

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOHNATHAN RYAN SIMMONS,	:	
	:	
Appellant	:	No. 1381 WDA 2014

Appeal from the PCRA Order July 28, 2014,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0016775-2009
CP-02-CR-0016835-2009

BEFORE: PANELLA, JENKINS, and STRASSBURGER, JJ.*

DISSENTING MEMORANDUM BY STRASSBURGER, J.: **FILED JULY 31, 2015**

Because trial counsel was ineffective for failing to prepare adequately for trial, I respectfully dissent.

I provide some short background information. Appellant, along with another man, were convicted of robbing the victim, a jitney driver.¹ Appellant got into the backseat of the victim’s vehicle. The victim did not have the opportunity to get a good look at Appellant. The victim was able to get away from the men within minutes of Appellant getting into the car. Appellant called the police, who responded shortly thereafter. When police were transporting the victim to the police station to make a report, the victim pointed out Appellant, who was standing in front of Mike’s Corner

¹ Walter Ferguson was also convicted of robbing the victim in this incident. He did not testify at Appellant’s trial.

*Retired Senior Judge assigned to the Superior Court.

Store, as the perpetrator. At trial, Officer Langham testified that he did not get a good look at that individual and that it would not be "fair" to identify Appellant as the perpetrator. N.T., 1/12/2011, at 7. The victim again saw Appellant on the street on September 1, 2009 and contacted police. Police responded and arrested Appellant for the July 21, 2009 incident at that time.

Thus, Appellant's entire defense was premised on the fact that it was not he who robbed the victim. Moreover, the only individual who positively identified Appellant as the perpetrator was the victim.

With this background in mind, I consider Appellant's issue regarding counsel's preparedness. On direct exam, counsel for Appellant questioned his alibi witness, long-time girlfriend Anita Murrell, extensively as how she remembered where she and Appellant were on Saturday, July 21, 2009.² Furthermore, the Commonwealth questioned Murrell extensively about why she remembered the day as being a Saturday.³ So, when shortly thereafter,

² Counsel asked the following questions of Murrell:

Do you remember July 21st as a Saturday?

Now, where were you, where did you spend Friday night, the night before Saturday?

What do you remember about the Saturday that he is accused of robbing [the victim] at approximately eleven in the morning?

N.T., 1/12/2011, at 16-17.

³ The Commonwealth questioned Murrell as follows:

the Commonwealth asked the trial court to take judicial notice that July 21, 2009 was, in fact, a Tuesday, Appellant's counsel was caught off guard. He stated, "I actually thought it was a Saturday, Your Honor." N.T., 1/12/2011, at 102.

"Counsel's general duty of effective representation ... includes a duty to familiarize himself with the witnesses counsel intends to call to testify at trial. Given the nature of an alibi defense, this duty is especially important when preparing alibi witnesses." ***Commonwealth v. Johnson***, 966 A.2d 523, 537 (Pa. 2009). "At the core of an alibi defense is, of course, consistency between the date and time of the crime and that of the defendant's alibi." *Id.* at 538.

Instantly, Appellant's defense was undermined severely by counsel's failure to ascertain a simple piece of information, the day of the week on which the crime occurred. Counsel's trial strategy of questioning Appellant's identification by the victim, then calling an alibi witness, was reasonable and

[Commonwealth:] Now, you said the day of the robbery was a Saturday?

[Murrell:] Yes.

[Commonwealth:] Are you sure about that?

[Murrell:] Yes.

[Commonwealth:] And you know it's a Saturday why?

[Murrell:] Because Saturday we don't do anything, and that is when I can really play my music.

N.T., 1/12/2011, at 22-23.

sound in this case. However, there could be no reasonable basis for counsel to have questioned Murrell about July 21 being a Saturday. In fact, at the PCRA hearing, counsel admitted that he was "incorrect" in this regard. N.T., 7/14/2014, at 24.

The majority concludes that Appellant was not prejudiced by this error because the parties stipulated that the robbery occurred on a Tuesday, not a Saturday. That does not remove the prejudice. If the alibi witness does not know what day of the week the crime occurred, the witness is less than useless. The error about the day of the week was so egregious that it would have been impossible for the jury to believe anything said by Murrell. Accordingly, Appellant is entitled to a new trial on the charges related to the robbery of the victim.