

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR-994-2017
 :
 CODY CHESTNUT, :
 :
 Petitioner : PCRA

OPINION AND ORDER

By Information filed on June 16, 2017, Petitioner Cody Chestnut was charged with one count of aggravated assault, one count of strangulation, one count of unlawful restraint, one count of simple assault and one count of harassment. Following a jury trial which was held on April 10 and April 11, 2018, Petitioner was found guilty of Count 1, aggravated assault, a felony of the first degree and Count 4, simple assault, a misdemeanor of the second degree.

On June 18, 2018, the court sentenced Petitioner on the aggravated assault conviction to a term of incarceration in a State Correctional Institution, the minimum of which was five (5) years and the maximum of which was twelve (12) years. All remaining counts were dismissed.

Petitioner filed a timely Post-Sentence Motion, which was denied by Opinion and Order of the Court dated October 16, 2018. Petitioner filed a Notice of Appeal to the Superior Court on or about October 19, 2018. By Opinion and Order of the Superior Court filed on August 19, 2019, the judgement of sentence was affirmed.

On March 11, 2020, Petitioner filed a pro se Petition for Post-Conviction

Collateral Relief. Donald Martino, Esquire was appointed to represent him. On May 28, 2020, Mr. Martino filed a motion to withdraw as counsel with an attached *Turner/Finley*¹ no merit letter.

Following a conference on July 13, 2020, by Order of Court dated July 14, 2020, the court directed Mr. Martino to file either a supplemental *Turner/Finley* no merit letter or an Amended PCRA petition within sixty (60) days. Subsequently, however, because Mr. Martino's contract with Lycoming County was terminating, the case was reassigned to Trisha Jasper, Esquire by Order of Court dated August 26, 2020.

On September 25, 2020, Petitioner, through Ms. Jasper filed an Amended Petition for Post-Conviction Collateral Relief. In said amended petition, Petitioner submitted that his trial counsel was ineffective for failing to call additional character witnesses at trial. While acknowledging that two character witnesses were called at trial, Petitioner asserted that had the jury heard from additional witnesses, Petitioner's testimony of self-defense would have been deemed to be credible and the victim's testimony would have been deemed not credible.

The hearing on Petitioner's Amended PCRA was held on December 22, 2020. Danielle Giardano, Shane Nearhoof's fiancé, first testified for Petitioner. She testified that she previously received a subpoena to appear as a witness at the trial, appeared for Petitioner's trial and was willing to testify but was never called as a witness.

Had she been called as a witness, she would have testified that she knew

¹ *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super.

Petitioner since 2015 and that in her interactions with him he never “showed” her “anything negative” with respect to truthfulness or honesty and that she never witnessed Petitioner being violent.

As for the victim, she knew him since 2015 as well. He had a reputation for being “extremely violent.” She described specific “personal” incidents of him threatening her, intimidating her and destroying property. She described another incident at the Lycoming County Fair where the victim got into an argument with her and others, took some of their property, and almost hit a small child with the car.

On cross-examination, she testified that she was not aware of Petitioner being previously convicted of forgery and that knowing such would have “affected” her opinion as to his honesty and truthfulness. She conceded that she did not know about Petitioner’s character or reputation for peacefulness.

Shane Nearhoof was next called. He testified that Petitioner was like his step-brother, as his mother and Petitioner’s father dated for eight or nine years when he and Petitioner were children. He testified that he was subpoenaed for trial, appeared and was willing to testify but was never called as a witness.

If he was called as a witness, he would have testified that he knew Petitioner for the past thirty (30) years. When asked about Petitioner’s reputation in the Muncy/Hughesville community for truthfulness and honesty, he testified that he did not “see” Petitioner as a liar and did not have that opinion of him. As for reputation for violence,

he testified that he never saw Petitioner as violent and never saw Petitioner beat up people.

He knew the victim as well over the same thirty (30) year span. When asked about the victim's "reputation", Mr. Nearhoof testified that it wasn't good at all, that he couldn't say anything good about the victim and that the victim was never truthful. He indicated that he had not seen the victim in many years (about four) and described an incident where the victim took some of their "gear", hit a truck and almost hit their daughter.

He also testified to the victim putting him in the hospital "numerous times as a kid." He described seeing and talking to the victim's "wife or whatever" and that the victim hadn't changed. He noted that "90% of the community and cops" would verify such.

He further testified about Petitioner's reputation for non-violence, noting that a majority of people thought he was non-violent. He was not aware that Petitioner was convicted of forgery and noted that such a conviction would affect his judgment as to Petitioner's reputation for honesty.

Petitioner's sister, Demsey Long, testified that she too was subpoenaed as a witness for trial. She appeared and was willing to testify but was not called.

If called, she would have testified that she knew Petitioner for years. He was always truthful to her and her family. Neither she nor her family had problems with him. He had a reputation for being truthful and honest.

She never saw him being violent. Among the community, he wasn't "really that violent."

She knew the victim for many years as well. He lied a lot. He was not a good

guy. He was not honest. He was violent. She described as well a few incidents in which she observed him being violent.

Deborah Parks testified as well that she was subpoenaed as a witness for trial. She appeared and was willing to testify but was not called. Petitioner is her grandson. He was never violent.

As for the victim, she has known him since 1987. He is not truthful or honest and is a violent person. She described specific incidents of the victim being violent.

Ruth King testified next. She was subpoenaed as a witness for trial. She appeared and was willing to testify but was not called.

She has known Petitioner since he was born, approximately thirty (30) years ago. She raised him for ten (10) years. She described him as being “so honest” that he did jail time for telling the truth. He was never violent to her knowledge. He was known to be non-violent “toward anybody.” On cross-examination, she acknowledged that Petitioner served time because he stole checks, but she claimed that Petitioner was on drugs at the time, which affected his ability to be truthful. She was aware that Petitioner testified at trial that he was using drugs at the time of this incident, but she didn’t feel that affected his honesty.

She knew the victim for thirty (30) years as well. He was not truthful or honest at all. She described an incident where in a land transaction, the victim kept wanting more money from her. She described the victim as “very arrogant.”

The victim’s reputation was being very violent. People were afraid to say anything against him because he would make their lives miserable.

The sixth and last witness to testify was Alexandra Reese, who previously dated Petitioner and had been friends with him for about ten years. She testified that she received a subpoena for the trial, appeared, and was willing to testify but wasn't called. However, the trial transcripts indicate that she was "one of the one's that didn't show up." Trial Transcript, April 10, 2018, at 222-223.

She testified that Petitioner was always truthful, honest and non-violent. She knew the victim as well. She testified that the victim "doesn't say truthful things" and "always tells stories." He was always extremely violent. She heard "around town" that he was violent and threatened Petitioner.

A claim of ineffective assistance of counsel is cognizable under the PCRA as an enumerated ground for relief. 42 Pa. C.S. § 9543 (a) (2) (ii); *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987).

Counsel is presumed to be effective and "the burden of demonstrating ineffectiveness rests on" the petitioner. *Commonwealth v. Hawkins*, 2020 Pa. Super. 280 (December 10, 2020); citing *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010).

To satisfy this burden, a petitioner must plead and prove by a preponderance of the evidence that: (1) his underlying claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) as a result of counsel's action or inaction, the petitioner suffered prejudice. *Commonwealth v. Little*, 246 A.3d 312, 323 (Pa. Super. 2021), citing *Commonwealth v.*

Pierce, 527 A.2d at 975-76.

The PCRA court may deny an ineffectiveness claim if the petitioner's evidence fails to meet any single one of these prongs. *Commonwealth v. Daniels*, 963 A.2d 409, 419 (Pa. 2009); *Commonwealth v. Dozier*, 208 A.3d 1101, 1103 (Pa. Super. 2019).

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

Commonwealth v. Orner, 2021 PA Super 80, 2021 WL 1620048, *4 (April 27, 2021)(citing *Commonwealth v. Sneed*, 45 A.3d 1096, 1108-09 (Pa. 2012)); *Commonwealth v. Miller*, 231 A.3d 981, 992 (Pa. Super. 2020).

The court will first address the prong regarding counsel's reason, if any, for not calling the additional witnesses. 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, 707 (Pa. Super. 2013). Counsel's

decisions will be considered reasonable if they effectuated his client's interests. *Id.* The court does not employ a hindsight analysis in comparing trial counsel's actions with other efforts he might have taken. *Stewart, Id.*

In this case, there was no testimony whatsoever as to why counsel chose not to call the additional character witnesses. During the trial, Petitioner called two character witnesses. These character witnesses were called to bolster the testimony of Petitioner that the victim was lying. The testimony also bolstered Petitioner's claim that the incident involving the victim was in self-defense.

Jamie Moore, a friend of Petitioner's family who had known Petitioner since he was 16 years old, testified that she knew the victim to have a reputation for untruthfulness, he was very violent, and he liked to fight according to his reputation in the community. She also testified that she knew Petitioner to be a non-violent person and had never witnessed him to be violent.

Tiffany Sellers, an individual who was Petitioner's ex-girlfriend and had known him for ten years, also testified on behalf of Petitioner. She testified that the victim had a reputation in the community for being untruthful and was a "known liar." As for Petitioner, he was non-violent and she never observed him commit an act of violence toward another person.

The court never heard from trial counsel as to why he did not call the other witnesses. While they may have been present, able and willing to testify, counsel chose not to call them. Without hearing from trial counsel under the circumstances, the court cannot

conclude that the course of conduct pursued by counsel did not have some reasonable basis designed to effectuate Petitioner's interests. Accordingly, Petitioner's claim fails in this regard.

In addition, Petitioner's claim also fails under the other requisite prongs. First, it is not of arguable merit. A claim has arguable merit where the factual averments, if accurate, could establish cause for relief. *Stewart*, 84 A.3d at 707.

The admission of character evidence is controlled by Pa. R. E. 404 and 405. According to Rule 404, a defendant may offer evidence of the defendant's pertinent trait. The official comment to Rule 404 further clarifies that a defendant is allowed to put his character in issue by calling character witnesses to testify to his good reputation for a law abiding disposition, or other pertinent trait of character. Pa.R.E. 404, cmt.; *Commonwealth v. Madina*, 209 A.3d 992, 997 (Pa. Super. 2019).

When evidence of a person's character or trait is admissible, it may be proved by testimony about the person's reputation. Testimony about the witness's opinion as to the character or character trait of a person is not admissible. Pa.R.E. 405(a). Evidence of good character offered by a defendant in a criminal prosecution must be limited to his general reputation for the particular trait or traits of character involved in the commission of the crime charged. Such evidence must relate to a period at or about the time the offense was committed and must be established by testimony of witnesses as to the community opinion of the individual in question, not through specific acts or mere rumor. *Madina*, 209 A.3d at 997, citing *Commonwealth v. Radecki*, 180 A.3d 441, 453-54 (Pa. Super. 2018).

Ms. Giordano's testimony likely would have been inadmissible. It did not address the general reputation of either Petitioner or the victim; rather it dealt with specific acts.

Mr. Nearhoof's testimony regarding Petitioner would likely not have been admissible as well. Again, he failed to testify about Petitioner's general reputation for the particular traits of character involved; rather, he testified regarding his personal opinion and specific acts.

His testimony regarding the victim would not have been admissible either. Although asked about the victim's "reputation" Mr. Nearhoof testified about his personal opinion and specific acts.

Perhaps the only portion of Mr. Nearhoof's testimony that would have been admissible dealt with his conclusion that Petitioner's reputation for non-violence was good "with a majority of people thinking he is non-violent."

The testimony of Ms. Long would not have been admissible. Again, she did not testify as to anyone's reputation in the community but instead testified to as specific acts and her personal opinion.

The same can be said about Ms. Parks. She set forth her personal opinion and specific acts rather than anyone's reputation in the community.

The same can be said about Ms. King. She testified about her personal opinion and specific acts. The only portion of her testimony potentially admissible was her testimony that the victim's reputation was "very violent."

Finally, as for the testimony of Ms. Reese, her testimony would not have been admitted. She did not testify to anyone's reputation in the community; rather she testified about specific acts and her opinion. As well, some of her testimony was mere rumor.

In sum, out of the six witnesses not called, four of them would not have been permitted to testify as they did during the PCRA hearing in this matter. One would have been limited to testimony that Petitioner's reputation was non-violent while another would have been limited in her testimony to only the victim's reputation for being very violent.

Petitioner has failed to establish that the testimony of these would-be character witnesses would have been admissible and the court cannot find counsel ineffective for failing to call the witnesses at trial.

Finally, Petitioner has failed to prove that he suffered prejudice due to the lack of these two witnesses being able to testify during the trial. The testimony at trial was so strong and so prevailing that the limited character witness testimony would have been insufficient to cast doubt on the victim's credibility. Moreover, the inclusion of this very limited testimony would not have altered the jury's credibility determination and thus, the outcome of the trial.

As the Superior Court noted in its Opinion, Petitioner admitted to having punched the victim in the face causing his nose to bleed. There was no question that at least one punch from Petitioner caused facial injuries to the victim. There was medical testimony that the victim's facial injuries were consistent with the physical assault. The victim testified that he had to have surgery to reconstruct his eye socket to secure his eye. The evidence

demonstrated not only that Petitioner actually caused serious bodily injury to the victim but also that he intended to cause serious bodily injury to the victim by attacking him several times, even after the victim tried to get away from Petitioner.

Accordingly, Petitioner's PCRA claim will be denied.

ORDER

AND NOW, this _____ day of May 2021, the court DENIES Defendant's PCRA petition.

Defendant 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 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, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (Assistant District Attorney)
Trisha Hoover Jasper, Esquire
Gary Weber, Esquire
Judge Marc F. Lovecchio
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