J. S55012/13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DAVID LAWRENCE DIXON,	:	No. 1757 WDA 2012
Appellant	:	

Appeal from the PCRA Order, October 18, 2012,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0005571-2007,
CP-02-CR-0006620-2007, CP-02-CR-0008288-2008

BEFORE: FORD ELLIOTT, P.J.E., GANTMAN AND SHOGAN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: December 4, 2013

David Lawrence Dixon appeals from the order of the Court of Common Pleas of Allegheny County dated October 18, 2012, denying his first petition brought pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Finding no error, we affirm.

The facts of this case, as previously summarized, are as follows.

> In February 2006, Appellant took six-year-old A.P. to a remote area in West Deer Township and represented to the boy that they were going fishing. A.P. was B.P.'s son, and B.P. and her four children lived in the same apartment building where Appellant resided. Instead of fishing with A.P., Appellant pulled down A.P.'s pants and underwear, touched the boy's buttocks, and stuck his finger inside A.P.'s rectum. After sexually abusing the boy, Appellant took him home.

Appellant returned to B.P.'s home a couple of days after this incident and asked B.P. if he could take A.P. somewhere. A.P. became visibly upset and told his mother that he did not want to accompany Appellant anywhere. Then, A.P. informed his mother that Appellant had touched his private area, and she immediately contacted police. Following an investigation, Appellant was charged at criminal action number CP-02-CR-0006620-2007 with one count each of indecent assault of a person less than thirteen years of age, corruption of a minor, and endangering the welfare of a child.

In March 2006, Appellant met another woman, C.J., and began to spend a significant amount of time with her two children, including C.J.'s five-year-old daughter, S.J. On February 23, 2007, Appellant took S.J. to the North Park Lounge Clubhouse near Pittsburgh. At around 10:00 p.m., S.J. entered the girl's bathroom because she had injured her finger, which was bleeding. Heather Henzler was in the bathroom and asked S.J. if her mother or father was present, and the child replied that she was with a friend whose first name was Dave. Ms. Henzler began to question S.J., and the child related to Ms. Henzler that Dave would often kiss her on the mouth. As a result, C.J. and police were contacted. While seated in a police car with Ms. Henzler waiting for her mother to arrive, S.J. told Ms. Henzler that Dave would also kiss her vagina. For his conduct involving S.J., Appellant was charged at CP-02-CR-0005571-2007 with involuntary deviate sexual intercourse ("IDSI") with a child, aggravated indecent assault of a child, endangering the welfare of a child, indecent assault of a person less than thirteen years old, corruption of a minor, and a charge that was later ***nol prossed*** by the Commonwealth.

A charge of criminal solicitation to commit a crime was filed against Appellant at criminal action number CP-02-CR-0008288-2008 after Appellant attempted to bribe A.P.'s mother, B.P., into

> withdrawing the criminal charges at CP-02-CR-0006620-2007.

Commonwealth v. Dixon, No. 1206 WDA 2009, unpublished memorandum at 1-3 (Pa.Super. filed August 6, 2010).

All three cases proceeded to a jury trial on November 12, 2008. Therein, S.J. and A.P. each testified regarding the abuse. Henzler also testified as to her encounter with S.J. at the North Park Clubhouse. In addition, police related that when appellant was arrested on March 20, 2007, he was hiding under a bed, fought with police, and had to be subdued with a Taser. When appellant was given a copy of the criminal complaint relating his sexual abuse of S.J., he stated that he was sorry for what he had done. Finally, Shawn Burns, a fellow inmate of appellant at the Allegheny County Jail, testified that appellant admitted that he had removed a boy's pants and placed his finger inside of his buttocks and that he had licked the vagina of a little girl.

In support of the criminal solicitation charge, B.P. testified as follows. After A.P. revealed appellant's activities to her, B.P. warned Lilu Miah about appellant; Miah was a friend of appellant and had young children about the same age as her son. Miah subsequently approached B.P. and asked her to listen to a message that was on her cellular telephone. The message was from appellant, was addressed to B.P., and offered B.P. $600 to either drop the charges or call police and inform them that A.P. was fabricating his accusations. Miah continued to relay offers from appellant to give B.P.

money if she would stop the criminal prosecution relating to appellant's abuse of A.P.

Appellant was convicted of all charges at the three criminal actions with the exception of the charge of aggravated indecent assault of a child with S.J. as the victim. On January 26, 2009, appellant was sentenced to an aggregate term of incarceration of 22 to 44 years' imprisonment.[1] After post-sentence motions were filed, Attorney Brestensky was permitted to withdraw and Thomas Farrell, Esq., was appointed. On May 14, 2009, a hearing was conducted and appellant was determined to be a sexually violent predator.

A timely notice of appeal was filed, and the sole issue presented was whether the evidence was sufficient to sustain appellant's conviction of IDSI as he did not penetrate S.J.'s vagina with his tongue. A panel of this court affirmed judgment of sentence on August 6, 2010 and denied his petition for reargument on October 8, 2010. ***Commonwealth v. Dixon***, 11 A.3d 1015 (Pa.Super. 2010), reargument denied. A timely petition for allowance of appeal to the Pennsylvania Supreme Court was filed and subsequently denied on April 7, 2011. ***Commonwealth v. Dixon***, 610 Pa. 605, 20 A.3d 1210 (2011).

On September 28, 2011, appellant filed the instant PCRA petition. Counsel was appointed and an amended petition was filed. On August 27,

[1] At trial, appellant was represented by Veronica Brestensky, Esq.

2012, the Honorable Anthony Mariani filed a notice of intent to dismiss all of appellant's issues with the exception of one. Appellant filed a response to the notice of intent to dismiss on September 7, 2012. A PCRA hearing was scheduled for October 2, 2012. Following the hearing, the PCRA court ordered briefs to be filed. On October 18, 2012, Judge Mariani dismissed the PCRA petition. A timely notice of appeal was filed, and appellant complied with the PCRA court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the PCRA court has filed an opinion.

The following issues have been presented for our review:

1. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S PCRA PETITION SINCE TRIAL COUNSEL BRESTENSKY WAS INEFFECTIVE FOR FAILING TO OBJECT TO COMMONWEALTH WITNESS SHAWN BURNS, WHO WAS THE MOST DAMAGING COMMONWEALTH WITNESS, TESTIFYING BEFORE THE JURY VIA VIDEO RATHER THAN IN PERSON, WHICH VIOLATED APPELLANT'S CONFRONTATION CLAUSE RIGHTS?

2. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S PCRA PETITION SINCE TRIAL COUNSEL WAS INEFFECTIVE FOR STIPULATING TO WHAT VICTIM S.J.'S MOTHER, COMMONWEALTH WITNESS [C.J.], WHO WAS INCARCERATED AT SCI-MUNCY, WOULD TESTIFY TO, AND FOR FAILING TO CROSS EXAMINE [C.J.] OR ASK IF SHE HOPED FOR OR RECEIVED ANY DEAL FROM THE COMMONWEALTH FOR TESTIFYING AGAINST APPELLANT?

> 3. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S PCRA PETITION SINCE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DAMAGING HEARSAY TESTIMONY FROM [MS. HENZLER] AND [S.S.] REGARDING WHAT [S.J.] ALLEGEDLY TOLD THEM AT THE NORTH PARK CLUBHOUSE LOUNGE?
>
> 4. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S PCRA PETITION SINCE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A SUPPRESSION MOTION REGARDING APPELLANT'S ALLEGED STATEMENT IN THE POLICE CAR, AND THE DRAWING BY S.J.?
>
> 5. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S PCRA PETITION SINCE POST SENTENCING/APPEAL COUNSEL FARRELL WAS INEFFECTIVE FOR FAILING TO RAISE A LACK OF JURISDICTION ISSUE REGARDING VICTIM S.J. AT CC NO. 5571-2007?

Appellant's brief at 3-4.

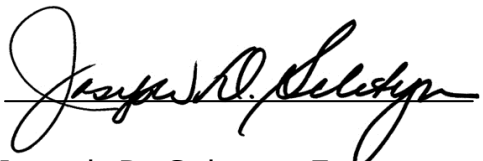
Our standard of review for an order denying post-conviction relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Franklin***, 990 A.2d 795, 797 (Pa.Super. 2010). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

We find no error with the PCRA court's ruling. After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the PCRA court, it is our determination that there is no merit to the questions raised on appeal. The PCRA court's opinion, filed

on April 26, 2013, comprehensively discusses and properly disposes of the questions presented. We will adopt it as our own and affirm on that basis.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013

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

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	CC Nos. 200705571
	)	200706620
DAVID DIXON,	)	200808288
	)	
Petitioner.	)	
	)	

OPINION

Mariani, J.

This is an appeal from this Court's denial of Petitioner's Post-Conviction Relief Act petition. Petitioner, David Lawrence Dixon (hereinafter, "Mr. Dixon" or "Petitioner"), was originally charged by multiple criminal informations with the following: at CC No. 2007005571 with one (1) count each of involuntary deviate sexual intercourse with a child, aggravated indecent assault of a child, endangering welfare of children, indecent assault, corruption of minors, and failure to comply with sexual offender's registration; at CC No. 200706620, Petitioner was charged with one count each of indecent assault, corruption of minors, and endangering the welfare of children; at CC No. 200808288, he was charged with one count of criminal solicitation (intimidation of victim/witness).

Prior to trial, the count of failure to comply with sexual offender's registration was severed from the remaining charges. Petitioner proceeded to a jury trial before the

late Honorable John K. Reilly, Jr.[1] On November 13, 2008, the jury found Petitioner not guilty of aggravated indecent assault and guilty of all of the remaining charges.

On January 26, 2009, Judge Reilly sentenced Petitioner to not less than fifteen (15) nor more than thirty (30) years of incarceration for involuntary deviate sexual intercourse and a consecutive term of not less than one nor more than two years of incarceration for endangering the welfare of children at CC No. 200705571. At CC No. 200706620, he imposed a consecutive sentence of not less than one (1) nor more than two (2) years of imprisonment for indecent assault, a consecutive sentence of not less than one (1) nor more than two (2) years of incarceration for corruption of minors and a consecutive sentence of not less than three (3) nor more than six (6) years of consecutive imprisonment for criminal solicitation. Petitioner received an aggregate sentence of twenty-two (22) to forty-four (44) years of incarceration. The Commonwealth filed a motion to nolle prosse the charge of failure to comply with sexual offender's registration. The motion was granted. Petitioner filed a timely appeal. The Superior Court affirmed the judgment of this Court. Petitioner then timely filed a pro se petition pursuant to the Post-Conviction Relief Act ("PCRA"), which was assigned to this member of the Court. This Court appointed Scott Coffey, Esquire, to represent Petitioner. Appointed counsel then filed an Amended Petition Pursuant to the Post-Conviction Relief Act. After a hearing, the Court denied the amended petition. This timely appeal follows.

Petitioner filed a Concise Statement of Matter Complained of on Appeal Pursuant to Rule 1925(b). In this filing, Petitioner asserts that he is raising the following issues:

[1] The instant case was reassigned to the Honorable Anthony Mariani after Judge Reilly unexpectedly passed away.

1. The trial court erred in denying Appellant's PCRA petition since trial counsel Brestensky was ineffective for failing to object to Commonwealth witness Shawn Burns, who was the most damaging Commonwealth witness, testifying before the jury via video rather than in person, which violated Appellant's Confrontation Clause Rights.

2. The trial court erred in denying Appellant's PCRA petition since trial counsel was ineffective for stipulating to what victim S.J.'s mother, Commonwealth witness Christina Kones, who was incarcerated at SCI-Muncy, would testify to, and for failing to cross examine Jones or ask if she hoped for or received any deal from the Commonwealth for testifying against Appellant.

3. The trial court erred in denying Appellant's PCRA petition since trial counsel was ineffective for failing to object to the damaging hearsay testimony from Heather Henzler and Stacy Smith regarding what S.J. allegedly told them at the North Park Clubhouse Lounge.

4. The trial court erred in denying Appellant's PCRA petition since trial counsel was ineffective for failing to file a suppression motion regarding Appellant's alleged statement in the police car, and the drawing by S.J.

5. The trial court erred in denying Appellant's PCRA petition since post-sentencing/appeal counsel Farrell was ineffective for failing to raise a lack of jurisdiction issue regarding victim S.J. at CC No. 5571-2007.

Relative to the petitioner's claims in this case, it is well established that counsel is presumed effective and the petitioner bears the burden of proving ineffectiveness. Commonwealth v. Cooper, 596 Pa. 119, 941 A.2d 655, 664 (Pa. 2007). To overcome this presumption, the petitioner must satisfy a three-pronged test and demonstrate that: (1) the underlying substantive claim has arguable 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 counsel's deficient performance. Commonwealth

v. Pierce, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001). A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any of these prongs. Id. at 221-222. Moreover, the credibility determinations of a trial court hearing a PCRA petition are binding on higher courts where the record supports such credibility assessments. Commonwealth v. R. Johnson, 600 Pa. 329, 356-57, 966 A.2d 523, 539 (2009).

The threshold inquiry in a claim of ineffective assistance of counsel is whether the issue/argument/tactic which counsel has forgone and which forms the basis for the assertion of ineffectiveness is of arguable merit. Commonwealth v. Ingram, 404 Pa. Super. 560, 591 A.2d 734 (Pa.Super. 1991). Counsel cannot be considered ineffective for failing to assert a meritless claim. Commonwealth v. Tanner, 600 A.2d 201 (Pa.Super. 1991).

Petitioner's first claims that trial counsel was ineffective for failing to object to the video-conferenced testimony of Shawn Burns because the video-conferenced testimony violated his Confrontation Clause rights. This claim is meritless. Although Pa.R.Crim.P. 119 generally prohibits the use of live video-conferencing at trial, use of such testimony is permitted if a defendant consents to its use. Specifically, as set forth in Pa.R.Crim.P 119(B), a "defendant may consent to any proceeding being conducted suing two-way simultaneous audio-visual communication". In this case, the record fully supports this Court's conclusion that the defendant consented to the presentation of the testimony of Shawn Burns through the use of live video-conferencing. At the PCRA hearing, trial counsel clearly and unequivocally testified that she had consulted with Petitioner about the fact that the assistant

district attorney advised her that Shawn Burns resided out of state and the Commonwealth hoped that his testimony could have been presented via video-conferencing rather than having him appear in person. The Assistant District Attorney advised, however, that she would present him live if necessary. Trial counsel conferred with Petitioner and discussed her belief that it may have been beneficial to have Burns testify via video-conferencing. According to trial counsel, she believed that the video-conferenced testimony may have provided a strategic benefit because Burns' failure to testify live before the jury could provide the defense with a basis to challenge his credibility, a basis that would not exist if he testified in court. Trial counsel testified that she discussed the issue with Petitioner prior to trial and the petitioner consented to the video-conferenced testimony and he did not challenge trial counsel's proposed strategy. Trial counsel's testimony was supported by the testimony of the assistant district attorney that represented the Commonwealth at trial. This Court found the testimony of trial counsel and the assistant district attorney to be credible. Petitioner also testified at the PCRA hearing. For the reasons set forth on the record in that proceeding, this Court did not find his testimony credible. Because the credible evidence convinced this Court that the petitioner consented to the use of the video-conferenced testimony and the consent was part of a sound trial strategy, this Court does not believe that trial counsel rendered ineffective assistance of counsel to Petitioner relative to the use of the video-conferenced testimony.[2]

Petitioner next claims that trial counsel rendered ineffective assistance of counsel by stipulating to the testimony of Christina Jones, the mother of victim "SJ". Ms. Jones was incarcerated at SCI-Muncy at the time of trial. Petitioner claims he is entitled to relief

[2] Petitioner also claims that his consent should have been memorialized in an on-the-record- colloquy. This Court has found no legal authority requiring such consent to be placed on the record.

because the stipulation denied him the ability to cross examine her to determine if she hoped for or received any favorable treatment from the Commonwealth for testifying against Petitioner.

In Commonwealth v. Bridell, 252 Pa.Super. 602, 605, 384 A.2d 942, 943-944 (1978) the Superior Court noted that the Pennsylvania Supreme Court, in Commonwealth v. Davis, 457 Pa. 194, 322 A.2d 103 (1974),

> recognized that testimony entered by counsel's stipulation may be so damaging that admission of the stipulation at trial must be surrounded by safeguards similar to those attending the entry of a guilty plea. There, it was stipulated that the complaining witness, if present at trial, would have testified that the defendant was one of two men who had robbed him at gunpoint. The Court concluded that counsel's stipulation to this testimony placing his client at the scene of the crime and naming him as a participant therein was the equivalent to an admission of guilt by the defendant, despite his plea of not guilty. By stipulating to the testimony that would have been offered by the complaining witness, *appellant gave up the opportunity to cross-examine that witness and to attempt to discredit his incriminating testimony*. Under the circumstances of the case the stipulation made a not guilty verdict highly unlikely. Therefore, an on-record colloquy, demonstrating defendant's understanding of the consequences of the stipulations, and his consent thereto, was deemed necessary." (Emphasis added).

In evaluating whether trial counsel's stipulation constitutes the ineffective assistance of counsel, the inquiry is whether the stipulation in question makes the outcome [of the trial] a foregone conclusion.' Davis, 322 A.2d at 105.

Initially, trial counsel executed a certification acknowledging that she agreed to the stipulation because she believed that Ms. Jones may have had a more damaging impact on the petitioner had she testified live, in court, before the jury. She feared that

Ms. Jones may have cried and may have engendered more sympathy with the jury had she actually testified in court. This Court believes that this strategy was a sound strategy and trial counsel's strategy is entitled to deference. Additionally, the facts contained in the stipulation certainly did not make the outcome of the trial a foregone conclusion. On the contrary, the stipulation did not contain any facts establishing that the petitioner ever touched the victims. The stipulation actually acknowledged that "[t]hroughout the investigation [Ms. Jones] denied that the children told her of any inappropriate contact with [Petitioner] . . . ." The victims testified at trial as to the actions of Petitioner. Their testimony was credible and it alone supported Petitioner's conviction. As the Commonwealth notes in its brief, the facts contained in the stipulation were also cumulative of other trial testimony. This Court believes that trial counsel had a reasonable basis for stipulating to Ms. Jones' testimony and because the stipulation did not render Petitioner's guilt a forgone conclusion, trial counsel did not render ineffective assistance of counsel for entering into the stipulation.

> 3. The trial court erred in denying Appellant's PCRA petition since trial counsel was ineffective for failing to object to the damaging hearsay testimony from Heather Henzler and Stacy Smith regarding what S.J. allegedly told them at the North Park Clubhouse Lounge.

Petitioner next claims that trial counsel rendered ineffective assistance of counsel by failing to object to the testimony of two witnesses who relayed what the victim had told them about the Petitioner's conduct. At trial, Heather Henzler and Stacy Smith testified that victim "S.J." told them that the petitioner had kissed her. Ms. Henzler testified that the victim told her that the petitioner kissed her on her mouth and vagina and Ms. Smith testified that the victim told her at the North Park Clubhouse that the

petitioner had kissed her on the mouth. Petitioner claims that this testimony was inadmissible hearsay.

As set forth in Commonwealth vs. Bryson, 860 A.2d 1101, 1103-1104(Pa.Super. 1004):

> Generally, hearsay is inadmissible at trial unless it falls into one of the exceptions to the hearsay rule. Commonwealth v. O'Drain, 2003 PA Super 255, 829 A.2d 316 (Pa. Super. 2003). We find the explanation of "prompt complaint" testimony given by esteemed colleague, the Honorable Kate Ford Elliott, in Commonwealth v. O'Drain, 2003 PA Super 255, 829 A.2d 316 (Pa. Super. 2003), to be instructive in this case. As will be discussed below, pursuant to the rationale posited in O'Drain, A.W.'s hearsay testimony in this case was admissible pursuant to Pennsylvania caselaw and Pennsylvania Rule of Evidence 613(c), commonly known as the prompt complaint exception to the hearsay rule. Pennsylvania Rule of Evidence 613(c)(1) allows evidence of prior consistent statements to rebut an express or implied charge of "fabrication, bias, improper influence or motive, or faulty memory." O'Drain, *supra*. In cases involving sexual assault, Rule 613 authorizes the Commonwealth to present evidence in its case-in-chief of a prompt complaint by the victim "because [the] alleged victim's testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part." O'Drain, *supra*, quoting Pa. R. Evid. 613(c) (comment), citing Commonwealth v. Freeman, 295 Pa. Super. 467, 441 A.2d 1327, 1331 (Pa. Super. 1982). "Evidence of a complaint of a sexual assault is 'competent evidence, properly admitted when limited to establish that a complaint was made and also to identify the occurrence complained of with the offense charged. '" O'Drain, *supra*, at 322, quoting Commonwealth v. Stohr, 361 Pa. Super. 293, 522 A.2d 589, 592-593 (Pa. Super. 1987) (en *banc)*, quoting Commonwealth v. Freeman, 441 A.2d at 1331.

In this case, the record reveals that the victim made prompt statements to two disinterested witnesses about the sexual assault she suffered. In this Court's view, these statements satisfy the prompt complaint exception to the hearsay rule and were properly admitted at trial. It is clear that the statements admitted at trial are consistent with the types of evidence deemed permissible in Bryson. Therefore, trial counsel cannot be deemed ineffective for failing to object to admissible testimony. Accordingly, this claim fails.

> 4. The trial court erred in denying Appellant's PCRA petition since trial counsel was ineffective for failing to file a suppression motion regarding Appellant's alleged statement in the police car, and the drawing by S.J.

Petitioner next claims that trial counsel was ineffective for failing to file two suppression motions. First, Petitioner claims that trial counsel should have filed a motion seeking to suppress his statement to police officers stating, "I am sorry for what I had done." The record reflects that after the petitioner was arrested, he was handcuffed and placed in the rear seat of a police vehicle. After the officers provided him with a copy of the arrest warrant and the affidavit of probable cause to arrest him, he made the statement set forth above.

In Miranda v. Arizona, 384 U.S. 436, 479 (1966), the United States Supreme Court explained:

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is

> jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

As set forth in Commonwealth v. Best, 789 A.2d 757, 762 (Pa. Super. 2002):

> [T]he protective provisions of Miranda prohibit the continued interrogation of an interviewee in police custody once he or she has invoked the right to remain silent and/or to consult with an attorney. Commonwealth v Rucci, 543 Pa. 261, 670 A.2d 1129 (Pa.Super. 1996). "Interrogation" means police questioning or conduct calculated to, expected to, or likely to evoke an admission. Commonwealth v Brown, 551 Pa. 465, 711 A.2d 444 (Pa.Super. 1998). **Where an interviewee elects to give an inculpatory statement without police interrogation, however, the statement is "volunteered" and not subject to suppression, notwithstanding the prior invocation of rights under Miranda.** Id; Commonwealth v. Bracey, 501 Pa. 356, 461 A.2d 775 (Pa.Super. 1993); Commonwealth v. Abdul-Salaam, 544 Pa. 514, 678 A.2d 342 (Pa.Super. 1992). Interrogation occurs when the police should know that their words or actions are reasonably likely to elicit an incriminating response, and the circumstances must reflect a measure of compulsion above and beyond that inherent in custody itself. See Commonwealth v. Fisher, 564 Pa. 505, 769 A.2d 1116. (Pa.Super. 2001)(emphasis supplied).

In this case, the record reveals that, although the petitioner was in custody at the time he blurted out the incriminating statement, he was not subjected to an interrogation. The police officers were not questioning him at the time. Moreover, the officers were simply advising him of the charges against him and providing him with the arrest warrant and the affidavit of probable cause. There is nothing about Petitioner's interaction with the police officers which was calculated to, expected to, or likely to evoke an admission. It appears to this Court that the officers were simply fulfilling their adminsitrative function of advising the petitioner of the charges against him. Accordingly, the statement made by the petitioner was not obtained in violation of Miranda and trial counsel cannot be deemed ineffective for not raising a meritless claim.

Petitioner also claims that trial counsel should have filed a motion to suppress the sketch seized from the petitioner at the time of his arrest. The sketch appeared to depict a crude drawing of a sex act between the petitioner and S.J. The drawing was prepared by S.J. Importantly, Petitioner offers no basis for the suppression of the sketch other than it "bore no relevance to the instant charges." Relevance, however, does not constitute a basis to suppress the sketch as the fruit of an illegal search and trial counsel cannot be ineffective for failing to file a suppression motion challenging the relevance of the sketch.[3] Accordingly, this claim fails.

> 5. The trial court erred in denying Appellant's PCRA petition since post-sentencing/appeal counsel Farrell was ineffective for failing to raise a lack of jurisdiction issue regarding victim S.J. at CC No. 5571-2007.

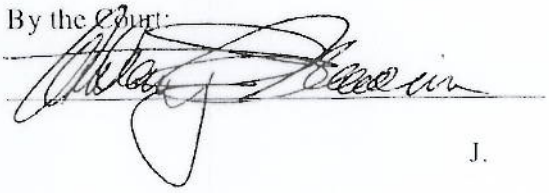
[3] To the extent, if at all, the petitioner's claim is interpreted as alleging a failure of trial counsel to object to the admission into evidence of the sketch on relevance grounds, that claim is also meritless.

Petitioner finally claims that post-sentencing/appeal counsel was ineffective for failing to challenge the jurisdiction of the trial court on the basis that there was no definitive proof that the crimes occurred in Allegheny County. This claim is meritless. There was absolutely no evidence presented at trial that the offenses occurred outside of Allegheny County. To the contrary, Petitioner's own statement to another witness was admitted at trial in which the petitioner admitted that the sexual assault occurred in the parking lot of a K-Mart store located on Route 8 near Etna, Pennsylvania. This K-Mart location is in Allegheny County. Moreover, the events that occurred during that evening occurred at the North Park Clubhouse, a restaurant located further north on Route 8 still within Allegheny County. Post-sentencing counsel had no basis to attack the jurisdiction of this Court as all credible evidence demonstrated that the crimes occurred in Allegheny County. Even the victim, S.J., testified that the petitioner performed sex acts on her at a location "where people couldn't see him" then took her to the North Park Clubhouse. Her testimony was consistent with Petitioner's own admissions. Post-sentencing counsel cannot be deemed ineffective for failing to raise a claim that could not have been successful. Accordingly, this claim fails.

For the foregoing reasons, the judgment of sentence should be affirmed.

Date: APRIL 25, 2013

By the Court:



J.

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