

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KENNETH EMIL MEYERS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 29 MDA 2014

Appeal from the PCRA Order December 4, 2013
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0000641-2009

BEFORE: BENDER, P.J.E., BOWES, and PANELLA, JJ.

MEMORANDUM BY BOWES, J.:

FILED JULY 23, 2014

Kenneth Emil Meyers appeals from the December 4, 2013 order denying him PCRA relief. After thorough review, we affirm.

Appellant was charged with two counts of involuntary deviate sexual intercourse, and one count each of indecent assault and corruption of minors. This Court on direct appeal recited the facts underlying the convictions:

The victim was twelve years old at the time of the incident and Appellant was approximately forty-two years old. Appellant and the victim's uncle ha[d] been partners for several years and at the time of the incident, which was around Christmas of 2008, the two were visiting with the victim's family. On one of the evenings of this visit, Appellant performed oral sex on the victim who then performed oral sex on Appellant. Subsequently, the two exchanged various graphic emails and texts that were substantially incriminating.

Commonwealth v. Meyers, 31 A.3d 753 (Pa.Super. 2011) (unpublished memorandum at 1).

On May 5, 2010, a jury found Appellant guilty of all charges, and the trial court sentenced him to forty to eighty years imprisonment. Appellant filed a post-sentence motion seeking to reduce his sentence and a motion to recuse the trial court from participation in any further proceedings. The court denied the motion to recuse, but granted the post-sentence motion and reduced the sentence to twenty to forty years imprisonment. The judgment of sentence was affirmed by this Court on June 24, 2011.

Meyers, supra.

Appellant filed the instant PCRA petition on July 20, 2012, and a counseled amended petition on February 19, 2013. The Commonwealth filed an answer and a motion to dismiss without a hearing on April 23, 2013. The parties submitted briefs in support of their respective positions. A PCRA conference was held on the Commonwealth's motion on November 4, 2013, and, on December 4, 2013, the trial court granted the Commonwealth's motion to dismiss without a hearing. Appellant timely appealed and raises two issues for our consideration.

- A. Trial counsel was ineffective for failing to call character witnesses and in failing to discuss the importance of character witnesses with the Defendant. The trial court erred by not granting a new trial based on the above.
- B. Trial counsel was ineffective for failing to explain to the Defendant why the motion for recusal was withdrawn and

further failing to appeal the court's order denying the motion to recuse.

Appellant's brief at 4.

"Our standard of review for an order denying post-conviction relief is limited to whether the trial court's determination is supported by evidence of record and whether it is free of legal error." **Commonwealth v. Ali**, 86 A.3d 173, 177 (Pa. 2014). We review claims of ineffective assistance of counsel, such as the claims asserted herein, mindful that "[c]ounsel 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." **Commonwealth v. Spatz**, 84 A.3d 294, 311 (Pa. 2014).

In order to prove counsel ineffective in this Commonwealth, a petitioner must demonstrate all of the following: "(1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result." **Id.** at 311. Prejudice involves a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." **Id.** at 312. Where the alleged ineffectiveness involves counsel's failure to call witnesses, "a defendant must prove the witnesses existed, the witnesses were ready and willing to testify, and the absence of the witnesses' testimony prejudiced petitioner and denied him a

fair trial.” ***Commonwealth v. Johnson***, 27 A.3d 244, 247 (Pa.Super. 2011) (quoting ***Commonwealth v. Cox***, 983 A.2d 666, 693 (Pa. 2009)).

Appellant avers that trial counsel rendered ineffective assistance of counsel when he failed to call character witnesses to provide reputation testimony on Appellant’s behalf, or advise Appellant of the importance of doing so. Appellant supplied affidavits from two persons with whom he had previously worked and maintained that they would have testified to his general reputation for truthfulness. He contends that such evidence was critical in this “he said/she said” type of case and that counsel had no reasonable basis for such an omission. Appellant directs our attention to this Court’s decision in ***Commonwealth v. Harris***, 785 A.2d 998 (Pa.Super. 2001), where we recognized that character evidence alone may provide substantive evidence in support of acquittal in a case where the credibility of witnesses is vital.

The Commonwealth counters that Appellant has not preliminarily demonstrated that the character witnesses were available and willing to testify at trial. Furthermore, it contends that Appellant has failed to demonstrate prejudice. The Commonwealth points to the emails and instant messages between Appellant and the victim and argues that they distinguish this case from the typical “he said/she said” case.

The PCRA court agreed that the affidavits lacked crucial information, particularly that counsel knew or should have known about the character

witnesses, and that they were available and willing to testify at trial. Furthermore, the court reasoned that counsel may have had a reasonable strategy for not calling such witnesses as their testimony would have opened the door to the Commonwealth's introduction of evidence rebutting Appellant's veracity. Pa.R.E. 404(a)(2)(A). Moreover, the court found the proffered affidavits, which attested to Appellant's reputation in the workplace, to be of little probative value where the crimes involved his personal life and community. Ultimately, the court found there was no reason to believe that the outcome of the trial would have been any different had the witnesses testified. Trial Court Opinion, 12/4/13, at 8. At the PCRA conference, the trial court recalled that several jurors were "in shock" and one woman "close to tears" when the emails were introduced, and commented, "that's tough to overcome." N.T., 11/4/13, at 21. The judge stated on the record at that time that he was "struggling" with the question of whether any strategy employed by counsel "would have made a difference." *Id.* at 22.

This Court has held that the failure to present available character evidence may constitute ineffective assistance of counsel. In ***Commonwealth v. Hull***, 982 A.2d 1020, 1023 (Pa.Super. 2009), the defendant was convicted of sexual crimes involving his adopted daughter. The victim and her brother offered the only evidence in support of conviction, and defense counsel's strategy was to show that they were lying

in order to escape the discipline of their adoptive home and return to their mother where they could do as they wished. It was uncontested that there were character witnesses who were willing and able to testify on his client's behalf, but defense counsel did not call them. The PCRA court concluded that, on these facts, counsel was ineffective for failing to call the character witnesses.

On appeal, we relied upon *Harris, supra*, for the proposition that, "evidence of good character is to be regarded as evidence of substantive fact just as any other evidence tending to establish innocence and may be considered by the jury in connection with all the evidence presented in the case on the general issue of guilt or innocence." *Id.* at 1000. We agreed with the PCRA court that the claim had reasonable merit as counsel failed to appreciate the role of character evidence in his trial strategy.¹ Furthermore, the testimony of character witnesses depicting appellee "as a good man who would emphasize morals and discipline" would have been consistent with counsel's strategy of showing the motive for the victim and her brother to fabricate the allegations. Finally, the PCRA court rejected the Commonwealth's contention that the evidence of guilt was overwhelming in light of the brother's testimony. We agreed, finding that evidence to be "too

¹ We rejected the notion that counsel could justify his failure to present good-character evidence by citing a broad concern that opposing counsel might introduce bad-character evidence on cross-examination. Counsel had not investigated whether there was, in fact, any basis for concern.

vague and uncertain to constitute overwhelming evidence,” and furthermore, that character evidence could have cast doubt on the brother’s credibility as well as the victim’s. We affirmed the PCRA court’s conclusion that counsel was ineffective.

Herein, the PCRA court had the benefit of observing the witnesses at trial, and we are charged with determining whether its findings are supported by the evidence and support its conclusion. Even assuming that Appellant’s claim has reasonable merit, we find ample support for the PCRA court’s conclusion that Appellant could not demonstrate prejudice. While at first blush this appears to be the “he said/she said” scenario, the availability of emails and instant messages added a new dimension. It is apparent that trial counsel’s strategy was to show that the victim fabricated the basis for the charges in order to escape his mother’s punishment when she discovered the sexually explicit emails and instant messages. Appellant admitted that he authored the emails and instant messages, but testified that the graphic sexual talk conveyed therein was merely fantasy, and that nothing more than a kiss actually occurred with the victim. However, his references to specific sexual acts that he and the victim engaged in “that night,” N.T., 5/5/10, at 266, and “last time,” *id.* at 268, indicated otherwise. The jury credited the victim’s account of the sexual conduct he and Appellant had engaged in and rejected Appellant’s fantasy explanation.

The PCRA court found that the sexually explicit emails and instant messages exchanged between Appellant and the young victim, together with the victim's testimony, constituted such overwhelming evidence of guilt that reputation evidence from his co-workers would not have changed the outcome. We find no basis to disturb that finding. The victim testified that Appellant performed oral sex on him and he did the same to Appellant. *Id.* at 99-100. In subsequent emails, Appellant told the victim not to cut his pubic hair because he liked the scent of it. *Id.* at 296. The victim asked Appellant, "What was your favorite thing to do to me? Mine was when I felt you and you felt me, and also I like being felt in the ass, and also the first kiss." *Id.* at 287. The victim referred to doing things next time "like what we did last time." *Id.* at 268. "But this time, we are going to really wait till they are all asleep and I'm going to take my clothes off." *Id.* In graphic terms, they discussed engaging in anal sex the next time. *Id.* at 269. The tone and text of the emails and instant messages indicated that sexual conduct had occurred, greatly enhancing the credibility of the victim. We find no basis to disturb the PCRA court's finding that the proffered character evidence could not have overcome the damaging effect of the graphic email exchanges. Absent prejudice, Appellant is not entitled to relief.

Appellant's remaining claim is that trial counsel was ineffective because he withdrew the recusal motion, resulting in waiver of that issue for purposes of direct appeal. Furthermore, Appellant alleges that counsel

should have consulted with him or explained his reasons for withdrawing the motion prior to the withdrawal. Appellant posits that the motion was withdrawn in exchange for the court's promise to impose a less severe sentence, but he complains that the result was tantamount to a life sentence. He concludes that counsel's failure to place his reasons for withdrawing the motion on the record necessitates either an evidentiary hearing or a new trial.

The Commonwealth denies Appellant's claim that the reduction in sentence was the *quid pro quo* for the withdrawal of the recusal motion. In addition, it contends that an evidentiary hearing is unnecessary since defense counsel stated his reasons for filing and subsequently withdrawing the recusal motion at the hearing on post-trial motions on September 7, 2010. Counsel represented that he filed the motion after becoming aware of some comments by the trial court in another sex crime case involving a minor victim. He went on to address the following remarks to the trial court:

Since August 2nd I have had an opportunity to meet on this matter with you, do some more investigation, and I'm satisfied that you harbor no bias, prejudice or ill will towards Mr. Meyers. In a sense, I want to apologize to the court that I should have done some more investigation on this matter. At the same time, given the limited time frame that I had to investigate the matter, I felt comfortable filing the motion. If I had more time, I wouldn't have. And now that I've had that time, I'd like to withdraw that motion if I could.

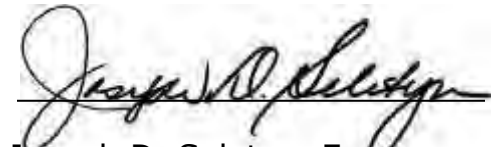
N.T., Hearing Post-Sentence Motion, 9/7/10, at 4. The court permitted counsel to withdraw the motion.

According to the Commonwealth, having legitimately concluded that the motion was baseless, counsel had an ethical obligation to withdraw it. Furthermore, it contends that no relief is due as Appellant failed to demonstrate that his recusal motion had arguable merit and that he was prejudiced due to his inability to assert it on direct appeal.

The record refutes Appellant's contention that counsel never explained his reasons for withdrawing the recusal motion, or that he did so in exchange for a reduction in Appellant's sentence. Furthermore, we agree with the Commonwealth that Appellant failed to demonstrate that his recusal motion had arguable merit or that its withdrawal was prejudicial. We view Appellant's ineffectiveness claim as a thinly veiled collateral attack on a sentence that he believed to be excessive. No relief is due.

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