

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

BRETT MARTIN PETERS

Appellant

No. 663 MDA 2014

Appeal from the PCRA Order of March 17, 2014
In the Court of Common Pleas of Lancaster County
Criminal Division at Nos.: CP-36-CR-0001874-2010
CP-36-CR-0001880-2010

BEFORE: BOWES, J., WECHT, J., and MUSMANN, J.

MEMORANDUM BY WECHT, J.:

FILED DECEMBER 18, 2014

Brett Peters appeals the March 17, 2014 order denying his petition for relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-46. We adopt the PCRA court's comprehensive and well-reasoned opinion, and we affirm.

On January 14, 2011, a jury convicted Peters of rape by forcible compulsion, sexual assault, stalking, and intimidation of a witness with respect to each of these charges.¹ The PCRA court has summarized the evidence presented at Peters' trial as follows:

In early January 2010, the victim, E.M., broke off a six-year relationship with [Peters]. [Peters] "didn't take it well." He

¹ 18 Pa.C.S. §§ 3121(a)(1), 3124.1, 2709.1(a)(1), and 4952(a)(3) respectively.

called E.M. "incessantly." The victim's billing records showed a 24-hour period during which [Peters] made 288 calls from his land line to the victim's cell phone.

[Peters] also began showing up at E.M.'s place of employment. The first time, he approached E.M. as she entered the front door of the nursing home and threatened, "are you going to talk to me, because if you are not I'm going to call your daughters, and I know where they live." [Peters] did try calling one of the victim's daughters that same afternoon.

The second time [Peters] showed up at E.M.'s place of employment, he ran up to E.M.'s car as she was approaching it and demanded "everything that he had ever given [her] in those six years." E.M. said that she would pack it all up and leave it in her car and [Peters] should come the next day to retrieve it. [Peters] showed up the next day, got the things out of E.M.'s car, went through them and approached E.M. as she left her job and said, "that is not everything." [Peters] then tried to get into E.M.'s car. That evening, E.M. packed up "everything" and left it on [Peters'] porch the next morning on the way to work.

When [Peters] showed up a third time at E.M.'s place of employment, he tried to get into her car as she was leaving and insisted, "[y]ou are going to listen to me." As a result of these encounters at work, E.M. became fearful of [Peters] and began parking her car as close to the front door entrance as possible, and even asked the co-worker whom she was taking home if she could go out after work and get the car and bring it to the door. Four co-workers testified to E.M.'s fear of [Peters].

Because of this fear, E.M. asked her son-in-law to change the locks on her apartment door. Arrangements were made to do the work on Saturday, January 16, 2010. When E.M. came home that Saturday after spending the night at her daughter's house, she found all the clothing which she had returned to [Peters] back in her bedroom closet, which frightened her. E.M.'s son-in-law arrived later in the afternoon and changed the locks on the front door of the apartment as planned. E.M.'s daughter, who had stayed to have dinner with her mother, went out on the patio to smoke a cigarette after dinner and noticed [that] the sliding door was unlocked, which was unusual because E.M. never left it unlocked. E.M.'s daughter became suspicious and tried to open the door to the utility closet on the patio but felt someone on the inside holding the door shut. Eventually,

[Peters] came out of the utility closet. E.M. called 911 as [Peters] fled the apartment.

Ephrata Police Officer Douglas E. Heilman responded to the emergency call. While he was investigating, [Peters] called the apartment and Officer Heilman spoke to him. After admitting to being in the apartment, Officer Heilman warned [Peters] not to have any more contact with E.M., not to call, and not to come to E.M.'s home or place of employment. No charges were filed against [Peters] as a result of this incident.

On January 27, 2010, just before 9:00 p.m., E.M. drove up to her apartment and [Peters] approached her car. [Peters] tried to get E.M. to leave her car but she refused. [Peters] only fled when he heard E.M. calling 911 for help. [Peters] was cited for harassment as a result of this incident and found guilty on April 29, 2010.

Less than two weeks later, on either February 10 or 11, 2010, as E.M. was unlocking the door to her apartment, [Peters] walked out from the bushes beside the house. [Peters] stated that he "wanted to talk" but E.M. refused and entered her apartment. [Peters] left but later called E.M. and left her a voice mail in which he stated: "You know that I love you or I would have gotten in that door." Detective Graeme Quinn, with the Ephrata Police Department, listened to the voice mail, identified the speaker as [Peters], and made a recording of the message, which he played for the jury.

On February 12, 2010, [Peters] sent flowers, a card, and a letter to the victim at her place of employment. The card said: "I love you. Always. Just call or come by. OXOXOXOXOXO BP." The letter stated that [Peters] loved her and was responsible for all the good fortune she had in her life. [Peters] further identified all the material things he had given E.M. during their relationship and offered to pay off her car loan.

That evening, E.M. arrived home from work at approximately 8:30 p.m. As she unlocked the front door, "[Peters] jumped out of the bushes beside the house just beside [E.M.'s] door, . . . and [she] screamed. And he put his hand over [her] mouth, pushed [her] in the door with his hand over [her] mouth . . . pushing and dragging [her] up the steps." He told her: "[You] better keep [your] mouth shut. You're going to talk to me."

Once upstairs, E.M. walked over to the couch, sat down and reached inside her purse for her cell phone. [Peters] grabbed the phone and crushed it. [Peters] threatened to hit E.M. if she screamed. [Peters] then said: "[Y]ou've got two choices. You can suck me off or you can give me what I want." To which, E.M. kicked him with her legs. "And that's when he really became angry and got this look on his face and came at [E.M.] unbuttoning his pants." E.M. looked at [Peters] and said: "[S]o what you're telling me is you are going to rape me?" [Peters'] response was, "well, I gave you a choice." [Peters] then dragged E.M. off the couch onto the floor, pulled her pants down, and inserted his penis into her vagina. E.M. begged [Peters] to go and warned him that her daughter was coming at any moment.¹⁷

¹⁷ E.M.'s daughter, A.M., testified that her mother did not feel safe staying in the apartment so A.M. had made plans to spend the night with her.

[Peters] proceeded down the steps and E.M. followed to lock the door behind him. When [Peters] opened the door, E.M. heard a car pull up. As E.M.'s daughter, A.M., approached the door, [Peters] walked out. A.M. found her mother just inside the door, crying. In response to A.M.'s question of "what's wrong, mom," E.M. stated: "He just raped me." A.M. called 911 and then put her mother on to speak with the operator.

Meanwhile, Cassandra Legg, the friend who had driven A.M. to her mother's apartment, observed that as A.M. got out of the car, "a person walked out of [E.M.'s] house and walked towards [Legg's] car to the passenger door and looked like he was going to open the door and then changed his mind and walked to the driver's side and left."

The quality assurance supervisor at the Lancaster County 911 Center testified that a 911 call for an incident that occurred at the home of E.M. in Ephrata of February 12, 2010, came in at 9:03 p.m. Ephrata Police Officer John Hirniesen was dispatched to E.M.'s apartment. Upon his arrival, Officer Hirniesen searched the area with a flashlight looking for [Peters] and discovered a "burrowed out area in the snowbank" big enough for a person to fit into. The officer referred to this area as a "fighting position or a foxhole."

When Officer Hirniesen encountered the victim, he found her to be "quiet, taken back, real removed," and "shaken." The officer

advised E.M. to go to the hospital. A.M. drove her mother, whom she described as "upset [and] scared," to the emergency room at the local hospital, where a sexual assault forensic examination (SAFE) was performed on her. E.M. reported to the SAFE nurse that [Peters] told her: "[Y]ou are either going to suck me off or let me screw you." According to the nurse's notes, "[E.M.] said no and pushed him away. And then he pulled her pants off, got on top of her, and penetrated her with his penis." The examination revealed two small abrasions to the left side of E.M.'s face.

A forensic scientist with the Pennsylvania State Police Crime Laboratory in Harrisburg testified to the presence of spermatozoa in the crotch area of E.M.'s underwear and on the vaginal swabs taken at the hospital. This spermatozoa matched the DNA profile of [Peters].¹⁸ An Ephrata Police Officer processed the crime scene and, with the aid of a forensic light source, found bodily fluids on the carpeting in the area of the sexual assault.

¹⁸ Specifically, the probability of [Peters'] genetic profile match is approximately 1 in 4.3 sextillion from the Caucasian population, approximately 1 in 200 quintillion from the African American population, and approximately 1 in 370 quintillion from the Hispanic population.

On February 13, 2010, [Peters] was arrested and charged with rape by forcible compulsion, sexual assault, stalking and simple assault. [Peters] made bail and was released from prison on February 14, 2010, and ordered not to have any contact with the victim. The following day, [Peters] met up with Gloria Boyer, a co-worker, and explained to her his reasons for missing work over the weekend. [Peters] told Ms. Boyer that E.M. invited him over to talk and have sex, but that he only stayed 30 minutes because E.M.'s daughter was coming over.

Ms. Boyer told [Peters] that her daughter, Sherry Goodley, worked with E.M. and that she (Ms. Goodley) had observed scratches on E.M.'s face following their sexual encounter. [Peters] denied being responsible for those injuries. [Peters] then asked Ms. Boyer to have her daughter relay a message to E.M. The message was that [Peters] would pay off the victim's car loan if she dropped the rape and sexual assault charges against him. The victim received the message from Ms. Goodley on February 16, 2010, and called the Ephrata Police to report the

contact. As a result, on February 19, 2010, [Peters] was arrested a second time and charged with having committed the offense of intimidation of a witness/victim.

[Peters] took the stand in his own defense at trial. He admitted being present on the victim's balcony on January 16, 2010. He steadfastly denied, however, the allegations of rape and sexual assault said to have occurred on February 12, 2010. He offered the following counterpoint to the Commonwealth's rendition of the facts.

On Friday, February 12, 2010, [Peters] was in his house in the City visiting with his female friend, Brook Klinehaus. [Peters'] daughter, Tandra Peters, was also in the house. E.M. arrived at approximately 3:00 p.m., and stayed 25 minutes. During this time, [Peters] and E.M. had sex in an upstairs bedroom. [Peters] presumes that E.M. then returned to work. E.M. stopped back at [Peters'] house between 8:05 and 8:10 p.m. that evening and invited [Peters] to her apartment in Ephrata. [Peters], his daughter, and her two children arrived at E.M.'s apartment 20 to 25 minutes later. They all sat around and talked for about 30 to 35 minutes. During the visit, [Peters] asked E.M. about the flowers that he had delivered to her place of employment that day. E.M. told [Peters] that her daughter was coming over so "that was the key to leave because we don't get along." [Peters] and his daughter and grandchildren then left, without ever seeing E.M.'s daughter, A.M.

[Peters] refuted the victim's assertion that she had been the one to terminate the relationship, insisting that he had broken off things with E.M. in early January 2010. [Peters] persisted in his assertion even after hearing the voice mail message in which he begged E.M. to take him back for whatever he had done and offered to pay off her car if she would only take him back, and after hearing read to him the letter sent with flower on February 12, 2010, in which [Peters] pleaded with E.M. to take him back. [Peters] denied making the 288 calls from his home phone to E.M.'s cell phone, and claimed that his grandchildren placed those calls. [Peters] further denied being at E.M.'s place of employment other than the one time to collect the bags of clothing which he had demanded be returned to him.

[Peters] also firmly denied the allegation relating to the charge of intimidation of a witness/victim. In an effort to discredit his co-worker, Ms. Boyer, [Peters] insinuated that she was

untruthful in her testimony because she had been shunned by [Peters] romantically. [Peters] claimed that it was Ms. Boyer who initiated the conversation by asking "what would you do to get out of that mess." To which, [Peters] responded: "I'd do anything to get out of that mess. . . . I'd even pay off [E.M.'s] car." [Peters asserted] that it was Ms. Boyer who made the decision to pass that information on to E.M. through her daughter.

PCRA Court Opinion ("P.C.O."), 3/17/2014, at 12-20 (citations to notes of testimony omitted).

On May 5, 2011, following Peters' jury trial convictions of the above-referenced offenses, Peters was sentenced to an aggregate term of incarceration of thirteen and one-half to thirty-two years. However, Peters subsequently was resentenced to thirteen to thirty-two years' incarceration because of a miscalculation in his prior record score.

We affirmed Peters' judgment of sentence on direct appeal. **See Commonwealth v. Peters**, No. 2071 MDA 2011, slip op. at 1, 11 (Pa. Super. Sep. 7, 2012). Peters did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On March 13, 2013, Peters filed a *pro se* PCRA petition. The PCRA court appointed counsel, who filed an amended PCRA petition on Peters' behalf. Following a response by the Commonwealth, the PCRA court held an evidentiary hearing on Peters' PCRA claims. At the conclusion of the hearing, the PCRA court directed the parties to file briefs in support of their respective positions. On March 17, 2014, the PCRA court issued an order and a corresponding opinion denying Peters' PCRA petition.

On April 14, 2014, Peters filed a notice of appeal. The PCRA court did not direct Peters to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Peters did not file one. Also, the PCRA court did not issue an opinion pursuant to Pa.R.A.P. 1925(a). However, the court thoroughly addressed Peters' claims in its March 17, 2014 opinion that the court issued in support of its order denying PCRA relief. Thus, the court's failure to file a Rule 1925(a) opinion does not hinder our ability to review Peters' claims.

Peters raises two issues for our review:

1. Did the PCRA court err in determining that [Peters] was not deprived of the effective assistance of counsel when trial counsel failed to call witnesses at trial?
2. Did the PCRA court err in determining that [Peters] was not deprived of the effective assistance of counsel when trial counsel failed to utilize the services of a private investigator?

Brief for Peters at 4.

We review a PCRA court's order to determine whether the order is "supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Garcia***, 23 A.3d 1059, 1061 (Pa. Super. 2011) (citation omitted).

Both of Peters' claims challenge the effectiveness of his trial counsel, which implicates the following well-established standard:

[I]n order to obtain relief based on [a claim of ineffective assistance of counsel], a petitioner must establish: (1) the

underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1224 (Pa. 2005) (citing **Commonwealth v. Pierce**, 527 A.2d 973, 975 (Pa. 1987)). The petitioner bears the burden of proving all three prongs of this test. **Commonwealth v. Meadows**, 787 A.2d 312, 319-20 (Pa. 2001).

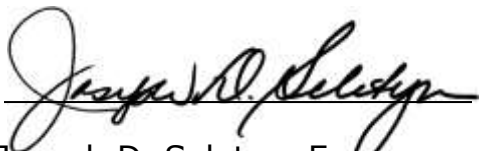
We also note that, in his first claim, Peters alleges that trial counsel was ineffective for failing to call various witnesses at trial. To succeed on such a claim, a petitioner must demonstrate the following: (1) the witness was available to testify; (2) counsel knew, or had a duty to know, of the existence of the witness; (3) the witness was willing and able to "cooperate and appear on behalf of the defendant"; and (4) the testimony must have been necessary in order to avoid prejudice. **Commonwealth v. Priovolos**, 715 A.2d 420, 422 (Pa. 1998). "As [an a]ppellant's trial counsel is presumed to have rendered him effective assistance, he will not be deemed ineffective for failing to call . . . witnesses based solely on [a]ppellant's unsubstantiated allegations concerning the witnesses' existence and willingness to testify on his behalf." **Commonwealth v. Lopez**, 739 A.2d 485, 496 (Pa. 1999); **see also Commonwealth v. Walls**, 993 A.2d 289, 302 (Pa. Super. 2010) (applying same standard to expert witnesses).

We have reviewed the parties' respective briefs, including the arguments and citations to legal authority contained therein. More

importantly, we have reviewed the record and the applicable law, including those general provisions set forth above. Having done so, we conclude that the PCRA court correctly denied Peters' PCRA petition. Furthermore, we adopt the PCRA court's thorough, well-supported March 17, 2014 opinion as our own. Therein, the court set forth a highly detailed recitation of the factual and procedural history. More importantly, the court reviewed each of Peters' claims, most notably those that Peters' raises herein, **see** P.C.O. at 23-30, 30-34, and comprehensively reviewed the factual and legal bases for each of those claims before concluding that they did not warrant relief. Having reviewed the PCRA court's opinion, we have nothing to add that would necessitate any additional analysis. Therefore, we adopt the PCRA court's opinion as our own, and affirm the court's order denying Peters' PCRA petition. A copy of the PCRA court's opinion is attached hereto for convenience.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2014