COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
SIXTO MATIAS,	:	
Appellee	:	No. 9 EDA 2011

Appeal from the Order entered on December 7, 2010 in the Court of Common Pleas of Philadelphia County, Criminal Division, No. CP-51-CR-0011362-2007

BEFORE: FORD ELLIOTT, P.J.E., MUSMANNO, BENDER, DONOHUE, SHOGAN, LAZARUS, MUNDY, OLSON and WECHT, JJ.

DISSENTING OPINION BY MUNDY, J.: Filed: March 14, 2013

I respectfully dissent. Contrary to the Majority, I believe the PCRA court committed error in concluding that trial counsel rendered ineffective assistance by failing to call Matias's minor daughter, K., as a witness, and in failing to present photographic evidence regarding the absence of a bathroom in Matias's basement. Specifically, the Majority reasons as follows.

> [W]e discern no error or abuse of discretion by the PCRA court. The record supports the PCRA court's observation that the Commonwealth's case against Matias rested entirely upon the credibility of R., and the PCRA court's determination that the absence of K.'s testimony was so prejudicial as to deny Matias a fair trial.
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> ...
>
> The record supports the PCRA court's determination that Matias's claim has merit, [trial counsel] had no reasonable basis for not

> investigating and presenting the photographs at trial, and that [trial counsel's] dereliction caused Matias prejudice.

Majority Opinion at 8, 9-10.

My review of the evidentiary record, however, reveals ample support for the Commonwealth's contention that "[t]rial counsel was not ineffective for not calling [K.] as a witness where she could not have materially impeached the victim and would have undermined [Matias's] case." ***See*** Commonwealth's Brief at 16. This Court has held, "[a] defense attorney's failure to call certain witnesses does not constitute *per se* ineffectiveness." ***Commonwealth v. Cox***, 983 A.2d 666, 693 (Pa. 2009) (citation omitted). Rather, "the failure to call a witness … generally involves a matter of trial strategy." ***Commonwealth v. Lauro***, 819 A.2d 100, 105 (Pa. Super. 2003) (citation omitted), *appeal denied*, 830 A.2d 975 (Pa. 2003).

Herein, Matias's trial counsel had a reasonable and legitimate basis for not calling his daughter, K., to testify on his behalf at trial. At the PCRA hearing, Attorney LaTour testified that his strategy during trial was that the failure to call K., an alleged eyewitness to the initial sexual assault, should be held against the Commonwealth.

> [Attorney LaTour]: [F]rom a strategy standpoint, I felt is [sic] was advisable to [not call K. to testify]. Number one, I didn't want to subject [K.] to that. She was young. And as I made the argument to the jury during the case, [K.] was equally available to the government to call as a witness and she was never called as witness by the government to testify against [Matias] and the argument was then

> obviously if there was any corroboration by my client's daughter to the allegations the Government would have called her.

N.T., 11/9/10, at 11, *referencing* N.T., 5/22/09, at 22. Attorney LaTour further testified that he discussed calling K. as a defense witness with her parents, and they accepted his advice against it. N.T., 11/9/10, at 10-11.

Moreover, my review of the record reveals that trial counsel's strategic decision not to call K. to testify was sound, given that her testimony would not have been particularly helpful to Matias's case. Indeed, Attorney LaTour cautioned that calling such a young child as a defense witness "could backfire." N.T., 11/9/10, at 22-23. My review further indicates that K.'s testimony contradicted that of Matias. Notably, K.'s account at the PCRA hearing was inconsistent with Matias's trial testimony. At trial, Matias testified that he did not play the video game with R. and K., but only entered the basement for the purpose of connecting the video game to the basement television, and "didn't stay down there with them." N.T., 5/21/09, at 135-136. K., however, specifically acknowledged that at one point during the incident in question, they were sitting on the couch with Matias.

> Q. Do you ever remember your dad ever playing the video game?
>
> A. He only checked it out once to see if he put it together correctly?
>
> Q. When you were playing the video game, where were you guys sitting?
>
> A. I was sitting next to –

> THE COURT: I'm sorry. I missed that.
>
> Q. Repeat your answer.
>
> A. I was sitting in the middle and he was next to me and [R.] was on the other side of me.

N.T., 11/10/10, at 37.

This Court will not deem counsel to be ineffective if counsel's strategy not to call a witness had some reasonable basis designed to effectuate his client's interest. ***See Commonwealth v. Poindexter***, 646 A.2d 1211, 1217 (Pa. Super. 1994) (stating, "[t]he failure to call a possible witness will not be equated with a conclusion of ineffectiveness, absent some positive demonstration that the testimony would have been helpful to the defense[]") (citation omitted), *appeal denied*, 655 A.2d 512 (Pa. 2005). Thus, I disagree with the Majority that trial counsel was ineffective for pursuing this reasonable and legitimate trial strategy. ***See Commonwealth v. Hammond***, 953 A.2d 544, 558 (Pa. Super. 2008) (stating, "[a] claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued[]") (citations omitted), *appeal denied*, 964 A.2d 894 (Pa. 2009).

Furthermore, I discern no legitimate basis upon which to deem trial counsel ineffective for failing to introduce photographs of Matias's basement. In support of its finding that trial counsel was ineffective, the PCRA court reasoned that these photographs "conclusively proved that there was no

bathroom in [Appellee's] basement" and would have rendered R.'s testimony that Appellee sexually assaulted her in said bathroom incredible. PCRA Court Opinion, 12/7/10, at 4; ***see also*** PCRA Court Supplemental Opinion, 3/1/11, at 2-3. For the following reason, I disagree.

My review of the record reveals that Attorney LaTour's failure to introduce the photographs depicting an absence of a bathroom in Matias's basement was in no way prejudicial, as this fact was conceded during trial. Specifically, R. acknowledged on direct examination that her pretrial statements referring to a basement bathroom were incorrect, and that there was no toilet in the basement but only a sink that she characterized as "like part of a bathroom." N.T., 5/21/09, at 70. Specifically, R. testified as follows.

> Q. You mentioned a bathroom in the basement. Where was the bathroom?
>
> A. (Witness did not respond.)
>
> Q. We can't hear you. What did you say?
>
> A. It wasn't a bathroom down there. There was like one upstairs. There wasn't one in the basement.
>
> Q. Was there a toilet in the basement?
>
> A. No.
>
> Q. Was there a little bathroom in the basement?
>
> A. No.

> Q. When you talk about something happening in the bathroom, what bathroom are you talking about?
>
> A. I was talking about the one that was like kind of like down there, but it was not like a bathroom there. It was kind of like a sink down there.
>
> Q. When you say the one that was down there, are you talking about the basement?
>
> A. Yes.
>
> Q. And there was a sink down there?
>
> A. Yeah.
>
> Q. So it was like part of the bathroom?
>
> A. Yeah.

Id. at 69-70.

Based on the foregoing, therefore, I believe that Matias was not prejudiced by Attorney LaTour's decision not to introduce the photographs depicting an absence of a bathroom in the basement. This Court has long recognized that "[i]n order to obtain relief on an ineffective assistance of counsel claim, a petitioner must establish[, *inter alia*,] … the ineffectiveness of counsel caused the petitioner prejudice." ***Commonwealth v. Miller***, 987 A.2d 638, 648 (Pa. 2009), *referencing* ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987) (remaining citations omitted). Accordingly, I conclude that Matias is not entitled to relief on this ineffectiveness claim.

Lastly, although not addressed by the Majority, I also conclude that the PCRA court erred in granting Matias PCRA relief on the basis the verdict was against the weight of the evidence. ***See*** PCRA Court Supplemental Opinion, 3/1/11, at 5-6. This Court has long recognized that in order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). As a weight of the evidence challenge is not one of the enumerated errors set forth in section 9543(a)(2), I conclude that the PCRA court erred in granting relief on this basis.

In reaching its decision, I recognize that the PCRA court acknowledged, "a weight of the evidence theory is usually raised in a direct appeal from a judgment of sentence." PCRA Court Supplemental Opinion, 3/1/11, at 5. Nonetheless, the PCRA court further noted, "[it] considered and decided [Matias's] weight of the evidence claim in this case **in the interest of economy and justice** since no direct appeal was filed by [Matias] to the Superior Court and, as a consequence, there has been no appellate court review of [Matias's] claim that the jury's verdict was against the weight of the evidence." ***Id.*** at 6 (emphasis in original). Based upon a strict application of the PCRA, I find this reasoning improper. ***See Commonwealth v. Judge***, 797 A.2d 250, 257 (Pa. 2002) (noting that "strict adherence to the statutory language of the PCRA is required[]")

(citation omitted); ***Commonwealth v. Sneed***, 45 A.3d 1096, 1105 (Pa. 2012) (reiterating that "a petitioner must establish that his conviction or sentence resulted from one or more of the enumerated circumstances found in section 9543(a)(2)[,]") (citation omitted).

In any event, I note that Matias's weight claim is waived. Matias, as recognized by the PCRA court, could have raised this claim on direct appeal to this Court, but failed to do so. ***See*** 42 Pa.C.S.A. § 9544(b) (stating, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding[]").

Accordingly, for all the foregoing reasons, I cannot agree that Matias was entitled to relief under the PCRA. Thus, I would vacate the December 7, 2010 order and remand so that Matias's judgment of sentence could be reinstated.