

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

GEORGE T. VICKERS, JR.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1151 WDA 2013

Appeal from the PCRA Order December 12, 2012
In the Court of Common Pleas of Washington County
Criminal Division at No(s): CP-63-CR-0000359-2008

BEFORE: BOWES, JENKINS, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.:

FILED JULY 23, 2014

George T. Vickers, Jr. appeals from the December 12, 2012 order denying him PCRA relief. We affirm.

On May 7, 2009, Appellant was convicted of aggravated assault, recklessly endangering another person ("REAP"), disorderly conduct, and harassment. The charges arose after Appellant sucker-punched Scott Lambert above the right eye on November 10, 2007. This assault resulted in a severe and permanent brain injury. The trial court summarized the pertinent facts:

This case stems from an incident that took place in the town of Finleyville, Pennsylvania on the evening of November 9,

* Former Justice specially assigned to the Superior Court.

2007 involving the Defendant, the victim Scott Lambert, and a third, ultimately unidentifiable individual. . . .

Mr. Lambert testified that he arrived at the Finleyville Moose, a local bar, around 6:00 pm on the night in question in order to socialize with friends. He proceeded to consume one bottled Miller Lite per hour while socializing with friends, up to some time between 10:00 and 11:00 pm when he left the bar in order to catch a bus back to his home in Monongahela, Pennsylvania.

After arriving at the bus stop around 11:00 pm, Mr. Lambert decided to walk across the street and enter another local bar, Roy's by the Track (hereinafter "Roy's"), in order to escape the cold weather. Upon entering Roy's, Mr. Lambert noticed that his ex-girlfriend, Angie Killian, was sitting at the bar with the Defendant, who as far as Mr. Lambert knew at the time, was Ms. Killian's new boyfriend. Mr. Lambert proceeded to sit at the corner of the bar, approximately fifteen (15) to twenty (20) feet from Ms. Killian and Defendant, purchase a bottled Miller Lite, and obtain change in order to pay for his bus ride.

Mr. Lambert was inside Roy's for fifteen (15) to thirty (30) minutes, and while there, he "wanted nothing to do with" the Defendant, did not speak to him, and "just ignored him" while inside the bar. After being asked if he recalled whether Defendant and Ms. Killian were yelling at him and "using cuss words" while inside Roy's, Mr. Lambert testified that he did recall such behavior. Once finished with his beer, Mr. Lambert left the bar between 11:30 pm and 11:45 pm in order to catch the last bus back to Monongahela. At this point, the incident giving rise to the case at hand occurred.

Mr. Lambert testified that while waiting alone at the bus stop, in an area well-lit by streetlights, and approximately forty (40) to fifty (50) feet from the bar from which he had just departed, he was struck from behind. Mr. Lambert did not see or hear anyone approaching him prior to his being struck, but due to his positioning at the bus stop, he could only see the lights emanating from Roy's out of the corner of his eye. Defendant testified at trial that he had "gotten up and walked out the door behind [Lambert]."

Mr. Lambert testified that he was struck once from behind, in an open-palmed shove-like manner on his "upper neck, shoulder and back area," causing him to "stumble." He testified that he did not know who shoved him from behind. After stumbling as a result of this shove, Mr. Lambert "looked up" and "saw George Vickers," who was "a step and a half away." Within a matter of seconds of the initial shove from behind, Mr. Lambert was struck over his right eye by what he thought was a closed fist. After being struck over the right eye, he fell, unconscious, to the ground. When police responded to the scene, approximately forty-five (45) minutes after the assault, Mr. Lambert was still unconscious. When asked if he could see who struck him with the blow over his eye, Mr. Lambert clearly and unequivocally responded, "[y]es, it was George Vickers."

According to the hospital and medical records from Mon Valley Hospital, Jefferson Memorial Center, and UPMC-Shadyside entered into evidence without objection, and being stipulated to by all parties as the true and correct medical records of Mr. Lambert, Mr. Lambert suffered [severe] injuries as a result of the punch delivered by Defendant. In addition to being knocked unconscious for at least forty-five (45) minutes as a result of the blow to the area above his right eye, Mr. Lambert sustained a fractured skull in two places and suffered brain hemorrhaging in two areas. He also sustained bruising of the brain in a third area, suffered soft tissue trauma around the skull, and was in a coma for four (4) days.

With respect to residual injuries, Mr. Lambert's quality of life has diminished severely as a result of Defendant's actions. He suffers from memory loss and constant migraine headaches. His driving has been limited to twenty (20) minute intervals, and he may not drive in congested area. He often loses his train of thought, cannot focus well, and is often unable to sleep. He has lost his sense of smell and taste. Furthermore, Mr. Lambert is unable to work for his family business that prior to this assault, he owned and operated. Taken together, Mr. Lambert suffers from lifetime permanent injuries, is permanently disabled, receives disability benefits, and can no longer live an independent life.

Trial Court Opinion, 1/20/10, at 3-7 (footnotes and internal citations to record omitted).

Following a bench trial, Appellant was convicted of the aforementioned offenses. He filed a post-trial motion to dismiss for a judgment of acquittal, which the trial court denied on July 30, 2009 following a hearing. Thereafter, Appellant was sentenced to seven to fourteen years imprisonment and payment of restitution. Appellant timely appealed, and this Court affirmed the judgment of sentence on August 4, 2010. ***Commonwealth v. Vickers***, 11 A.3d 1011 (Pa.Super. 2010) (unpublished memorandum). The Supreme Court of Pennsylvania denied allowance of appeal on February 10, 2011. ***Commonwealth v. Vickers***, 2011 Pa. LEXIS 128 (Pa. 2011).

On November 17, 2011, Appellant filed a *pro se* PCRA petition, his first, and counsel was appointed. Counsel filed an amended PCRA petition on Appellant's behalf. The PCRA court held an evidentiary hearing on August 23, 2012, and denied relief on December 12, 2012.

On January 2, 2013, the court appointed current counsel to represent Appellant on appeal. However, since Appellant filed a notice of appeal on March 18, 2013, well beyond the thirty-day appeal period, we quashed the appeal. Counsel filed a motion to reinstate Appellant's appellate rights *nunc pro tunc*, which this Court granted on July 11, 2013. Appellant complied with this Court's order directing that an appeal be filed within thirty days and the trial court's order directing the filing of a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. President Judge Debbie O'Dell

Seneca filed a Pa.R.A.P. 1925(a) opinion adopting the December 12, 2012 memorandum of Judge Moschetta Bell who presided over the PCRA proceedings, but who subsequently left the bench. This matter is ripe for our review. Appellant raises five issues:

[1] Whether there was ineffective assistance of counsel/Constitutional violations – for Trial Counsel’s failure to appropriately investigate and impeach the victim as to his level of impairment/intoxication at the time of the alleged incident.

[2] Whether there was ineffective assistance of counsel when Trial Counsel failed to preserve issues for appeal: Failure to object to introduction of hearsay testimony and to permit the unreliable testimony of the purported victim.

[3] Whether there was ineffective assistance of counsel when Trial Counsel failed to challenge the creditability of Commonwealth witnesses and formulate a defense.

[4] Whether there was ineffective assistance of counsel by Trial Counsel and improper obstruction by the Court and Commonwealth Officials of Appellant’s right to a Trial by Jury.

[5] Whether there was ineffective assistance of counsel by Trial Counsel and Constitutional violations for failure to provide Appellant’s rights to a trial by jury or to permit him to knowingly, voluntarily, and intelligently waive said right.

Appellant’s brief at 1-2.¹

In reviewing the decision of the PCRA court, “[a]n appellate court reviews the PCRA court’s findings of fact to determine whether they are free from legal error.” **Commonwealth v. Spatz**, 84 A.3d 294, 311 (Pa. 2014). Our “scope of review is limited to the findings of the PCRA court and the

¹ The Commonwealth did not file a brief in this matter.

evidence of record, viewed in the light most favorable to the prevailing party at the trial level.” ***Id.***

All five of Appellant’s claims on appeal allege ineffective assistance of counsel. The law is well settled that “counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him.” ***Strickland v. Washington***, 466 U.S. 668, 687-91 (1984). In Pennsylvania, in order to prove ineffectiveness, the petitioner must demonstrate all of the following: “(1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) the petitioner was prejudiced by counsel's act or omission.” ***Commonwealth v. Elliott***, 80 A.3d 415, 427 (Pa. 2013). To satisfy the reasonable basis prong of the ineffectiveness test, the petitioner must prove that an alternative strategy not selected offered a substantially greater potential for success than the course counsel actually pursued. ***Commonwealth v. Koehler***, 36 A.3d 121, 132 (Pa. 2012). To establish prejudice, “the petitioner must demonstrate that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness.” ***Elliott, supra*** at 427.

Mindful of our standard and scope of review, we address Appellant’s first contention, that trial counsel was ineffective for failing to appropriately investigate and impeach the victim as to his level of impairment/intoxication

at the time of the alleged incident. Appellant maintains that counsel should have either tried to exclude the victim's testimony in its entirety as unreliable, or hired an expert, or called additional witnesses to impeach the victim with evidence of intoxication.

We agree that evidence of the victim's intoxication may have been relevant in assessing his credibility, specifically his ability to perceive the events that transpired that evening. Such evidence, if believed, may have tended to discredit the victim's identification of Appellant as his assailant. However, at the PCRA hearing, trial counsel Thomas Cooke, III testified that the only information available was "the discovery, prior pleadings and Complaint." N.T., 8/23/12, at 6. The medical records received in discovery indicated that the victim had "some level of intoxication but was aware of what was going on around him." **Id.** Counsel denied that Appellant provided him with names of potential witnesses who would testify to the victim's intoxication, **id.** at 7, or that Appellant told him that the victim was "so intoxicated that he could not have known what was going on." **Id.** at 8. The PCRA court found counsel's testimony credible.

The notes of testimony from the trial reveal that on cross-examination, the victim admitted that he had consumed as many as six beers that evening. He denied, however, that he was feeling the effects of the alcohol. **Id.** at 36. Such evidence did not necessarily establish that the victim was too intoxicated to perceive his surroundings or render him incompetent to

testify. ***See Commonwealth v. Judd***, 897 A.2d 1224, 1228 (Pa.Super. 2006) (citing general rule that every witness is presumed to be competent to be a witness). Thus, Appellant's argument that counsel should have sought to preclude the victim from testifying on the basis that his testimony was "unreliable" and "inflammatory" offered little likelihood of success.

Furthermore, Appellant did not proffer witnesses at the evidentiary hearing to support his claim that they were available to testify at trial regarding the victim's level of intoxication. Nor did Appellant substantiate that an expert could have provided an expert opinion that the victim was so intoxicated that his ability to perceive events was substantially impaired. Absent such a demonstration, Appellant has failed to satisfy the first prong of the ineffectiveness test.

Next, Appellant claims that counsel was ineffective when he stipulated to the admission of the victim's medical records rather than objecting to their admission as hearsay. Appellant's somewhat convoluted reasoning presumes that the court would have overruled a hearsay objection, and that he would have prevailed on this issue on direct appeal. Of course, if counsel had objected, and the trial court sustained the objection, there is no indication that the Commonwealth would have been unable to introduce the medical testimony necessary to establish serious bodily injury.

We need not speculate as to what may have occurred because Attorney Thomas Cooke explained that it was a strategic decision on his part to stipulate to the records. He reasoned:

I found in doing trials, especially trials involving personal injury, and I have done a large number of them, that when you put an emergency room or other doctor on the stand to explain the nature of the injury, they start explaining how the injury occurred, what force, what trauma occurs, either using a bullet or bludgeoned weapon, or a fist, and they start to describe the damage it does to the brain.

I did not want a doctor on the stand describing that in a trial, and if I could just use medical records, I would not have that doctor putting in that kind of damaging testimony.

N.T. PCRA Hearing, 8/23/12, at 14. Counsel testified further that he discussed his strategy with Appellant and Appellant agreed with it. ***Id.*** Moreover, he was informed by the Commonwealth that a healthcare professional would testify if he did not stipulate. ***Id.*** at 12.

The PCRA court found Attorney Cooke credible, and “his rationale was intelligent, cogent and strategic.” PCRA Court Opinion, 12/12/12, at 4. Furthermore, we agree with the PCRA court that counsel had a reasonable basis for his chosen strategy. Moreover, absent some indication that the Commonwealth would have been unable to produce a physician to testify regarding Mr. Lambert’s injuries, we find that there was no prejudice. Appellant has failed to prove the reasonable probability that the outcome of the proceeding would have been different had counsel objected rather than stipulated. No relief is due on this basis.

Appellant alleges next that defense counsel failed to investigate, locate, and utilize the testimony of additional witnesses to impeach the credibility of Commonwealth witnesses. In establishing that counsel was ineffective for failing to call a witness, “a petitioner must demonstrate: (1) the witness existed; (2) the witness was available; (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 to petitioner to have denied him or her a fair trial.” ***Commonwealth v. Dennis***, 17 A.3d 297, 302 (Pa. 2011).²

At the evidentiary hearing, Appellant testified that he identified co-defendant Mike Wittman, a mutual friend Jim Skover, and Angie Killian as persons who could testify regarding the victim’s level of intoxication. Angie Killian testified at trial; co-defendant Mike Wittman did not testify, nor could he be compelled to testify. Appellant conceded at the evidentiary hearing that Jim Skover refused to get involved. ***Id.*** at 55. Thus, even if the PCRA court had credited Appellant’s account, Appellant failed to demonstrate either arguable merit or prejudice.

Appellant also alleges that trial counsel was ineffective because he failed to call numerous witnesses who heard Mr. Wittman admit that he, not

² Appellant did not identify these witnesses in his PCRA petition, certify that such witnesses were willing and able to testify, or provide the substance of their testimony.

Appellant, punched Mr. Lambert. ***Id.*** at 56. Trial counsel acknowledged that Appellant provided the names of George Vickers, Sr., Pete Togni, Charles Pike, Jim Noro, Angie Killian, and Alex Kuhel as possible witnesses to Mr. Wittman's admissions. He and Appellant discussed what each witness could offer in terms of Appellant's defense. ***Id.*** at 41-2. In reliance upon Appellant's representation, counsel subpoenaed all of these witnesses with the possible exception of Mr. Noro. Even Appellant conceded at the evidentiary hearing that counsel did, in fact, subpoena all of the witnesses he identified except Charles Pike. After interviewing the witnesses, Attorney Cooke was disappointed as the majority of the witnesses were not as helpful to the defense as Appellant had claimed. The PCRA court credited trial counsel's version of the events and the record supports the court's conclusions. Mr. Vickers, Sr., Pete Togni, Angie Killian, and Alex Kuhel testified at trial. While Mr. Noro did not testify, Appellant's father explained at the evidentiary hearing that Jim Noro was subpoenaed, but when counsel spoke to him, Mr. Noro "couldn't remember a lot of it." N.T. Trial, 5/4/09, at 151. Appellant has failed to satisfy the arguable merit prong of the ineffectiveness test, and thus, this claim fails.

Appellant's last two issues involve allegations of trial counsel ineffectiveness and government obstruction based on the lack of an on-the-record colloquy regarding his right to a jury trial. At the evidentiary hearing, Appellant maintained that he never waived his right to a jury trial. N.T.

PCRA Hearing, 8/23/12, at 58. He alleges that Mr. Cooke was ineffective because he did not insist upon a written and oral colloquy. ***Id.*** at 63. Appellant stated that he and Mr. Cooke never had a conversation regarding his right to a jury trial, and that he only learned about this constitutional right through research at the prison library post-trial. ***Id.*** at 64. He testified that he advised Mr. Cooke that he intended to proceed to a jury trial. ***Id.*** at 61. Appellant now claims, somewhat inconsistently, that his waiver of his jury trial right was unknowing and unintelligent.

The Commonwealth introduced evidence at the evidentiary hearing that Appellant was familiar with the criminal justice system and his right to a jury trial. On cross-examination, Appellant admitted that he previously pled guilty to a first-degree felony. In connection with that plea, he completed a guilty plea form, which recited what a jury trial entailed. Appellant denied, however, that he had read the form, although he signed and dated the form indicating that he understood his right to a jury trial. ***Id.*** at 71-72.

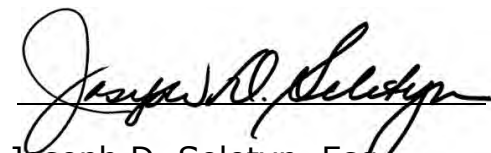
Trial counsel testified to the following. Appellant's case had already been scheduled for a non-jury trial when it was assigned to him. Counsel discussed with Appellant his right to a jury trial on several occasions, and explained the tactical advantages of proceeding to a non-jury trial rather than a jury trial. In that regard, counsel advised Appellant that he had a chance of winning on the aggravated assault charge at a bench trial because the narrow legal issue involved in this one-punch case "might be lost on a

panel of jurors” but appreciated by a judge. ***Id.*** at 30-31. Based on the advice and tactics provided, Appellant chose to proceed non-jury. ***Id.*** at 16-17. Counsel re-visited the subject of a jury trial with Appellant on the scheduled day for the non-jury trial. He advised Appellant that he still had a right to ask for a jury trial, but Appellant wanted to go forward. ***Id.*** at 20. Counsel represented that Appellant knew the difference between a jury and non-jury trial, that he had prior experience with the criminal justice system, and that Appellant never indicated on the day of trial that he wanted a jury trial. ***Id.*** at 22. The PCRA court found counsel rather than Appellant credible. PCRA Court Opinion, 12/12/12, at 9. The court noted various discrepancies and inconsistencies in Appellant’s testimony, which it believed undermined his credibility. We have no basis to disturb that determination, which is supported by the record.

For all of the foregoing reasons, Appellant is not entitled to post-conviction relief.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014

