

COMMONWEALTH OF PENNSYLVANIA
v. COREY L. WILLIAMS, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action, No. 511-2002

Appeal from denial of post-sentence motions; Alibi defense; Sufficiency of circumstantial evidence of guilt

1. Defendant has the burden of proving by a preponderance of the evidence that the issue underlying the claim of counsel's ineffectiveness has arguable merit, that counsel's actions or omissions were not reasonably designed to advance the defendant's interests, and that but for counsel's errors, the outcome of the proceedings would have been different.
2. Defendant's claim that counsel was ineffective for not pursuing an alibi defense lacked arguable merit because defendant did not assist counsel in developing that defense, and the proposed testimony of the alibi witnesses as presented at the post-sentence hearing was not credible and/or was incomplete as to the defense of alibi.
3. Counsel's decision to focus on challenging the circumstantial nature of the Commonwealth's evidence was reasonable, given the absence of alibi evidence.
4. The evidence was sufficient to support defendant's robbery conviction where it included ballistics evidence linking the gun used in the robbery to a gun found in the defendant's possession during another robbery.

Appearances:

Franklin County District Attorney's Office

Michael J. Whare, Esq., *Counsel for Defendant*

OPINION

Opinion Sur Pa.R.A.P. 1925(a)

Herman, J., July 20, 2004

Introduction

The defendant was convicted by a jury on October 23, 2003 of the following charges: one count of robbery in the first degree, four counts of simple assault, one count of terroristic threats, four counts of recklessly endangering, and one count of carrying a firearm without a license. The court sentenced him on December 3, 2003 to 72-132 months incarceration. The defendant was represented at trial and sentencing by court-appointed counsel James K. Reed, Esquire.

Proceeding *pro se*, the defendant filed post-sentence motions alleging ineffective assistance of counsel and challenging the sufficiency of the evidence. The court appointed Thomas J. Trgovac, Esquire, to represent him. Counsel filed an amended motion for acquittal or in the alternative, a new trial. The court held a hearing on May 13, 2004. By speaking Order on May 17, 2004, the court denied the post-sentence motions.

The defendant filed a notice of appeal. The court granted Attorney Trgovac's motion for leave to withdraw, and Michael J. Whare, Esquire, was appointed to represent the defendant on appeal. At the

court's direction, counsel filed a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Background

According to the evidence presented at trial, the defendant was charged with these offenses as a result of a robbery which occurred on January 30, 2002 at 6:07 a.m. at the Getty Mart convenience store on Lincoln Way West in St. Thomas Township, Franklin County. On that date and time, four persons were in the store -- three customers and the store's owner -- who met there early each morning for coffee. The customers were Chauncey LeMaster, Terry Swartz, and Wilbur Reasner. The owner was Mohinder Singh.

LeMaster was the last of the men to arrive at approximately 5:40 a.m. As he pulled into the lot, he noticed a burgundy mid-sized sedan with headlights on, backing out slowly. The sight made LeMaster suspicious because he had never seen the car before and it was unusual to see a car in the lot at that early hour. Once inside the store, he told his companions about the car because it made him uneasy.

Several minutes later, a man entered the store wearing a bandana across the lower part of his face, a knit cap on his head, and black gloves. He pointed a silver, snub-nosed revolver at the four men and told them to lie face down on the floor. The three customers complied. The perpetrator then walked around the front counter, pointed the gun at Singh's neck and had him open the cash register, threatening to kill him if he called the police. The perpetrator fired a shot into the counter and ordered Singh to lie on the floor. All four men testified they were very much in fear for their lives during this incident. The perpetrator fled the store with some cash from the register. After realizing the perpetrator was gone, the four men got up from the floor and called the police. Police found the bullet a few days later near the counter area. Ballistics indicated that it had been fired from a .38 caliber revolver.

LeMaster described the robber as a lighter-skinned black male, between 5'11" and 6' tall. Swartz described him as a light-skinned black male with a slender build, approximately 6' tall. According to Reasner, the robber was a light-skinned black male, approximately 140-150 pounds, standing 5'8" to 5'9" tall. Singh described the robber as 6' tall. The four eyewitnesses testified that they were able to see a few inches of skin around the perpetrator's eyes. However, because the perpetrator's face was almost completely covered, none of the eyewitnesses were able to identify the defendant seated in the courtroom as the man who robbed the Getty Mart on the morning of January 30, 2002.

According to the evidence produced at trial, as well as other information in the record pertaining to pre-trial motions, despite the perpetrator's efforts at a disguise, police were eventually able to discover his identity using other information, including evidence gathered during another robbery which occurred two months later on March 3, 2002 at a local 7-11 store. The perpetrators of that robbery were apprehended shortly after the crime. One was Corey Williams, arrested while driving his mother's 1991 burgundy Plymouth Acclaim, a mid-sized sedan. In his possession at the time of his arrest was a Rossi .38 caliber revolver. Williams was charged with robbery and possession of a stolen firearm. He was found guilty of those crimes at a jury trial on March 15, 2003, presided over by the Honorable John R. Walker, President Judge.

During the trial in the instant case, the Commonwealth presented evidence from George Simmers and his daughter Joella Simmers. Mr. Simmers was the registered owner of the .38 caliber Rossi revolver found in the defendant's possession on March 3, 2002. He kept the gun in an unlocked cabinet in his home. Joella testified that she met the defendant in November of 2001 and that he spent a night alone with her at her father's house in either late November or early December 2001, during which they watched a movie and she fell asleep. In late November or early December of 2001, Mr. Simmers noticed the Rossi revolver was missing and reported the theft to the police. There was no evidence that anyone had gained access to the Simmers home by forcible entry at any time between late November and early December of 2001.

The Commonwealth presented ballistics evidence at this trial through the expert testimony of Pennsylvania State Police Trooper Todd Neumyer. Trooper Neumyer offered extensive testimony about his examination of the bullet recovered from the Getty Mart and the Rossi revolver used to commit the 7-11 robbery. He testified to a reasonable degree of scientific certainty that the Getty Mart bullet had been fired from the Rossi revolver found in the defendant's possession upon his arrest for the 7-11 robbery which occurred on March 3, 2002.

As noted above, the jury convicted the defendant on all counts on October 23, 2003. The defendant then filed *pro se* post-sentence motions and amended motions for judgment of acquittal, or in the alternative, for a new trial. The court held a hearing on May 13, 2004 and issued a lengthy speaking Order on May 17, 2004 outlining the evidence presented at that hearing and addressing the issues arising from that evidence. The Order is part of the record, and we refer the appellate court to our reasoning and

findings therein.

The defendant raises the following grounds for appeal in his concise appeal statement:

1. Appellant argues that his trial counsel, James K. Reed, Esquire, was ineffective in his representation. Specifically, Mr. Reed failed to pursue possible alibi defenses that if [sic] were called to testify, the jury would have returned a verdict of not guilty. As such the Appellant was prejudiced because he was denied his right to effective assistance of counsel and his right to a fair trial.
2. Further, Appellant argues that Mr. Reed was ineffective for failing to assert that the firearm introduced by the Commonwealth as evidence in this case should have been suppressed because the stop of his vehicle was without sufficient probable cause or reasonable suspicion and therefore, violated Article I, Section 8 of the Pennsylvania Constitution as well as the 4th Amendment of the United States Constitution.
3. Any and all evidence from this stop should have been suppressed as the fruits of the poisonous tree.
4. Also, Appellant asserts that there is insufficient evidence to support a conviction in this matter, as the case was circumstantial and allowed for a conviction only by speculation and conjecture, as no one could identify the actual perpetrator.

Discussion

Ineffective Assistance of Counsel: Alibi Defense

The defendant alleges that Attorney Reed did not effectively represent him both before and during the trial. It is well-established that the defendant has the burden of proving by a preponderance of the evidence that the issue which underlies the claim of ineffectiveness (1) has arguable merit, (2) counsel's action or omission was not reasonably designed to advance the defendant's interests, and (3) but for counsel's errors, the outcome of the proceedings would have been different, in other words, that counsel's errors prejudiced the defendant. Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987).

The defendant alleges that counsel was ineffective for not pursuing an alibi defense using three witnesses who testified at the May 13, 2004 hearing on his post-sentence motions. Those witnesses were Cynthia Pearson (his mother), Jamine Pearson (his minor brother), and Erin Levon (his now ex-girlfriend).

An alibi places a defendant at a different location than the scene where the incident took place, with that different location being so far removed from the place where the incident occurred, that it would have been impossible for him to be guilty. Commonwealth v. Mikell, 729 A.2d 566 (Pa. 1999); Commonwealth v. Whiting, 187 A.2d 563 (Pa. 1963). An alibi defense, either standing alone or in conjunction with other evidence, may be sufficient to raise a reasonable doubt with the trier of fact as to the defendant's guilt. Mikell, supra. It is for the defendant to prove purported alibi witnesses were available to testify at the time of trial; counsel knew or should have known of every witness's identity; every witness would have testified on the defendant's behalf; and he was prejudiced by the absence of the testimony which those witnesses would have offered. Commonwealth v. Privolos, 715 A.2d 420 (Pa. 1998); Commonwealth v. Lark, 698 A.2d 43 (Pa. 1997). After considering the testimony of the three purported alibi witnesses, we found that the defendant's assertion of trial counsel's ineffectiveness on this matter lacked any arguable merit.

The defendant did not in any way assist counsel in developing an alibi defense because he did not clearly communicate to counsel that two of the three witnesses (his mother and brother) had information which might form the basis of that defense. Attorney Reed credibly testified at the post-sentence hearing that the defendant and his mother were not on good speaking terms during the preliminary stages of the case. In addition, the defendant never mentioned his brother Jamine to Attorney Reed as a possible alibi witness as they prepared for trial.

Another reason we concluded that this allegation of ineffective representation lacks arguable merit is that the proposed testimony of these three witnesses was not credible and/or was incomplete as to the defense of alibi. Specifically, the defendant's mother and brother testified that they would have told the jury that the defendant was at home with them during the time the Commonwealth alleged he robbed the Getty Mart. However, they were unable to offer actual, clear recollections of the sequence of events on the particular date and time in question: January 30, 2002 during the 6:07 a.m. time frame. Instead, their purported alibi testimony was only an imprecise description of the usual routine of their household in terms of when mother, the defendant, and his younger brother arise in the morning, get ready for school, and arrive home from work. As was clear from the Commonwealth's questioning of the defendant's mother and

brother at the post-sentence hearing, these witness did not have a real recollection of the defendant's whereabouts on that day, and as a result, there was no alibi.

Also lacking in credibility and/or completeness as to an alibi defense was the proffered testimony of the defendant's now ex-girlfriend, Erin Levon. According to the record, Levon gave police two different versions of the defendant's comings and goings on the evening of January 29, 2002 and into the morning hours of January 30, 2002. Those two versions were inconsistent with each other, which Attorney Reed testified convinced him that Levon would not make a credible witness. In addition, Levon's proffered testimony at the May 13th hearing was also at odds with both those prior versions. Furthermore, even if Levon had been called by trial counsel to testify at trial to the version which she presented to the court at the May 13th hearing (which places the defendant with Levon between 6:45 and 7:00 a.m.), the defendant still had the opportunity to commit the crime at approximately 6:07 a.m. on January 30, 2002. Finally, the defendant testified at the post-sentence hearing that, during the course of trial preparation, he agreed with Attorney Reed that Erin Levon would not be called as an alibi witness at trial.

Attorney Reed credibly testified that, given the obstacles to mounting an alibi defense due to the lack of reliable alibi witnesses, he believed the strongest chance of obtaining at least a partial acquittal was to challenge the rest of the Commonwealth's evidence. Because the perpetrator's disguise prevented the victims of the Getty Mart robbery from making a positive identification, the Commonwealth's case against the defendant was circumstantial in nature and focused on the defendant's possession of the .38 caliber Rossi revolver which he used in the later 7-11 robbery. Attorney Reed attempted during the pretrial stage of this case to limit the Commonwealth's ability to present the gun as evidence linking the defendant to the Getty Mart robbery. He pursued this by effectively responding to a Commonwealth motion in limine, which we discuss more below. Also, Attorney Reed cross-examined Joella Simmers in an effort to show that persons other than the defendant may have had access to the gun cabinet at the Simmers residence during the period before Mr. Simmers realized that the gun was missing. Attorney Reed's strategy as to the circumstantial nature of the evidence was a reasonable one.

Ineffective Assistance of Counsel: Motion to Suppress

The defendant alleges that Attorney Reed should have filed a motion to suppress the gun used in the Getty Mart robbery because that gun was obtained as a result of an illegal vehicle stop. As mentioned above, a jury convicted the defendant on March 15, 2003 of the armed robbery of the 7-11 store on March 3, 2002. The 7-11 robbery case was Criminal Action No. 432-2002, presided over by the Honorable John R. Walker. The defendant filed a motion to suppress the firearm in that case, but Judge Walker denied the motion. His ruling became part of the law of that case, and the Commonwealth was therefore permitted to introduce the gun at that trial.

The only avenue open to Attorney Reed to challenge the admission of this firearms evidence at the Getty Mart trial was a motion in limine. The record in the instant case shows that such a motion was filed by the Commonwealth seeking a court ruling as to whether the gun used in the 7-11 robbery and admitted at the trial of that case was admissible at the instant trial to prove the identity of the Getty Mart robber. Attorney Reed filed an answer to the motion, as well as a brief citing to relevant legal authority. The court had ample time before the October 23, 2003 trial to consider the arguments of counsel and to make an informed ruling. Nevertheless, this court had no authority to revisit a suppression motion filed and decided under a different docket number concerning a different incident.

Sufficiency of the Evidence

Lastly, the defendant contends that the verdict was not supported by sufficient evidence, entitling him to an acquittal. Such a challenge raises a question of law for the court. Evidence is sufficient to support the verdict when it establishes beyond a reasonable doubt each material element of the crime charged and its commission by the defendant. Only where the evidence offered to support the verdict contradicts the physical facts, human experience and the laws of nature, will the evidence be insufficient as a matter of law. Commonwealth v. Widmer, 744 A.2d 745 (Pa. 2000).[1] As we concluded in our May 17, 2004 Order, the defendant's claim of insufficiency must fail.

The evidence linking the defendant to the Getty Mart robbery consisted mainly of evidence showing the same gun was used to commit that robbery as was used by the defendant to commit the 7-11 robbery less than two months later. Although the defendant contends that the verdict was based on mere speculation and conjecture, the Commonwealth presented extensive evidence from a ballistics expert to show that the bullet found at the scene of the January 30, 2002 robbery had been fired from the same gun which was used to hold up the 7-11, a crime for which the defendant had already been found guilty by the time of the trial in the instant case. As discussed above, the Commonwealth also presented testimony about the defendant's opportunity to gain access to that gun before January 30, 2002.

The defendant also alleges that the eyewitnesses' testimony about the physical descriptions of the Getty Mart robber was at odds with the defendant's actual appearance. We disagree. The eyewitnesses identified the perpetrator as a light or lighter-skinned black male. The court observed the defendant during trial, and his appearance was not inconsistent with the eyewitnesses' description. As for any alleged discrepancies in height and weight, the evidence was not insufficient as a matter of law merely because the witnesses' descriptions varied slightly. Again, the defendant's appearance was not inconsistent with that testimony.

As for other circumstantial evidence, the defendant alleges that the court erred in allowing the Commonwealth to present evidence about the car used to commit the January 30, 2002 robbery through the testimony of Chauncey LeMaster because Mr. LeMaster was not qualified as an expert in vehicle identification. As discussed in our May 17th Order, this does not undermine the sufficiency of the verdict for two reasons. First, the defendant cites no authority for the idea that expert testimony was required on this matter. Second, Mr. LeMaster testified at trial that he noticed a mid-sized burgundy sedan right before the robbery. The Commonwealth presented evidence that the defendant had been the driver of a mid-sized burgundy sedan used in the 7-11 robbery for which he had already been convicted by the time of the Getty Mart trial, and that the car used in the 7-11 robbery was owned by the defendant's mother. The Commonwealth showed Mr. LeMaster photographs of the car used in the 7-11 robbery, and he testified that the car did indeed look like the same car he noticed shortly before the Getty Mart robbery. Therefore, there was sufficient evidence from which the jury could conclude that the defendant used the same vehicle to commit both robberies. The defendant's allegation in his concise appeal statement that his conviction in the case at bar was based on mere speculation and conjecture is without merit.

We submit that no error was committed in any aspect of this proceeding, and respectfully request that the defendant's conviction and this court's Order of May 17, 2004 be affirmed.

ORDER OF COURT

Now this 20th day of July 2004, pursuant to Pennsylvania Rules of Appellate Procedure 1931(c), it is hereby ordered that the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion Sur Pa.R.A.P. 1925(a).

^[1]In his post-sentence motions, the defendant also sought a new trial as an alternate remedy. Such relief entails a challenge to the weight of the evidence. We addressed this claim in our May 17, 2004 Order. He has not preserved that challenge on appeal.