

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
LAMARR GEORGE,		
Appellant		No. 1109 WDA 2011

Appeal from the PCRA Order June 28, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0007850-2008

BEFORE: BOWES, LAZARUS, and COLVILLE,* JJ.

MEMORANDUM BY BOWES, J.:

Filed: March 8, 2013

Lamarr George appeals from the June 28, 2011 order denying him PCRA relief. After review, we affirm.

On May 6, 2009, a jury convicted Appellant of criminal attempt at homicide and aggravated assault – serious bodily injury in connection with the February 4, 2008 shooting of Conrad Rozier. Mr. Rozier was in the vicinity of a block of row houses on Bentley Avenue in Pittsburgh when he was shot in the chest, stomach, and finger. While an Allegheny County

* Retired Senior Judge assigned to the Superior Court.

Housing Authority video camera installed on a nearby light pole captured the shooting, the shooter could not be identified.¹

Vernon Mack was located near the scene of the shooting, and he told police that the shooter ran into 2001 Bentley Drive, Cynthia Gooden's residence. Mr. Mack, when presented with a photographic array, identified Donell Gooden, Ms. Gooden's adult son, as one of the individuals at the scene. Based on that information, police arrested Donell.

After learning that Donell Gooden was arrested, Denise Payne contacted police. Initially, she expressed reluctance to identify herself for fear of reprisal. Eventually, however, she provided a recorded statement to police detailing her knowledge of the February 4, 2008 shooting and incriminating Appellant. The jury heard the recorded statement, which was inconsistent in many respects with Ms. Payne's testimony at trial. Ms. Payne stated in the recording that she and her children resided in a row house at 2003 Bentley Drive, and she was next door visiting Ms. Gooden when shots rang out. She saw Appellant and the victim in front of her home before the shooting. Appellant was the boyfriend of Amber Gooden, Cynthia Gooden's daughter. Upon hearing the gunfire, and fearing for the safety of her young daughter unattended next door, Ms. Payne immediately headed home. As she exited the Gooden residence, Amber asked her to unlock her basement

¹ Mr. Rozier testified at trial that he could not identify the shooter.

rear door. Ms. Payne complied with Amber's request and Appellant entered Ms. Payne's basement from the backyard. He was carrying a black and silver gun and a cell phone. Amber joined him shortly thereafter and the couple remained in Ms. Payne's basement for a time smoking, drinking, and watching TV.

Ms. Payne further recounted that Appellant and Amber later came upstairs and that Amber stationed herself at the window and reported to Appellant on the movements of police as they conducted their investigation. Ms. Payne overheard Appellant tell Amber, "I was trying to aim for his head." N.T., 5/4-6/09, at 81. The couple left Ms. Payne's home around 11:30 p.m. that evening.

Cynthia Gooden testified that Donell was painting an upstairs bedroom in her home that day. Amber and Appellant were going back and forth between her home and that of Ms. Payne. At around 4:00 p.m., she opened her door to summon Ms. Payne to see her new kitchen tile and wallpaper. She saw Appellant and the victim outside arguing, and Appellant had a gun. She heard Appellant tell the victim, "You're going to get shot." *Id.* at 105. She went back into her home and shortly thereafter heard gunshots. Then, Appellant entered through the front door of her home and exited through the back door of her home.

Dr. Robert Levine, laboratory manager in the Forensic Science Section of the Allegheny County Medical Examiner's Office, testified that he

conducted gunshot residue tests on samples from Donell Gooden and there was no evidence that he fired a weapon. The parties stipulated at trial that the firearm used in the shooting was found on the person of Alan Glover on February 22, 2008, and that Mr. Glover lived across the street from Appellant's residence.

Defense counsel elicited testimony from Officer Cynthia Smith on cross-examination that Vernon Mack saw the shooter run into 2001 Bentley Drive. *Id.* at 151. On redirect examination, Officer Smith testified that the Commonwealth attempted to subpoena Mr. Mack but was unable to find him. *Id.* at 154.

At the commencement of the defense case, trial counsel apprised the court that if Vernon Mack appeared, he intended to call him as a defense witness. He would also call Detective Joseph Myers, the officer who located and interviewed Mr. Mack. In his offer of proof as to Detective Myers, defense counsel proffered that the witness would testify that the individual that Mr. Mack identified in the photo array was not Appellant. The Commonwealth objected to such testimony on hearsay grounds and the court sustained the objection. Shortly thereafter, counsel for Appellant advised the court that the defense would not be calling Vernon Mack as a witness, and, in accord with the court's earlier ruling, Detective Myers was precluded from testifying. *Id.* at 121.

It was the defense theory that the bias of Denise Payne and Cynthia Gooden raised reasonable doubt as to Appellant's guilt. The Commonwealth focused on the fact that the forensic evidence exculpated Donell Gooden, and it attributed the inconsistencies between Ms. Payne's and Ms. Gooden's earlier statements and trial testimony to their fear of reprisal. The jury returned a guilty verdict on both charges and Appellant was sentenced on August 6, 2009 to nine to eighteen years incarceration.

Appellant did not file a direct appeal. Instead, on October 13, 2009, he filed a timely *pro se* PCRA petition. Counsel was appointed, and he filed an amended PCRA petition on Appellant's behalf. The Commonwealth filed an answer to the petition and the court held an evidentiary hearing on June 28, 2011. That same day, relief was denied. Appellant filed the within appeal on July 7, 2011, and complied with the trial court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. The PCRA court issued its Rule 1925(a) opinion and the matter is ripe for our review. Appellant presents one issue for our consideration:

1. Did the trial court err when it denied [Appellant's] Petition for Post-Conviction relief wherein [Appellant] alleged that trial counsel was ineffective for failing to call Vernon Mack as a witness where Mr. Mack was present at trial and where [Appellant] specifically requested that counsel call Mr. Mack as a witness?

Appellant's brief at 4.

Our standard of review of a PCRA court's decision "is limited to examining whether the PCRA court's findings of fact are supported by the

record, and whether its conclusions of law are free from legal error. Our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the party who prevailed in the PCRA court proceeding.” ***Commonwealth v. Busanet***, 54 A.3d 35, 45 (Pa. 2012) (citation omitted).

It is Appellant’s contention that he was denied the effective assistance of counsel at trial because counsel chose not to call Vernon Mack to testify that Donell Gooden was the shooter, as evidenced by his choice during the photographic array. In order to prevail on such a claim, Appellant must establish

(1) that the underlying claim is of arguable merit; (2) that counsel’s course of conduct was without a reasonable basis designed to effectuate his client’s interest; and (3) that he was prejudiced by counsel’s ineffectiveness, *i.e.* there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different.

Commonwealth v. Wah, 42 A.3d 335, 338 (Pa.Super. 2012) (citations omitted). Where counsel’s alleged ineffectiveness concerns a matter of strategy or tactics, “counsel’s assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client’s interests.” ***Commonwealth v. Sneed***, 45 A.3d 1096, 1107 (Pa. 2012). Unless the alternative strategy not pursued offered a “substantially greater” potential for success than the one chosen, there can be no finding that counsel’s strategy lacked a reasonable basis. ***Id.***

In order to establish that trial counsel was ineffective for failing to call a certain witness, Appellant must also demonstrate:

(1) the 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 [Appellant] a fair trial.

Commonwealth v. Johnson, 966 A.2d 523, 536 (Pa. 2009) (quoting ***Commonwealth v. Washington***, 927 A.2d 586, 599 (Pa. 2007)).

At the PCRA hearing, trial counsel acknowledged that Vernon Mack selected Donell Gooden's photograph from an array. N.T. PCRA Hearing, 6/28/11, at 4. However, counsel interviewed Mr. Mack during the recess immediately before the start of the defense case. ***Id.*** at 5. At that time, Mr. Mack looked into the courtroom and stated that he recognized Appellant as being at the scene with the victim when the latter was shot and that he would so testify. Exhibit 1 (Certified Statement of Joseph Paletta, Esquire, at 2); N.T. PCRA Hearing, 6/28/11, at 9. This testimony, together with the surveillance video depicting two males, would have placed Appellant at the scene and excluded Donell Gooden. Further, it would have corroborated the testimony of Ms. Payne and Ms. Gooden, buttressing the credibility of those witnesses, and undermining a defense strategy highlighting their lack of credibility. ***Id.*** at 10. While counsel conceded minimal benefit to Appellant from Mr. Mack's earlier identification of Gooden as the shooter, that benefit was outweighed by the fact that counsel would have to explain away Mr.

Mack's in-court identification of Appellant as being at the scene. Exhibit 1 (Certified Statement of Joseph Paletta, Esquire, at 2). He explained the choices to Appellant, and Appellant made the ultimate decision not to call Mr. Mack. *Id.*

At the evidentiary hearing, Appellant testified that he was unaware that Vernon Mack was present in the courthouse during his trial and available to testify. He denied that he made the decision to forego Mr. Mack's testimony or that there was any discussion with counsel regarding the witness. He characterized Mr. Mack as "the only witness [he] had." N.T. PCRA Hearing, 6/28/11, at 12. Appellant maintained that he would have instructed his counsel to call the witness had he known he was present, even though the witness's testimony potentially could have hurt his defense. PCRA counsel argued that trial counsel's strategy was not reasonably designed to protect Appellant's interest.

The Commonwealth countered that Mr. Mack would have identified Appellant as being present at the scene. Since the video surveillance confirmed the presence of only two people at the scene, the shooter and the victim, Appellant would have necessarily been the shooter. Thus, the Commonwealth argued that the defense strategy of proving reasonable doubt by discrediting the testimony of the Commonwealth's witnesses was a reasonable one.

The PCRA court found trial counsel's testimony credible and concluded that counsel had a reasonable basis for not calling Mr. Mack as a witness. The court also found that the witness's testimony would not have been beneficial to the defense.

We must accord the PCRA court's credibility findings great deference. ***Commonwealth v. Dennis***, 17 A.3d 297 (Pa. 2011). Where, as here, the record supports the court's credibility determination, we are bound by it. ***Id.*** We see no basis to disturb the PCRA court's finding that trial counsel had a reasonable basis for choosing not to call Vernon Mack to the stand, and that Appellant agreed with counsel's strategy. Hence, Appellant cannot prevail on his claim that the PCRA court erred in denying relief.

Order affirmed.