

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

COMMONWEALTH OF PENNSYLVANIA :

vs. :

PATRICIA E. GADALETA, :  
Defendant/Appellant :

No. 975 CR 2011

Jean A. Engler, Esquire

Counsel for Commonwealth  
District Attorney

Kent D. Watkins, Esquire

Counsel for Defendant

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MEMORANDUM OPINION

Matika, J. - August 21, 2015

On July 21, 2014, the Defendant, Patricia E. Gadaleta, filed a "Motion for Post-Conviction Collateral Relief" (hereinafter "PCRA Motion"). In that motion, she raised, *inter alia*, a claim of ineffective assistance of counsel. Attorney Kent Watkins, Esquire, was appointed to represent Defendant and was directed to consider whether the motion met the PCRA time limits and to evaluate defendant's claims for merit. If necessary and appropriate, Attorney Watkins was directed to file an amendment to the motion. Attorney Watkins filed an amendment to that motion on November 14, 2014. A hearing was held on July 12, 2015 after which time the Defendant and Commonwealth were given the opportunity to submit Memorandums of Law in support of their respective positions, which both parties did.

## FACTUAL AND PROCEDURAL BACKGROUND

The Defendant was charged with theft by deception, a violation of 18 Pa.C.S.A. § 3922(a)(1), theft by receiving stolen property, a violation of 18 Pa.C.S.A. § 3925(a), forgery, a violation of 18 Pa.C.S.A. § 4101(a)(3), access device fraud, a violation of 18 Pa.C.S.A. § 4106(a)(1)(iv), and two counts of identity theft, violations of 18 Pa.C.S.A. § 4120(a). On July 17, 2012, a jury found the Defendant guilty of one count of identity theft and one count of forgery.

Defendant was sentenced on November 30, 2012 to six (6) to thirty (30) months incarceration on the charge of forgery and three (3) to eighteen (18) months on the charge of identity theft, to run concurrent to each other, but consecutive to sentences imposed in other cases involving Defendant. On December 14, 2012, Defendant filed an appeal of the sentence to the Superior Court, which the Superior Court affirmed on November 15, 2013. A Petition for Allowance of Appeal was filed to the Pennsylvania Supreme Court, which was denied by order of the Supreme Court on June 26, 2014.

Subsequently, Defendant filed her *pro se* PCRA Motion on July 16, 2014, claiming, *inter alia*, ineffective assistance of counsel. Unsure as to which of her counsels Defendant was asserting this claim against, this Court held a conference with Defendant. This

Court was then able to determine that Defendant's PCRA Motion was being asserted only against her trial counsel, Michael Gough, Esquire. Attorney Watkins was appointed to represent Defendant in this matter.

In her original petition, Defendant made several claims regarding Attorney Gough's alleged ineffective assistance. She also argued that her sentence, when imposed consecutively, was "excessive." Attorney Watkins, in his review of the *pro se* petition, found the imposition of consecutive sentences issue to be without merit, and the Amended Petition contained the following three (3) issues: 1) "Trial counsel interfered with Defendant's ability to defend herself at trial by advising her that her criminal record would be used against her, without having filed a pre-trial motion to determine the admissibility of such record and advising her that her prior convictions would be used against her at trial. She could not take the stand without being prejudiced by the prior convictions"; 2) "Trial counsel failed to call Defendant's witnesses"; and 3) "Trial counsel failed to explain to Defendant that the prior convictions could only be used under circumstances set forth in 42 Pa. C.S. § 5918(c), *Commonwealth v. Garcia*, 551 Pa. 616, 712 A.2d 746 (1998)."

At the hearing before this Court on June 12, 2015, Attorney Watkins stated that he was no longer pursuing the second of the three issues raised by Defendant, as he was only able to contact

one of Defendant's prospective witnesses to come and testify at the hearing that they would have been willing to testify at Defendant's trial; however, that potential witness refused to speak to Attorney Watkins about Defendant's case. Thus, while a small amount of testimony was taken on that matter, the hearing primarily focused on Defendant's decision not to testify at the July 2012 trial.

### DISCUSSION

Before reviewing the substantive issues of Defendant's motion, this Court must first address the timeliness of the filing. 42 Pa. C.S.A. § 9545 requires that a PCRA motion must be filed within one (1) year of the date the judgment becomes final. According to the statute, a judgment becomes final "at the conclusion of direct review . . . or at expiration of time for seeking review." 42 Pa. C.S.A. §9545(b)(3). Here, Defendant's Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on or about July 1, 2014, and Defendant's *pro se* PCRA petition was filed on July 16, 2014. Therefore, Defendant's petition was timely filed in accordance with Pennsylvania law.

Defendant's issues raised on appeal are in essence Sixth Amendment ineffective assistance of counsel claims. Under Commonwealth case law, a court begins with the presumption that counsel was effective. See *Commonwealth v. Miller*, 819 A.2d 504,

517 (Pa. 2002). In order to establish an ineffective assistance of counsel claim, an individual must show that "[1] the underlying claim is of arguable merit; [2] that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate the appellant's interest; and finally [3] that counsel's action or inaction was prejudicial to the client." *Commonwealth v. Costa*, 742 A.2d 1076, 1077 (Pa. 1999); see also *Commonwealth v. Clayton*, 816 A.2d 217 (Pa. 2002). In order for a counsel's action, or inaction, to be considered prejudicial to the client, there needs to be "reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Johnson*, 815 A.2d 563, 573 (Pa. 2002). "All three prongs of this test must be satisfied. If an appellant fails to meet even one prong of the test, his conviction will not be reversed on the basis of ineffective assistance of counsel." *Commonwealth v. O'Bidos*, 849 A.2d 243, 249 (Pa. Super. Ct. 2004).

***I. Attorney Gough's Decision not to call Defendant as a Witness***

Defendant first argues in her PCRA Motion that her ability to defend herself was interfered with when her trial counsel, Michael Gough, erroneously advised her about the Commonwealth's ability to incriminate Defendant with her criminal record if she were to testify. Defendant, in her motion, cites to statute 42 Pa.C.S.A § 5918, which explains the examination of a defendant as to other offenses. Defendant claimed that she was prevented from testifying

on her own behalf at trial by Attorney Gough. Defendant also testified that Attorney Gough told her not to testify, claiming he said he "would not know how to represent me" if she were to take the stand.

To address this issue, courts are guided by *Commonwealth v. Thomas*, which states that the decision to testify on one's own behalf:

is ultimately to be made by the accused after full consideration with counsel. In order to support a claim that counsel was ineffective for 'failing to call the appellant to the stand', [the appellant] must demonstrate either that (1) counsel interfered with his client's freedom to testify, or (2) counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf.

783 A.2d 328, 334 (Pa. Super. Ct. 2001). The Superior Court has also stated that "[c]ounsel is not ineffective where counsel's decision to not call the defendant was reasonable." *Commonwealth v. Breisch*, 719 A.2d 352, 355 (Pa. Super. Ct. 1998).

Attorney Gough testified during the PCRA hearing that, after reviewing Defendant's criminal record with her, his advice to Defendant was not to testify as her previous convictions<sup>1</sup> were of "great or paramount concern" to him. He stated that not only was

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<sup>1</sup> During the PCRA hearing, the Commonwealth questioned Defendant about her criminal history prior to this conviction. It was determined, by admission of Defendant, that Defendant had six (6) prior convictions within the ten (10) years prior to this conviction, and twelve (12) prior convictions in total, both in Pennsylvania and New York. Attorney Gough, during his testimony, expressed concern about how he would deal with these *crimen falsi* convictions when they were brought up if Defendant took the stand in her own defense.



he under the understanding that the six (6) Pennsylvania convictions within the last decade would be admissible under Pennsylvania Rule of Evidence 609, but that the Assistant District Attorney prosecuting Defendant's case at trial, James M. Lavelle, Esquire, had informed him that he would be attempting to use all twelve (12) convictions if Defendant were to take the stand.

Attorney Gough also testified that Defendant's assertions that he told her not to testify were "absolutely incorrect", that he had informed her that it was her choice whether or not to testify, and that he "specifically recalled" discussing both the Pennsylvania and New York convictions with Defendant prior to the trial in reaching the decision that she would not testify. Attorney Gough further stated that he would give her the exact same advice today.

Further, this Court conducted a colloquy with Defendant regarding her decision not to testify:

THE COURT: In making that decision not to testify in this trial, is it being made of your own free will?

DEFENDANT: Yes, it is.

THE COURT: Have you had an opportunity to speak with Attorney Gough and discuss the issue of not testifying at this trial?

DEFENDANT: Yes, I have.

THE COURT: And were there any questions you had regarding your right against self-incrimination and not testifying here that Attorney Gough was unable to answer for you?

DEFENDANT: No.

THE COURT: You understand this decision is yours and yours alone?

DEFENDANT: That is correct.

THE COURT: And any advice that Attorney Gough has given you on that issue and on the subject is simply that, advice?

[FM-33-15]

DEFENDANT: Correct.

THE COURT: And would it be fair to say that Attorney Gough has not pressured you in any way to make this decision?

DEFENDANT: Not at all.

THE COURT: He has advised you only?

DEFENDANT: Correct.

THE COURT: And after consulting with him and him advising you about the decision to or not to testify, you have made the voluntary, knowing, and intelligent decision on your own with his advice to not take the witness stand and testify on your own behalf, is that correct?

DEFENDANT: That is correct.

THE COURT: Beyond Attorney Gough advising you, has anyone else forced you not to testify?

DEFENDANT: No.

N.T., 7/17/12, at 186-188.

Following this Court's colloquy, Attorney Gough then performed his own colloquy of Defendant regarding his advice to her and her decision not to testify.

ATTORNEY: Ms. Gadaleta, is it fair for me to say that, among other things, we discussed the possibility that, if you were to take the stand, you could potentially subject - could subject yourself to Cross Examination by the prosecution concerning prior what we've identified as *crimen falsi* convictions? Did I explain that to you?

DEFENDANT: Yes, you did.

ATTORNEY: And that, if that were to occur, the jury could be told that it could consider that evidence solely for the purposes of assessing your credibility at this trial. Do you understand that?

DEFENDANT: Yes.

ATTORNEY: Knowing that, is it still your decision to not offer any testimony at this time?

DEFENDANT: That's my decision.

N.T., 7/17/12, at 188-89.

Upon the testimony of all parties, as well as a review of Defendant's colloquies, this Court is convinced that Defendant's waiver of her right to testify was voluntary, informed, and based



upon a reasonable legal strategy. Therefore, this Court does not find Defendant's trial counsel ineffective for failing to call Defendant as a witness in her own defense.

## **II. Attorney Gough's Failure to Call Witnesses**

Defendant next argues that Attorney Gough was ineffective for failing to call potential witnesses that she suggested. Defendant claims that she provided him with full names and addresses of these witnesses, but that Attorney Gough failed to contact or subpoena any of them to come and testify at trial.

In order to prove ineffectiveness for failure to call a witness, the Superior Court has laid out clear criteria that must be shown:

To establish ineffective assistance for failure to call a witness, Appellant must establish that: (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or counsel should otherwise have known of him; (4) the witness was prepared to cooperate and testify for Appellant at trial; and (5) the absence of the testimony prejudiced Appellant so as to deny him a fair trial. *Commonwealth v. Petras*, 534 A.2d 483, 485 (Pa. Super. Ct. 1987). A defendant must establish prejudice by demonstrating that he was denied a fair trial because of the absence of the testimony of the proposed witness. *Commonwealth v. Nock*, 606 A.2d 1380 (Pa. Super. Ct. 1992). Further, ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses, indicating availability and willingness to cooperate with the defense. *Commonwealth v. Davis*, 554 A.2d 104 (Pa. Super. Ct. 1989), *allocator denied*, 571 A.2d 380 (Pa. 1989).

*Commonwealth v. Khalil*, 806 A.2d 415, 422 (Pa. Super. Ct. 2002).

Attorney Gough testified that, to the best of his recollection, Defendant did not provide him with full names and addresses of potential witnesses, but rather a few first names of people that she thought may have "set her up." Attorney Gough stated that he did not feel this was a viable trial strategy, as he would be required to have these people admit under oath that they had in fact acted as Defendant claimed. Attorney Gough pointed specifically to the fact that whoever had committed these crimes had used Defendant's sister's Social Security Number to obtain a loan, and Attorney Gough did not feel there was a plausible way to show that those witnesses could have obtained such information.

Moving beyond Attorney Gough's reasons for not calling these witnesses at trial, Defendant has failed to meet the criteria needed to prove his ineffectiveness, as listed above. Defendant's PCRA Counsel, Kent Watkins, was only able to get into contact with one of these potential witnesses, so Defendant has failed to prove even the first requirement, that any of these witnesses existed, but for one individual. Attorney Watkins also stated that when he was able to speak to that one individual, he/she refused to talk to him about the Defendant and hung up the phone. Therefore, with regards to that witness, Defendant has failed to prove that he or she was available, they were prepared to cooperate and testify at trial, or that their absence prejudiced Defendant from receiving

a fair trial. Also, in accordance with *Davis, supra*, Defendant did not provide any affidavit indicating their availability and willingness to cooperate in the trial. Notwithstanding the Defendant's failure to answer the threshold question presented in *Davis*, this Court cannot say that, even if the proper affidavit was submitted at the PCRA hearing, Attorney Gough's strategy of not presenting these unnamed witnesses was ineffective.

#### CONCLUSION

Based upon the foregoing, this Court finds that Defendant has failed to adequately demonstrate that Attorney Gough was ineffective in his representation of Defendant at her July 17, 2012 trial. Therefore, Defendant's PCRA Motion, as amended, is **DENIED and DISMISSED.**

BY THE COURT:

  
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Joseph J. Matika, J.

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