

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1467-2013
 :
 TYRELL BOYD, : Opinion and Order Re
 Defendant : Defendant's PCRA petition

OPINION AND ORDER

This matter came before the court on December 18, 2019 for a hearing and argument on three issues asserted in Petitioner's Post Conviction Relief Act (PCRA) petition.¹ The three issues were: (1) counsel was ineffective for failing to object to references to Petitioner being at the state parole office in Philadelphia and/or any references to him being on parole with a detainer; (2) counsel was ineffective for failing to adequately prepare and meet with Petitioner prior to his testimony in his own defense; and (3) counsel was ineffective for failing to advise Petitioner of a proposed plea agreement prior to jury selection.

By way of background, on July 20, 2013, Petitioner shot Ansari Wilson inside a residence at 1510 Scott Street in Williamsport, Pennsylvania. In the day or hours prior to the shooting, Petitioner and Mr. Wilson had disagreements over money, and Petitioner told Reginald Morton that he might have to "down Mook" (shoot Mr. Wilson). Just prior to the shooting, witnesses saw Petitioner walking towards 1510 Scott Street together with another young African American male who was riding a bike. Petitioner had a black handgun tucked

¹The court previously gave Petitioner notice of its intent to dismiss the remaining issues without holding an evidentiary hearing.

inside the waist of his pants and he was talking on a cellular phone. These witnesses heard Petitioner tell the person on the other end of the conversation that he was on the block, and then Petitioner angrily said “now what” and “I don’t play” several times. Petitioner hung up the phone and entered the residence at 1510 Scott Street. Shortly thereafter, the witnesses heard gunshots and Petitioner yelling “I don’t play” and/or “I told you I don’t play.” Petitioner quickly came out of the residence, took the bike from the other individual, got on the bike, and left.

Petitioner fled to Reginald Morton’s residence where he changed his shirt before ultimately fleeing to Philadelphia.

A witness who heard the shots called 911. Police and emergency medical personnel responded to 1510 Scott Street. The police kicked in the door and found Mr. Wilson near the door lying on his back, covered in blood and gasping for air. Shortly thereafter, Mr. Wilson died from a gunshot wound to the torso.

Through their investigation, the police determined that Petitioner was involved in the shooting and that he was on state parole. On July 22, 2013, the police contacted Petitioner’s parole agent in Philadelphia and notified the parole agent that Petitioner was a suspect in a Williamsport homicide. Later that day when Petitioner appeared in the Philadelphia parole office for a scheduled appointment, his parole agent contacted the Williamsport police who asked that Petitioner be detained until their arrival. Agent Raymond Kontz of the Williamsport Bureau of Police and Lycoming County Detective Steven Sorage arrested and interviewed Petitioner at the Philadelphia parole office.

Additional follow-up interviews were conducted after Petitioner was transported back to Williamsport.

Petitioner was charged with an open count of homicide, aggravated assault, firearms not to be carried without a license, person not to possess a firearm, and flight to avoid apprehension, trial or punishment.

A trial was held from November 3-7, 2014. Petitioner was convicted of all the charges, including first degree murder. At trial, Petitioner was represented by Jeffrey Rowe, Esquire and William Miele, Esquire.

Both attorneys and Petitioner testified at the PCRA hearing.

Mr. Rowe testified that he was co-counsel for Petitioner. He stated that Mr. Miele filed a motion for special relief to preclude references regarding Petitioner being on parole. Mr. Rowe testified that Petitioner made several uncounseled statements in which he made references to being on supervision. Mr. Rowe also noted that Petitioner was arrested at the state parole office in Philadelphia. Mr. Rowe testified that he and Mr. Miele discussed on numerous occasions trying to redact the statements which would be played at trial. Through the motion for special relief, they tried to exclude as much information regarding parole as they could. Mr. Rowe admitted that no objections were made during trial to the various

² Trial Transcript, 11/5/2014, at 80-82 (testimony of Agent Kevin Stiles); Trial Transcript, 11/5/2014, at 39-42 (testimony of Detective Steven Sorage).

references to parole. When asked whether they raised this issue in Petitioner's post sentence motion, Mr. Rowe replied "whatever the motion says, it says." On cross examination, Mr. Rowe indicated that the references to parole were fleeting, and he did not believe that the Commonwealth had made any arguments that specifically referenced Defendant being on parole.

With respect to plea offers, Mr. Rowe testified that the only offer from the Commonwealth was for Petitioner to plead guilty to an open count of homicide. This offer was made well in advance of trial. Petitioner was made aware of this offer but counsel did not recommend it and Petitioner did not accept it. Mr. Rowe had discussions with Petitioner about his willingness to enter a plea if they could get the Commonwealth to offer third degree murder, but the Commonwealth never made such an offer.

Mr. Rowe testified that they really did not want to call Petitioner as a witness at trial and were trying to avoid it, if at all possible. They called Petitioner as a witness because they were concerned that they would not get a self-defense or unreasonable self-defense instruction and that it became apparent that the whole defense would collapse without Petitioner's testimony. Petitioner was aware that his attorneys did really did not want him to testify but that he may have to do so.

Mr. Rowe testified that he met with Petitioner on at least four separate occasions to prepare Petitioner in the event they would need to call him as a witness at trial. Mr. Rowe testified that he spent 1.2 hours with Petitioner on September 23, 2014, the majority of which was preparing Petitioner's testimony. On September 26, 2014, there were

two hours of trial preparation, the majority of which was preparing Petitioner's testimony. On October 17, 2014, Mr. Rowe had a conference with Petitioner which lasted 1.4 hours, the bulk of which was preparing Petitioner to testify. On October 24, 2014, Mr. Rowe spent 2.2 hours on this case, the majority of which included a conference with Petitioner at the Lycoming County Prison preparing Petitioner to testify at trial, if necessary. These sessions included mock direct and cross-examinations. Mr. Rowe even wrote out questions for the mock examinations which was "kind of unusual" for him. Petitioner testified at trial on November 6, 2014.

Mr. Miele testified that the motion for special relief was either prepared by him or under his supervision. He did not disagree with anything Mr. Rowe said in his testimony. Mr. Miele noted that he interpreted the court's decision as permitting the Commonwealth to introduce evidence consistent with what occurred at trial, i.e., that Petitioner was at the parole office and arrested. He further stated that there was no other basis to object other than what he had already argued with respect to the motion.

Petitioner testified that Mr. Rowe's testimony was inaccurate. Petitioner was first told that he would have to testify when he was in the Sheriff's Office approximately 15 minutes before he testified at trial. Petitioner admitted that he was told he had to testify because he would not get a self-defense instruction otherwise. Petitioner indicated that, at the meetings with Mr. Rowe, they discussed what Reginald Morton would say and Petitioner was advised not to lose his cool. He stated counsel did not "go over" the elements of the self-defense instruction with him or tell him what to testify to.

Petitioner testified that he did not get a plea offer and he rejected an open plea. He was not aware of any plea offer for what he was hoping, 15 to 30 years. He also admitted that he “had no reason to doubt” Mr. Rowe’s testimony that the Commonwealth did not respond to the request for a plea to third degree murder.

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.

Petitioner asserted in his petition that trial counsel was ineffective for failing to object to references of Petitioner being at the state parole office in Philadelphia and/or any references to him being on parole with a detainer. The court cannot agree.

Mr. Miele filed a motion for special relief to preclude such references. The motion for special relief, which had been filed on September 17, 2014, was admitted as Defendant’s Exhibit #1. Specifically, in Count 2 of the motion for special relief, Mr. Miele requested that all references to Petitioner being incarcerated previously and being on

supervision, as well as Petitioner's statements about being on parole or probation supervision, be excluded from trial. In an order entered on October 14, 2014, the court made the following ruling:

The Commonwealth shall present no evidence referencing the [Petitioner] previously being incarcerated but may to the extent necessary to explain the circumstances of the alleged criminal conduct, reference [Petitioner] being on supervision. The Commonwealth may not present evidence as to why [Petitioner] was on supervision.

The court also noted that the Order was "without prejudice to the parties to raise an appropriate evidentiary motion at trial upon notice to the other party and outside the hearing of the jury".

The court finds that Petitioner has not met his burden of proof to establish by a preponderance of the evidence all three prongs of an ineffective assistance of counsel claim. The court finds that this claim has arguable merit based on the Pennsylvania Supreme Court's decision in *Commonwealth v. Crispell*, 193 A.3d 919 (Pa. 2018), despite the fact that one could argue *Crispell* is distinguishable in that the appellant in that case was not charged with flight to avoid apprehension and the evidence expressly referred to other criminal conduct, namely a purse snatching. However, the court finds that Petitioner has not established the second and third prongs.

Petitioner failed to question Mr. Rowe and Mr. Miele about why they failed to object at trial to the references to "parole." On cross-examination by the Commonwealth, however, Mr. Miele indicated that he did not have any basis to object at trial other than the reasons which the court had already rejected when it ruled on his motion for special relief.

At that time, if Mr. Miele had made the same objection at trial as he had regarding the motion, the court would have made the same ruling. The court would not make that ruling today in light of *Crispell*, but this trial occurred in 2014 and *Crispell* was not decided until 2018. Counsel cannot be deemed ineffective for failing to predict developments or changes in the law. *Commonwealth v. Cousar*, 638 Pa. 171, 198, 154 A.3d 287, 303 (2017); *Commonwealth v. Gribble*, 580 Pa. 647, 663, 863 A.2d 455, 464 (2004).

Petitioner has also failed to prove prejudice.

In *Crispell*, the only evidence that Crispell stabbed the victim was the testimony of a jailhouse informant. Nonetheless, a new penalty phase of the trial was not ordered because the evidence regarding the purse snatching in Arizona was helpful to Crispell's defense that his co-defendant was the leader who made all the decisions and was the one who stabbed the victim.

Here, the Commonwealth argued that the evidence was not harmful to Petitioner because the fact that he appeared for a scheduled appointment in the parole office tended to negate any argument that he "fled" to Philadelphia to avoid apprehension or that his flight constituted consciousness of guilt.

The court agrees that Petitioner was not prejudiced but its reasoning is not limited to the Commonwealth's argument. In addition, the court would cite the following additional reasons.

First, the references were fleeting when compared to the trial as a whole. There were brief references during the testimony of Agent Sorage and Agent Stiles on

November 5, 2014.³ These references merely described how the law enforcement officers located and apprehended Petitioner at the parole office in Philadelphia and how they initially interviewed him there. There were no specific or direct references to any prior criminal activity by Petitioner.

Second, neither trial counsel nor the Commonwealth mentioned Petitioner's parole status or even the word "parole" during their closing arguments.⁴

Third, and perhaps most significantly, there was ample evidence that Petitioner shot the victim and was not acting in self-defense. Witnesses saw and heard Petitioner arguing with the victim over money and heard Petitioner say that he might have to "down" (kill) the victim.⁵ Other witnesses saw Petitioner walking toward the residence where the crime occurred with another individual who was riding a bike next to him.⁶

While walking, Petitioner was speaking on his phone saying "I'm on the block, now what" and "I don't play."⁷ Witnesses saw Petitioner enter the residence.⁸ The witnesses then heard gun shots and called 911.⁹ The 911 call was played for the jury.¹⁰ Police responded to the 911 call, kicked in the door of the residence, and found the victim

³ Trial Transcript, 11/5/2014, at p. 39, lines 24-25; p. 40, lines 11-15, and lines 20-21; p. 41 line 25 – p. 42 line 1; p. 48, lines 4-5; and p. 81 lines 8-12 and lines 14-20.

⁴ Trial Transcript, 11/7/2014, at 22-77.

⁵ Trial Transcript, 11/3/2014, at 161-162 (Testimony of Kisha Depitte); Trial Transcript, 11/4/2014, at 17-18 (Testimony of Reginald Morton)

⁶ Trial Transcript 11/3/2014, at 61-63 (Testimony of Cindy Kurtz); Trial Transcript, 11/3/2014, at 89 (Testimony of Sean Walker).

⁷ Trial Transcript, 11/3/2014, at 62 (Testimony of Cindy Kurtz); Trial Transcript, 11/3/2014, at 89-91 (Testimony of Sean Walker).

⁸ Trial Transcript, 11/3/2014, at 65-66 (Testimony of Cindy Kurtz); Trial Transcript, 11/3/2014, at 92 (Testimony of Sean Walker).

⁹ Trial Transcript, 11/3/2014, at 65-69 (Testimony of Cindy Kurtz); Trial Transcript, 11/3/2014, at 92-94 (Testimony of Sean Walker).

lying on the floor covered in blood from a gunshot wound.¹¹

Petitioner was seen leaving the area riding a bike.¹² Petitioner rode the bike to Reginald Morton's house, changed his shirt, and eventually fled to Philadelphia.¹³ Mr. Morton saw one gun in Petitioner's waist band when Petitioner was at his residence.¹⁴ Petitioner also made statements that he was glad the victim was dead because if he had lived he would have told on him.¹⁵

Petitioner also made numerous inconsistent statements about the incident. The prosecutor extensively cross-examined Petitioner with his inconsistencies.¹⁶

Petitioner initially claimed that he was in Philadelphia when the victim was killed and he had heard about it from others. Petitioner also told Agent Sorage and Officer Kontz that a woman named "Tish" used to text the victim, and Petitioner thought she had something to do with the victim being killed. Petitioner denied that the victim owed him money, and he made false statements about when he arrived in Philadelphia.

Later he admitted that he shot the victim but claimed he did so in self-defense. He claimed that when he entered the residence the victim was reaching under the couch for a firearm, and then the victim stood up and moved his arm as if he was going to shoot.

The police did not find any firearms inside the residence, and Petitioner only

¹⁰ Trial Transcript, 11/3/2014, at 69.

¹¹ Trial Transcript, 11/3/2014, at 31-34 (Testimony of Officer Robert Williamson).

¹² Trial Transcript, 11/3/2014, at 70 (Testimony of Cindy Kurtz); Trial Transcript, 11/3/2014, at 95 (Testimony of Sean Walker).

¹³ Trial Transcript, 11/4/2014, at 7, 11 (Testimony of Reginald Morton).

¹⁴ Trial Transcript, 11/4/2014, at 21, 23 (Testimony of Reginald Morton).

¹⁵ Trial Transcript, 11/4/2014, at 16 (Testimony of Reginald Morton).

¹⁶ Trial Transcript, 11/6/2014, at 168-210 (Testimony of Tyrell Boyd).

possessed one firearm when he was at Reginald Morton's residence.

Petitioner claimed he took the firearm and discarded it along with the firearm that he used. His statements in this regard, however, were also inconsistent in that at times he referred to multiple guns and other times he referred to a single gun.

Finally, Petitioner was not acting in self-defense because he was the initial aggressor, he illegally possessed a firearm, and he was engaged in criminal activity or was using the residence to further criminal activity.

There are statutory limits on self-defense or justification. The use of deadly force is not justifiable if the actor provoked the use of force or was the initial aggressor. 18 Pa. C.S.A. §505(b)(2). When the actor is the initial aggressor, he has a duty to retreat even from his own dwelling. 18 Pa. C.S.A. §505(b)(2)(ii). Petitioner was aware that the victim was inside the residence and allegedly retrieving a firearm prior to entering the residence. He could have easily avoided any confrontation by remaining outside the residence until the victim left or by calling the police. Additionally, prior to even becoming aware that Petitioner was inside the residence, Petitioner made statements that he might have to "down" or shoot the victim.

Furthermore, the Castle Doctrine presumption and the Stand Your Ground provisions do not apply when the actor is in illegal possession of a firearm. 18 Pa.C.S.A. §505(b)(2.2)(iii), (2.3); *Commonwealth v. Cannova*, 199 A.3d 1282, 1290 (Pa. Super. 2018), *appeal denied*, 217 A.3d 180 (Pa. 2019). The parties stipulated that Petitioner did not have a

license to carry a firearm.¹⁷

Based on the totality of the evidence, the court's confidence in the jury's verdict is not undermined. *See Commonwealth v. Montalvo*, 631 Pa. 516, 114 A.3d 401, 409-410 (2015) ("prejudice is assessed in terms of whether the petitioner has shown that the demonstrated ineffectiveness sufficiently undermines confidence in the verdict").

Petitioner also contends that trial counsel did not prepare Petitioner to testify at trial. Again, the court cannot agree. The court finds Mr. Rowe's testimony credible. While trial counsel did not want to call Petitioner as a witness at trial if they could avoid it, such was necessary to obtain jury instructions regarding self-defense and unreasonable self-defense. Although the final decision whether to call Petitioner as a witness would have been made during trial, it is clear that in the weeks leading up to trial that Mr. Rowe prepared Petitioner to testify at trial, even to the extent of preparing questions and conducting mock examinations.

Petitioner complains that Mr. Rowe did not advise him of the elements of self-defense or tell him what to testify to. It seems as if Petitioner wanted Mr. Rowe to suborn perjury. Mr. Rowe could not tell Petitioner what to testify to. Petitioner needed to testify to the events of the evening in his own words.

Petitioner also asserted that counsel was ineffective for failing to advise him of a potential plea agreement or plea offer. This issue lacks merit. There is no evidence to

¹⁷ Trial Transcript, 11/6/2014, at 62. Petitioner also had a conviction which precluded him from lawfully possessing a firearm. Trial Transcript, 11/6/2014, at 219.

support that the Commonwealth ever made any kind of plea agreement or offer in this case for any negotiated sentence. The only “offer” in this case was for Petitioner to plead guilty to an open count of homicide. Petitioner was aware of this offer prior to trial and rejected it. During the arguments at the close of the hearing, the Commonwealth asserted that there was no legitimate issue regarding a plea and PCRA counsel agreed.

With respect to the remaining issues, the court would deny them based upon its Opinion and Order entered on October 2, 2019.

ORDER

AND NOW, this ___ day of February 2020, the court DENIES Petitioner’s Post Conviction Relief Act (PCRA) petition.

Petitioner is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Petitioner may lose forever his right to raise these issues.

The clerk of court shall mail a copy of this order to Petitioner by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Ryan Gardner, Esquire (DA)
Martin Wade, Esquire (ADA)
Robert Hoffa, Esquire (counsel for Petitioner)
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