

APPENDIX 5

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY,
PENNSYLVANIA, CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,)

vs.)

MICHAEL DEEP)

1722-
No. 1772-2005

CLERK OF COURT
WASHINGTON CO., PA

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FILED

Paul Pozonsky, J.

January 4, 2011

**OPINION PURSUANT TO PENNSYLVANIA RULE OF APPELLATE
PROCEDURE 1925 (a)**

Defendant files an appeal from an Order entered September 23, 2010, in which this Court denied his Post-Conviction Relief Act (“PCRA”) Petition without an evidentiary hearing. This Court found the petition lacked merit and dismissed the same pursuant to Pa. R. App. Pr. 907.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

In the October 9, 2007 Opinion Pursuant to Rule 1925(a), this Court summarized the facts of this case as follows:

On August 11, 2005, a Criminal Complaint was filed against Michael George Deep (“Appellant”), alleging that he committed an assortment of sexual offenses on his juvenile stepdaughter, Hannah Kennedy (“Victim”), from July 1999 through August 2005. The Criminal Complaint charged 87 counts of “Statutory Sexual Assault”, 18 Pa.C.S.A. § 3122.1; 87 counts of “Rape by Forcible Compulsion”, 18 Pa.C.S.A. § 3121(a)(1); 87 counts of “Involuntary Deviate Sexual Intercourse of a Person Less than 16 Years of Age”, 18 Pa.C.S.A. § 3123(a)(7); 87 counts of “Sexual Assault”, 18 Pa.C.S.A. § 3124.1; 86 counts of “Aggravated Sexual Assault”, 18 Pa.C.S.A. § 3125; 87 counts of “Indecent Assault of a Person Less than 16 Years of Age”, 18 Pa.C.S.A. § 3126(a)(8); 87 counts of

(59)

(A)

“Endangering the Welfare of Children”, 18 Pa.C.S.A. § 4304(a); and 87 counts of “Corruption of Minors”, 18 Pa.C.S.A. § 6301(a)(1).

On August 24, 2005, the preliminary hearing of this matter was scheduled and, at that time, the Commonwealth and the Appellant reached an agreement, whereby 81 of 87 counts at each charge would be dismissed by the Commonwealth, in exchange for the waiver of the preliminary hearing by the Appellant on six (6) of the remaining counts at each charge. On October 23, 2006, the Appellant proceeded to a jury trial, on six (6) counts of “Statutory Sexual Assault”, six (6) counts of “Rape by Forcible Compulsion”, six (6) counts of “Involuntary Deviate Sexual Intercourse of a Person Less Than 16 Years of Age”, six (6) counts of “Sexual Assault”, six (6) counts of “Aggravated Sexual Assault”, six (6) counts of “Indecent Assault of a Person Less Than 16 Years of Age”, six (6) counts of “Endangering the Welfare of Children”, and six (6) counts of “Corruption of Minors”. After a week of testimony, the Appellant was convicted of two (2) counts of “Sexual Assault”, two (2) counts of “Endangering the Welfare of Children”, and two (2) counts of “Corruption of Minors”. The Defendant was found not guilty of all the remaining charges. This Court deferred sentencing, pending a pre-sentence investigation (“PSI”).

On March 22, 2007, following receipt and review of the PSI, this Court sentenced the Appellant as follows:

On the charge of Sexual Assault, two counts, for a period of not less than five years, no more than 10 years on each count to run consecutively;

On the charge of Endangering the Welfare of Children for a period of not less than one year, no more than seven years on each count to run consecutively;

On the charge of Corruption of Minors, for a period of not less than one year, no more than five years on each count to run consecutively.

All of the above sentences are to run consecutively; the [Appellant’s] total sentence shall be not less than 14 years, not more than 44 years.

(Judgment of Sentence, 3/22/07, pp. 1-2).

Defendant then filed post-sentence motions. Before this Court ruled on his post-sentence motions, he filed an appeal to the Superior Court of Pennsylvania. All procedural requirements were adhered to, and the Superior Court reviewed Defendant’s appeal. In its Memorandum Opinion, the Superior Court held: “Based on our review of the record, we conclude that the trial court’s extensive

and well-written Opinion sets forth the appropriate law regarding Deep's first five claims, and correctly concludes that each claim lacks merit. We therefore affirm on the basis of the trial court's Opinion with regard to Deep's first five claims of error." **Memorandum Opinion** April 15, 2009, at 3. The Superior Court went on to deny Defendant's sixth claim for relief, concluding that the sentencing issue was waived for failure to properly raise the claim in his 1925(b) Concise Statement. *Id.* at 6.

On August 6, 2010 Defendant filed a Petition for Post Conviction Relief, where he alleged the ineffectiveness of his trial and appellate counsel. This Court entered an order on August 31, 2010 notifying Defendant that it intended to dismiss his PCRA without a hearing, and ordering Defendant to respond within twenty days of that order. On September 10, 2010 Defendant filed an Objection to Dismissal of Petition for Post Conviction Collateral Relief. In his Objection, Defendant asserted that this Court needed to further develop the record for his PCRA and hold an evidentiary hearing. This Court disagreed, and on September 27, 2010 denied Defendant's PCRA Petition without a hearing. Defendant then properly filed a Notice of Appeal on October 10, 2010 and this Court ordered Defendant to file a Concise Statement of Matters Complained of on Appeal.

DISCUSSION

Defendant raises four issues on appeal. Specifically, Defendant takes issue with this Court's denial of his PCRA Petition without an evidentiary hearing. In his first three contentions of error, Defendant argues that his trial counsel was ineffective for failing to file a bill of particulars, failing to properly prepare for

trial, and failing to preserve sentencing issues on appeal. Defendant asserts that there was merit to these arguments, and that this Court erred in denying the Petition without a hearing. In his fourth issue raised on appeal, Defendant alleges that this Court erred in denying his PCRA Petition without a hearing because his appellate counsel was ineffective.

None of the arguments set forth in Defendant's Petition present a genuine issue of material fact for this Court to determine in a PCRA hearing. Where "there are no genuine issues concerning any material fact and...the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings" a trial court can deny a petition without a hearing. Pa. R. Crim. Pro. 907.

Trial Counsel's Ineffectiveness

The test for ineffective assistance of counsel is well settled:

...the *Pierce* test requires the PCRA petitioner to demonstrate that: (1) the underlying claim has substantive merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of that counsel's deficient performance.

Commonwealth v. Hall, 872 A.2d 1177, 1184 fn 6 (Pa. 2005) citing ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987). Defendant's arguments fall far below the high threshold of merit required by the *Pierce* test. Indeed, none of Defendant's arguments presented a genuine issue of material fact concerning the prejudice prong of the *Pierce* test for this court to determine in a PCRA hearing. As set forth below, Defendant failed to present any argument alleging

how trial counsel's alleged failure to file a bill of particulars, failure to properly prepare for trial, or failure to properly preserve issues for appeal prejudiced him.

Therefore, this Court respectfully requests that the Order entered September 23, 2010 denying Defendant's PCRA Petition be affirmed.

Failure to File a Bill of Particulars

"The function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise." *Commonwealth v. Simone*, 447 Pa. 473, 477 (Pa. 1972). Defendant argues that his trial counsel failed to file a bill of particulars to request the specific dates and times of the alleged offenses. Such a request was unnecessary and its absence did not prejudice Defendant.

The Commonwealth did not allege specific dates for the crimes. Instead, the Commonwealth asserted that between July 1999 and August 2005, Defendant committed 87 counts of Statutory Sexual Assault, Rape by Forcible Compulsion, Involuntary Deviate Sexual Intercourse of a Person Less Than 16 Years of Age, Sexual Assault, Aggravated Sexual Assault, Indecent Assault of a Person Less Than 16 Years of Age, Endangering the Welfare of Children, and Corruption of Minors. At the preliminary hearing, pursuant to an agreement between the Commonwealth and Defendant, the Commonwealth dropped 81 of the 87 counts of each charge. Trial Transcript, p. 424. Defendant was put on notice of these dates in the charging instrument filed October 20th, 2005, and therefore the lack of specificity was not a surprise to Defendant at trial, nor was it prejudicial.

In chambers after the trial began, defense counsel specifically addressed the range of dates alleged by the Commonwealth:

...in the criminal information there is not a specific date on any of the allegations. They are from when she was 10 years old to when she was 16 1/2 years old. It doesn't specifically allege conduct on a particular day, which is the general technique of the Commonwealth in such cases so that the defense cannot obviously use an alibi as their defense. We have no idea what days we're supposed to have committed the crime.

Trial Transcript at 200-01. Defense counsel was not surprised by the Commonwealth's tactics at the trial. Indeed, based on counsel's statement that a general charging instrument is the "technique of the Commonwealth" it seems counsel even anticipated such a broad charging instrument. *Id.*

In his Petition, Defendant alleged that a Bill of Particulars was necessary "...because of the uncertainty of the dates of the alleged offenses, which was critical at trial when the most of the charges were dismissed and the couple of remaining charges switched dates during the course of the trial." **PCRA Petition**, ¶ 35(a) (sic). At trial, the Commonwealth did elicit testimony about specific allegations on specific dates, and at the conclusion of the Commonwealth's case, the Court ruled in Defendant's favor and narrowed the dates which the jury could consider for the various charges. There was no change in the dates, there was no surprise at trial, and the defense was fully prepared regarding the alleged dates of the offenses. The Defendant, therefore, was not prejudiced and this claim lacks merit.

Even assuming, *arguendo*, that the underlying claim has merit, Defendant did not present any argument which would give rise to a genuine issue of material fact concerning the prejudice prong of the *Pierce* test. Defendant merely asserts that the lack of a bill of particulars "prohibited [Defendant] from using certain defenses that would have been available to him at the time of trial (such as an

alibi defense).” Defendant does not explain what this alibi defense would have been, how it would have countered the Commonwealth’s evidence, who would have presented it, or any other information about the possibility of an alibi.

Further, when Defendant testified in his defense, he did not deny his presence or assert any kind of alibi. Instead, he specifically admitted to being present on August 7, 2005:

Ms. McDonald: Would you tell the jury what happened on August 7?

Michael Deep: I went upstairs to go to bed. I knew my wife was taking some things two miles down the road to her son. I was half asleep. Hannah walked into the room and I believe she said, "Do you need anything?" And then my ex-wife came in and everything broke loose then.

Trial Transcript, p. 441.

Without any further information or allegation about the potential of an alleged alibi defense, there is no genuine issue of material fact for this Court to consider at a hearing and therefore, this Court properly denied Defendant’s Petition without a hearing.

Failure to Prepare for Trial

In his petition, Defendant alleged:

- B) Counsel failed to properly prepare for trial, specifically by:
1. Counsel did not meet with and prepare [Defendant] for his testimony prior to the commencement of trial; and
 2. Counsel failed to meet with [Defendant] prior to the commencement of trial to discuss potential witnesses and trial strategies; and
 3. Counsel failed to make reasonable investigation into matters brought to his attention by [Defendant]...

PCRA Petition at ¶ 35. However, Defendant makes no argument asserting how he was prejudiced by this alleged deficient performance. Without any such allegations or argument, there are no genuine issues of material fact for this Court to consider in a hearing. Therefore, this Court properly ruled that a hearing on this issue was unnecessary pursuant to PA Rule of Criminal Procedure 907.

Failure to Preserve Issues on Appeal

Defendant's trial counsel failed to challenge the discretionary portion of this Court's sentencing in Defendant's 1925(b) post-sentence motions and Defendant's 1925(b) statement. Defendant attempts to analogize his case to **Com. v. Lantzy**, where there was a complete failure to file a direct appeal. In **Lantzy**, the Pennsylvania Supreme Court ruled that where there is a complete failure to file an appeal, counsel is presumed ineffective and a petitioner need not establish prejudice. **Com. v. Lantzy**, 736 A.2d 564, 571 (Pa. 1999) However, the Supreme Court clarified the scope of this rule in **Com. v. Halley**:

"[I]t is well established that the decision whether to presume prejudice or to require an appellant to demonstrate actual prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel. As we observed in **Lantzy**, the failure to perfect a requested direct appeal is the functional equivalent of having no representation at all. The difference in degree between failures that completely foreclose appellate review, and those which may result in narrowing its ambit, justifies application of the presumption [of ineffectiveness] in the more extreme instance. Accord **Hernandez**, 755 A.2d at 9 n.4 ("[A] PCRA petitioner is entitled to an appeal nunc pro tunc where prior counsel's actions, in effect, entirely denied his right to a direct appeal, as opposed to a PCRA petitioner whose prior counsel's ineffectiveness may have waived one or more, but not all, issues on direct appeal.").

Commonwealth v. Halley, 870 A.2d 795, 801 (Pa. 2005) (some internal citations omitted). The **Halley** decision makes it clear that where counsel merely

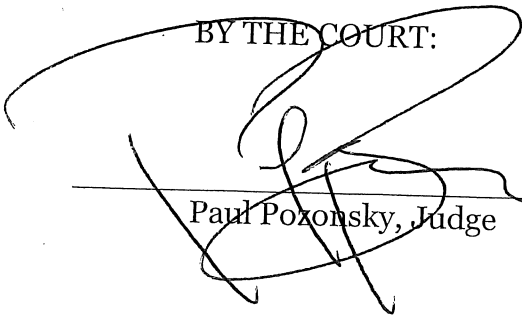
fails to raise certain issues on appeal, there is no presumption, and thus Defendant must show prejudice. Defendant makes no argument that the failure to properly appeal the discretionary aspects of his sentence prejudiced him. Without any argument, there is no genuine issue of material fact for this Court to explore at a PCRA hearing.

Appellate Counsel's Alleged Ineffectiveness

In his Petition, Defendant challenged the effectiveness of his counsel on direct appeal as well as his appeal to the Pennsylvania Supreme Court. In both claims, Defendant contends that appellate counsel failed to properly file claims. However, Defendant fails to make any argument on the merit of the alleged underlying claims. This is the first prong of the *Pierce* test. "The three-prong standard for ineffectiveness established in *Commonwealth v. Pierce* relates to the performance of counsel at any level of representation." ***Commonwealth v. Hall*** 872 A.2d 1177 (Pa. 2005). Thus Defendant was responsible for alleging some merit in the alleged underlying claims. Defendant has failed to even make an argument to that effect, and therefore there is no genuine issue of material fact to require this Court to hold a hearing on said alleged claims.

For the foregoing reasons, this Court respectfully requests that its order denying Defendant's PCRA Petition be affirmed.

BY THE COURT:


_____, J.
Paul Pozonsky, Judge