

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	: No. CP-41-CR-0000882-2015
	:
vs.	: CRIMINAL DIVISION
	:
	:
MICHAEL SPENCER,	:
Petitioner	: PCRA

OPINION AND ORDER

On July 29, 2016, following a jury trial, Michael Spencer (hereinafter “Petitioner”) was found guilty of, among other charges: Count 1, criminal attempt to commit homicide of Tyree Green, a felony of the first degree; Count 3, aggravated assault (attempting to cause or causing serious bodily injury to Julie Rosa-Santiago), a felony of the first degree, Count 5, aggravated assault (attempting to cause or causing serious bodily injury to Anthony Snyder), a felony of the first degree; Count 9, aggravated assault (attempting to cause or causing bodily injury to Georgianna Strait), a felony of the first degree; and Count 12, aggravated assault (attempting or causing bodily injury to Jessica Eckman with a deadly weapon), a felony of the second degree. Although Petitioner was found guilty of numerous other related charges, they are not relevant for the purposes of this Opinion.

On October 12, 2016, the court sentenced Petitioner to an aggregate term of twenty-seven and a half (27½) years to fifty-five (55) years of incarceration in a state correctional institution, which consisted of six (6) to twelve (12) years on count 1; six and one-half (6 ½) to thirteen (13) years each on counts 3, 5 and 9; and two (2) to four (4) years on count 12. All of these sentences were consecutive to each other. The remaining sentences

merged or were concurrent. Petitioner filed a Post-Sentence Motion on October 31, 2016. Among the issues raised by Petitioner in his Post-Sentence Motion were that the court abused its discretion in sentencing Petitioner to consecutive sentences and that the evidence was insufficient to convict Petitioner with respect to all of the counts. Petitioner's Post-Sentence Motion was denied by Order of Court dated January 30, 2017.

Petitioner timely appealed his conviction and sentence to the Pennsylvania Superior Court. In his Concise Statement of Matters Complained of on Appeal, Petitioner claimed that the evidence was insufficient to convict him of the offenses and that the verdict was against the weight of the evidence. By Opinion and Order of the Superior Court dated February 22, 2018, the judgment of sentence was affirmed.

Petitioner subsequently sought allowance of appeal to the Pennsylvania Supreme Court. On August 20, 2018, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal.

Petitioner filed a pro se Post Conviction Relief Act (PCRA) petition on May 31, 2019. At a subsequent Grazier hearing on October 3, 2019, Spencer waived his right to counsel and elected to represent himself. The Commonwealth filed a written Answer to Petitioner's PCRA petition on October 30, 2019. On January 2, 2020, Spencer changed his mind and elected to have counsel appointed to represent him. Helen Stolinas, Esquire was appointed to represent Petitioner.

On June 1, 2020, Attorney Stolinas filed a Petition for Leave to Withdraw as Counsel and attached a Turner/Finley No Merit Letter. The court held a conference on July 2, 2020 and issued an Order deferring a ruling on the PCRA petition and counsel's Petition for Leave to Withdraw until the jury instructions were transcribed and reviewed by counsel.

PCRA counsel was given twenty (20) days after the instructions were transcribed to file an amended petition or supplemental No Merit Letter. Counsel indicated on September 16, 2020, through an email to all parties, that the amended petition or No Merit Letter would be filed “next week.”

On October 6, 2020, Petitioner filed an Amended Post-Conviction Relief Petition. Counsel acknowledged that she initially filed a No Merit Brief on June 2, 2020 as well as a Motion to Withdraw. Following the conference on July 2, 2020, counsel again reviewed the transcript, along with the jury instructions, and withdrew the No Merit Brief and Motion to Withdraw.

First, Petitioner alleges that counsel was ineffective for failing to object to the jury instructions that were provided with respect to consciousness of guilt. Petitioner next argues that counsel was ineffective in failing to object to portions of the trial taking place outside of Petitioner’s presence. Prior to addressing the assertions raised in the Amended Post-Conviction Relief Petition, the court will first address the contentions raised in Petitioner’s pro se petition.

In Petitioner’s pro se petition, he sets forth numerous boilerplate issues without explanation or factual support. A thorough and liberal reading of the “discussions” portion of Petitioner’s petition illustrates and confirms, as Attorney Stolinas concludes, that Petitioner is raising the following claims:

- (1) The propriety of consecutive sentences;
- (2) Sufficiency and weight of the evidence; and
- (3) Ineffectiveness of counsel in numerous particulars including failing to meet, prepare and strategize a defense; failing to investigate allegations, witnesses and to seek witnesses; failing to

know the law; refusing to discuss any matters of defense; ignoring [Petitioner's] requests; not calling witnesses; not being diligent in defending against the charges; failing to set up a defense strategy; being biased and prejudiced against Petitioner; failing to retain an expert to testify; failing to "correct" false testimony; and utilizing scare tactics to "play confidence gamesmanship against [Petitioner] to sandbag [Petitioner]."

The court will first address Petitioner's claim that the court improperly imposed multiple consecutive sentences. To be eligible for PCRA relief, a petitioner must plead and prove that the allegation of error had not been previously litigated. 42 Pa. C.S.A. § 9543(a)(3). An issue has been previously litigated if the highest appellate court in which a petitioner could have had review as of right has ruled on the merits of the issue. 42 Pa.C.S.A. §9544(a)(2). Petitioner previously litigated his claim regarding consecutive sentences and accordingly, he is not entitled to relief. Specifically, Petitioner raised his argument against multiple consecutive sentences both in his Post-Sentence Motion and before the Pennsylvania Superior Court.

The court will next address Petitioner's claim that the evidence was insufficient to convict him in that it failed to identify him as the shooter. Petitioner previously litigated this claim as well and he is not entitled to relief. Petitioner raised this claim in both his Post-Sentence Motion and before the Pennsylvania Superior Court.

The court will next address Petitioner's claim that the verdict was against the weight of the evidence. To be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his claim has not been waived. 42 Pa. C.S. § 9543(a)(3). "An issue is waived if petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42 Pa. C.S. § 9544(b).

Pursuant to Rule 607 of the Pennsylvania Rules of Criminal Procedure, a claim that the verdict was against the weight of the evidence must be raised with the trial judge in a motion for a new trial. Pa.R.Crim.P. 607(A). Failure to properly reserve a weight of the evidence claim results in waiver. *Commonwealth v. Thompson*, 93 A.3d 478, 490 (Pa. Super. 2014). Accordingly, because the allegation of error has been waived, Petitioner is not entitled to PCRA relief in connection with his weight claim.

With respect to Petitioner's ineffectiveness claims, counsel is presumed effective. *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1117 (Pa. 2012). In order to prevail on a claim of ineffectiveness, a petitioner must plead and prove by a preponderance of evidence that: (1) the claim has arguable merit; (2) counsel lacked any reasonable basis for the action or inactions; and (3) the petitioner suffered prejudice as a result. *Commonwealth v. Diaz*, 226 A.3d 995, 1007 (Pa. 2020); *Commonwealth v. Hopkins*, 231 A.3d 855, 870-71 (Pa. Super. 2020).

A failure to establish any one of these prongs warrants a denial of the ineffectiveness claim. *Commonwealth v. Treiber*, 121 A.3d 435, 465 (Pa. 2015).

A claim as arguable merit where the factual averments, if accurate, could establish cause for relief. *Commonwealth v. Stewart*, 84 A.3d 701, 706-707 (Pa. Super. 2013)(en banc). Whether the facts rise to the level of arguable merit is a legal determination. *Commonwealth v. Saranchak*, 866 A.2d 292, 304 n.14 (Pa. 2005); *Commonwealth v. Barnett*, 121 A.3d 524, 540 (Pa. Super. 2015).

The test for deciding whether counsel had a reasonable basis for counsel's action or inaction is whether no competent counsel would have chosen that action or inaction, or, in the alternative, not chosen, offered a significantly greater potential chance of

success. *Stewart, id.* Counsel's decisions will be considered reasonable if they effectuated counsel's client's interests. *Id.* The courts do not employ a hindsight analysis in comparing trial counsel's actions with other efforts counsel may have taken. *Commonwealth v. Miller*, 987 A.2d 638, 653 (Pa. 2009).

As to prejudice, it is measured by whether there is a reasonable probability that the result of the proceeding would have been different. *Commonwealth v. Housman*, 226 A.3d 1249, 1260 (Pa. 2020), citing *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001). A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding. *Commonwealth v. Spatz*, 84 A.3d 294, 312 (Pa. 2014). This standard, however, is not intended to be mechanical.

Although these principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding which is being challenged. In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984); *Diaz*, 226 A.3d at 1008. It has been posited that a petitioner must establish only that the challenged conduct resulted in "some effect...on the reliability of the trial process in order for the constitutional guarantee of effective assistance to be implicated." *Diaz, id.*, citing *Strickland, id.*

With respect to holding an evidentiary hearing on a PCRA petition, the decision is within the discretion of the court. There is no absolute right to an evidentiary hearing. *Commonwealth v. Jones*, 942 A.2d 903, 906 (Pa. Super. 2008). If a PCRA court can determine from the record that no genuine issue of material fact exists, a hearing is not necessary. *Commonwealth v. Maddrey*, 205 A.3d 323, 328 (Pa. Super. 2019). To be entitled

to a hearing, the petitioner must demonstrate that the petitioner has raised genuine issues of fact, which if resolved in petitioner's favor, it would have entitled petitioner to relief. *Commonwealth v. Hanible*, 30 A.3d 426, 452 (Pa. 2011). Furthermore, the court may deny petitioner a hearing and dismiss the petition if it is patently frivolous and without a trace of support in either the record or from other evidence. *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001).

At this stage, the court has no hesitation in determining that Petitioner's PCRA claims regarding the consecutive nature of the sentences as well as the sufficiency and weight of the evidence are without basis and clearly do not entitle petitioner to relief. The court is, however, without sufficient information to determine whether the petitioner is even entitled to a hearing in connection with petitioner's pro se PCRA ineffectiveness claims. While counsel has filed a "No Merit" letter on these issues, the court is unable to conduct its own independent evaluation of the record and comment on counsel's decision.

In that Petitioner has requested an evidentiary hearing, counsel must further investigate the specifics in support of Petitioner's ineffectiveness claims and if there is a factual basis to support such, include signed certifications as to intended witnesses pursuant to 42 Pa. C.S.A. § 9545. Moreover, counsel is DIRECTED to explore with Petitioner the factual basis for Petitioner's claims of ineffectiveness and then address such in either a supplemental petition for PCRA relief or a supplemental Turner/Finley letter.

With respect to Petitioner's claim that was raised in his Amended petition, Petitioner submits that counsel was ineffective for failing to object to the jury instruction relating to consciousness of guilt. The court instructed the jury as follows.

There was evidence in this case that tended to show that Defendant

fled from police. The defendant explained why he allegedly did that. The credibility, weight, and effect of the evidence is for you to decide. Generally speaking, however, when a crime has been committed and a person thinks he is or may be accused of committing it and he flees or conceals himself, such flight or concealment is a circumstance tending to prove the person is conscious of guilt. Such flight or concealment does not necessarily show consciousness of guilt in every case. A person may flee or hide for some other motive and may be do so even though innocent. Whether the evidence of flight or concealment should be looked at as tending to prove guilt depends upon the facts and circumstances of the case, and especially upon the motives that may have prompted the flight or concealment.

There was also evidence tending to show that the defendant made false and contradictory statements when questioned by the police. If you believe this evidence, you may consider it as tending to prove the defendant's consciousness of guilt. You are not required to do so.

You should consider and weigh this evidence along with all the other evidence in the case. You may not find the defendant guilty solely on the basis of evidence of consciousness of guilt.

Transcript, 7/29/2016 at 15-16.

Petitioner argues that the use of the word "the" before the word "motives" presumes that there were motives prompting flight or concealment. Petitioner argues that counsel was ineffective in failing to object to this charge. The court concludes that this issue lacks any arguable merit.

The standard jury charge does not include the word "the" prior to the word "motives" but the argument raised by the petitioner is an artificially created distinction where no real difference exists. The use of the word "the" clearly reflected the fact that the defendant testified as to why he fled from the police. The court did not err in presuming motives; the court instructed the jury to consider the motives as testified to by Petitioner.

When a court instructs the jury, the objective is to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict.

Commonwealth v. Bradley, 232 A.3d 747, 759 (Pa. Super. 2020). A charge will be found

adequate unless the issues are not made clear, the jury was misled by the instructions, or there was an admission from the charge amounting to a fundamental error. *Id.* Moreover, in reviewing a challenge to a jury instruction, the entire charge is considered, not merely discreet portions thereof. *Id.* The trial court is free to use its own expressions as long as the concepts at issue are clearly and accurately presented to the jury. *Id.*; *see also Commonwealth v. Antidormi*, 84 A.3d 736, 754 (Pa. Super. 2014). Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error. *Antidormi, id.*

Because there was no abuse of discretion or an inaccurate statement of the law, there was no error and Petitioner's trial counsel was not ineffective in not objecting to the jury instruction. Defense counsel cannot be found ineffective for failing to pursue a meritless claim.

Petitioner next claims that counsel was ineffective for failing to object to portions of the trial taking place outside of Petitioner's presence.

The record shows that a recess was taken and the jury went back to deliberate. Transcript, 7/29/2016, at 90. It is then noted that outside the presence of the jury, the court advised Petitioner as follows:

THE COURT: Okay, let's go [on] the record. Mr. Spencer, I just kind of want to kind of let you know what's going on, and, um—there were two questions that the Jury asked and I thought it was perhaps more expedient or easier to answer the questions with counsel but in the—

TIPSTAVE: They have a verdict.

THE COURT: Well, good thing you're down here. Um, but one of the questions was on Count 3, 5 and 9, we dropped attempted, um, to cause serious bodily injury. 4, 6, 8, 10, 12 do we keep attempt to cause serious bodily injury? And I explained to them they did. That they were correct in

that.

Then the last question was, “what does specific intent to kill, fully formed intent to kill, consciousness of his intention mean, and beyond reasonable doubt. Someone is questioning Michael’s ability to think intentionally and plan the act and be conscious of intention. And what I did then was I read to them the portion of the charge about specific intent to kill. And then I read to them the portion—can I see that, Mr. Wade?”

MR WADE: Yes.

THE COURT: And I read to them the definition of specific intent to kill as defined in the first degree murder, but I didn’t say pre-meditated. What I said was, specific intent to kill does not require planning or previous thought or any particular length of time. It can occur quickly. All that is necessary is there be time enough so that the defendant can and does fully form an intent to kill and is conscious of that intention. In deciding whether the defendant had specific intent to kill[,] you should consider all of the evidence regarding his words and conduct and the attending circumstances that might show his state of mind.

Okay, and I thought I should let you know that. Did you have any concerns or did you want to question your attorneys on any of that?

[PETITIONER]: No

THE COURT: Are you sure?

[PETITIONER]: Yes

THE COURT: Okay do you have any questions of me regarding any of that?

[PETITIONER]: No.

THE COURT: I figured the first one was fairly straightforward and the second one was just a little confusing, but I figured, um, I would try to answer as best as I can, okay?”

[PETITIONER]: Yes.

Prior to this conversation with Petitioner and counsel, the court discussed with counsel calling the jury in and explaining and/or answering their question. The court proposed how to respond to the questions and both counsel agreed with the court’s decision. Although the record is not entirely clear, giving Petitioner the benefit of the doubt it appears

that the court gave instructions to the jury outside the presence of Petitioner.

Nonetheless, Petitioner is not entitled to relief on this claim for two reasons. First, it does not have any arguable merit and second, Petitioner cannot establish prejudice.

Pursuant to Rule 646 of the Pennsylvania Rules of Criminal Procedure, the judge must instruct the jury that during deliberations they may submit questions regarding any portion of the charge. Pa. R. Crim. P. 646(B)(2)(b). Further, and contrary to Petitioner's claim, after the jury has retired to consider its verdict, additional or correctional instructions may be given by the trial judge in the presence of all parties, except that the defendant's absence without cause shall not preclude the court from proceeding, as provided in Rule 602. Pa. R. Crim. P. 647(D).

Finally, Defendant's absence during the jury's deliberation when the court explained reasonable doubt and specific intent, despite his rule based and constitutional right to be present, would have been harmless error. The jury did not hear a new or different charge in private; the jury heard verbatim what previously transpired in open court in the presence of Petitioner. Furthermore, the verdict showed that the jury carefully considered all of the evidence and the court's instructions by deliberating for a significant time and actually acquitting Petitioner on various charges. See *Commonwealth v. Williams*, 959 A.2d 1272 (Pa. Super. 2008), *affirmed*, 607 Pa. 597, 9 A.3d 613 (2009); *Commonwealth v. Berrigan*, 535 A.2d 91 (Pa. Super. 1987), *appeal denied*, 557 A.2d 341 (Pa. 1989).

ORDER

AND NOW, this ____ day of December 2020, Petitioner's counsel has until **December 31, 2020** to further explore with Petitioner the issues raised in this Opinion, including the jury instructions and the factual basis for the ineffectiveness claims, and

within that time period to file a supplemental PCRA petition and/or a supplemental Turner/Finley letter.

A PCRA conference is scheduled for January 5, 2021 at 4:30 p.m. in the court's chambers.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Helen Stolinias, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)