

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CP-41-CR-0000161-2017
	:	CP-41-CR-0000411-2017
vs.	:	CP-41-CR-0000580-2017
	:	CP-41-CR-0000597-2017
	:	
WAYNE ORTEGO CRIPPEN,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the court on the Post Conviction Relief Act (PCRA) petition filed by Wayne Ortego Crippen (“Crippen”)

BACKGROUND

In Docket CR-580-17, Crippen was charged with six counts of Possession of a Controlled Substance with Intent to Deliver, three counts of Criminal Use of a Communication Facility, and three counts of Possession of a Controlled Substance and Possession of Drug Related Paraphernalia. Those charges arose out of the Lycoming County Narcotic Enforcement Unit’s use of a confidential informant to make controlled purchases of heroin from Crippen on November 16, 2016, December 6, 2016, and January 4, 2017.

In Docket CR-161-2017, Crippen was charged with one count of Possession of a Small Amount of Marijuana, one count of Possession of Drug Paraphernalia, and one summary offense. These charges arose out of a traffic stop conducted by the Pennsylvania State Police on December 6, 2016.

In November of 2016, Lycoming County Narcotics Enforcement Unit (“NEU”) Detective James Capello (“Capello”) began investigating an individual who had sold drugs to a confidential informant of the NEU. The confidential informant, Autumn Day (“Day”), told

Capello that the individual went by the name “Mikey” and described him as being approximately 5’9” with glasses, a short beard, and short hair. Day also stated that “Mikey” conducted business through the phone number 570-980-3497. Detective Capello utilized Day to conduct three controlled purchases of heroin for the NEU on November 16, 2016, December 6, 2016, and January 4, 2017. On each occasion, Day used her cellular phone to contact “Mikey” in order to set up a purchase of heroin. Prior to each controlled buy, Capello searched Day and her vehicle; Day was then provided with pre-recorded police funds to conduct the controlled purchases. During each controlled buy, surveillance was maintained over Day and Capello was in contact with those conducting surveillance. After the controlled purchases, Day returned to Capello and handed in the purchases; in each case the controlled substance was field-tested positive for heroin.

On November 16, 2016, “Mikey” was driving a white 4-door car with tinted windows and delivered 11 blue waxen bags of heroin stamped with the words “FIRST 48.”

On December 6, 2016, Day attempted to reach “Mikey” at the 570-980-3497 number, but there was no answer. She tried another number and she reached him utilizing 267-778-8088. “Mikey” was driving a tan or gold Honda CRV and delivered 11 bags of heroin stamped with blue light bulbs.

On December 6, 2016, Williamsport Bureau of Police Officer Justin Snyder (“Snyder”), who was acting in an undercover capacity for the NEU, assisted Capello and other officers in maintaining surveillance of Day and “Mikey.” After the controlled purchase, Snyder enlisted the assistance of Pennsylvania State Police Trooper Edward Dammer (“Dammer”) in order to determine “Mikey’s” true identity, providing Dammer with the information regarding the controlled purchase which had just taken place. Dammer

monitored “Mikey’s” vehicle and observed him violate a motor vehicle law, Title 75 Pa. C.S.A. § 3323(b), by not stopping his vehicle until he had driven over a crosswalk after a stop sign. Dammer subsequently conducted a traffic stop on “Mikey’s” vehicle. As a result, “Mikey’s” identity was determined to be Crippen.

During the stop, Dammer smelled marijuana in the vehicle. Dammer asked the Crippen to step out of the vehicle; Crippen had a passenger who remained in the vehicle. Crippen did so and stated that he did not have anything on his person. Crippen then immediately turned around and put his hands in the air without Dammer requesting him to do so. Dammer then commenced a pat down of Crippen. He asked Crippen what was in his pocket, to which Crippen responded that it was marijuana. Dammer told Crippen that he did not have to give him the marijuana, but Crippen elected to do so. Dammer ultimately seized marijuana and the pre-recorded police funds, US Currency, which had been used by Day during the controlled purchase of heroin from Crippen’s person. Nothing was found in the vehicle. As a result of Dammer’s interaction with Crippen, Dammer charged Crippen with possession of a small amount of marijuana, possession of drug paraphernalia and a summary traffic offense in case 116-2017.

On January 4, 2017, “Mikey” (Crippen) was driving a blue Honda Civic and he delivered to Day 12 blue waxen bags of heroin with SRT8 stamped on them.

In Dockets CR-411-2017 and CR-597-2017, Crippen was charged with one count of Delivery of Heroin, one count of Possession with Intent to Deliver Heroin, one count of Criminal use of a Communication Facility, one count of Possession of a Controlled Substance, and one count of Endangering the Welfare of a Child. Those charges arose out of the Pennsylvania State Police’s use of a confidential informant to make a controlled purchase

of heroin from Crippen on December 5, 2016.

In December of 2016, Pennsylvania State Police Trooper Tyler Morse (“Morse”) also was investigating an individual who was selling drugs. Morse utilized a confidential informant, Kelly Miller (“Miller”), to conduct a controlled purchase of heroin on December 5, 2016. Miller knew the individual he was purchasing drugs from as “Dboy Car Nik.” After this purchase, Miller provided Morse with a description of the individual from whom he had purchased the heroin. The individual was driving a 2016 silver Hyundai Sonata. Miller testified that during the controlled purchase, a young female child was in the back seat of the car sitting on a pile of money. Miller further testified that during the controlled buy, he opened the rear passenger door and was partially inside the car; the individual then looked back at him and gave him the drugs.

Morse was able to get a positive identification of the individual as Crippen because the cell phone number which Miller used to contact the individual for the controlled purchase was the same number that the NEU was using and the NEU had identified that number as belonging to Crippen. After the NEU identified “Mikey” as Crippen, Morse then administered two photographic line-ups to Miller. In the first photo array, none of the individuals were wearing glasses. Miller was used to seeing the individual in glasses, so Morse created a second photo array of individuals wearing glasses. Miller identified Crippen as the individual from whom he had purchased heroin. The individual delivered 46 bags of heroin each stamped with an image of a light bulb.

Crippen filed an omnibus pretrial motion which included a request for suppression of the informants’ identification of him. The court suppressed the pretrial identification by Day because the police utilized a single photo and that photo could not be located; however, the

court denied the request to suppress Miller's pretrial identification as well as Crippen's request to preclude both Day and Miller from identifying him in court at trial.

All four cases were consolidated for trial. A jury trial was held January 31, 2019 and February 1, 2019. The jury convicted Crippen of all charges. On March 19, 2019, the court sentenced Crippen to an aggregate term of 10 ½ to 21 years' incarceration in a state correctional institution.

Crippen filed a post-sentence motion in which he challenged the weight and sufficiency of the evidence, the trial court's pretrial rulings permitting consolidation and denying his omnibus pretrial motion, the trial court's trial ruling on a motion for a mistrial based on an alleged *Brady* violation and the unreasonableness and excessiveness of the sentence imposed against him. On or about June 26, 2019, the trial court denied Crippen's post-sentence motion.

On July 19, 2019, Crippen filed a timely notice of appeal in which he raised the same or substantially similar issues as those asserted in his post-sentence motion. In a memorandum decision filed on September 29, 2020, the Pennsylvania Superior Court affirmed Crippen's judgment of sentence. On October 26, 2020, Crippen filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on April 28, 2021.

On June 22, 2022, Crippen filed a *pro se* PCRA petition, but he indicated that he would be represented by private PCRA counsel. The court gave PCRA counsel until August 22, 2022 to file an amended PCRA petition or a *Turner/Finley* "no merit" letter. On August 22, 2022, PCRA counsel filed an amended PCRA petition in which he asserted the following claims: (1) trial counsel was ineffective for failing to call fact witnesses, Nadi Hatchett and Christina Schon, who had information regarding a phone number and the some of the

vehicles utilized by the seller in the drug transactions, to testify on Crippen's behalf at trial; (2) one of Crippen's preliminary hearing transcripts was withheld; (3) trial counsel was ineffective for failing to object to Day's in-court identification of Crippen; (4) trial counsel failed to object to two of the exhibits of the controlled buy money being the same photographs. The court gave PCRA counsel additional time to file witness certifications to support his claims, and then the court held an evidentiary hearing on January 31, 2023, at which Christina Schon, trial counsel Ryan Gardner, and Crippen testified.

Christina Schon testified that she was the owner of the gold Honda CRV. She testified that between 2012 and 2017 her husband used the vehicle "all the time" when she was not using it, her friend "J" used the vehicle "every so often" in 2015 and 2016, and Crippen used the vehicle whenever he needed it, which was "fairly often" but "not that much." She was available and willing to testify at Crippen's trial but she was never contacted by trial counsel. She did not testify as set forth in her certification that "J" was the last person who used her vehicle before Crippen was arrested.

Ryan Gardner was trial counsel for Crippen. Attorney Gardner testified that he met with Crippen probably five to seven times over a month leading up to trial. At trial, he presented an identification defense. He did not recall making an objection to photocopied currency but he also did not recall the Commonwealth introducing at trial the photographs contained in Exhibit E of the amended PCRA petition. He admitted that the serial numbers of the bills on two different pages of Exhibit E appeared to be the same. He did not recall Crippen speaking to him during trial about the bills from case #2 and case #4 being the same or questioning the officers about this issue. He acknowledged on cross-examination that there were no exhibit stickers on the documents to show that they were introduced at trial.

Crippen testified that the exhibits at trial for sales #2 and #4 were the same bills. He testified that he told trial counsel about this issue the second time he met him and on the day of trial. According to Crippen, case #1 with Trooper Morse had \$400 in buy money but there was \$100 on one page and the rest of the pages were blank and the serial numbers were the same on every bill as a case with Detective Capella. The same was true for the \$100 in case #2 and case #4. Crippen testified that the photographs of the money were supposed to be authenticated and there was supposed to be a “paper trail” but there wasn’t. There was a whole lot of conflict in the testimony and his trial attorney never raised this issue.

With respect to Ms. Schon’s Honda CRV, Crippen testified that he was familiar with Ms. Schon and used her car a few times. He met her husband but he never met “J”. Crippen seemed to indicate that he used the vehicle when he was “messaging” with a lady named Donna. He also indicated that he used the CRV because his Mercury Montego kept getting pulled over because the vehicle was from Philadelphia.

Crippen also testified that he only met with Attorney Gardner two to three times for fifteen to twenty minutes each. Attorney Gardner told him not to worry; his case would not go to trial because it was not going to be ready. Crippen also stated that he never received Attorney Gardner’s letter dated January 28, 2019. He said he gave Gardner the name of Ms. Jett, a girl he “messed” with and Gardner obtained the name of his doctor in Philadelphia from someone else. Crippen also testified that they never discussed an identification defense and they never discussed any witnesses. Crippen claimed that Gardner kept “pushing him off” and telling him not to worry about it because the case was not going to trial. Then January 31 came and they were in trial. He asserted that he was on a GPS monitor at the time with Ron Poust and it would show that Gardner did not meet with him six or seven times.

However, Crippen did not present any evidence from the GPS monitor or Ron Poust.

The defense admitted two exhibits. Exhibit #1 was the amended PCRA petition, including the documents attached as exhibits. The defense incorporated the trial record as Exhibit #2. The Commonwealth objected to the photographs of money contained in Exhibit E of the amended PCRA petition, because they were never authenticated as trial exhibits. The court accepted the photographs as part of the record, but indicated that the best evidence to look at was that presented at trial.

DISCUSSION

To be eligible for relief under the PCRA in this case, Crippen must plead and prove that: (1) he is currently serving a sentence of imprisonment, probation or parole for the crime, 42 Pa. C.S.A. §9543(a)(1)(i); (2) his conviction or sentence resulted from ineffective assistance of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place, 42 Pa. C. S. §9543(a) (2); (3) that the allegation of error has not been previously litigated or waived, 42 Pa. C.S. § 9543(a)(3); and (4) that the failure to litigate the issue prior to trial, during trial, or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel, 42 Pa. C.S.A. §9543(a)(4). A claim is previously litigated under the PCRA if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. 42 Pa. C.S. § 9544(a)(2). An allegation is deemed waived “if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state postconviction proceeding.” 42 Pa. C.S. § 9544(b). *Commonwealth. v. Brown*, 582 Pa. 461, 470–71, 872 A.2d 1139, 1144 (2005).

The law presumes counsel has rendered effective assistance, and to rebut that

presumption, a petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. *Commonwealth v. Kohler*, 36 A.3d 121, 132 (Pa. 2012). “[T]he burden of demonstrating ineffectiveness rests on [the petitioner].” *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) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different.” *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the petitioner's ineffective assistance of counsel claim. *Commonwealth v. Jones*, 811 A.2d 994, 1002 (Pa. 2002).

“Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests.” *Commonwealth v. Miller*, 819 A.2d 504, 517 (Pa. 2000) (citation omitted). A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued. *Id.* In addition, we note that counsel cannot be deemed ineffective for failing to pursue a meritless claim. *Commonwealth v. Nolan*, 855 A.2d 834, 841 (2004) (superseded by statute on other grounds).

1. Was trial counsel ineffective for failing to call Nadi Hatchett and Christina Schon as witnesses at trial

In order to prevail on an effectiveness claim for failure to call a witness, the petitioner

must demonstrate that: (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness's existence; (4) the witness was prepared to cooperate and would have testified on petitioner's behalf; and (5) the absence of the testimony prejudiced petitioner. *Commonwealth v. Hall*, 867 A.2d 619, 629 (Pa. Super. 2005).

Crippen has failed to meet his burden of proof. Issues regarding Nadi Hatchett were previously litigated as a *Brady* violation and/or after-discovered evidence claims. Those claims were denied because Crippen was the one who notified the police that the phone number with a (570) area code utilized by the CIs to contact the seller belonged to Nadi Hatchett. Unfortunately, Crippen never shared this information with his trial counsel and that page of discovery was missing from trial counsel's discovery packet. Crippen testified that he spoke to trial counsel two or three times but they never talked about witnesses. While the court did not find Crippen's testimony entirely credible,¹ it is clear to the court that trial

¹ The court generally did not find Crippen's testimony credible and it did find trial counsel's testimony credible because trial counsel's testimony was more consistent with what actually occurred at trial than Crippen's.

counsel was not aware of the existence of Nadi Hatchett as a witness in advance of trial to be able to locate him and call him as a witness. Although Nadi Hatchett wrote a statement indicating that he never allowed Crippen to use or borrow or drive his vehicle² and that Crippen never had a (570) phone number, Hatchett did not testify at the PCRA hearing, because PCRA counsel could not locate him.

The court also finds that it is unlikely that Hatchett would have testified at Crippen's trial that he was the owner of the white Buick or the (570) phone number. The statute of limitations for delivery of a controlled substance is five years. 42 Pa. C.S.A. §5552(b)(2). The crimes in these cases occurred between mid-November of 2016 and early January of 2017. Crippen's trial occurred on January 31, 2019 and February 1, 2019. As the statute of limitations had not run yet at the time of Crippen's trial, it is unlikely that Hatchett would have testified at Crippen's trial in the manner suggested and potentially incriminated himself in these crimes. Furthermore, even if Hatchett was the owner of the vehicle and the phone number, that does not necessarily mean that Crippen did not have possession of those items and utilize them to sell drugs to Day and Miller. Notably, Hatchett's statement does not state that Crippen never took or was in possession of the vehicle or that Crippen never utilized his phone or never forwarded calls from Hatchett's alleged phone number to Crippen's phone.

With respect to Christina Schon, the court finds that trial counsel was not aware of the existence of the witness and Crippen was not prejudiced by the absence of her testimony. Trial counsel is not a mind reader. It is clear from Crippen's own testimony at the PCRA hearing that he met with trial counsel at least two to three times, but he allegedly never talked

² According to Crippen, Hatchett was the owner of the white 2002 Buick sedan with the license plate KDD7772 that was used by the individual who allegedly sold drugs to Day on November 16, 2016, as well as the (570)

about witnesses with him. This cannot be entirely true because Crippen admitted that he gave trial counsel the name of Ms. Jett; however, it is clear to the court that Crippen never provided the names of Nadi Hatchett and Christina Schon to trial counsel.

Nevertheless, even if Crippen had provided Ms. Schon's name and contact information to trial counsel, he would not be ineffective for failing to call her as a witness, as her testimony would not have been helpful to the defense or reasonably likely to change the outcome of the proceedings. Both Ms. Schon and Crippen testified that Crippen used Ms. Schon's vehicle. The testimony presented at trial was that Crippen utilized Ms. Schon's vehicle to meet the CI and conduct the drug transaction with Day that occurred on December 6, 2016. That transaction was the second delivery in case 580-2017. The police continued surveillance on Crippen after the transaction, and Trooper Dammer stopped him for a stop sign violation. Crippen was identified as the driver of the vehicle from his driver's license. Trooper Dammer noticed an odor of marijuana and asked Crippen about it. Crippen had marijuana on his person and gave it to Trooper Dammer. As a result of this interaction, Crippen was charged with the offenses in case 161-2017. Crippen also had on his person the buy money from the second transaction with Day in case 580-2017. Nothing was found in the vehicle. The testimony of Ms. Schon and Crippen would only strengthen the evidence that Crippen was in possession of the vehicle. Notably, Ms. Schon did not testify that "J" had the vehicle on the day in question prior to Crippen's arrest as was alleged in the witness certification for her; she only testified that her husband and "J" also used the vehicle. Since the marijuana and money were found on Crippen's person and not in the vehicle, any testimony about others also using the vehicle would not have affected the verdict in these

phone number that was utilized to arrange many of them transactions.

cases. The Commonwealth also introduced photographs of the rear of the gold Honda CRV showing its license plate (Commonwealth's Exhibit 16) and a photograph containing Crippen's face in front of the right rear of the gold Honda CRV with the same license plate on the left side of the photograph (Commonwealth's Exhibit 36). *See also* Trial Transcript, 01/31/2019, at 137-138 (testimony of Officer Jeremy Brown of the Williamsport Bureau of Police) and 188-191 (testimony of Trooper Dammer). Crippen also gave Trooper Dammer his telephone number, which was the number with the (267) area code that Day used to ultimately reach Crippen and arrange the transaction on December 6, 2016.

As Crippen has not presented evidence to satisfy the five requirements for ineffective assistance of counsel for failure to call witnesses, he is not entitled to relief on this claim.

2. *Was one of Crippen's preliminary transcripts withheld*

No testimony or other evidence was presented on this issue. Therefore, this claim fails as it is Crippen's burden to prove his claims. The court, however, does not believe that any transcripts were withheld from Crippen. Rather, it appears that Crippen failed to appear for his preliminary hearing in case 161-2017 and a bench warrant was issued. See Lycoming County Criminal Case Scheduling form noting "D FTA @ prelim" which is attached to the docket transcript. The charges were held for court in the absence of Defendant or any counsel for Defendant. Proceedings held before an MDJ are not in a court of record. Therefore, the only way a transcript of a preliminary hearing is made is if defense counsel hires a court reporter or records the preliminary hearing and has the recording transcribed. Therefore, there would not be any transcript of this preliminary hearing. Moreover, in case 161-2017, the court sentenced Crippen six to twelve months' incarceration entirely concurrent to his sentence in 411-2017. Crippen was sentenced on March 19, 2019. Therefore, he has

completed this sentence and he is not eligible for any relief in case 161-2017. See 42 Pa. C.S.A. §9543(a)(1)(i)(“To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following: (1) That the petition had been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted: (i) currently serving a sentence of imprisonment, probation or parole for the crime;”).

3. *Was trial counsel ineffective for failing to object to Day’s in-court identification*

This claim lacks merit because the admissibility of Day’s in-court identification of Crippen was litigated in pre-trial motions, and the court’s decision permitting the in-court identification was upheld on appeal. On pages five through seven of the Opinion and Order entered on June 20, 2018, the trial court ruled that an in-court identification of Crippen by Day was permissible. Crippen challenged this ruling on appeal. In a memorandum decision, the Pennsylvania Superior Court affirmed the trial court and adopted its reasoning. *See Commonwealth v. Crippen*, J-S28033-20 at 7-9, 2020 WL 5796195 at *4 (Pa. Super. 09/29/2020). Since Crippen cannot meet the first prong of the test for ineffective assistance of counsel, he is not entitled to relief on this claim.

4. *Was trial counsel ineffective for failing to object to two exhibits of the controlled buy money being the same photographs*

This claim also lacks merit. Although multiple photographs of currency may have been exchanged in discovery, only one photograph of currency was introduced at trial – Commonwealth’s Exhibit 4 – which was the money utilized in the December 6, 2016 transaction (the “second” controlled buy) in case 480-2017 and was recovered by Trooper Dammer as a result of the traffic stop in case 161-2017. See Trial Transcript, 01/31/2019, at

39-40.³ There were numerous other exhibits introduced at trial, including other photographs such as photographs of the packets of drugs Crippen delivered to Day and Miller and a photograph of Crippen at the rear of the gold Honda CRV, but there were no other photographs of money introduced at trial. Since only one photograph of money was introduced at Crippen's trial, trial counsel could not be ineffective for failing to object to two exhibits being the same money.

Based on the foregoing Opinion, the court finds that Crippen is not entitled to relief on any of his PCRA claims. Accordingly, the following order is entered.

ORDER

AND NOW, this 12th day of July 2023, the court DENIES Defendant's Amended PCRA petition.

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

³ Commonwealth's Exhibit 4 was admitted into evidence. See Trial Transcript, 02/01/2019, at 52.

By The Court,

Nancy L. Butts, President Judge