NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JERRY REEVES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2159 MDA 2012

Appeal from the PCRA Order of November 26, 2012
In the Court of Common Pleas of Dauphin County
Criminal Division at No.: CP-22-CR-0003869-2009

BEFORE: BOWES, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY WECHT, J.: **FILED NOVEMBER 07, 2013**

Jerry Reeves ("Appellant") appeals from the November 26, 2012 order dismissing his first petition for relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. We adopt the thorough opinions issued by the PCRA court, and we affirm.

In 2009, Appellant was charged with second-degree murder, robbery, tampering with or fabricating physical evidence, and carrying a concealed firearm without a license.[1] The charges arose from a May 25, 2006 robbery-murder that occurred at the City Gas and Diesel convenience store in Harrisburg, Pennsylvania. In an opinion addressing Appellant's direct

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* Retired Senior Judge assigned to the Superior Court.

1 18 Pa.C.S. §§ 2502(b), 3701, 4910, and 6106, respectively.

appeal, the trial court summarized the facts that were presented at Appellant's jury trial as follows:

> On May 25, 2006, after making sure any customers had left the premises, Appellant entered the City Gas and Diesel convenience store between 12:30 a.m. and 1:00 a.m. He walked up to the clerk's counter and pulled a semiautomatic pistol from the front of his pants. He pointed it through the open, bullet proof counter window at the on duty clerk, Hitender Thakur. Appellant demanded money from the cash register. Hitender refused. There was a brief struggle and Appellant fired the weapon, hitting Hitender in the upper right chest. Hitender remained on his feet and attempted to remove the money from the cash register, but fell to the ground seconds later. Hitender died almost immediately from a gunshot wound to the chest, which pierced his heart and punctured his aorta. Appellant jumped over the counter and emptied the cash register. He then fled the store.
>
> That night had not been the first time Appellant was at City Gas and Diesel. In fact, by his own admission, Appellant had been to the store numerous times and was familiar with the clerks on duty. Nishant Rana, another clerk at the store and Hitender's friend, testified that Appellant came to the store almost every day. Occasionally, Appellant did odd jobs for the clerks in exchange for Black and Mild cigars. Following the night of Hitender's death, Nishant never saw Appellant at the store again.
>
> State Trooper Curtis Salak, who was a patrol officer with the Harrisburg City Police at the time, was the first to arrive on the scene following the shooting. He was dispatched to the convenience store. As he approached he observed a white male in the street flagging him down. A brief conversation with the white male alerted Trooper Salak that someone inside the store had been shot. He parked his vehicle, secured the scene and entered the store. There he observed Hitender lying on the floor behind the counter. He jumped through the open, bulletproof window at the counter, and attempted to render aid. Hitender was lying on his back with his eyes open and did not appear to be breathing. His chest and shirt were covered with blood, and there was a pool of blood on the floor around him. Other officers began arriving on the scene. Trooper Salak called for medical

assistance. They then opened the secured door which led behind the counter to give EMS access to Hitender. He also spoke with Sansay Ghanur, a friend of Hitender's who arrived at the store at approximately 1:10 a.m., immediately after Hitender was shot.

William Kimmick, a forensic investigator with the Harrisburg Police, arrived on the scene at approximately 1:20 a.m. By that time, other officers were already on the scene and EMS had departed. Investigator Kimmick testified that Investigator Kunkle,[2] who is no longer with the Harrisburg Police Department, arrived at the scene at approximately 2:20 a.m. or 2:30 a.m. Investigator Kunkle took photographs of the crime scene. They collected a 20 dollar bill from the floor under the register as well as the video surveillance tape from the store. Investigator Kimmick testified that the cash register drawer was open and empty except for some coins. He observed blood on the cash register and on the floor directly beneath the cash register. They processed the counter, window and door to the clerk's area for fingerprints. However, Karen Lyda, another forensics expert with the Harrisburg Police Department, testified that none of the prints that were collected matched Appellant's fingerprints.

Lyda was also present for Hitender's autopsy. There, she collected the bullet from Hitender's body which she sent to the Pennsylvania State Police for processing. There, Corporal David A. Krumbine, an expert in firearms and tool markings, determined that the bullet was a .25 caliber. He testified that it was most likely fired from a semiautomatic pistol.

Police also identified Derrick Small, another individual seen on the video tape in the store prior to the shooting. Xavier Hendry, a witness for the Commonwealth, testified that on the night of Hitender's death he had driven Small to the City Gas and Diesel. He also identified a picture of Small. Detective Christopher Krokos, who was familiar with Small from past interactions, identified Small in the surveillance video that was played for the jury. He was seen leaving the store moments before Appellant entered.

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[2] Investigator Kunkle's first name does not appear in the notes of testimony.

The Commonwealth also presented testimony regarding Appellant's confession to police as well as the conflicting statements he made to officers and detectives prior to making his confession. Appellant's first contact with police occurred at the end of May, 2006. Shortly after the homicide, Appellant had a conversation with Officer Derrick Fenton of the Harrisburg City Police. During that conversation, Appellant told Officer Fenton that he had information about the City Gas and Diesel homicide, and that he could provide the name of the individual responsible. Officer Fenton testified that Appellant stated he was a witness to the crime. Appellant claimed he was standing across the street at the time of the shooting, and told Officer Fenton that he saw an individual named Jermaine Taylor enter the store and rob it. Appellant further claimed that Taylor exited the store following the shooting and got into a dark colored car with tinted windows and left the area. He claimed that there were other people sitting in the car. When Detective Krokos later spoke with Appellant regarding the homicide on May 30, 2006, Appellant changed his story. Appellant told Detective Krokos that he did not know anything about the City Gas and Diesel homicide. Further, Appellant claimed that he told Officer Fenton that he was a witness because he was under arrest at the time and he was hoping that police would let him go to be with his family over the Memorial Day holiday if he provided them with information. Detective Krokos further testified that Appellant admitted to fabricating the story and that, to his knowledge, the individual named Jermaine Taylor did not actually exist. Appellant also told Detective Krokos that he had been lying when he stated he saw the shooting. However, Appellant did tell the detective that he had heard the shooting from his house. Detective Krokos typed Appellant's statement from that day and Appellant signed the back of it.

Appellant spoke to police about the homicide again on July 29, 2009. At that time, Detective Donald Heffner, Detective Hector Baez and Detective Krokos were present for the interview. The detectives read Appellant his ***Miranda*** rights and confirmed that he was not under the influence of any drugs or alcohol. Further, they determined that he was not suffering from any medical problems at the time of the interview. Detective Heffner and Detective Baez both testified that in the early stages of the interview, Appellant claimed he was a witness to the homicide and that he was sitting across the street on a porch when Ferred Ray and Joseph Baldwin and an unknown third male arrive[d] at

the City Gas and Diesel. Appellant told the detectives that Baldwin and the unknown male entered the store, while Ray remained outside. Appellant stated that he heard a gunshot, and that the two men exited the store. Appellant told the detectives that the three got into a car and fled the scene. As the interview progressed, Appellant told the detectives that he was actually right in front of the store with Ray, Baldwin and the unidentified male. He stated that Ray was the individual that walked into the store. Appellant told the detectives that, when he heard the gunshot, he ran from the scene and did not know what happened to the other three men. Detective Heffner testified:

> During the course of the conversation, where he was saying he was closer and closer to the store. He was putting himself physically closer to the store he became more serious. At one point right before he said that he had committed this crime he began to tremble and he began to cry. . . . It came to a point where we actually said we are going to interview these other guys you just named. What are they going to say about it? That is kind of where he broke down and he said, no, I did this.

[Appellant] confessed to the homicide, stating that it was an accident and that he needed the money. Following the initial confession, Appellant gave his consent for the detectives to [record] his statement. The audio-recording of the confession was played for the jury.

Appellant took the stand and stated that he did not rob or shoot Hitender. He stated he was picked up by police at approximately 2:30 a.m on July 29, 2009. Appellant testified that, at the time he spoke with detectives later that day, he had various health problems. Specifically, Appellant stated he was light headed and was vomiting up blood at the time. However, none of the detectives observed any of Appellant's alleged medical issues. Further, on the audio-tape of the confession, Appellant stated he was not suffering from any medical problems. Appellant further claimed that one of the reasons he confessed to the homicide was because detectives told him that they would take him to the hospital only if he confessed. Appellant also claimed that, on top of his other medical issues, he was also suffering from a hangover from the night before.

* * *

> Besides his alleged medical problems, Appellant also testified that another reason he spoke with police was because the detectives promised to help him out by letting his girlfriend go free. She had been picked up at the same time Appellant was arrested.
>
> Despite his contentions that police fed him details of the homicide, Appellant provided them to the police during his taped confession. Appellant also stated that he did not rob or murder Hitender and that he was in Baltimore at the time of the crime. However, Appellant was unable to state the exact timeframe in which he was in Baltimore or explain how he learned the details of the homicide upon his alleged return to Harrisburg. Further, James Thornton, a rebuttal witness for the Commonwealth, testified that he spoke with Appellant regarding his Baltimore alibi while at Dauphin County Prison:
>
> > Well, I happened to be sitting there, and it was maybe four individuals sitting around where I was and they were talking, and one individual was saying they almost got me, man. And I called for some help. He needs an alibi. So the individual told me that he had a friend in Baltimore he was going to give a thousand dollars and get him to say he was down there.
>
> Thornton identified the individual speaking as Appellant.

Trial Court Opinion ("T.C.O."), 11/16/2010, at 2-9 (citations to notes of testimony and footnotes omitted).

On June 23, 2010, the jury found Appellant guilty of all of the aforementioned charges, save the tampering with or fabricating physical evidence charge, which was withdrawn by the Commonwealth prior to jury deliberations. Thereafter, Appellant was sentenced to life imprisonment on the murder count, a concurrent five to ten-year term of imprisonment on the robbery count, and a concurrent one to two-year term of imprisonment on the firearm count. On July 1, 2011, in an unpublished memorandum, we

affirmed the judgment of sentence. ***See Commonwealth v. Reeves***, 1193 MDA 2010 (Pa. Super. July 1, 2011) (unpublished memorandum).

On July 30, 2012, Appellant filed a PCRA petition, wherein Appellant alleged that trial counsel was ineffective. In support of this overall claim, Appellant raised the following issues:

> 1. Evidence of viable alternative suspects was not presented to the jury at the time of trial. Kai Anderson murdered Hitender Thakur, not [Appellant].
> 2. At trial, Trial Counsel failed to employ readily available and admissible expert testimony in the well-known and well-studied psychological phenomenon of a false confession.
> 3. [Appellant] could not have committed the murder as he was in Baltimore. Trial Counsel's failure to exercise minimal due diligence precluded evidence of an alibi to be fully presented before the jury.
> 4. Alibi rebuttal evidence was produced into the record and placed before the trier of fact that could not and should not have been entered into evidence.
> 5. Trial Counsel failed to give proper notice of alibi concerning Terry Reeves and as such his testimony was precluded.

PCRA petition, 7/30/2012, at 6, 16, 25-27. On September 28, 2012, the Commonwealth filed a response to Appellant's PCRA petition.

On October 10, 2012, by written order, the PCRA court notified Appellant of its intent to dismiss the PCRA petition without a hearing within twenty days, pursuant to Pa.R.Crim.P. 907. The PCRA court simultaneously issued a memorandum opinion in support of its notice order. On October 29, 2012, Appellant filed a response to the PCRA court's notice of intent to dismiss. On November 26, 2012, the PCRA court issued a second

memorandum opinion, wherein the court addressed the objections raised by Appellant in his response to the PCRA court's notice of intent to dismiss. The PCRA court then entered an order dismissing Appellant's PCRA petition.

On December 7, 2012, Appellant filed a notice of appeal. In response, the PCRA court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On January 2, 2013, Appellant timely complied. Finally, on January 8, 2013, the PCRA court issued a Pa.R.A.P. 1925(a) opinion, wherein the court adopted its October 10, 2012 and its November 26, 2012 opinions as its rationale for dismissing Appellant's PCRA petition.

Appellant raises the following claim for our review:

> A PCRA claim may be denied a hearing where the claims set forth are patently frivolous and the issues have no trace of support either in the record or from other evidence. Here there is evidence of exculpatory value, on the record, to Jerry Reeves that need to be developed. Did the trial court improperly deny Jerry Reeves's PCRA petition without the benefit of an evidentiary hearing?

Brief for Appellant at 4. In support of this overarching claim, Appellant focuses his argument on three main contentions: (1) trial counsel was ineffective for failing to present "viable alternative suspects at trial," ***id.*** at 11; (2) trial counsel was ineffective for failing to present evidence of the "false confession phenomenon" at trial, ***id.*** at 18; and (3) trial counsel was ineffective for failing properly to file notice of certain alibi evidence and failing to present that evidence at trial. ***Id.*** at 21.

We review the denial of a post-conviction petition to determine whether the record supports the PCRA court's findings and whether the court's order is otherwise free of legal error. ***Commonwealth v. Faulk***, 21 A.3d 1196, 1199 (Pa. Super. 2011) (citation omitted). It is well-settled that "a petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1040 (Pa. Super. 2007) (citing Pa.R.Crim.P. 907(1); ***Commonwealth v. Hardcastle***, 701 A.2d 541 (Pa. 1997)).

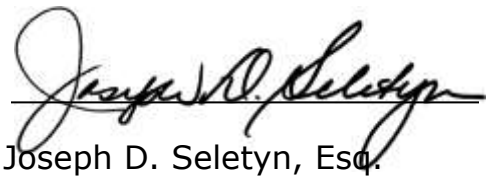
To succeed on a claim of ineffective assistance of counsel, a PCRA petitioner must demonstrate that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Steele***, 961 A.2d 786, 796-97 (Pa. 2008). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. ***Commonwealth v. Jones***, 815 A.2d 598, 611 (Pa. 2002).

We have conducted an independent review of the certified record, the briefs of the parties, the reasoning set forth by the PCRA court in its October 10, 2012 and November 26, 2012 opinions, and the legal authorities upon

which the PCRA court based its analyses and cited above. Having done so, we conclude that the PCRA court's findings are supported by the evidence of record, and that the court's application of the law to those facts was in all respects free of legal error. Consequently, we adopt both of the PCRA court's opinions in full, and we affirm. A copy of each of the PCRA court's opinions is attached hereto for ease of reference.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/7/2013

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
	:	
vs.	:	3869 CR 2009
	:	
JERRY REEVES	:	POST CONVICTION RELIEF ACT

2012 NOV 26 AM 11:31
DAUPHIN COUNTY PA
OFFICE OF CLERK OF COURTS

MEMORANDUM ORDER

AND NOW, this 26th day of November, 2012, this Court shall consider Petitioner Jerry Reeves' Response to Memorandum Opinion and Intent to Dismiss.

Petitioner filed his Response to Memorandum Opinion and Intent to Dismiss on October 29, 2012 in response to this Court's Memorandum Opinion and Order[1] which gave Petitioner notice of our intent to dismiss his Motion for Post Conviction Collateral Relief. Petitioner raises three objections to this Court's intention to dismiss his PCRA petition, which this Court will address individually.

Petitioner asserts that he has raised material questions of fact pertaining to the effectiveness of his trial counsel and that this Court should hold an evidentiary hearing on these issues. The Superior Court has held:

> Although the right to an evidentiary hearing is not an absolute one, a hearing should be held on any issue which the PCRA court is not certain lacks merit. We will only remand for an evidentiary hearing if it is not possible to determine from the record whether the petition is frivolous and without support. Otherwise, we will affirm if our review of the record evinces that the claims are patently frivolous.

Commonwealth v. Jones, 640 A.2d 1330, 1335 (Pa. Super. 1994) (Internal citations omitted).

In Pennsylvania, the determination of ineffective assistance of counsel is a three-prong test. Specifically, a petitioner must show that (1) the underlying claim is of arguable merit, (2)

[1] We hereby incorporate this Court's Memorandum Opinion and Order dated October 10, 2012.

no reasonable basis existed for counsel's action or inaction, and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. Commonwealth v. Thomas, 44 A.3d 12, 17 (Pa. 2012)(citing Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987)). An ineffective assistance of counsel claim will be rejected if the petitioner fails to establish each prong of the Pierce test. Id.

1. Evidence of an Alternate Suspect

Petitioner alleges that he has raised a material issue of fact with regard to whether his trial counsel rendered ineffective assistance of counsel when she allegedly failed to produce witnesses to testify to Petitioner's theory that another individual committed the robbery/homicide. We find that the record demonstrates that even if Petitioner's trial counsel had presented the testimony allegedly supporting the theory that another individual committed the robbery/homicide that Petitioner has ultimately failed to demonstrate how this prejudiced him in light of the record overwhelmingly demonstrating Petitioner's guilt of the robbery/homicide. Accepting Petitioner's argument that all of the hearsay and non-hearsay testimony that would have been presented at his trial would have been admissible, Petitioner fails to explain how this testimony would have rebutted Petitioner's own admission to the robbery/homicide. We further note that not only did Petitioner admit to committing the robbery/homicide but that he described certain details of the robbery/homicide that were corroborated with video surveillance footage from City Gas and Diesel. (Notes of Testimony June 21-23, 2006, 201-06). Had the jury been presented with all of the testimony Petitioner asserts his trial counsel should have presented at trial the jury would have still been left with an admission from Petitioner that matched the recorded events from the City Gas and Diesel surveillance footage. Additionally, the jury was presented with four different versions of events from Petitioner which negatively affected Petitioner's credibility

with the jury. Accordingly, we find that Petitioner has failed to establish prejudice from the absence of the testimony supporting Petitioner's theory that Kai Anderson committed the robbery/homicide in light of Petitioner's confession and the video surveillance footage corroborating Petitioner's admission. Therefore, we find that Petitioner has failed to establish a claim for ineffective assistance of counsel against his trial counsel and that an evidentiary hearing on this issue is not warranted.

2. Expert Witness on False Confession Phenomenon

With respect to Petitioner's claim that his trial counsel was ineffective for failing to call an expert witness to testify to the phenomenon of false confession, Petitioner fails to cite to anywhere in the record to indicate that there was the possibility that Petitioner was suffering from false confession.

The Supreme Court has held:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. 'There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Commonwealth v. Jones, 327 A.2d 10, 14 (Pa. 1974) (quoting Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952)).

We further note that expert testimony regarding the credibility of a witness takes away the function of the jury who is to be the ultimate trier of fact at trial. See Commonwealth v. Szakal, 50 A.3d 210, 228 (Pa. Super. 2012) (The Superior Court held that "if the expert is only testifying generally about the fact that false confessions happen, that is well within the grasp of the average layperson and expert testimony would not be required under Rule 702.");

Commonwealth v. Selenski, 18 A.3d 1229, 1232 (Pa. Super. 2011) ("An expert may not testify as to the credibility of a witness's testimony"); Commonwealth. v. Constant, 925 A.2d 810, 822 (Pa. Super. 2007) (quoting Commonwealth v. Spence, 627 A.2d 1176, 1182 (Pa. 1993) ("Whether the expert's opinion is offered to attack or to enhance, it assumes the same impact—an 'unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess.'").

In the present matter Petitioner asserts that the trier of fact was incapable of attributing the proper level of credibility to Petitioner's testimony. The record does not contain any facts that would suggest that Petitioner suffered from false confession phenomenon when he was interrogated by detectives. The facts at trial demonstrated that Petitioner at first gave two different versions of the events at City Gas and Diesel until he finally made a third statement in which he admitted to committing the robbery/homicide. The jury was capable of determining that an issue of Petitioner's credibility existed which was the jury's duty to determine. In addition to having Petitioner's testimony and the testimony of Det. Krokos, the jury was able to view the surveillance footage from City Gas and Diesel which demonstrated that Petitioner's admission was an accurate recounting of events. As an expert witness testifying to another witness's credibility is inadmissible in Pennsylvania, we find that Petitioner's trial counsel did not render ineffective assistance of counsel when she did not present expert testimony on false confession phenomenon. Therefore, this Court dismisses this alleged error.

3. Prior Notice of Alibi Defense

Petitioner alleges that his trial counsel failed to exercise due diligence in developing an alibi for Petitioner prior to trial when Petitioner was allegedly in Baltimore, Maryland when the

robbery/homicide occurred at the City Gas and Diesel on May 25, 2006. The Pennsylvania Rules of Criminal Procedure provide the following:

> A defendant who intends to offer the defense of alibi at trial shall file with the clerk of courts not later than the time required for filing the omnibus pretrial motion provided in Rule 579 a notice specifying an intention to offer an alibi defense, and shall serve a copy of the notice and a certificate of service on the attorney for the Commonwealth.

Pa.R.Crim.P. 567(A).

If a defendant fails to provide notice of an alibi defense pursuant to Pa.R.Crim.P. 567(A), the rules dictate that "the court may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, may grant a continuance to enable the Commonwealth to investigate such evidence, or may make such other order as the interests of justice require." Pa.R.Crim.P. 567(B)(1).

The record indicates that Petitioner never informed his trial counsel as to his presence in Baltimore until the last day of trial. (N.T., 227-28). While Petitioner asserts that he did inform his trial counsel of his whereabouts prior to trial there is nothing in the record to support this claim. Other than Petitioner's bald assertion that he informed his trial counsel prior to trial, Petitioner relies upon nothing in the record to further support this claim. Petitioner also fails to explain how his trial counsel's alleged omission of this alibi prejudiced him in light of Petitioner's admission to the robbery/homicide. Furthermore, Petitioner was still able to present this alibi defense when he took the stand in his defense and asserted that he was in Baltimore during the robbery/homicide. The jury was able to take this testimony into consideration and as the triers of fact determined his alibi to be false. Had Petitioner informed his trial counsel of his alibi for his trial counsel to provide notice of the alibi prior to trial, the jury would have still been presented with Petitioner's admission, Petitioner's presence at the scene captured on video, and

Petitioner's alibi. Accordingly, even if Petitioner established that he informed his attorney that he was in Baltimore during the robbery/homicide Petitioner fails to demonstrate how it prejudiced him when he had already admitted to committing the robbery/homicide. Therefore, we find that Petitioner has failed to assert a claim of ineffective assistance of counsel against his trial counsel when she did not provide prior notice of Petitioner's alibi defense.

Petitioner has failed to raise any issue that requires this Court to hold an evidentiary hearing regarding Petitioner's PCRA petition. Accordingly:

IT IS HEREBY ORDERED that Petitioner's Motion for Post Conviction Collateral Relief is DISMISSED.

Petitioner is hereby advised of his right to appeal this Order to the Superior Court of Pennsylvania within thirty (30) days from the date of this Order. **The Clerk of Courts is directed to send a copy of this Order to the petitioner by certified mail, return receipt requested.**

BY THE COURT:

John F. Cherry, Judge

Distribution:

Jason E. McMurry, Esquire, Deputy District Attorney
Justin J. McShane, Esquire, 4807 Jonestown Road, Ste. 148, Harrisburg, PA 17109
Victor Riley, Esquire, Deputy Court Administrator
Judge Cherry

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
	:	
vs.	:	3869 CR 2009
	:	
JERRY REEVES	:	POST CONVICTION RELIEF ACT

MEMORANDUM OPINION

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Presently before this Court is Petitioner Jerry Reeves' (Petitioner) Petition for Post Conviction Relief filed pursuant to the Post Conviction Relief Act[1] (PCRA).

Procedural History

A trial by jury was held in the above captioned matter on June 23, 2010 wherein Petitioner was found guilty on all counts and sentenced to the following:

Count 1: Murder of the second degree[2] – life imprisonment without parole in a state correctional institution plus costs of the proceedings;

Count 2: Robbery[3] - 5-to-10 years' imprisonment in a state correctional institution concurrent to Count 1 with time credit from July 29, 2009 to June 23, 2010 plus costs of the proceedings;

Count 3: Tampering with or fabricating physical evidence[4] - Withdrawn

Count 4: Firearms not to be carried without a license[5] - 1-to-2 years' imprisonment in a state correctional institution concurrent to Count 1 plus costs of the proceedings.

On July 20, 2010, Petitioner's trial counsel, Lenora M. Smith, Esquire, filed a Petition to Withdraw as Counsel for Petitioner. A Notice of Appeal was filed on July 22, 2010 appealing this Court's sentencing order of June 23, 2010. On July 26, 2010 this Court granted Attorney Smith's motion to withdraw as counsel in this matter and granted Petitioner's in forma pauperis

[1] 42 Pa.C.S. § 9541 et seq.
[2] 18 Pa.C.S. § 2502(b)
[3] 18 Pa.C.S. § 3701(a)(1)(i)
[4] 18 Pa.C.S. § 4910(1)
[5] 18 Pa.C.S. § 6106(a)(1)

McShane

status on his appeal. On August 9, 2011, the Superior Court of Pennsylvania affirmed this Court's judgment of sentence. Thereafter, Petitioner acquired new counsel and filed a Motion to Compel Trial Counsel to Turn Over Client's File to Successor Counsel for PCRA Investigation on November 14, 2011. This Court entered a Rule to Show Cause upon Attorney Smith on November 18, 2011 to show cause why Petitioner's prayer for relief should not be granted. Attorney Smith filed Correspondence with this Court acting as an Answer to the Motion to Compel.

On July 30, 2012, Petitioner filed a counseled PCRA petition. This court then ordered the Commonwealth to file a Response within 60 days of the order on August 1, 2012. The Commonwealth filed its response on September 28, 2012, and this matter is now ready for disposition.

Petitioner's Motion for Post Conviction Relief

In Petitioner's PCRA petition, Petitioner premises his claims for relief upon the following:

> (ii) 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. § 9543(a)(2) (PCRA Pet. ¶ 27).

In support of these claims, Petitioner asserts the following issues:

1. Evidence of viable alternative suspects was not presented to the jury at the time of trial. Kai Anderson murdered Hitender Thakur, not [Petitioner][;] (PCRA Pet. at 6)

2. At trial, Trial Counsel failed to employ readily available and admissible expert testimony in the well-known and well-studied psychological phenomenon of a false confession[;] (PCRA Pet. at 16)

3. [Petitioner] could not have committed the murder as he was in Baltimore. Trial Counsel's failure to exercise minimal due diligence precluded evidence of an alibi to be fully presented before the jury[;] (PCRA Pet. at 25)

4. Alibi rebuttal evidence was produced into the record and placed before the trier of fact that could not and should not have been entered into evidence[;] (PCRA Pet. at 26)

5. Trial Counsel failed to give proper notice of alibi concerning Terry Reeves and as such his testimony was precluded. (PCRA Pet. at 27)

Discussion

42 Pa.C.S. § 9543(a)(2) provides the relevant rule regarding eligibility for relief pursuant to the PCRA:

> 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 Petitioner has 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 . . . (2) that the conviction or sentence resulted from one or more of the following: (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States 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. (ii) 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. (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the Petitioner to plead guilty and the Petitioner is innocent. (iv) The improper obstruction by government officials of the Petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court. (v) Deleted. (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced. (vii) The imposition of a sentence greater than the lawful maximum. (viii) A proceeding in a tribunal without jurisdiction. (3) That the allegation of error has not been previously litigated or waived. (4) That

> the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

All of Petitioner's claims assert that his trial counsel rendered ineffective assistance of counsel. In reviewing a claim of ineffective assistance of counsel, we begin with the presumption that trial counsel rendered effective assistance. Commonwealth v. Chmiel, 30 A.3d 1111, 1127.(Pa. 2011). To obtain relief on an ineffective assistance claim, a petitioner must rebut that presumption and demonstrate that counsel's performance was deficient, and that such performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-91 (1984). In Pennsylvania, the determination of ineffective assistance of counsel is a three-prong test. Specifically, a petitioner must show that (1) the underlying claim is of arguable merit, (2) no reasonable basis existed for counsel's action or inaction, and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. Commonwealth v. Thomas, 44 A.3d 12, 17 (Pa. 2012)(citing Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987)). An ineffective assistance of counsel claim will be rejected if the petitioner fails to establish each prong of the Pierce test. Id. We now address each individual issue Petitioner raises in his PCRA petition.

1. Whether evidence of viable alternative suspects was not presented to the jury at the time of trial.

Petitioner first alleges that his trial counsel was ineffective for failing to call several witnesses and elicit certain testimony from witnesses at trial. Specifically, Petitioner alleges that his trial counsel was ineffective for failing to call Jonathon Johnston, Danielle Ignazzitto, Kimberly Ann Clark and Kenneth Marlow. The Pennsylvania Supreme Court has held that in

order for a petitioner to prove that his trial counsel failed to call a potential witness the petitioner must establish the following:

> (1) [T]he witness existed; (2) the witness was available to testify for the defense; (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 of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Johnson, 966 A.2d 523, 536 (Pa. 2009).

Petitioner asserts that his trial counsel was ineffective for failing to call Jonathon Johnston as a witness to testify. Mr. Johnston would have testified that he heard that another individual was responsible for the robbery/homicide at City Gas and Diesel on May 25, 2006. It is apparent that Petitioner's trial counsel was aware of Mr. Johnston because Mr. Johnston made a recorded statement to Detective Christopher Krokos (Det. Krokos) on June 28, 2006. (PCRA Appendix A). Petitioner asserts that Mr. Johnston was available to testify for his defense and that he would have been willing to testify if Petitioner's trial counsel would have called him as a witness. We must determine whether the absence of Mr. Johnston's testimony was so prejudicial to Petitioner as to have denied him a fair trial.

Upon review of Mr. Johnston's statement made to Det. Krokos on June 28, 2006, we find that most, if not all, of Mr. Johnston's testimony would have been inadmissible hearsay testimony for which there would not have been an exception. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Hearsay testimony is inadmissible unless one of the hearsay exceptions is satisfied. Pa.R.E. 802.

In the matter at bar, Mr. Johnston's entire statement made to Det. Krokos involved what Mr. Johnston allegedly heard Mr. Anderson tell him regarding the robbery/homicide at City Gas

and Diesel on May 25, 2006. Had Mr. Johnston been called as a witness for the defense, his testimony would have been that Mr. Anderson told him that he committed the robbery/homicide at City Gas and Diesel on May 25, 2006. (PCRA Appendix A). In relevant part, the Pennsylvania Rules of Evidence provide that a statement made by the declarant, which is against the interests of the declarant, is admissible if the declarant is determined to be unavailable to testify at trial. Pa.R.E. 804. Pennsylvania further provides that "[i]n a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Pa.R.E. 804(b)(3). Assuming, arguendo, that Mr. Anderson was not available to testify at Petitioner's trial, Petitioner has not presented any other testimony or evidence to corroborate the alleged statement made by Mr. Anderson to Mr. Johnston. Mr. Johnston alleged that Mr. Anderson told him that the reason why Mr. Anderson was not seen on the video surveillance footage from City Gas and Diesel was due to the fact that Mr. Anderson along with two other individuals, Mike Holmes and another unidentified individual were standing out of view from the surveillance camera while Mike Holmes' younger brother committed the robbery/homicide. (PCRA Appendix A at 1). However, Petitioner admitted to committing the robbery/homicide and Petitioner's recounting of the events in his admission match the events that transpired in the surveillance footage. (See Notes of Testimony June 21-23, 2010, 201-06). As the evidence and testimony presented at trial did not corroborate Mr. Anderson's out-of-court statement, Mr. Johnston would have been precluded from testifying as to what Mr. Anderson allegedly said to him. Therefore, we find that Petitioner's ineffective assistance of counsel claim based on his trial counsel's failure to call Mr. Johnston as a witness to be meritless.

Petitioner also identified Ms. Ignazzitto and Ms. Clark as witnesses that were available to testify for his defense. Petitioner asserts that his trial counsel knew of their existence and that they would have been willing to testify if she would have called them as witnesses. (PCRA ¶ 50.2.2; Appendix C). Therefore, the absence of Ms. Ignazzitto and Ms. Clark's testimony must be considered to determine whether their absence prejudiced Petitioner as to have been denied a fair trial. This Court is mindful that only relevant evidence is admissible at trial and evidence that is not relevant is inadmissible. Pa.R.E. 402. Petitioner asserts that Ms. Ignazzitto and Ms. Clark would have testified that Ms. Ignazzitto received a call from Mr. Anderson during the early morning hours of May 27, 2006, wherein Mr. Anderson informed Ms. Ignazzitto that he had a lot of money to give her for their child. (PCRA Appendix C, lines 14-31). However, this information would have been irrelevant in light of the fact that there was no other evidence to corroborate Petitioner's allegation that Mr. Anderson committed the robbery/homicide. It is apparent that Mr. Johnston's testimony would have been inadmissible as hearsay and has failed to assert that any other evidence pointed to Mr. Anderson as the perpetrator of the robbery/homicide. Furthermore, the Petitioner had given a confession that was corroborated by the surveillance footage from the City Gas and Diesel which further discredited any theory Petitioner may have attempted to present at trial. Therefore, as the testimony from Ms. Ignazzitto and Ms. Clark would have been irrelevant, their respective testimony would have been inadmissible.

It is also alleged that Petitioner's trial counsel failed to call Mr. Marlow as a witness when he was available to testify for his defense, that Petitioner's trial counsel knew of his existence, and that he would have been willing to testify if Petitioner's trial counsel would have called him as a witness. This claim also lacks merit as Mr. Marlow's testimony would have been

nothing more than hearsay testimony like the testimony to which Mr. Johnston would have given. Mr. Marlow would have attempted to testify that Mr. Anderson admitted to Mr. Marlow that he committed the robbery/homicide at City Gas and Diesel on May 25, 2006. (PCRA ¶ 50.2.4). Again, assuming arguendo that Mr. Anderson was unavailable to testify at trial, Petitioner has not offered any evidence to corroborate this testimony in light of significant evidence corroborating Petitioner's admission to the robbery/murder. (See Pa.R.E. 804(b)(3) and N.T., 201-06). As Mr. Anderson's out of court statements would have been hearsay for which no exception to the hearsay rule would have been satisfied we find that Petitioner's ineffective assistance of counsel claim based upon his trial counsel's failure to call Mr. Marlow as a witness to be meritless.

In addition to Petitioner's claims that his trial counsel failed to call the above mentioned witnesses, Petitioner also asserts that his trial counsel was ineffective for failing to question Det. Krokos on his interviews with these witnesses. However, as we have already determined that the testimony that the above mentioned witnesses would have provided would have been hearsay evidence or deemed irrelevant, Petitioner's claim that trial counsel's failure to question Det. Krokos on his interviews with these witnesses is without merit. Had Petitioner's trial counsel questioned Det. Krokos about his interview with Mr. Johnston and Mr. Marlow, the only relevant information would have been what Mr. Anderson said to Mr. Johnston and Mr. Marlow about Mr. Anderson's involvement in the robbery/homicide. As this would have been hearsay testimony for which there was no exception for admission, Petitioner's trial counsel was not ineffective for failing to question Det. Krokos regarding his interview with Mr. Johnston and Mr. Marlow. Additionally, the information elicited from Ms. Ignazzitto and Ms. Clark was irrelevant

which would have been inadmissible. Accordingly, Petitioner's trial counsel was not ineffective for failing to question Det. Krokos about his interview with Ms. Ignazitto and Ms. Clark.

2. Whether Petitioner's Trial Counsel was ineffective in failing to call an expert witness to explain false confession phenomenon.

In Petitioner's second issue raised in his PCRA petition, Petitioner avers that his trial counsel rendered ineffective assistance of counsel when she failed to call an expert witness to testify as to false-confession phenomenon. Our Supreme Court has held that "[w]here, by the Commonwealth's witnesses, it is shown that a confession is made voluntarily, without such threat or inducement as might secure a false confession, it must be admitted. If afterwards the defendant testifies, or produces other witnesses who testify, that it was not voluntarily made, it becomes a question for the jury[.]" Commonwealth v. Spardute, 122 A. 161, 165 (Pa. 1923). We first note that the Commonwealth did not present expert witness testimony pertaining to Petitioner's mental health. The Superior Court has held that "[w]e will not find inevitably ineffective a defense that failed to refute with its own expert that which, arguably, had not been established by a Commonwealth expert witness." Commonwealth v. Showers, 782 A.2d 1010, 1021 (Pa. Super. 2001) (citing Commonwealth v. Copenhefer, 719 A.2d at 253-54 n.12 (Pa. 1998)). For a petitioner to establish that his trial counsel was ineffective for failing to present an expert witness, the petitioner "must present facts establishing that counsel knew or should have known of the particular witness." Commonwealth v. Millward, 830 A.2d 991, 994 (Pa. Super. 2003) (internal citation omitted).

In the present matter, Petitioner asserts that his trial counsel should have known of the existence of Dr. Richard Leo, who was available and willing to testify at trial regarding the phenomenon of false confession. However, there was no indication that Petitioner was coerced

into making a confession when he was interviewed by Det. Krokos and Det. Heffner. Petitioner testified that he voluntarily chose to speak with Det. Krokos and that he was never threatened to give a confession. (N.T., 193). We further find that Petitioner's confession was properly corroborated with the video surveillance footage. (See N.T., 203-06). Accordingly, there was no reason for Petitioner's trial counsel to attempt to put forth a false-confession defense when Petitioner admitted that he was not coerced into confessing and the video surveillance footage matched the details Petitioner provided in his confession of the robbery/homicide. Furthermore, the Commonwealth did not present any expert testimony to support the credibility of Petitioner's confession. In light of Petitioner's confession and the evidence corroborating Petitioner's confession, the absence of an expert witness testifying to the phenomenon of false confession cannot be said to have prejudiced Petitioner when the evidence supports Petitioner's recounting of events in his confession. Therefore, Petitioner's trial counsel did not render ineffective assistance of counsel when she failed to call Dr. Leo to testify as to the phenomenon of false confession.

3. Whether Petitioner's trial counsel rendered ineffective assistance when she did not present an alibi in defense of Petitioner.

Petitioner alleges that his trial counsel failed to exercise due diligence in developing an alibi for Petitioner prior to trial when Petitioner was allegedly in Baltimore, Maryland when the robbery/homicide occurred at the City Gas and Diesel on May 25, 2006. We find this assertion to be without merit. The Pennsylvania Rules of Criminal Procedure provide the following:

> A defendant who intends to offer the defense of alibi at trial shall file with the clerk of courts not later than the time required for filing the omnibus pretrial motion provided in Rule 579 a notice specifying an intention to offer an alibi defense, and shall serve a copy of the notice and a certificate of service on the attorney for the Commonwealth.

Pa.R.Crim.P. 567(A).

If a defendant fails to provide notice of an alibi defense pursuant to Pa.R.Crim.P. 567(A), the rules dictate that "the court may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, may grant a continuance to enable the Commonwealth to investigate such evidence, or may make such other order as the interests of justice require." Pa.R.Crim.P. 567(B)(1).

Petitioner asserts that his trial counsel was ineffective for failing to file proper notice of his alibi defense which ultimately precluded Petitioner from presenting such a defense at trial. Upon review of the record, Petitioner's trial counsel informed this Court at side bar that Petitioner and Terry Reeves, Petitioner's father, had never mentioned Petitioner being present in Baltimore when the robbery/homicide occurred. (N.T., 227-28). It was not until the last day of Petitioner's trial that he asserted to his trial counsel that he was in Baltimore. This Court noted at side bar that "if [Petitioner] knew this . . . it is such an important thing that, my goodness, even a child would say you weren't there." (N.T., 228). Even Petitioner in his PCRA petition acknowledges his alibi defense as "perhaps the strongest type of exculpatory evidence available to the accused." (PCRA ¶ 64). We note that had Petitioner truly been in Baltimore during the time of the robbery/homicide that he would have discussed this alibi with his trial counsel. Such an important and undeniable defense would have been the first matter he would have discussed with his trial counsel if there was any substance to the claim. However, we find it more likely that Petitioner realized that his inconsistent recounting of the robbery/homicide and confession were demonstrative of his guilt and that his late realization that he was in Baltimore during the robbery/homicide was a last-ditch attempt to avoid culpability for his crimes. Therefore, we find

that Petitioner's trial counsel did not render ineffective assistance of counsel for not investigating Petitioner's whereabouts during the commission of the robbery/homicide.

4. Whether this Court erred in permitting alibi rebuttal evidence to be produced into the record

Petitioner specifically avers that the Commonwealth produced a surprise witness when it presented James Thornton to testify as to what Petitioner told Mr. Thornton when they were cell mates in jail. Mr. Thornton testified that Petitioner told him that he was going to pay $1,000.00 to a friend in Baltimore to corroborate his alibi that Petitioner was in Baltimore at the time of the robbery/homicide. "Where evidence would have been admissible in the Commonwealth's case in chief it may properly be received in rebuttal for the purpose of contradicting the testimony offered by the defendant." Commonwealth v. Evans, 154 A.2d 57, 95 (Pa. Super. 1959). The trial court is primarily given discretion in determining whether to admit rebuttal evidence. Commonwealth v. Taylor, 876 A.2d 916, 929 (Pa. 2005); Commonwealth v. Mathis, 464 A.2d 362 (Pa. Super. 1983). With respect to witnesses, "[t]he provisions of Pa.R.Crim.P. [573] require the Commonwealth to disclose the identity of eyewitnesses. There is no comparable provision which requires the Commonwealth to disclose rebuttal witnesses who are not eyewitnesses." Commonwealth v. Feflie, 581 A.2d 636 (Pa. Super. 1990). (Where the court allowed calling two rebuttal witnesses despite the fact that they were not disclosed before trial).

During Petitioner's trial he testified that he never discussed the idea of being in Baltimore at the time of the robbery/homicide with anyone else. (N.T., 212). On cross examination, Petitioner conclusively denied that he told anyone that he was going to make up a story about being in Baltimore. (N.T., 212). In response, the Commonwealth presented Mr. Thornton to rebut Petitioner's testimony that he was in Baltimore during the robbery/homicide. In Mr. Thornton's testimony he testified that Petitioner told him that he was going to give $1,000.00 to

a friend in Baltimore to corroborate his alibi that he was in Baltimore during the robbery/homicide. (N.T., 216). This Court exercised its discretion and permitted the rebuttal witness to testify as to Petitioner's whereabouts during the robbery/homicide as Petitioner clearly raised the issue of his whereabouts during his testimony. Therefore, this Court properly permitted the Commonwealth to present Mr. Thornton as a rebuttal witness.

5. Whether Petitioner's trial counsel was ineffective for failing to give notice of an alibi defense in order to produce Terry Reeves as an alibi witness.

Petitioner alleges that his trial counsel was ineffective in failing to exercise due diligence in discovering the alleged whereabouts of Petitioner during the robbery/homicide which ultimately precluded Petitioner from giving notice of his alibi defense and presenting Terry Reeves as an alibi witness. As previously stated, the Pennsylvania Rules of Criminal Procedure require a defendant to provide notice of an alibi prior to trial. See Pa.R.Crim.P. 567(A). Our Supreme Court has held that counsel will not be found to have rendered ineffective assistance of counsel when the defendant fails to cooperate with his trial counsel and apprise trial counsel of relevant information. See Commonwealth v. Bond, 819 A.2d 33 (Pa. 2002)(Where the defendant and his family failed to apprise his trial counsel of trauma he incurred when there was no other way for defendant's trial counsel to have learned of the defendant's trauma) and Commonwealth v. Uderra, 706 A.2d 334 (Pa. 1998) (Ineffectiveness claims against the defendant's trial counsel were held to be meritless when the defendant failed to provide relevant information to his trial counsel regarding witnesses and the defendant's own drug use and psychological problems in a timely manner).

This Court fails to see how anyone other than Petitioner would have had more accurate knowledge as to his whereabouts during the robbery/homicide. Without Petitioner even alluding

to being in Baltimore during the robbery/homicide, Petitioner's trial counsel had no other information that would have prompted her to investigate such a claim. This Court cannot believe that Petitioner's trial counsel would have disregarded Petitioner and Terry Reeves' assertions that Petitioner was in Baltimore during the robbery/homicide. As the record clearly shows that Petitioner's trial counsel was only apprised of his alleged presence in Baltimore on the last day of his trial we find that Petitioner's failure to apprise his trial counsel of his whereabouts amounts to failing to cooperate with his trial counsel. (See N.T., 228). Therefore, Petitioner's claim that his trial counsel rendered ineffective assistance of counsel when she failed to provide notice of an alibi defense in order to present Terry Reeves as a witness is meritless.

Accordingly, we enter the following: