MODERN MYTHS

MYTH #1: The disease of alcoholism is caused by drinking alcohol.

MYTH #2: Alcoholism is caused by stress.

MYTH #3: Alcoholism is the symptom of an underlying psychological disorder.

MYTH #4: Alcoholics must drink to excess on a daily basis.

MYTH #5: Alcoholism is cured by not drinking.

Alcoholism is:

a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with drug/alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial.

There is no cure for alcoholism; however, with proper treatment the disease can be placed in remission.

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COMMONWEALTH OF PENNSYLVANIA VS. RONALD LEE HOCKENBERRY, DEFENDANT, Franklin County Branch, Criminal Action No. 720 of 1991

Post Conviction Relief Act-Former Jeopardy-Withdrawal of Guilty Plea-Effectiveness of Counsel-Jury Instructions-Harmless Error

Defendant sought relief under the Post Conviction Relief Act after being found guilty by a jury and sentenced for aggravated assault and furnishing intoxicants to minors. Defendant alleged trial counsel was ineffective in 1/ failing to defend against an accomplice liability theory; 2/ in seeking a "corrupt source" instruction for a defense witness; 3/ in failing to ask for a crimen falsi jury instruction with respect to the victim's credibility; 4/ in failing to properly advise petitioner regarding the impact of withdrawing a negotiated guilty plea. The court found that defendant had failed to articulate any prejudice resulting from any of trial counsel's actions or inactions and denied the defendant's request for post-conviction relief.

1. If a defendant does not act in a timely manner, he may waive his right to raise a former jeopardy issue.

2. Where defendant stated to the court that he was aware of the possible consequences of withdrawing his guilty plea, and where defendant had stated that he did not believe he would be found guilty of the charges, counsel will not be deemed ineffective for advising the defendant to withdraw his plea.

3. In ineffectiveness of counsel claims, the court must evaluate whether 1/ the issue underlying the claim is of arguable merit; 2/ whether the course chosen by counsel has a reasonable basis designed to serve the accused's interests; and 3/ whether prejudice resulted.

4. Where an abundance of evidence exists establishing defendant's liability as a principal actor, trial counsel will not be deemed ineffective for disregarding an accomplice theory of liability unless the defendant establishes actual resultant prejudice.

5. Where a jury instruction was erroneously requested but caused no harm to defendant, counsel will not be found ineffective.

6. For defense counsel's performance to prejudice the defendant, there must be shown a reasonable probability that the result of the trial would have been different but for counsel's performance.

7. Counsel will not be deemed ineffective for acquiescing to a client's desire to go to trial.

Franklin County District Attorney, Attorney for Commonwealth
Jules Epstein, Esquire, Attorney for Defendant

OPINION AND ORDER

OPINION SUR DEFENDANT'S AMENDED MOTION FOR POST-CONVICTION COLLATERAL RELIEF

KAYE, J., November 28, 1995

In the instant proceeding, Ronald Lee Hockenberry ("defendant") seeks relief under the Post-Conviction Relief Act ("PCRA"), 42

Pa.C.S.A. §9541 et seq. following an unsuccessful appeal to Superior Court [No. 569 Harrisburg, 1992] from judgments of sentence imposed after a jury found him guilty of aggravated assault, simple assault, and furnishing intoxicants to minors. A hearing was held on the motion, and counsel have submitted memoranda, which counsel for defendant subsequently twice supplemented, and the matter is now ripe for disposition.

Prior to a discussion of the issues raised, we will initially observe that this case has an extensive procedural history which we will review briefly. The incident which led to the instant charges took place on June 19, 1991, and the criminal complaint was filed on August 27, 1991. For reasons not appearing of record, the preliminary hearing was not held until February 14, 1992, and the charges were bound over to Court. Mandatory arraignment was scheduled for March 25, 1992.

Pursuant to a negotiated plea agreement, defendant entered a plea of guilty to a charge of simple assault, a misdemeanor of the second degree before the Honorable John R. Walker on June 10, 1992, and the plea was accepted. A pre-sentence investigation report was ordered, and sentencing was scheduled for August 26, 1992. On the latter date, defendant's trial counsel, Allen L. Welch, specifically moved that sentencing be continued to a date certain, *i.e.* on September 9, 1992.

On September 9, 1992, Mr. Welch did not appear for sentencing, but rather sent an associate, Attorney David Foster, who consulted with defendant, and thereafter indicated that defendant wished to withdraw from the negotiated guilty plea. We recognized this request, and gave the Commonwealth the opportunity to object to the motion at a hearing to be held on September 23, 1992. However, no hearing was held on that date, and the Commonwealth thereafter made no objection to defendant's motion to withdraw the plea.

A jury was selected to try the case on December 21-22, 1992. At the conclusion of the trial, the jury deliberated from 10:13 o'clock a.m. until 10:45 o'clock a.m. prior to returning with verdicts of guilty to the charges. Defendant filed post-verdict motions. The motions were briefed and argued before the Court on May 6, 1993, and dismissed by order of court dated June 8, 1993.

Sentencing was scheduled for July 14, 1993, at which time Attorney Welch appeared, as did Attorney R. Mark Thomas, who indicated tentatively that he was going to be representing defendant but, somewhat inconsistently, also indicated that he was not yet prepared to enter an appearance in defendant's behalf, apparently because he had not yet been paid. At that proceeding, Mr. Thomas indicated that there were issues of ineffectiveness of counsel regarding Mr. Welch's handling of the case that defendant wished to raise [N.T. 7/14/93 at 7]. Judgments of sentence were imposed on that date with Mr. Welch representing defendant, and Superior Court affirmed on May 11, 1994. The PCRA motion thereafter was filed.

Defendant has raised five issues for our consideration. These issues, as set forth in his brief, are as follows: 1/ The Court was without jurisdiction to hear petitioner's trial, as jeopardy had attached when petitioner pled guilty and petitioner never made a knowing and intelligent waiver of the jurisdictional defect; 2/ Trial counsel was ineffective for failing to defend against a conviction based upon accomplice liability; 3/ Trial counsel was ineffective in seeking a "corrupt source" instruction for a defense witness; 4/ Trial counsel was ineffective in failing to investigate the complainant's criminal record, introduce evidence of the same, and seek appropriate jury instructions regarding the impact of a record for *crimen falsi* on credibility and the potential for bias and motivation caused by a pending criminal case; and 5/ Trial counsel was ineffective in failing to properly advise petitioner regarding the impact of withdrawing his negotiated guilty plea. We will consider these matters seriatim:

1/ Whether the lower court is without jurisdiction to hear petitioner's trial.

In our recitation of the procedural history of this case, we previously noted that defendant entered into a negotiated plea on June 10, 1992, and that sentencing was scheduled for August 26, 1992. On the latter date, defense attorney Welch made a specific request for a continuance to September 9, 1992 to allow more time to get information from the District Attorney.

On September 9, 1992, Mr. Welch did not appear for sentencing, but sent an associate, David Foster who, after consultation with defendant, indicated that the latter wished to withdraw his negotiated plea. We gave the Commonwealth until September 23, 1992 to object

or for a hearing to be held. The Commonwealth made no objection, and no hearing was held. It is also correct that the Court did not make an order which granted defendant leave to withdraw the plea. Defendant apparently alleges that the Court was without jurisdiction to try this case because the plea was never properly withdrawn, and thus jeopardy had attached with the entry of the plea of guilty.

First of all, Superior Court already considered this issue in the first appeal herein, and rejected it:

> [A] defendant will not be permitted to sit back and put the Commonwealth to the time and expense of presenting its evidence. If a defendant does not act in a timely manner, he may waive his right to raise a former jeopardy [compulsory joinder under section 110 of the Crimes Code] issue.
>
> *Commonwealth v. Hockenberry*, [No. 569 Harrisburg, 1993] at 5, citing *inter al., Commonwealth v. Rabik*, 259 Pa.Super. 456, 459, 393 A.2d 916 917 (1978).

By way of amplification, we reiterate that defendant told the Court on the continued date fixed for hearing, September 9, 1992, that he wished to withdraw his negotiated plea. The only reason that was not acted on at that time was to allow the Commonwealth some time to make a response thereto. At no time prior to a time that followed the verdict did defendant indicate he wished to reconsider his stated desire to withdraw the plea. Approximately two and one-half (2 1/2) *months* passed between his stated desire to withdraw the plea and the jury trial, so he obviously had sufficient time to communicate with the Court on this issue.

Instead, he proceeded to jury selection and to a trial by jury. We think the action taken in this case was tantamount to a withdrawal of the plea, even if the precise words to do so somehow were not incanted. By permitting the matter to proceed to trial, defendant waived the right to raise the issue he now is attempting to assert, and therefore is not entitled to relief.

Defendant has extended his argument by asserting that he cannot be held to have effectively waived the rights he had unless he knowingly and intelligently did so. The difficulty herein is that the whole panoply of rights of an accused are involved when an

individual attempts to withdraw a plea in a criminal trial prior to sentencing, not only the one which defendant asserts was violated, *i.e.* his right against twice being put in jeopardy for the same offense. Obviously, an accused has the right to remain silent, and not to implicate himself in the commission of the offense. Another fundamental right is the right to a trial by jury in which he is not required to prove anything, and the Commonwealth has to prove its case beyond a reasonable doubt. An individual must be permitted to withdraw a plea prior to imposition of sentence where a fair and just reason exists for such relief, *Commonwealth v. Lesko*, 502 Pa. 511, 467 A.2d 307 (1983), where there is a lack of substantial prejudice to the Commonwealth. *Commonwealth v. Iseley*, 419 Pa.Super. 364, 615 A.2d 408 (1992), appeal denied 534 Pa. 653, 627 A.2d 730.

Although there is some confusion in this matter owing to defendant's original trial counsel's failure to appear for sentencing on the date he presumably had selected for this purpose, by that time defendant had access to his pre-sentence investigation report which, despite his plea to misdemeanor of the second degree simple assault, contained a recommendation for a lengthy jail sentence. Since he was also on parole on a Delaware conviction for armed robbery, and on probation for a later conviction for "possession of destructive weapon during a felony" and "escape" [see copy of defendant's pre-sentence investigation report attached hereto], it is also likely that defendant was concerned about a possible lengthy reincarceration due to this new conviction. Obviously, he had concerns that involved not only the significant incarceration for the instant case, but also from these prior convictions.

During the PCRA hearing, trial counsel testified that he had spent hours and hours trying to convince the defendant to plead guilty to something despite being told by defendant that the defendant "couldn't imagine how he could ever be found guilty of anything out of this incident". Counsel also testified that he "sold" defendant on pleading guilty by asserting that defendant would be allowed to serve his time in the County prison rather than state prison. Since the presentence investigation report regarding the guilty plea came back with a recommendation for a state sentence, trial counsel fully expected that defendant would seek to withdraw his plea, and informed substitute counsel, Mr. Foster, that he should anticipate a request by defendant to withdraw the plea.

We think the evidence suggests that defendant was quite aware of the consequences of his withdrawal of the plea, which spared him from immediate incarceration, and he simply decided to take his chances with a trial where he hoped to be acquitted.

2/ Whether trial counsel was ineffective in defending against an accomplice liability conviction.

In his memorandum on this issue, defendant acknowledges that there existed a basis for a finding that he was an accomplice in the severe beating inflicted on the victim in this case, citing *Commonwealth v. Harper*, _____, Pa.Super.____, 660 A.2d 596 (1995). However, he asserts that his trial counsel was ineffective in representing him as it inexplicably had not occurred to counsel that this could be a theory for defendant's criminal culpability in this matter. [See N.T. 12/22/92 at 22, beginning with line 22]. The argument presented is that it had not occurred to counsel that the accomplice theory might be pursued, he did not properly advise defendant about the risks of going to trial nor did he properly prepare for trial.

In evaluating claims of ineffectiveness of counsel, we are instructed to follow the rule established nearly three decades ago in *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967): 1/ the issue underlying the claim of ineffectiveness is of arguable merit; 2/ whether the course chosen by counsel has a reasonable basis designed to serve [the accused's] interests; and 3/ whether resultant prejudice occurred.

First of all, we have no difficulty at all in finding it to be astonishing that it would not occur to experienced criminal defense counsel that an accomplice theory might be pursued where, as herein, the Commonwealth alleged that the beating of the victim was committed by a number of individuals, including defendant, who had gathered at defendant's residence to drink and gamble. We do not think it necessary to cite case law that counsel is charged with maintaining his professional competence, and of knowing the law in the area of his practice. Thus, we think that his confessed ignorance of the law surrounding accomplice liability established the first prong of the above test.

The second item generally would involve a purposeful stratagem employed by counsel, and does not appear to be applicable herein except to say that since counsel was blissfully unaware of the accomplice theory, he had *no* strategy whatever, and this obviously was not designed to serve the interests of defendant.

The third prong of the test of counsel's effectiveness is more problematic. For defendant to be entitled to relief, he has to demonstrate what prejudice he suffered as a result of counsel's shortcomings. For instance, in *Commonwealth v. McCord*, 435 Pa.Super. 1, 644 A.2d 1206 (1994), defendant alleged his counsel's ineffectiveness by reason of his failure to raise issues of pre-trial delay. He asserted prejudice resulted to him because several potential witnesses had died during the period of the delay, but did not state except in general terms what their testimony would have been, or that trial counsel had ever been apprised of their existence. As a consequence of these shortcomings, Superior Court held that he had not established the resultant prejudice necessary to support a finding of ineffective assistance of counsel.

In the case *sub judice*, defendant's memorandum suggested only generally what the resultant effect was to defendant from his counsel's shortcomings. One of these alleged effects was that counsel did not advise defendant of the risks of going to trial because of the possibility of a guilty verdict based upon this theory. However, although defendant now alleges that he did not *really* want to withdraw his plea, and that this was forced upon him by counsel as a tactic to delay sentencing, he did not testify that counsel's failure to inform him of the possibility of a verdict of guilty based upon complicity through the accomplice theory had any impact whatever on his decision to withdraw the guilty plea. The mere *hypothetical possibility* that defendant may have chosen a different course of action does not establish *actual* resultant prejudice.

While we certainly think it is astonishing that it never occurred to counsel that the Commonwealth would, *inter al.*, pursue an accomplice theory of liability, [1] there has been no demonstration that this had any effect whatever on the ultimate outcome.

[1] The evidence presented also clearly could have warranted a finding by the jury that defendant personally inflicted a severe beating to the victim and that he thereafter purposefully deprived him of medical care by throwing him, unconscious, into the bed of a pickup truck when he then drove for miles to show him, like a trophy, to a friend who worked at a rest area on an interstate highway.

A review of the transcript shows that the victim was the only witness presented by the Commonwealth who testified that the defendant had encouraged the other participants in the melee to continue their assault. All of the other Commonwealth witnesses testified that defendant struck the victim, and/or paraded the victim's mutilated body around in his truck. The trial transcript shows that the victim did not testify that he had been assaulted by the defendant. The primary theory which the victim's testimony would support is an accomplice theory. Trial counsel vigorously sought to discredit the victim's testimony by accentuating the extent of the victim's inebriation, and by pointing out that the victim had not reported any of defendant's statements during the initial investigation. This line of questioning shows that the primary evidence which supported accomplice liability was not ignored by trial counsel. Defendant has not suggested any additional action which would have been taken had counsel prepared a defense to specifically counter an accomplice theory.

Thus, we conclude that defendant has failed to establish the resultant prejudice which would be necessary to support his position herein, and we will decline to grant relief.

3/ Whether counsel was ineffective for seeking a "corrupt source" charge for a defense witness.

In the course of discussing with counsel for defendant his request for the so-called "corrupt source" jury instruction, counsel identified John Goshorn, a defense witness as one of those against whom the rule would apply. [N.T. 12/22/92, part 2 at 32]. It has been held to be error requiring a new trial when this instruction is applied to a defense witness.

> Giving an 'accomplice charge' when an accomplice testified on behalf of the prosecution is a well-established practice. *See Commonwealth v. Sisak*, 436 Pa. 262, 259 A.2d 428 (1969) see also *Cool v. United States*, 409 U.S. 100, 103, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972) (citing cases). Giving such a charge when the witness testifies for the defendant, however, is far less common. There are few reported appellate cases from other jurisdictions directly passing on this issue, which is apparently one of the first impression for this Court.

> A legitimate basis exists for charging the jury to view an accomplice's testimony with suspicion when the accomplice testifies for the Common-wealth. Such a witness, out of a reasonable expectation of leniency, has an interest in inculpating others. This basis is inapplicable, however, when the accomplice testifies on behalf of the defense. One implicated in a crime cannot reasonably expect such leniency by exonerating others, particularly where, as here, the witness has already been sentenced for committing the crime. Thus, it is unreasonable to infer, and improper for the court to charge, that because this defendant witness stood convicted of the crime in question, his testimony must be viewed 'with disfavor' and accepted only with 'caution and care.' (footnotes omitted).
>
> *Commonwealth v. Russell*, 477 Pa.147, 152-53, 383 A.2d 866, 868-69 (1978).

In *Commonwealth v. Kennedy*, 309 Pa.Super. 300, 455 A.2d 169 (1983), it was held to be reversible error to give the "corrupt source" charge as to a defense witness, Andrew Brown, when Brown's testimony was crucial to the defense because it exonerated defendant and provided the only corroboration for defendant's testimony.

The instant case is significantly different, in that an examination of Goshorn's testimony can best be said to be of questionable utility to the defense. The thrust of his testimony appears to be that he saw several other individuals hit the victim, at the conclusion of which "[the victim] was standing on his own then. He was all right." [N.T. 12/21/92 at 28]. The witness testified that he left the area the victim was in at that time, and went to the living room of defendant's house. After some time, he saw defendant return to the area where the victim was and then the witness and defendant carried the victim out of the area to which defendant had gone, to the living room, where he was laid on the floor. [N.T. 12/21/92 at 29-30].

Although his testimony is not clear, it certainly did not exonerate defendant. Rather, it was to the effect that the victim was in relatively good physical condition prior to defendant's entry of the room where the victim was located, and had to be carried out of that room thereafter. This testimony certainly puts defendant at the same place where the victim was reduced from "all right" condition to one of unconsciousness that made it necessary for him to be carried to the living room. Moreover, it corroborated that defendant participated in

transporting the unconscious victim to a rest area in the bed of a pickup truck so he could be viewed by a friend. [N.T. 12/21/92 at 32].

While this testimony did not indicate that defendant hit the victim personally, it put defendant in a position that he could have done so during the time the victim's condition became noticeably worse. Thus, we think that this testimony was at least harmful, and probably more so, to defendant than it was helpful. Thus, from the perspective of defendant, if the jury chose to disregard this witness' testimony, defendant at worst was not prejudiced thereby and, at best, may actually have benefitted. We believe that although the instruction was in error, it caused defendant no resultant harm, and thus, this will not provide a basis for relief. *Commonwealth v. Rivera*, 409 Pa.Super. 120, 129, 597 A.2d 690, 695 (1991).

4/ Whether trial counsel was ineffective for failure to seek a jury instruction on the victim's *crimen falsi* record.

It was stipulated to that the victim herein had entered pleas of guilty to several criminal charges, *i.e.* theft and unlawful use of a motor vehicle, prior to the trial of this case. Those convictions were disclosed by the Commonwealth in its direct examination of the victim. [N.T. 12/21/92 at 32].

Trial counsel, however, did not request a jury instruction regarding *crimen falsi* because he felt that the victim's testimony was not particularly damaging to his client. Defendant now asserts that this reflects a substandard performance that worked to his detriment. For defense counsel's performance to prejudice the defendant, there must be shown a reasonable probability that the result of the trial would have been different but for counsel's performance. *Commonwealth v. Perry*, 537 Pa. 385, 644 A.2d 705 (1994).

We find that any benefit which defendant would have obtained had an instruction on *crimen falsi* been given would have been overshadowed by the abundance of evidence submitted which established defendant's guilt as a principal participant in this crime. The only purpose for the instruction would have been to impeach the credibility of a witness who testified that he did not see the defendant participate in the crime, and was the only witness of several who were present at the scene of the crime to testify that defendant had encouraged others to participate in the assault. Trial counsel had

already attempted to discredit this testimony by questioning the witness's ability to testify due to his intoxication and through the witness's acknowledgement that he had never mentioned the alleged statements to the police. Even assuming *arguendo* that this witness was believed by the jury, his testimony regarding the defendant's statements was insignificant in light of the overwhelming independent evidence which sufficiently established the defendant's guilt.

5/ Whether trial counsel was ineffective in failing to properly advise petitioner regarding the impact of withdrawing his negotiated guilty plea.

When defendant's substitute counsel, after consulting with the defendant, requested to withdraw the defendant's negotiated guilty plea, the defendant stated to the Court that he understood what was going on and acknowledged that despite the fact that he would be scheduled for trial on all of the original charges, he still wished to withdraw his plea. [Sentencing transcript 9/9/92]. Trial counsel's previous conversations with the defendant indicate that the defendant was aware of the consequences of withdrawing his plea and desired to go to trial rather than serve the recommended prison sentence.

Regardless of defendant's knowledge of the consequences of his withdrawal of a guilty plea, the defendant has not shown how the "truth seeking" process was hindered by such withdrawal. Plea negotiations are not part of the "truth seeking" process. It is through trial that the truth is determined.

Defendant asserts that a federal case from Arkansas, *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1984) stands for the proposition that a criminal defendant is entitled to the effective assistance of counsel when being advised of the merits of entering a negotiated non-trial disposition. *Thomas*, however, presents the situation where counsel advised an accused rapist to plead guilty and receive a 30 year sentence. Neither *Thomas* nor any Pennsylvania case found by the Court deems counsel to be ineffective for acquiescing to a client's desire to go to trial.

We find that this defendant represented to the Court that he understood the consequences of his withdrawing his plea, and also find no evidence to suggest that the "truth seeking" process of the trial was prejudiced as a result of the withdrawal of his plea.

It is difficult to comprehend that counsel would be deemed ineffective for acquiescing to the desires of a client, to proceed to trial when defendant expected to be acquitted.

CONCLUSION

Defendant has failed to articulate any prejudice which resulted from the action or inaction of trial counsel. To the extent that any of the claims have merit, the Court finds any error harmless beyond a reasonable doubt in light of the overwhelming evidence supporting the jury's guilty verdict. The defendant's request for post-conviction relief will be denied.

ORDER OF COURT

NOW, November 28, 1995, upon consideration of the evidence, and of counsel's briefs and argument, pursuant to the rationale in the attached opinion, defendant's Amended Petition for Post Conviction Collateral Relief is hereby DENIED.