IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**CR-2023-2013**
	:	
v.	**:**	
	:	
ANTHONY RUDINSKI,	**:**	**PCRA**
Petitioner	**:**	

OPINION AND ORDER

Anthony Rudinski (Petitioner) was charged with sixteen (16) counts of Child Pornography and other related crimes. An initial jury trial was conducted on October 20, 2015 that resulted in a mistrial. The trial was rescheduled before this Court and held on April 21, 2016 and April 22, 2016. Following the conclusion of the two-day trial, the jury ultimately found Petitioner guilty of all charged offenses. On September 13, 2016, this Court sentenced Petitioner to an aggregate term of incarceration in a state correctional institution for a minimum of seven (7) years to a maximum of fifteen (15) years, to be followed by a five (5) year period of probation.

Petitioner, through his trial counsel, filed a Post-Sentence Motion on October 10, 2016 based on allegations of discovery violations and after discovered evidence. This Court held a hearing on this motion on November 7, 2016 and subsequently denied Petitioner's requests for relief on February 9, 2017. Petitioner neither filed a direct appeal nor was an appeal filed on his behalf. On July 11, 2017, Petitioner submitted a motion for a new trial based on after discovered evidence, which this Court treated as a first Post-Conviction Relief Act (PCRA) Petition due to its untimely filing. An amended PCRA petition was submitted through his appointed counsel. PCRA counsel filed a second amended PCRA petition on July 6, 2018 requesting a new trial or in the alternative, to reinstate his direct appeal rights. This Court reinstated Petitioner's direct appeal rights *nunc pro tunc* on October 1, 2018 without objection

by the Commonwealth. This Court requested a Concise Statement of Matters Complained of on Appeal on October 30, 2018. Petitioner filed a notice of appeal on October 23, 2018. Petitioner filed his Statement of Matters Complained of on Appeal on November 1, 2018 asserting three (3) issues, including the same discovery violations and after discovered evidence, as well as challenging the trial court's decision to allow "inflammatory photos" to be shown to the members of the jury. This Court relied on its Opinion and Order denying Petitioner's Post-Sentence Motions issued February 9, 2017. On November 7, 2019, the Superior Court found no merit in all three (3) of Petitioner's issues and affirmed the trial court's judgment of sentence.

Following the Superior Court's dismissal, Petitioner submitted a *pro se* Second PCRA Petition on September 18, 2020. On September 21, 2020, this Court appointed Trisha Jasper Hoover, Esquire, to represent Petitioner in the immediate PCRA petition, which the Court has treated as a First PCRA petition following the reinstating of Petitioner's direct appeal rights. Appointed counsel filed an amended PCRA petition on November 10, 2020 asserting the ineffective assistance of trial counsel for several failures. First, Petitioner contends that trial counsel was ineffective for failing to call his Ophthalmologist at trial who would have testified to the extent of Petitioner's vision impairment at the time the offenses were purportedly committed. Second, Petitioner alleges trial counsel was ineffective for failure to present Alcoholics Anonymous meeting sheets at trial that would have shown Petitioner's whereabouts at the times the images were supposed to have been downloaded onto his computer. Lastly, Petitioner believes trial counsel was also ineffective for failing to request a Bill of Particulars.

Testimony

This Court held a hearing on the instant PCRA petition on March 11, 2022. Michael Rudinski, Esquire, (Rudinski) testified on behalf of Petitioner at the hearing on this motion.

Rudinski testified that he was Petitioner's trial counsel in the above-captioned matter. N.T. 3/11/2022, at 5. Rudinski stated that this case had been tried in front of Judge Gray and a mistrial had been granted due to a lack of discovery. Id. at 6. Part of the missing information was regarding specific dates in question of when the pornographic images had been downloaded. Id. Following the mistrial, Rudinski admitted that he did not file a bill of particulars in large part because the court had ordered discovery to be turned over to trial counsel after declaring a mistrial. Id. Rudinski was under the impression that he had all necessary information, but upon the commencement of the second trial, he was "caught off guard with a date that we did not have." Id. Rudinski agreed that the purpose for filing a bill of particulars is to have "specific dates so that you may prepare an adequate defense." Id. at 7.

Rudinski further testified that at the time Petitioner was charged with these offenses, Petitioner was in recovery and attending meetings to aid in his recovery. Id. Rudinski also agreed that Petitioner advised him of his attendance at the Alcoholics Anonymous (AA) meetings and that Petitioner possessed sign-in sheets that would show his presence at certain meetings. Id. at 8. Rudinski noted that Petitioner had given these meeting sheets to someone at his office, but he did not know where they went. Id. at 13. Rudinski indicated that at the time of the second trial, he was not aware of all the dates that Petitioner had allegedly downloaded child pornography. Id. at 9. Rudinski stated, "at the trial it came out that there was a date they were now questioning, I believe it was one of the agents or somebody, and at that point I moved for a mistrial because we did not have that information even though discovery was ordered on two occasions." Id. Rudinski confirmed the motion for mistrial at the second trial was denied. Id. Rudinski testified that, because they were not aware of the date that arose at trial, he was not able to present any evidence of Petitioner's whereabouts on that date. Id. at 10.

Petitioner had given Rudinski various witnesses to be called at trial, one of whom, a man named Fred Erikson (Erikson), who was subpoenaed but did not actually testify at trial because he could not be specific as to dates and times that he would take Petitioner to AA meetings. Id. at 10-11. In conversing with Erikson, he told Rudinski that he gave Petitioner rides to AA meetings and they would get there early to help set up the meeting space. Id. at 11. However, Rudinski could not match a date they attended a meeting together with a date that the pornography was allegedly downloaded. Id. at 12. Petitioner had also given Rudinski the name of his neighbor for her to be a witness on his behalf at trial. Id. The neighbor told Rudinski that Petitioner's garage was not locked and anyone had access to it and the computer was located in the garage. Id. at 13. After speaking with her, Rudinski determined that the majority of her testimony would have been hearsay, so she was not called as a witness. Id. at 12-13.

Rudinski explained that Petitioner was his son and that their relationship was unique compared to the typical clients he represents. Id. at 15. Rudinski noted that his defense strategy for this case was to concede the child pornography was on Petitioner's computer, but that Petitioner was not the one who downloaded, disseminated, or possessed it. Id. This strategy was advanced by eliciting testimony about the number of law enforcement agents who executed a search warrant at Petitioner's residence, testimony about clothing the agents wore, other people staying at or visiting Petitioner's residence and obtaining the password to Wi-Fi, the proximity of Petitioner's garage to his residence and other's ability to access the garage, and testimony about Petitioner's eyesight issues and sleeping habits. Id. at 16. Rudinski acknowledged that the information in this case charged Petitioner with committing these offenses on or about August 18, 2013 through September 19, 2013. Id. at 18. However, Rudinski admitted that their defense

strategy of Petitioner not being near his computer when he was in fact not needed to operate his computer to finish the download was "problematic." Id. at 21.

Rudinski denied being provided any evidence to show that Petitioner was attending AA meetings from 10 p.m. to 4 a.m. from September 9 to September 10, 2013. Id. at 22. Rudinski was not aware of any substance abuse meetings scheduled at this time and none of his prior clients with substance abuse issues had ever told him they attended a meeting from 10 p.m. to 4 a.m. Id. at 23. Rudinski further testified that he understood at the pre-trial stage that the Commonwealth was not able to provide digital copies or email the child pornography due to the nature of the images. Id. at 27. Rudinski also confessed that nothing prohibited him from asking to view the photographs from the time of the preliminary hearing up to the time of the second trial. Id. at 27-28.

Frederick Erikson (Erikson) also testified on behalf of Petitioner. Erikson testified that he is familiar with Petitioner through attending AA meetings. Id. at 31. Erikson stated that in 2013, Petitioner was his best friend. Id. Erikson noted that he met Petitioner for the first time at an AA meeting in the spring of 2012 and specifically noticed his amber colored glasses. Id. at 32. Erikson has attended AA meetings throughout the last thirty (30) years with varying frequency to maintain his sobriety. Id. From August 18, 2013 to September 19, 2013, Erikson confirmed that he was attending AA meetings regularly. Id. at 33-34. During that time, Erikson indicated that he saw Petitioner approximately five (5) times per week and occasionally picked Petitioner up on his way to meetings at various locations. Id. at 34. Erikson further testified that he would arrive at Petitioner's house about thirty (30) minutes prior to the start of the meeting, which would generally be around 6:30 p.m. to 6:45 p.m. Id. at 36. Erikson did not have

documentation that confirmed the particular dates that he drove Petitioner to AA meetings. Id. at 38.

During the August and September 2013 time period, Erikson lived approximately ten (10) minutes away from Petitioner's residence. Id. at 41. Erikson would typically leave from his house to pick up Petitioner but would also leave from the gym to go to Petitioner's home. Id. at 42. Erikson could only recall one (1) instance where he personally observed Petitioner get into someone else's vehicle to go to an AA meeting. Id. Erikson reiterated that he did take Petitioner to AA meetings during that time period but could not articulate the specific dates he did so. Id. at 43. Despite describing himself as a "pack rat", Erikson did not have any documents that could confirm what meetings he attended between August 18, 2013, and September 19, 2013. Id. at 45. Erikson also testified that he cleans out his cabinet file and gets rid of papers he deems no longer important. Id. at 44.

On cross-examination, Erikson's testimony was that he could not remember specific times but could remember the days during the time period in question from 2013. Id. at 47. However, upon additional questioning, Erikson stated that he cannot remember what he had for dinner the night before, and that he was reciting "typically what I did back then" and that he, "can't tell you what I was doing probably just about any day of the week for anything other than Monday through Friday I'm at work." Id. at 46-47.

Erikson could not specifically remember signing a witness certification but upon the attorney for the Commonwealth presenting it to him, Erikson confirmed his signature on that document. Id. at 49. On that certification, Erikson had written that he and Petitioner would arrive at AA meetings approximately thirty (30) to forty-five (45) minutes prior to the start of the meeting. Id. When asked about his previous testimony of picking Petitioner up, "15 to 30

minutes before the meeting started, how could you have arrived at the meetings 30 to 45 minutes before they began?" Id. at 52. Erikson responded, "Beats me." Id. Erikson stated he could not recall how early he arrived at Petitioner's home to pick him up for meetings. Id. Erikson denied ever attending a meeting with Petitioner between 11 p.m. and 3 a.m. Id. at 55. Erikson also denied seeing Petitioner take a laptop or a power cord to meetings. Id. at 57. Erikson further testified that AA did not keep attendance records and stated that the group was "organized to the point to where we can keep our bills paid…." Id. at 59-60. The only attendance that is required at these meetings is for those who have been court-ordered to attend. Id. at 60.

Erikson confirmed that he had been contacted by Rudinski in regard to Petitioner's criminal trial but could not recall exactly when this occurred. Id. at 39. Erikson stated that he did not testify at Petitioner's trial and did not remember being served a subpoena to testify. Id. Erikson indicated that he usually keeps important documents in a filing cabinet but could not verify for certain that the subpoena was included in his files. Id. at 40. Erikson denied being an optometrist or qualified to evaluate an individual's vision. Id. at 41. Erikson acknowledged that if he had been called as a witness in Petitioner's trial, he would have answered similarly as he did on the day of the hearing for this motion. Id. at 61. Additionally, Erikson disavowed having any knowledge of the child pornography or how it was downloaded. Id. at 56.

Alison Codispoti (Codispoti) also testified on behalf of Petitioner. Codispoti resides in the city of Williamsport and was neighbors with Petitioner during the summer of 2013. Id. at 62. Codispoti testified that Petitioner resided on the "other half of the house" but their residences did not share any common space. Id. Codispoti was also familiar with another neighbor named Bernie. Id. at 63. Codispoti indicated that she never called the police based on

any concerns with Bernie between August 18, 2013 and September 19, 2013. Id. at 63-64. Codispoti stated that she would have testified the same way if called at Petitioner's trial. Id. at 64.

Petitioner testified on his own behalf at the hearing on this motion. Petitioner testified that from the time he was charged until the end of his second trial, he was represented by his father, Rudinski. Id. at 65. Petitioner stated that he and Rudinski were not provided specific dates of the alleged time and dates that the pornography was downloaded. Id. Petitioner could only recall one date that was provided, specifically August 28, 2013 with the download occurring at approximately 6:48 p.m. Id. Petitioner said that he "had been working all day at White Deer Run. I came home, had dinner, was picked up a half hour before that meeting and that meeting was more important than any other meeting because I was the treasurer of that meeting…." Id. Petitioner further testified that he would stay late at AA meetings in addition to arriving early, which was a "heated topic of discussion" between Petitioner and his wife. Id. Petitioner brought a folder "full of meeting sheets that I had signed for over a year and I'm at that meeting every week without fail…." Id. Petitioner asserted that he had obtained a meeting sheet for August 28th that showed his presence at that meeting and notified Rudinski. Id. at 66. Rudinski told Petitioner to bring the sheet to his office immediately, so Petitioner's wife drove him to the office and Petitioner handed the sheet to the secretary. Id.

Petitioner reiterated that August 28th was the only date that he and his attorney prepared for and contended that he was not informed of any specific dates in September of 2013. Id. at 66. Petitioner said that he provided Rudinski with two (2) witnesses to be used at the second trial, Erikson and Codispoti. Id. at 68. Both were present at the first trial but were not called due to the mistrial being declared shortly after trial began. Id. Petitioner could not remember if they

were present at the second trial, but remembered that he had instructed Rudinski to subpoena them for that trial. Id. at 68-69. Petitioner wished for Erikson to testify to provide corroboration of his whereabouts at the AA meeting. Id. at 69. Petitioner wanted Codispoti to testify because he believed she had information "that my neighbor was disturbed and had something against me and to back up my having to call the police twice on him for trying to just walk into my house." Id. at 70. "The second time he tried to walk into my house in his underwear in the middle of winter and I had to call the police." Id. Petitioner did not have a police report of the incidents when he called Pennsylvania State Police and South Williamsport Police on his neighbor and could not recall the specific dates that he did so. Id. at 71.

Petitioner stated that his computer was in the garage for a couple weeks and then he brought it back into the house, which is where it was found when the search warrant was executed. Id. Petitioner indicated that his computer is not a laptop, but is a "flat screen computer that you move and when you move it you have to move the keyboard." Id. Petitioner said that while attending AA meetings, he did not know the exact location of his portable computer. Id. at 72. Petitioner denied the existence of any AA meetings between approximately 11 p.m. and 2 a.m. Id. Petitioner further testified that Erikson picked him up thirty (30) minutes prior to the AA meeting on August 28, 2013. Id. at 73. Petitioner also said that Erikson was the only person that picked him up for AA meetings and his sponsor would pick him up for hospitals and institution meetings. Id.

Petitioner clearly stated that the events of August 28th were "burned into my brain because I'm the one that's been living…the same thing over and over." Id. The attorney for the Commonwealth pressed Petitioner on basic details about August 28th but Petitioner could not remember the temperature outside on the day in question, did not recall what he and Erikson

spoke about in the car, or the traffic at the only stop sign on their route. Id. at 73-75. Petitioner did remember that he and Erikson never listened to the radio while driving together and that it took them about five (5) minutes to travel to the meeting location. Id. at 73-74. No other witnesses were available to testify about Petitioner's whereabouts on August 28th. Id. at 75.

Petitioner admitted that he sat next to his counsel during trial and that he had the opportunity to speak with him as the trial was unfolding. Id. Petitioner was able to speak with Rudinski after the first day of trial concluded. Id. at 76. Petitioner recalled that he wanted Rudinski to file a motion concerning certain agents but Rudinski refused. Id. Petitioner was also able to converse with Rudinski prior to trial commencing on the second day. Id. Petitioner argued that if he had been given notice of the certain dates in September that he allegedly downloaded child pornography, he would absolutely have attempted to mount a defense that he did not download those materials. Id. at 78. The attorney for the Commonwealth asked what his evidence is to prove he did not download the pornography now that he has known about the September 2013 dates for about six (6) years, but Petitioner only said, "I don't because I still don't know the times." Id.

When asked what he was doing on September 9, 2013 from 11 p.m. until 2 a.m. the morning of September 10th, Petitioner stated that he was in bed with his wife and denied being with Erikson at an AA meeting. Id. at 79. Petitioner also said he was in bed with his wife on September 11th from 12:05 a.m. until approximately 1 a.m. Id. Petitioner further denied being at an AA meeting with Erikson on August 18, 2013 from 7 a.m. until 7:30 a.m. because he was at work. Id. However, Petitioner did not have witnesses that could verify he was at work during that time frame nor did he have a time sheet or paystub to show he worked those hours. Id. at 80. Petitioner also did not have a receipt or ticket to support his assertion that he took the bus to

work that morning. Id. Petitioner failed to remember the bus driver's appearance, how many passengers were on the bus, how many stops the bus made while he was travelling, and what the weather was like on August 18th. Id. at 81.

Petitioner asserted that he only asked for a new trial because the jury did not hear a defense to the contested dates. Id. at 82. When asked what relief he is seeking with this PCRA petition, Petitioner responded, "I've been in state prison for 5 ½ years. I just want to go home with my family. That's what I want. I don't want a new trial. I don't want to take this back to trial. I don't want to drag everybody and do this all over again. I just want—I just want to go home." Id. at 72-73. However, upon further questioning, the following conversation ensued.

> Q: So, Mr. Rudinski, when I was asking you questions you said you didn't want a trial, you just wanted to go home. Let me finish my question. You now just contradicted yourself you said you want a trial. So what is the relief that you want today from Judge Butts?
>
> A: Let me be clear about this. I want to go home. So my understanding was is that possibly the only way that that was going to happen is if the Judge grants me a new trial then possibly something could be worked out to just – we don't wanna to do – I don't want to do that. I don't want a new trial so I'm hoping that something can get worked out.
>
> Q: And so when you say worked out I'm understanding you as saying that the relief you want today from Judge Butts is to somehow reconfigure your convictions and/or your length of sentence, is that what you're asking for?
>
> A: That sounds – about right, yeah.

Id. at 83. However, Petitioner acknowledged that he was never advised that he would be granted a new sentence or another type of deal if the court granted his request for a new trial. Id. at 84.

After determining that additional time was needed, this Court held a second hearing on June 6, 2022. Supervisory Special Agent Nicole Whaley (Whaley) of the Attorney General's Office testified on behalf of the Commonwealth. The Commonwealth presented Whaley's CV,

marked as Commonwealth's Exhibit 3. Petitioner's counsel stipulated to Whaley's training and experience and she was qualified as an expert in the field of computer forensics. N.T. 6/6/2022, at 4. Whaley was the affiant in the case against Petitioner and recalled testifying at the trial against him. Id. at 4-5. Whaley provided an explanation with how an individual would use a BitTorrent program to download child pornography. Id. at 5. Whaley explained that obtaining the BitTorrent is as easy as Googling BitTorrent and downloading the program from Google. Id. Whaley further articulated, "once you download that application BitTorrent is configured to share files. You would have to turn that function off in the BitTorrent program. It makes you set up files and directories where you will download files to and where other people then can see the files from that folder with anyone using the BitTorrent network." Id.

Whaley indicated that the Commonwealth downloaded child pornography files from the computer at Petitioner's residence on August 18, 2013 from approximately 6:48 p.m. until 3:41 a.m. on August 19, 2013. Id. Whaley stated that their office understood that the pornography had not been downloaded initially during that time because,

> law enforcement software that monitors the peer-to-peer network uses hash values. These hash values are unique to every image and video that comes through the peer-to-peer program. Files that are known images and videos of child pornography are flagged by the program and our law enforcement software is able to recognize those files and start downloading from a direct source, meaning, from one computer only on the other end. That's the – when we download from another computer it's the date and time we're downloading from them. They would have had to have the file prior to us downloading from them.

Id. at 5-6. Whaley said that the files could have been downloaded by the BitTorrent user at any time prior to their office accessing the files. Id. at 6. Whaley also said that an individual did not need to be operating the computer during the time frame their office downloaded the files. Id.

Whaley further testified that she discovered that the computer she downloaded child pornography from was associated with an IP address at Petitioner's residence. Id. at 7. The Commonwealth presented Whaley's initial report written around the time she was assigned to this case, marked as Commonwealth's Exhibit 4. Id. This report confirmed that, during their investigation, the Attorney General's Office was able to download child pornography from August 18, 2013 to August 19, 2013, not that the suspect had downloaded the pornography at that time. Id. at 8. A supplemental report was also presented, marked as Commonwealth's Exhibit 5, which was written following the execution of the search warrant at Petitioner's home that stated the pornography was already present on Petitioner's computer as of August 18, 2013. Id. The Commonwealth provided a letter from the Senior Deputy Attorney General Chris Jones to Petitioner's trial counsel that provided him with a disc containing the computer forensics report, marked as Commonwealth's Exhibit 6. Id. at 9. This letter stated that if Petitioner's trial counsel wanted to see the images found on Petitioner's computer, he could contact Attorney Jones or Whaley. Id. These images were not provided in the original forensics report because they were child pornography. Id.

Whaley stated that it was her understanding that the pornographic images were shown to Petitioner's trial counsel at the preliminary hearing. Id. Whaley indicated that it was standard procedure for the images to be shown at the preliminary hearing to counsel and then allow defense counsel to make arrangements to see them again at a later date. Id. at 10. The Commonwealth referenced Supervisory Special Agent Rob Soop's computer forensics report, marked as Commonwealth's Exhibit 7. Id. This report was missing Attachment 2 because the images were the pornographic images found on Petitioner's computer. Id. Whaley testified that these images in Attachment 2 have a time and a date associated with when it was created,

accessed, and written as well as a file path indicating where the file was found. Id. at 11. Each image had this information and Whaley indicated that the times and dates for all pornographic images were when the Commonwealth averred that someone viewed or accessed those files. Id. Attachment 3 was listed as an image of "possible investigative interest" so that image was also not provided to defense. Id. at 12.

This exhibit also included Attachment 4 that was information about temporary internet files or files found in the recycle bin on September 9th, 10th, and 11th, 2022 used to run searches for the acronym PTHC, which stands for "pre-teen hard core." Id. at 19. This information included the date and time that the files were created, accessed, and written, not the actual file itself. Id. The following line of questioning ensued during cross-examination regarding specific technical information:

> Q: But, yea, I guess my question is, do we know specifically during that time frame when those files were accessed?
>
> A: I would need to see the other attachments, but if there is a created, accessed, and written date for actual files, not – and I don't believe we had that in this case, they were all deleted or temporary internet files, which are files that are created after the initial file would have been downloaded. So I think attachment four was all of the September 9th, 10th, and 11th dates are temporary internet files or files that were found in the recycle bin. So it would have been the date and time that those files were created, accessed, and written, not the actual file.
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> Q: So if I understand correctly, what you're saying is we know then that at least on those days that someone accessed those files to delete them?
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> A: Yes.
>
> Q: Okay.
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> A: And temporary internet files are a cache. When you visit a web site or – when you go on Facebook and the information is loaded on there, sometimes it takes a little bit and then it will pop up. A cached image is it will save those images that you just saw so the next time you go in to the web page or Facebook it loads quicker. So that's what a temporary internet

> file is, it's a cached image, not the actual image that would have been downloaded from BitTorrent or the internet or anything like that.
>
> Q: Okay. I guess what I'm trying to understand is how we know exactly when something was accessed to be able to essentially prepare a case to who actually accessed those items. That's not something that your office is able to provide?
>
> A: So those files, the actual files themselves weren't found on the computer, it was the temporary internet files and there was files found in the recycle bin. So we didn't recover the actual images that someone from that house would have downloaded, we only recovered the cached images and the images that were sent to the recycle bin. So we can provide the dates and times that those files were created, accessed, and written; but not the initial file because that file is not on the computer any more.
>
> Q: But you can provide the dates that they were last accessed at least in order to be deleted?
>
> A: Yes.

Id. at 19-21.

Whaley stated that the Commonwealth has always alleged that the criminal conduct occurred between August 18, 2013 and September 19, 2013. Id. at 15-16. Whaley testified, "8/18 is when we made the download so we are saying that would be the distribution date for this case and then September 19th was the date of the search warrant so we could say that he possessed them on that date." Id. at 19. Whaley attested that each pornographic image would have a created, accessed, and written date and a file path showing where the file was found. Id. at 11. The date and time for each image would be when that file was accessed or viewed by the individual. Id.

Whaley was shown a time card for Petitioner from June 30, 20213 through August 31, 2013, marked as Commonwealth's Exhibit 8. Id. at 12. One of the columns of times showed 3:56 p.m. or 3:58 p.m. indicating when Petitioner clocked out of his shift. Id. at 12-13. Whaley

testified that she was present at the first hearing held on Petitioner's current PCRA and stated that the attorney for the Commonwealth's references to Petitioner's computer as a "laptop" was grammatical error. Id. at 14. Whaley confirmed that Petitioner's computer is an "all-in-one" computer, meaning it is portable but not a laptop. Id. Whaley denied the existence of a second computer in Petitioner's residence. Id. Whaley indicated that the Commonwealth averred that the Commonwealth accessed child pornography on September 9, 10, and 11, 2013, through the peer-to-peer software on Petitioner's computer, not that he had downloaded it on those dates. Id. at 14, 16. These images were found on the computer on the date of the search warrant but had been downloaded prior. Id. Whaley confirmed that she was one of the agents present at Petitioner's home during the search warrant and personally viewed the child pornography on Petitioner's computer. Id. at 15.

Analysis

At oral argument, Petitioner's PCRA counsel determined the "only real issue" is the failure of Petitioner's trial counsel to request a bill of particulars. N.T. 6/6/2022, at 26-27. To be eligible for relief, a petitioner must prove by a preponderance of the evidence that they were convicted of a crime and that said conviction or sentence resulted from "ineffective assistance of counsel which, in 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). "This requires the petitioner to show: (1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999). "[W]here the petitioner has demonstrated that

counsel's ineffectiveness has created a reasonable probability that the outcome of the proceedings would have been different, then no *reliable* adjudication of guilt or innocence could have taken place." Id. When considering a claim of ineffective assistance, courts presume that counsel was effective. Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987); *See also* Commonwealth v. Miller, 431 A.2d 233 (Pa. 1981).

Petitioner contends that trial counsel's failure to request the bill of particulars left Petitioner without a way to decipher when the child pornography was allegedly downloaded to his computer. Without this information, Petitioner could not articulate a defense to the times that the pornography was last accessed. Petitioner believes that trial counsel had no reasonable basis for failing to request those dates, particularly since the days when the Attorney General's Office accessed the files and when they were initially downloaded are different. Petitioner believes this is prejudicial because he would have been able to present an alibi defense if he had known the date the files were last accessed. Petitioner's PCRA counsel alluded to a case regarding corruption of minors where counsel was found to be ineffective for failing to request a bill of particulars, but did not provide a cite for this Court to review. Petitioner believes he has satisfied his burden to show ineffective assistance of counsel and a new trial should be granted.

The Commonwealth reiterated that Petitioner's trial counsel is presumed to be effective. Additionally, the Commonwealth did not believe that Petitioner has established either prong of the test for ineffective assistance of counsel. The Commonwealth cites to Commonwealth v. Champney to support their assertion that Petitioner failed to demonstrate ineffective assistance of counsel for trial counsel not requesting a bill of particulars. Commonwealth v. Champney, 832 A.2d 403 (Pa. 2003). In the Champney case, the appellant requested a new trial because the

trial court denied his motion to compel the Commonwealth to file a bill of particulars specifying appellant's motive for killing a man. Id. at 412. The Pennsylvania Supreme Court ultimately held that the trial court did not abuse its discretion in denying the bill of particulars because "the request for motive was obviously a discovery request disguised as a bill of particulars…." Id. *See also* Commonwealth v. Chambers, 599 A.2d 630, 641 (Pa. 1991). The Commonwealth cited to a separate case that also held the bill of particulars was properly denied. Commonwealth v. Smith, 2021 WL 5104859 (Pa. Super. 2021). The Superior Court held in Smith that, because the appellant was provided with the informations and various discovery that included dates, times, and locations of the alleged criminal conduct, the trial court properly denied appellant's request for a bill of particulars. Id. at 4.

Similarly, in this case, the Commonwealth argued that discovery was provided to Petitioner, including the investigative reports and the pornographic images themselves, in a proper timeframe starting as early as the preliminary hearing. The Commonwealth further asserts that the Superior Court on direct appeal ruled that no discovery violation occurred in this case and that the Commonwealth provided adequate notice.

This Court is not convinced that Petitioner's argument regarding the failure to request a bill of particulars meets the first prong of the ineffective assistance of counsel test. The Commonwealth has consistently averred that the criminal conduct occurred between August 18, 2013 and September 19, 2013. August 18th is the day that the Attorney General's Office began the download of the child pornography located on Petitioner's computer, while September 19th was the date the search warrant was executed on Petitioner's residence. Whaley's testimony was consistent that the pornographic images had been downloaded to Petitioner's computer prior to their office's download using the peer-to-peer network. Simply

put, the child pornography was initially downloaded onto Petitioner's computer before August 18th. For this reason, this Court believes that Petitioner's focus on the date the material was downloaded is misguided. Whaley provided extensive technical testimony regarding the forensic reports and their meaning. Whaley detailed that the pornographic images retrieved from Petitioner's computer were shown to trial counsel at the preliminary hearing and each image had a corresponding time and date that the image was created and accessed. Trial counsel was reminded by the Commonwealth that he could have additional opportunities to re-examine the photographs themselves, which he chose not to do. Moreover, Whaley also provided testimony about the pornographic internet searches that yielded files in Petitioner's recycle bin or as cached images that also had corresponding times those files were last accessed on Petitioner's computer. Whaley repeatedly attested that the child pornography had the times accessed on Petitioner's computer contained in discovery provided to trial counsel.

For these reasons, this Court does not believe that Petitioner's argument on this issue has merit. Petitioner and his counsel had discovery that indicated when child pornography and internet images were last accessed. Although complicated at times, the testimony presented before the Court articulates that Petitioner had the information he needed to assert a specific defense. Petitioner now attempts to use the bill of particulars as additional discovery measures when the information he needed was included in the forensic reports and the child pornography images themselves. It is abundantly clear from Petitioner's testimony that he does not want the relief he requests and merely wishes to be free from incarceration. The actions of trial counsel were not unreasonable in foregoing a bill of particulars request in the instant case. Additionally, this Court is of the opinion that Petitioner has not suffered prejudice as a result nor would the outcome of trial been different had the bill of particulars been requested. Since Petitioner failed

to satisfy the first requirement of the test for ineffective assistance, this Court will not consider the remaining requirements to establishing ineffective assistance of counsel on this issue.

As for the other issues Petitioner raised in his written petition but did not assert at oral argument, this Court does not believe these issues satisfy the first prong of the ineffective assistance of counsel test either. The Commonwealth argued that Petitioner failed to present any productive alibi evidence or testimony at the hearings on this motion. The Commonwealth also believed that the failure to call Petitioner's contested witnesses was inconsequential to the outcome of trial because neither witness provided testimony that would have exonerated Petitioner. After hearing the testimony of Petitioner's witnesses, this Court has to agree with the Commonwealth on these issues. Even trial counsel himself admitted that their strategy of relying on Petitioner not physically being present at his computer during the download when his presence was not necessary to complete the download was problematic. At trial, Petitioner was able to elicit various testimony about his sleeping habits, vision troubles, and transportation to and from work to assert an alibi defense. Nevertheless, the jury was not convinced by this evidence.

At the hearing on this PCRA petition, Erikson provided significantly incomplete testimony regarding the timing of taking Petitioner to AA meetings and frequently forgot other details of the days in question. His testimony was contradictory and unhelpful, particularly when Petitioner's absence from his computer during the download was an unconvincing and problematic defense to begin with. Petitioner's and Codispoti's testimony about Petitioner's neighbor were also insignificant and not supported by external evidence, such as police reports, testimony that corroborated dates that law enforcement was allegedly called on Petitioner's neighbor, or evidence demonstrating that Petitioner's neighbor was successful in breaking into

Petitioner's home. As such, this Court does not believe that Petitioner's purported struggles with preparing an alibi defense has arguable merit and neither does the failure to call his specific witnesses at trial. This Court finds that trial counsel had a reasonable basis for choosing not to call the aforementioned witnesses and placed various testimony on the record at trial to attempt to show an alibi. Therefore, this Court finds that Petitioner has failed to satisfy the burden of demonstrating ineffective assistance of counsel on all issues presented to the Court and his request for a new trial shall be denied.

Since this Court finds that Petitioner's PCRA Petition is without merit, pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to deny Petitioner's PCRA Petition. Petitioner may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the Petition.

By the Court,

Nancy L. Butts, President Judge

cc: AG (CS)
Trisha Jasper Hoover, Esq.
Law Clerk (JMH)

NLB/jmh