

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

COMMONWEALTH OF PENNSYLVANIA :

vs.

NO. 815 CR 2018

GEORGE HARRIS,
Defendant

Criminal Law – PCRA - Ineffectiveness of Counsel - Presenting Character Evidence -
Pertinence to Crimes Charged - Form of Character Evidence -
Reputation Testimony - Evidence of a Defendant's Character for
Truthfulness – Bar to Calling Judge as Character Witness

1. To obtain post-trial collateral relief on the basis of a claim of ineffective assistance of trial counsel, a PCRA petitioner must plead and prove (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act.
2. To satisfy the prejudice prong of the ineffectiveness test for trial counsel's failure to call a character witness at trial, the PCRA petitioner must prove that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew, 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 the defendant a fair trial.
3. Evidence of a defendant's good character is substantive and positive evidence, and may, of itself, engender reasonable doubt or justify a defendant's acquittal.
4. Evidence of good character offered by a defendant in a criminal prosecution is limited to defendant's reputation in the community for the particular trait or traits of character involved in the commission of the crimes charged. To qualify as a character witness, the witness must be familiar with defendant's reputation in the community for those character traits pertinent to the crimes charged; the witness's subjective opinion of the defendant's character or knowledge of specific acts of conduct are irrelevant.
5. Where a defendant is charged with terroristic threats and resisting arrest, character evidence as to the defendant's reputation for being an honest and truthful person are irrelevant to the commission of these crimes. Since such evidence would be inadmissible, defendant is not prejudiced by trial counsel's failure to present evidence of defendant's character for truthfulness or honesty with respect to these offenses.
6. Character evidence of a criminal defendant's character for truthfulness is admissible only if (1) the character trait of truthfulness is pertinent to the elements of the crimes with which the defendant has been charged, e.g., perjury, or (2) the defendant's reputation for truthfulness generally has been attacked by the prosecution.
7. When truthfulness is not relevant to the underlying criminal offense, character evidence as to a criminal defendant's character for truthfulness is relevant and admissible if (1) the defendant chooses to testify on his own behalf, and (2) the

Commonwealth attacks the defendant's general reputation in the community for truthfulness through either cross-examination or by other witnesses' testimony. Such evidence is not admissible to bolster the defendant's credibility simply because doubt has been cast on the accuracy of his testimony by contradictory evidence presented by the Commonwealth offered to prove defendant's guilt or cross-examination questioning the defendant's motive for testifying. To be admissible, the Commonwealth must put the defendant's character or reputation for truthfulness generally in issue.

8. Common pleas court judges and magisterial district judges of this Commonwealth are prohibited by the Rules of Judicial Administration, Pa.R.J.A. No. 1701(e), from testifying voluntarily as a character witness.

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Cynthia Dyrda-Hatton, Esquire
Assistant District Attorney
Michael P. Gough, Esquire

Counsel for Commonwealth

Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – November 3, 2020

Herein, George Harris requests that the judgment of sentence imposed on June 25, 2019, be vacated and that he be awarded a new trial pursuant to the Post-Conviction Relief Act on the basis that his trial counsel was ineffective. For the reasons which follow, we deny Defendant's Petition for Collateral Relief.

PROCEDURAL AND FACTUAL BACKGROUND

At a bench trial held on March 26, 2019, the Defendant, George Harris, was convicted of Terroristic Threats¹ and Resisting Arrest.² Defendant was acquitted of the charge of Disorderly Conduct.³

Briefly, the evidence at trial showed an escalating series of conduct engaged in by Defendant at his home on July 17, 2018, with Defendant first complaining about the trash not being put out and dirty dishes piling up in the sink; next screaming and yelling derogatory terms and obscenities at his wife; followed by Defendant telling his wife she

¹ 18 Pa.C.S.A. § 2706(a)(1).

² 18 Pa.C.S.A. § 5104.

³ 18 Pa.C.S.A. § 5503(a)(1).

was going to die now; and ending with Defendant walking towards his wife as she stood on the stairs, reaching through the banister, grabbing her ankle, and attempting to pull her leg through the railing, at which point Defendant's son intervened and rescued his mother.

The police, responding to a call from Defendant's wife, found Defendant inside the home still screaming and cursing. When the police attempted to calm Defendant down, Defendant turned on the police, spitting and screaming insults at them. When Defendant, with his arms flailing, refused to heed the officers' warning that if he didn't calm down he would be arrested, Defendant persisted in his conduct. As the police tried to restrain Defendant and control his arms and place handcuffs on him, Defendant resisted and attempted to pull away, requiring the use of substantial force by two officers to subdue Defendant, who continued to resist and scream and curse as he was escorted from his home to the police cruiser.

On June 25, 2019, Defendant was sentenced to a period of imprisonment in the Carbon County Correctional Facility of no less than one month to no more than twenty-four months less one day on the charge of terroristic threats, with a concurrent sentence of one-year probation for resisting arrest. Following his sentencing, no post-sentence motions were filed by Defendant, nor was a direct appeal taken. Instead, on March 12, 2020, Defendant filed a timely *pro se* Petition for Collateral Relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, questioning the effectiveness of trial counsel.

Counsel was appointed and filed a First Amended Petition for Post-Conviction Relief on May 18, 2020. In this Petition, Defendant asserts three principal issues on

which he claims trial counsel was ineffective: (1) for requesting a bench trial rather than a jury trial without the prior knowledge or consent of Defendant; (2) for failing to present and call any character witnesses to testify to Defendant's general reputation in the community as an honest and peaceful person; and (3) for failing to obtain and present at trial Defendant's medical records for injuries he sustained in a fall in June 2018 to corroborate his trial testimony that he was physically unable to resist arrest as the Commonwealth claimed.

A hearing on Defendant's PCRA Petition was held on July 30, 2020. At that time, the only witnesses to testify were Defendant and Defendant's trial counsel. At the conclusion of this hearing, Defendant's counsel asked for an opportunity to brief the issues, which request was granted. In Defendant's brief, only two issues have been briefed, that pertaining to the alleged failure to call character witnesses and failure to obtain and present Defendant's medical records; no argument is made as to the decision to waive a jury trial and be tried before a judge alone.⁴

⁴ As the court will not act as counsel and will not develop arguments on behalf of Defendant, Defendant's failure to brief this issue or make any argument that ineffectiveness of counsel caused him to waive his right to a jury trial waives the issue. See Commonwealth v. Goodmond, 190 A.3d 1197, 1201 (Pa.Super. 2018). Moreover, prior to Defendant's waiver of his right to a jury trial, the court conducted a full and extensive oral colloquy to ensure Defendant had a full understanding of his right to a jury trial and the consequences of waiving that right. (N.T., 3/26/19, pp.3-12). Where a defendant waives his right to a jury trial after a thorough court colloquy, he cannot argue that trial counsel's ineffectiveness was the cause of this waiver. Cf. Commonwealth v. Peay, 806 A.2d 22, 29 (Pa.Super. 2002) (holding that where a defendant voluntarily waives his right to testify after a colloquy, he cannot argue that trial counsel was ineffective in failing to call him to the stand), *appeal denied*, 813 A.2d 840 (Pa. 2002); Commonwealth v. Shultz, 707 A.2d 513 (Pa.Super. 1997) (same). Finally, in this case, trial counsel had a reasonable basis to recommend Defendant waive his right to a jury trial since on at least two prior occasions in these proceedings - at Defendant's preliminary hearing and on November 5, 2018, when Defendant was before the Honorable Joseph J. Matika of this court for the entry of a guilty plea - the Defendant was unruly, created a disturbance, and needed to be restrained such that trial counsel was appropriately concerned

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DISCUSSION

As stated in Commonwealth v. Harris, 785 A.2d 998 (Pa.Super. 2001), *appeal denied*, 847 A.2d 1279 (Pa. 2004),

Our standard in reviewing claims of ineffective assistance of counsel is well settled.

The threshold inquiry ... is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit; for counsel cannot be ineffective for failing to assert a meritless claim. Once this threshold is met[,] we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. If we determine that there was no reasonable basis for counsel's chosen course[,] then the accused must demonstrate that counsel's ineffectiveness worked to his prejudice. The burden of establishing counsel's ineffectiveness is on the appellant because counsel's stewardship of the trial is presumptively effective.

To meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a reasonable probability that but for the act or omission in question the outcome of the proceedings would have been different.

Id. at 1000 (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Commonwealth v. Burkett, 5 A.3d 1260, 1272 (Pa.Super. 2010) (citation and quotation marks omitted). Where the defendant, "fails to plead or meet any elements of the above-cited test, his claim must fail." *Id.* at 1272 (citation and quotation marks omitted).

Character Witnesses

Defendant alleges in his First Amended PCRA Petition that counsel was

that if similar conduct occurred before a jury, the effect would be devastating on Defendant's chances of acquittal. (N.T., 7/30/20, pp.17-18, 52-56, 68-72).

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ineffective for failing to introduce evidence of his character for being an honest and non-violent person; however, in Defendant's Memorandum of Law filed in support of this Petition, Defendant appears to equate honesty with truthfulness, and argues that because it was his word against that of his wife, son, and two police officers, evidence of his reputation for truthfulness should have been introduced to bolster his credibility. See Defendant's Memorandum of Law, pp.12-14. Given this variance between the character trait of honesty asserted in Defendant's PCRA Petition and that of truthfulness argued in his Memorandum of Law, for purposes of our discussion below, we explain why Defendant was not entitled to present evidence concerning his reputation for truthfulness, recognizing at the same time that the trait of honesty is not pertinent to the crimes charged against Defendant, and thus equally inadmissible under Pa.R.E. 404(a)(2)(A).

"The importance of good character evidence is well-recognized" in Pennsylvania. Commonwealth v. Nellom, 565 A.2d 770, 776 (Pa.Super. 1989). "Evidence of good character is substantive and positive evidence, not a mere make weight to be considered in a doubtful case, and, . . . is an independent factor which may of itself engender reasonable doubt or produce a conclusion of innocence." Commonwealth v. Luther, 463 A.2d 1073, 1077 (Pa.Super. 1983) (quoting Commonwealth v. Gaines, 75 A.2d 617, 629 (Pa.Super. 1950)). Accordingly, the "[f]ailure to present available character witnesses may constitute ineffective assistance of counsel." Commonwealth v. Harris, 785 at 1000. Then to, "[t]he failure to call character witnesses does not constitute *per se* ineffectiveness." Commonwealth v. Treiber, 121 A.3d 435, 463 (Pa. 2015).

As to the admission of character evidence:

Evidence of good character offered by a defendant in a criminal prosecution must be limited to his general reputation for the particular trait or traits of character involved in the commission of the crime charged. Such evidence must relate to a period at or about the time the offense was committed and must be established by testimony of witnesses as to the community opinion of the individual in question, not through specific acts or mere rumor.

Commonwealth v. Radecki, 180 A.3d 441, 453-54 (Pa.Super. 2018); see *also* Pa.R.E. 404(a)(2)(A), 405 (a).

At the time of the PCRA hearing held on July 30, 2020, on the issue of character witnesses, Defendant testified on direct examination as follows:

Q. Immediately prior to your bench trial taking place, would you have had character reputation witnesses available to come in and testify for you?

A. Yes.

Q. And who would that have been?

A. I would have asked Cazi Kosciulek. He's a close friend of mine. Mr. Matika knows me well, but I don't know if that's allowed.

Q. Uh-huh.

A. My friend called Jimmy Kunkle and Doug Flex. You know, he's a former professional wrestler. And I was going to ask Judge Nanovic's father. I did business with him for 25 years. He knows me as – my – for my honesty and everything doing business with him.

(N.T., 7/30/20, pp. 26-27). On this same topic, on cross-examination, Defendant testified as follows:

Q. With regards to character witnesses, did you have any discussion with [trial counsel] about character witnesses?

A. Yes, I had asked him that question.

Q. Okay. And did you give him any names of anybody that would be able to be character witnesses?

A. I believe so.

Q. But you didn't bring anybody here today to testify as to what they would have testified to, correct? You don't have anybody here today?

A. Is this a trial?

Q. No. This is your PCRA petition.

- A. You can bring people into this?
MR. GOUGH: That's just a yes or no question.
THE WITNESS: Okay.
Q. Yes or no?
A. No; nobody came.
Q. So we don't know what people would have said, correct?
A. No. I never said they would.

(N.T., 7/30/20, pp.41-42). This is the only evidence Defendant presented at the PCRA hearing with respect to the question of whether trial counsel was ineffective for failing to call character witnesses at Defendant's trial.

An issue will have arguable merit if the facts upon which the claim is based appear as a matter of record and are accepted as true, and if the law on which the claim is premised could afford relief. As is evident from the foregoing, other than identifying character witnesses who Defendant would have liked to call as trial witnesses, none of these character witnesses testified at the time of the PCRA hearing, nor was any affidavit from any of these character witnesses presented by Defendant or proffer made to show what each witness would have testified to.⁵ Consequently, Defendant has presented no testimony or evidence as to what character trait these witnesses would have testified to or whether such testimony would comply with the requirement of Pa.R.E. 404(a)(2)(A) that only evidence of a "defendant's pertinent trait" may be admitted as character evidence. Additionally, there is no way of knowing from the simple naming of these witnesses whether they were familiar with and able to testify to Defendant's "reputation." Only reputation evidence may be used to prove character, not the witness's subjective opinion of the defendant's character or knowledge of specific

⁵ Pa.R.Crim.P. 902(A)(15) requires a petition for post-conviction collateral relief for which an evidentiary hearing is requested to include "a signed certification as to each intended witness, stating the witness's name, address, and date of birth, and the substance of the witness's testimony." This was not done.

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incidents bearing upon the character trait. Pa.R.E. 405(a); see *a/so* Cmt. to Pa.R.E. 404. For all of these reasons, Defendant failed to establish that the testimony of his proposed character witnesses would have been admissible under Pa.R.E. 404(a)(2)(A) and 405(a), and Defendant has not proven that trial counsel was ineffective or that Defendant was prejudiced because these witnesses were not called to testify at trial. See Commonwealth v. Medina, 209 A.3d 992, 997-98 (Pa.Super. 2019) (denying a claim of ineffectiveness for many of the same reasons).

Even if we were to assume that the witnesses identified by Defendant at the PCRA hearing were qualified to testify as character witnesses to Defendant's reputation for being a peaceful, honest citizen, and that such testimony would have been admissible pursuant to Pa.R.E. 404(a)(2)(A) and 405(a), we would still conclude that Defendant's ineffective assistance claim is without merit.

To satisfy the prejudice prong of [the ineffectiveness] test when raising a claim of ineffectiveness for the failure to call a potential witness at trial, our Supreme Court has instructed that the PCRA petitioner must establish that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew, 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 the defendant a fair trial.

Commonwealth v. Wantz, 84 A.3d 324, 331 (Pa.Super. 2014).

While perhaps Defendant's testimony at the PCRA hearing satisfies the first and second prongs of this test, Defendant has not proven by a preponderance of the evidence that the requirements of the third, fourth and fifth prongs have been met. While Defendant testified that he and trial counsel spoke about the use of character witnesses and that he believed he provided trial counsel with the names of the character witnesses he would have liked to have called (N.T., 7/30/20, pp.23-24, 41-42),

defense counsel credibly testified that none of these names were provided to him, that the only name Defendant mentioned as a potential character witness was his friend Kevin. (N.T., 7/30/20, pp.61,77). Commonwealth v. Hanible, 30 A.3d 426, 458 (Pa. 2011) (finding no ineffectiveness of counsel absent defendant establishing character witnesses identified by defendant at PCRA hearing were known to or should have been known by trial counsel).⁶ Nor did Defendant's evidence establish that any of the character witnesses he named were willing to testify on his behalf. Additionally, the Honorable Joseph J. Matika is a judge of this court and Casimir Kosciolek is a magisterial district judge in this county. As such, neither is permitted to testify voluntarily as a character witness. See Pa.R.J.A. No.1701(e).

With respect to the admissibility of character evidence to bolster or support a criminal defendant's character for truthfulness, character evidence is admissible only if: (1) the character trait of truthfulness is pertinent to the crimes with which the defendant has been charged, e.g., perjury, see Pa.R.E. 404(a)(2)(A) (defense introduction of evidence of a pertinent character trait); or (2) the defendant's general reputation in the community for truthfulness has been attacked by the prosecution, see Pa.R.E. 608(a)(2) (admission of evidence of witness' character for truthfulness to counter attack). Commonwealth v. Fulton, 830 A.2d 567, 572 (Pa. 2003); Commonwealth v. Kennedy, 151 A.3d 1117, 1128 (Pa.Super. 2016). Here, the traits of truthfulness and honesty are not pertinent to the elements of the crimes with which Defendant was charged. (N.T., 7/30/20, pp.76-77); see Commonwealth v. Schwenk, 777 A.2d 1149, 1156 (Pa.Super.

⁶ Kevin appears to be the name of an attorney Defendant knew in New York City with whom Defendant discussed his case and relied on for advice. (N.T., 7/30/20, pp.10-12, 48). Not only was Kevin's name not given by Defendant at the PCRA hearing as a potential character witness he intended to call, given

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2001) (“We agree that the traits of truthfulness and honesty are not relevant to the offenses of aggravated assault and resisting arrest, and therefore, we conclude that the trial court did not error in disallowing [the defendant from presenting character testimony as to these traits].”), *appeal denied*, 788 A.2d 375 (Pa. 2001). Thus, Defendant was not entitled to present character witnesses pursuant to Pa.R.E. 402(a)(2)(A) to testify to his character for truthfulness or honesty in relation to the two crimes of which he was convicted, terroristic threats and resisting arrest, and could not be prejudiced for the failure to present such evidence.

“[W]hen truthfulness is not relevant to the underlying criminal offense, a defendant may only call witnesses to testify as to his or her truthfulness when (a) he or she chooses to testify on his or her own behalf, and (b) the Commonwealth attacks the defendant’s truthfulness through either cross-examination or by other witness’ testimony.” Kennedy, 153 A.3d at 1128; *see also* Commonwealth v. Gwynn, 723 A.2d 143, 151 (Pa. 1998) (“Evidence of truthfulness or honesty may not be introduced to bolster credibility unless defendant’s truthfulness or honesty has first been attacked.”). As to this second basis for admitting character evidence of a defendant’s truthfulness, such evidence is not admissible to bolster the defendant’s credibility simply because doubt has been cast on the truth of his testimony by contradictory evidence presented by the Commonwealth offered to prove defendant’s guilt or by the Commonwealth’s cross-examination of the defendant. To be admissible, the Commonwealth must put the defendant’s character or reputation for truthfulness generally in issue. Fulton, 830 A.2d at 572-73.

Kevin’s location in New York, it is unlikely that this witness would be able to testify “as to the community
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Cross-examination that merely questions a defendant's motive for testifying or the accuracy of a defendant's testimony in a specific case is not an attack on the defendant's reputation for truthfulness generally. Consequently, "where the prosecution has merely introduced evidence denying or contradicting the facts to which the defendant testified, but has not assailed the defendant's community reputation for truthfulness generally, evidence of the defendant's alleged reputation for truthfulness is not admissible." Fulton, 830 A.2d at 573. "Similarly, cross-examination of the defendant that challenges the veracity of his testimony in the particular case, but does not touch upon his general reputation in the community for being truthful, does not open the door to the introduction of good character evidence concerning reputation for truthfulness." *Id.*

Because the Commonwealth never attacked Defendant's reputation for truthfulness generally through the evidence presented in its case-in-chief, by its cross-examination of Defendant, or in an opening statement or closing argument, the door was never opened for Defendant to present evidence of his truthful character under Pa.R.E. 608(a). As this claim lacks arguable merit, there can be no finding of ineffectiveness. Fulton, 830 A.2d at 575.

Medical Records

A month prior to the confrontation involving Defendant, his wife, and the police on July 17, 2018, Defendant fell and sustained injuries for which he was hospitalized for seventeen days. Defendant testified he was operated on and was still recovering from these injuries on the date of the offense, and because of this, he did not have the

opinion" of Defendant. Commonwealth v. Radecki, 180 A.3d 441, 454 (Pa.Super. 2018).

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physical capacity to attack his wife or resist arrest as testified to by the Commonwealth witnesses. In his PCRA Petition, Defendant claimed his medical records would corroborate his physical injuries and limitations and that his trial counsel was ineffective for failing to obtain these records and present them at trial. Defendant's medical records were not offered or made part of the record at the PCRA hearing.

Without knowing what Defendant's medical records contain, we have no way of determining whether they corroborate Defendant's trial testimony or would have assisted in his defense. Without this information, Defendant, who bore the burden of proof at the PCRA hearing, failed to prove either that his claim is meritorious or that he was prejudiced by the absence of such evidence. Commonwealth v. Spotz, 896 A.2d 1191, 1221 (Pa. 2006); *cf.* Commonwealth v. Pursell, 724 A.2d 293, 306 (Pa. 1999) (stating that "the [f]ailure of trial counsel to conduct a more intensive investigation or to interview potential witnesses does not constitute ineffective assistance of counsel, unless there is some showing that such investigation or interview would have been helpful in establishing the asserted defense.").

CONCLUSION

For all of the foregoing reasons, we conclude Defendant is entitled to no relief and deny his Petition for Collateral Relief.

BY THE COURT:

P.J.