IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**:**	**No. CP-41-CR-1662-2012**
	:	**CP-41-CR-1990-2013**
vs.	**:**	
	:	
	:	**Opinion and Order Re: Remaining**
KENNETH MARTIN,	**:**	**PCRA Issues**

OPINION

By Order of Court dated July 20, 2020, the court granted the request of Petitioner Kenneth Martin (hereinafter "Martin") for an evidentiary hearing with respect to two of the varied claims that he raised in his PCRA and supplemental PCRA petitions. The court held the hearing on September 24, 2020.

The first claim involves the alleged ineffectiveness of trial counsel for failing to call Jermaine Mullen as a witness during Martin's jury trial from January 28, 2016 to January 29, 2016. At the September 24, 2020 hearing, Mullen testified that on the date of the incident, June 19, 2012, he was with both the victim, Noor Ford, and Rob Diehl at the Econo Lodge in Williamsport.

Martin and some acquaintances arrived at Ford's hotel room, apparently because Ford called Martin and asked him to come over. When Martin arrived, only Ford and Mullen were in the room. An argument broke out between Ford and Martin for a reason unknown to Mullen. Ford and Martin soon started physically fighting with each other. Mullen described the fight as "one on one, mutual combat." Some of the individuals who arrived with Martin eventually broke up the fight. Mullen indicated that, although Martin

won the fight and Ford was “injured a bit”, there were no “hard feelings.” According to Mullin, it was a “cultural thing.” As a result, everyone hung out in the room for a couple of minutes and relaxed.

Because Ford was changing hotel rooms and apparently was drinking and had an interlock device on his vehicle meaning that he could not drive, he asked Martin to take some items, such as an X-Box 360 game system and CDs, to Ford’s aunt’s house. Martin, as well as the others with him, took the items and “other stuff” as requested by Ford. Mullen then left the room, went to Olympia Sports and returned. He then left that evening for Philadelphia. A few days later after he returned to the Williamsport area, he actually saw the CDs and “other stuff” at Ford’s aunt’s house.

With respect to testifying at trial, Mullen spoke to Martin’s counsel, E.J. Rymsza, about what he observed as well as conversations he heard between Ford and Trooper Tyson Havens, the investigating officer in the case. Mr. Rymsza asked Mullen to appear for trial and Mullen did so, but Mr. Rymsza never called him as a witness.

On cross, Mullen admitted that he spoke with Trooper Havens at the District Attorney’s office prior to the trial. The court notes that there were actually two trials. The first ended in a mistrial, and the second resulted in a verdict. The second trial as referenced above was held on January 28, 2016 and January 29, 2016. Prior to the first trial, Mullen told Trooper Havens that Ford had already been beaten up before “Snoop” arrived and that he didn’t see anybody get into a fight. Mullen explained that Ford asked him to lie to Trooper Havens indicating that Trooper Havens “coerced” Ford into implicating Martin.

The court took judicial notice of Martin's convictions under Information No's. 1662-2012 and 1990-2013, both in Lycoming County.

Mr. Rymsza, Martin's trial counsel, testified that he spoke with Mullen two times prior to trial and decided not to use him as a witness because he had "serious reservations" regarding his credibility. Prior to Martin's first trial, Mullen told Mr. Rymsza that he was at the Econo Lodge with Ford and that "nothing happened." Mr. Rymsza was prepared to use Mullen as a witness. After the first trial ended in a mistrial, Mr. Rymsza again spoke with Mr. Mullen. Mr. Mullen changed his story and indicated that Martin was at the Econo Lodge in Mr. Ford's room and that an altercation broke out but that Mr. Ford "started it."

On January 29, 2016, the last day of trial, Mr. Rymsza spoke with Mr. Martin about potentially using Mullen as a witness. Mr. Rymsza indicated that he had serious reservations about Mullen's credibility and that Mullen was a real "wildcard." Mr. Rymsza eventually decided not to call Mullen as a witness for a number of reasons. Mullen placed Martin in the room with Ford. Mullen indicated that there was an altercation between Martin and Ford. Mullen had provided different statements to both Mr. Rymsza and the police. Mullen's statements were contrary to some of the physical evidence including the Econo Lodge surveillance tapes, which depicted Martin and his cohorts carrying bags of items while leaving the Econo Lodge. Ultimately, Mr. Rymsza concluded that utilizing Mullen would be detrimental to Martin's defense.

Martin testified as well at the September 24, 2020 hearing. He indicated that he spoke with Mr. Rymsza multiple times before both trials. Mr. Rymsza knew about Mr.

Mullen, knew that the Commonwealth was not calling him and indicated to Martin that he refused to use him at the first trial despite Martin telling Mr. Rymsza to "let him get up there and tell the truth."

As for the second trial, Mr. Rymsza never said anything about utilizing Mr. Mullen, and Mr. Rymsza never called him. Somewhat inexplicably, Martin indicated that despite thinking that Mr. Rymsza would call Mullen and realizing that Mr. Rymsza did not call Mullen, Martin never discussed with Mr. Rymsza the decision not to call Mullen as a witness.

Tyson Havens, then a PSP Trooper but presently a detective with the Lycoming County District Attorney's Office, testified on behalf of the Commonwealth at the September 24, 2020 hearing. He investigated the incident leading to the charges against Martin. As part of his investigation, on July 10, 2013, he interviewed Mullen. The interview was recorded. Upon stipulation of the parties, the court listened to the interview. Among other things, Mullen indicated that he was at the hotel room on June 19, 2012 and when he first arrived, "Snoop" was already in the room with two others. A fourth person was outside of the room "on the phone." Mullen denied that any altercation occurred. He noted that Martin was there to collect CD's and bottles of vodka. He noted that when Ford arrived earlier in the morning to the hotel room, he had already been "beat up in Philadelphia" the prior evening.

Martin argues that calling Mr. Mullen would have, at the very least, negated the robbery charge. Defendant argues that Mr. Rymsza's reasons for not calling Mr. Mullen were not strategic or reasonable because the evidence already placed Martin in the room. As

for Mullen's inconsistent statements to Trooper Havens, those could easily be explained by Mr. Ford advising him to lie. Lastly, Martin claims prejudice.

The Commonwealth counters that Mr. Rymsza's choices not to call Mullen were reasonable and tactical. Mr. Mullen lacked credibility and it made perfect sense not for Mr. Rymsza to call a witness who had already told three different versions as to what happened.

Counsel is presumed to be effective. *Commonwealth v. Sepulveda,* 55 A.3d 1108, 1117 (Pa. 2012). The burden is on the petitioner to prove counsel's ineffectiveness by a preponderance of the evidence. *Commonwealth v. Cross*, 634 A.2d 173, 175 (Pa. 1993); *Commonwealth v. Miller*, 231 A.3d 981, 991-92 (Pa. Super. 2020). To be entitled to relief on an ineffectiveness claim, the petitioner must establish that: "(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) he suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability the result of the proceeding would have been different." *Commonwealth v. Epps*, 2020 PA Super 232, 2020 WL 5651759, *2 (Pa. Super. 2020), citing *Commonwealth v. Treiber,* 121 A.3d 435, 445 (Pa. 2015). A failure to establish any one of these prongs warrants a denial of the ineffectiveness claim. *Commonwealth v. Harper,* 230 A.3d 1231, 1236 (Pa. Super. 2020).

The court need not analyze the elements of an ineffectiveness claim in any particular order, if a claim fails under any prong of the ineffectiveness test, the court may proceed to that element first. *Sepulveda,* 55 A.3d at 1117-18. Counsel's assistance is deemed constitutionally effective once the court determines that the defendant has not established any

one of the prongs of the ineffectiveness test. *Commonwealth v. Rolan,* 964 A.2d 398, 406 (Pa. Super. 2008), citing *Commonwealth v. Harvey*, 812 A.2d 1190, 1196 (Pa. 2002).

> When raising a claim of ineffectiveness for the failure to call a potential witness, a petitioner satisfies the performance and prejudice requirements of the test by establishing 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 of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Sneed, 616 Pa. 1, 445 A.3d 1096, 1108-09 (2012).

While certainly Mullen existed, was available to testify, was willing to testify and Mr. Rymsza knew of his "existence", the court cannot conclude that the absence of the testimony was so prejudicial as to have denied Martin a fair trial.

Prejudice in this respect requires the petitioner to show how the uncalled witness's testimony would have been beneficial under the circumstances of the case. *Commonwealth v. Williams,* 636 Pa. 105, 141 A.3d 440, 460 (2016). Therefore, the petitioner's burden is to show that testimony provided by the uncalled witness would have been helpful to the defense. *Id.*

While Martin argues that Mullen's testimony would have been helpful to the defense in that it would have "negated the robbery charge," this argument assumes that the jury would have found Mullen credible. The court cannot reach such a conclusion, as the court did not find Mullen credible. Mullen had *crimen falsi* convictions and his version of the events changed. The prosecutor would have effectively cross-examined Mullen by utilizing his recorded statement against him. Mullen's statements were riddled with inconsistencies. Not only were there internal inconsistencies but there were also inconsistencies with respect

to the other physical evidence in the case. One significant point concerns his relationship with Martin. Mullen claimed that he did not know Mr. Martin until after the incident, yet when Mullen was interviewed by Trooper Havens, Mullen referenced Mr. Martin by his nickname "Snoop."

Furthermore, Mr. Rymsza had a reasonable basis for not calling Mr. Mullen as a witness. The test for deciding whether counsel had a reasonable basis for his action or inaction is whether no competent counsel would have chosen that action or inaction or the alternative not chosen offered a significantly greater potential chance of success. *Commonwealth v. Stewart,* 84 A.3d 701, 706-707 (Pa. Super. 2013) (en banc); see also *Commonwealth v. Hopkins,* 231 A.3d 855, 874 (Pa. Super. 2020). Counsel's decisions will be considered reasonable if they effectuated his client's interests. *Commonwealth v. Miller,* 987 A.2d 638, 653 (Pa. 2009). The courts do not employ a hindsight analysis in comparing trial counsel's action with other efforts he may have taken. *Id.*

The court does not question whether there were other more logical courses of action which counsel could have pursued; rather the court must examine whether counsel's decision had any reasonable basis. *Commonwealth v. Mason,* 130 A.3d 601, 618 (Pa. 2015). Counsel's decision to refrain from a particular action does not constitute ineffectiveness if it arises from a reasonable conclusion that there will be no benefit and it is not the result of sloth or ignorance of available alternatives. *Hopkins,* 231 A.3d at 875, citing *Commonwealth v. Collins,* 545 A.2d 882, 886 (Pa. 1988).

Certainly, in this case, the court cannot conclude that the choice of Mr. Rymsza had no reasonable basis. As he explained, the credibility of Mr. Mullen was at issue,

Mr. Mullen's testimony would have placed his client not only in the room but also involved in an altercation with Mr. Ford and utilizing Mullen would have been detrimental to Martin's defense. Mr. Rymsza had a reason for his decision and it was based on logic and experience.

The court found Mr. Rymsza's testimony credible. The defense presented at trial was that Martin was not "Snoop" and he was not involved in the incident with Mr. Ford. Mullen's testimony would have been inconsistent with that defense. Mullen's testimony would have confirmed that Martin was "Snoop" and that Martin was involved in an altercation with Ford. The prosecutor also would have been able to show that the portions of Mullen's statements that were inconsistent with the Commonwealth's case were lies. The prosecutor would have confronted Mullen with his *crimen falsi* convictions, his initial statement to the police that Mullen admitted was a lie, and other evidence in the case such as "Snoop's" postings on Instagram, which showed that Martin intentionally beat up Ford over a debt. In light of the photographs of the injuries Ford sustained and the Instagram postings by "Snoop" that supported the Commonwealth's position, the jury would have rejected Mullen's claims that the incident was a mutual combat and that Martin took the Xbox game system, games and CDs with Ford's consent.

Defendant's second claim involves the allegation that Mr. Rymsza was ineffective in not requesting a mistrial after a portion of a recording of Ford was inadvertently played to the jury. While there may be a factual dispute as to what exactly was played and what the jury heard, after reviewing the trial transcript, it is clear to the court that outside the presence of the jury, the court heard certain statements made by Ford and granted Martin's request to preclude said statements. Despite the court's ruling, the Commonwealth

erroneously played a portion that Mr. Rymsza had objected to and the court precluded. Specifically, the jury heard the following statement by Mr. Ford:

"I don't want them to come after me."

As soon as this was inadvertently played by the Commonwealth, Mr. Rymsza objected to it again and that objection was sustained.

While Mr. Rymsza could not recall what specifically was played to the jury, he did not request a mistrial for numerous reasons. First, the statement did not mention Martin by name. There were several individuals in the room at the time of the alleged incident and the statement could have referenced any of them if Mr. Ford was referring to them. Mr. Rymsza did not find the statement "objectionable enough" to warrant a mistrial. Ford had already testified that he didn't remember anything, the jury saw photos implicating Martin and depicting Ford's injuries and the jury as well saw surveillance videos.

As to this claim, Martin argues that the unavoidable effect of the jury hearing this was to deprive him of a fair trial, noting that the bell had already been rung. Martin argues that Mr. Rymsza did not have a reasonable basis to not request a mistrial and that Martin was prejudiced as a result.

The Commonwealth counters that Martin failed to establish what exactly was played to the jury but even if so, it was insufficient to warrant a mistrial. More specifically, there was no reference to Martin and the victim's statement was generally a state of concern over his safety, similar to any victim's concerns.

As to this claim, it fails to have arguable merit. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its

unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. *Commonwealth v. Chamberlin,* 30 A.3d 381, 422 (Pa. 2011). As a general rule, the trial court is in the best position to gage potential bias and deference is due to the trial court when the grounds for the mistrial relate to jury prejudice. *Commonwealth v. Walker,* 954 A.2d 1249, 1255-1256 (Pa. Super. 2008).

The court cannot conclude that this incident, which was very brief and innocuous, had the unavoidable effect of depriving Martin of a fair trial, particularly since Martin's name was never mentioned. As this was a significant case involving reluctant witnesses, the court would trust that every juror with even the merest scintilla of common sense would realize that there are likely to be witnesses who might be concerned in general about testifying. *See Commonwealth v. Johnson,* 815 A.2d 563 (Pa. 2002)(in a homicide case, every juror with the merest scintilla of common sense would realize that there are likely going to be grieving relatives for the victims; therefore, counsel was not ineffective for failing to request a mistrial when the victim's aunt began crying in the courtroom). Moreover, while Mr. Rymsza could not recall the incident or why he would not have requested a mistrial, such request would have been futile, as the court would not have granted a request for a mistrial.

ORDER

AND NOW, this ____ day of October 2020 following a hearing, the Court DENIES Petitioner's PCRA petition for the reasons set forth in this Opinion and in the Opinion entered on July 21, 2020.

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. **A separate notice of appeal is required for each case number.** Pa. R.A.P. 341; *Commonwealth v. Walker*, 646 Pa. 456, 185 A.3d 969 (2018). The form and contents of the Notice of Appeal shall conform to the requirements set forth in Rule 904 of the Rules of Appellate 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.A.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 Courts shall mail a copy of this order to Petitioner by certified mail, return receipt requested.

By The Court,

_____
Marc F. Lovecchio, Judge

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Work file