitioner still would not be entitled to relief. *Carpenter* announced a new rule for the conduct of criminal prosecution. *Commonwealth v. Pacheco,* 2020 PA Super 4, 2020 WL 400243, *6 n.9 (January 24, 2020); *see also* Note, *The Fourth Amendment and Technological Exceptionalism after Carpenter: A Case Study on Hash-Value Matching*, 29 Fordham Intell.

Prop. Media & Ent. L.J. 1243, 1262 (2019)(*Carpenter* marks a shift away from established Fourth Amendment principles). Pennsylvania law is clear that counsel cannot be deemed ineffective for failing to predict developments or changes in the law. *Commonwealth v. Gribble*, 863 A.2d 454, 464 (Pa. 2004).

Because Petitioner's claim in connection with this lacks arguable merit, it will be denied. The factual averments set forth by the petitioner, even if accurate, cannot establish cause for relief.

Petitioner next argues that he was taken into custody on November 14, 2013 and subsequently charged with burglary and related offenses. He asserts that "at one of his many interviews with police" he confessed to certain burglaries. (Paragraph 24 B. (1)). Petitioner arguably admitted to these offenses "in an attempt to receive some kind of benefit from the Commonwealth." (Paragraph 24 B.(4)). He asserts as well that his attorney had advised him prior to his discussions with the police that he needed to admit or say something in order to receive something from the police. (Paragraph 24 B. (2)).

Petitioner argues that the voluntariness of his confessions was at issue and that counsel was ineffective in failing to request a jury instruction as to said voluntariness. He argues that trial counsel's strategy in failing to request a jury instruction on the voluntariness of his confession, as well as the failure to file a motion to suppress, lacked any reasonable basis. (Paragraph 32).

Pennsylvania has long followed the Massachusetts rule with regarding to a defendant's confession. *Commonwealth v. Motley,* 372 A.2d 764, 768 (Pa. 1977). Under this

rule, a defendant may introduce at trial evidence relating to the voluntariness of his statement. *Commonwealth v. Cunningham,* 370 A.2d 1172, 1179 (Pa. 1977); *Commonwealth v. Cameron,* 780 A.2d 688, 693 (Pa. Super. 2001), *appeal denied,* 890 A.2d 1056 (Pa. 2005). A defendant is permitted to do so even if there has been a pretrial determination by a judge that the confession was voluntary and admissible at trial. *Motley,* 372 A.2d at 768.

When a defendant presents such evidence at trial, the jury "…may not assess the evidentiary weight to be given to the confession until at first it makes an independent finding that the confession was voluntarily made." *Cunningham,* 370 A.2d at 1179. A defendant "is entitled to a second opportunity to test the voluntariness of his statement by introducing evidence at trial relating to the voluntariness and to have the jury consider the question." *Cameron,* 780 A.2d at 693.

In *Commonwealth v. McLean,* 247 A.2d 640 (Pa. Super. 1968) the defendant was accused of committing rape, robbery and aggravated assault. During the course of the investigation, two police officers interrogated the defendant. *Id.* The defendant admitted a number of important details regarding the alleged crimes. *Id.* Subsequent to his admissions, defendant was arrested.

Prior to trial, the defendant filed a motion to suppress evidence regarding his admissions. *Id.* at 641. Following a hearing, the trial court denied the motion finding that the confession was voluntary. *Id.* At trial, the defendant denied committing the crimes, denied ever seeing the victim prior to trial, and questioned the circumstances under which his statement was given to police. *Id.* The defendant testified that he was nervous, upset and scared during the

interrogation because his common law wife was losing their baby, and the police officers were on both sides of him when they were speaking. *Id.* The defendant testified the police officers hollered at him and urged him to admit his guilt. *Id.* The defendant then testified that he "considered he might as well say he was guilty because he couldn't do anything, there was no one to help him, he didn't have an attorney at the time and he was scared." *Id.*

In the charge to the jury the trial court made no mention of the voluntariness of the defendant's confession. *Id.* at 642. The trial court did not instruct the jury that if they found that the confession was involuntarily made, they then must disregard it. *Id.* The jury returned a verdict of guilty. *Id.* On appeal, the defendant asserted that the trial court erred in failing to submit the issue of the voluntariness of his statements to the jury with appropriate instructions. *Id.* at 641.

The Pennsylvania Superior Court found that the trial court's failure to instruct the jury regarding the voluntariness of the defendant's confession was error and granted the defendant a new trial. *Id.* at 644. The court noted that the Pennsylvania Supreme Court had endorsed the Massachusetts rule and thereby required that "the final appraisal and resolution of a confession be left to the jury." *Id.* According to the court, if a defendant introduces evidence that his confession was not voluntarily made, then "it becomes a question for the jury, who must be instructed that, if they find the confession was not voluntarily made, they must totally disregard it." *Id.* at 642. As such, the court held that the trial court's failure to instruct the jury as to the voluntariness of the defendant's confession withdrew a vital issue from the jury's consideration. *Id.* at 644. The court further held that the trial court was bound to give the appropriate instruction

regarding the issue of voluntariness. *Id.* Accordingly, the failure to provide such instructions to the jury was an error of significant magnitude as to require a new trial.

On the other hand, it is "settled that a trial court should not instruct the jury on legal principles which have no application to the facts presented at trial. Rather, there must be some relationship between the evidence presented and the law upon which an instruction is requested." *Commonwealth v. Taylor*, 583 Pa. 170, 876 A.2d 916, 925 (2005); *see also Commonwealth v. Carter*, 502 Pa. 433, 466 A.2d 1328, 1331 (1983).

The suggested standard jury instructions provide two alternatives for determining the voluntariness of a defendant's statements. The first alternative states: "To be voluntary, a defendant's statement must be the product of an essentially free will and choice. If a defendant's will and ability to choose are overborne through physical or mental pressure, any statement that he or she then makes is involuntary." Pa.SSJI (Crim.) 3.04B. The second alternative states:

> To be voluntary, a defendant's statement must be the product of a rational mind and a free will. The defendant must have a mind capable of reasoning about whether to make a statement or say nothing and [he] [she] must be allowed to use it. The defendant must have sufficient willpower to decide for [himself] [herself] whether or not to make a statement, and [he] [she] must be allowed to make that decision. This does not mean that a statement is involuntary because the defendant made a hasty or a poor choice. It might have been wiser to say nothing. Nor does it mean that a statement is involuntary merely because it was made in response to certain questions. It does, mean, however, that if a defendant's mind and will are confused or burdened by promises of advantage, threats, physical or psychological abuse, or other improper influences, any statement he or she make is involuntary.

Id. The jury instruction goes on to explain that the prohibition against involuntary statements is "grounded in our constitutions" and is "based on a strong public policy that disapproves of the use by police of involuntary methods to extract involuntary confessions or admissions" or taking

"advantage of persons who are in a physically or mentally weakened condition to the point that they cannot give a knowing, intelligent, and voluntary statement." *Id*.

In deciding whether a statement in voluntary, the instructions advise the jury to weigh all facts and circumstances surrounding the making of the statement. Again, the standard instructions provide two alternatives.

> [First Alternative]
>
> 2. The facts and circumstances to be considered include the duration and methods of police questioning, the length of delay between the defendant's arrest and arraignment before a magistrate, the conditions of the defendant's detention, the attitudes of the police toward the defendant, the defendant's physical and psychological state, and all other conditions present that might have drained the defendant's power to resist suggestion and undermined his or her power of self-determination.
>
> [Second Alternative]
>
> 2. The facts and circumstances to be considered include the age, intelligence, personality, education, experience, and mental and physical state of the defendant, how the defendant was treated before, during and after questioning, the time, place and conditions under which the defendant was detained and questioned, the motives and attitudes of the police who questioned [him] [her] and what was said and done by the police, the defendant, and anyone else present during the questioning. [You should consider any delay by the police in bringing the defendant before a magistrate for arraignment and whether the delay was unnecessary.]

Pa. SSJI (Crim) 3.04C.

Here, no evidence was presented to show that Petitioner's statements were made involuntarily. There was no evidence that law enforcement officers used improper methods or that Petitioner was in a physically or mentally weakened condition. To the contrary, while accompanied by his counsel, Petitioner approached law enforcement and Petitioner chose to

provide statements in an effort to obtain favorable treatment from the District Attorney. Petitioner may have made an unwise choice to make the statements when the District Attorney was unwilling to extend a plea offer to him, but there is nothing in the record to show that his statements were involuntary. Petitioner's trial testimony regarding the advice of his attorney was an effort to show that his pretrial statements were false and to offer an explanation to negate those statements. His testimony, however, did not indicate that his statements were involuntary.

In the alternative, a hearing need not be granted because as a matter of law, Petitioner cannot show actual prejudice. A PCRA petitioner must normally plead and prove that counsel's error was prejudicial. *Commonwealth v. Isaac,* 205 A.3d 358, 365 (Pa. Super. 2019). An error that would invalidate a conviction on direct appeal, however, need not necessarily do so on collateral review. *Id.* at 365.

In an ineffective assistance of counsel claim, the burden is on the petitioner to show either a reasonable probability of a different outcome in his case or to show that the particular trial violation was so serious as to render his or her trial fundamentally unfair. *Isaac,* 205 A.3d at 365 (citing *Weaver v. Massachusetts,* - U.S. – ,137 S. Ct. 1899, 1911 (2017)).

In the context of a post-conviction challenge to counsel's stewardship, prejudice is established where the truth determining process was so undermined that no reliable adjudication of guilt or innocence could have taken place, i.e., there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *Commonwealth v. Jones,* 210 A.3d 1014, 1018-1019 (Pa. 2019). "This does not a mean a different outcome would have been more likely than not; a reasonable probability is a probability sufficient to

undermine confidence in the outcome of the proceeding." *Id.* at 1019 (internal quotation marks omitted). A speculative or attenuated possibility of a different outcome is insufficient to undermine confidence in the outcome. *Id.*

Petitioner offers cursory arguments that he has established prejudice. He argues that had the jury been properly instructed, those instructions would have guided the jury and provided some explanation as to Petitioner's testimony. He argues as well that he was denied "fundamental fairness."

To evaluate whether Petitioner can prove prejudice, the court must review the evidence introduced at trial. In reviewing such, the court concludes that there is not a reasonable probability the outcome of the proceedings would have been different had the instruction been given to the jury. Even if the instruction had been given, a jury would not have found that the statements were involuntary. Furthermore, in addition to Petitioner's statements, the Commonwealth presented testimony from the victims whose residences were burglarized and individuals who were present with Petitioner at or near the scene of the burglaries and observed him return to his vehicle with items from the burglarized residences, as well as evidence obtained from a GPS tracking device that was placed on Petitioner's vehicle and evidence regarding cell site location information which showed that Petitioner was at or near the locations of the burglaries on the dates/times that the burglaries were committed. Thus, counsel's failure to request such an instruction, or to object to the lack of one, does not undermined the court's confidence in the jury's verdict. That being the case, Petitioner would not be entitled to relief.

ORDER

AND NOW, this ___ day of May 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 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

cc: Joseph Ruby, Esquire (ADA)
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