

COMMONWEALTH OF PENNSYLVANIA v. THOMAS AMERSON, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 32-2004

Post Conviction Relief Act; Ineffective Assistance of Counsel; Sufficiency of Evidence

1. When reviewing the sufficiency of the evidence presented to support a conviction, a court must find, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.
2. When the evidence at trial showed that Defendant threatened to kill the victim, that he struck the victim with a statue in the head at least eight (8) times, that he choked the victim and that as a result the victim passed out and Defendant left her alone, the jury could infer that Defendant intended to inflict serious bodily injury on the victim.
3. When the court grants the defendant leave to appeal *nunc pro tunc*, the court will not reach the merits of the defendant's additional claim(s) of ineffective assistance of counsel; rather, the court issues an advisory opinion pursuant to Commonwealth v. Miller, 868 A.2d 578 (Pa. Super. Ct. 2005), in which it acts as an evidentiary tribunal and it addresses, but does not reach, the merits of defendant's additional ineffectiveness claim(s).
4. Counsel is presumed to be effective; the defendant bears the burden of overcoming that presumption and establishing ineffective assistance of counsel.
5. To sustain a claim for ineffective assistance of counsel, a defendant must establish (1) the issue underlying the claim of ineffectiveness has arguable merit; (2) counsel did not have a reasonable basis for the act or omission in question; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.
6. Based on the facts, it appears Defendant could establish his claim of ineffective assistance of counsel based on counsel's failure to request a jury instruction on simple assault. Specifically, (1) there is arguable merit to the claim that a simple assault instruction should have been requested; (2) counsel did not have a reasonable basis for failing to request the jury instruction; and (3) but for counsel's failure to request the simple assault instruction, there is a reasonable probability that the jury would have convicted Defendant of simple assault rather than aggravated assault.
7. When it appears that the defendant's claim regarding his trial counsel's ineffectiveness contains merit, the court will respectfully urge the Superior Court to find the defendant's trial counsel ineffective, even though the court has not reached the merits of the defendant's claim.

Appearances:

Angela R. Krom, Esq., *Assistant District Attorney*

Eric J. Weisbrod, Esq., *Counsel for Defendant*

Thomas Amerson, *Defendant*

Walsh, J., May 2, 2006

Background:[1]

On March 2, 2005, this Court sentenced Defendant to serve not less than twenty-two (22) months and not more than one hundred twenty (120) months in a state correctional institution for Count 1 - Aggravated Assault, which sentence was to be served at the expiration of the sentence for Count 2. That same day this Court sentenced Defendant to serve not less than one (1) month and not more than sixty (60) months in a state correctional institution for Count 2 - Terroristic Threats.

Prior to June 27, 2005, Defendant submitted[2] a Petition under the Post Conviction Relief Act ("PCRA") to the Court. In his Petition, Defendant asserts he is entitled to relief because he received ineffective assistance of counsel, a government official improperly obstructed his rights of appeal and he received a sentence greater than the lawful maximum. After reviewing Defendant's Petition, the Court allowed Defendant until Thursday, August 11, 2005 to file amendments to his PCRA Petition, allowed the Commonwealth twenty (20) days after any amendment or until August 31, 2005 to answer the Petition, allowed Defendant to proceed *in forma pauperis* and appointed Eric J. Weisbrod, Esq. to represent Defendant by Order of Court dated June 27, 2005. To its Order, the Court attached the Notice to Appointed Counsel from the Prothonotary of the Supreme Court of Pennsylvania.

Defendant filed a *pro se* Motion to Correct Illegal Sentence on July 5, 2005. On July 12, 2005, this Court issued an Order of Court in which the Court recognized that Defendant's first PCRA Petition was pending and that Mr. Weisbrod represents Defendant in that matter. Therefore, the Court ordered that the matters raised in Defendant's Motion to Correct Illegal Sentence be dealt with in the context of Defendant's pending PCRA Petition. In addition, the Court ordered the Clerk to attach Defendant's Motion to Correct Illegal Sentence to its Order and serve it upon the parties, including Mr. Weisbrod. See Pa. R.Crim.P. 576(A)(4).

Defendant filed his Amended Post-Conviction Relief Act Petition on September 12, 2005.[3] In his Amended Petition, Defendant asserts that he is entitled to relief because he received ineffective assistance of counsel. Specifically, Defendant alleges that J. Michael Sheldon, his trial counsel, was ineffective for failing to file a direct appeal on his behalf and for failing to request a jury instruction on the charge of simple assault. After careful review of the claims and the record, Mr. Weisbrod determined that the allegations of obstruction by a government official and a sentence greater than the lawful maximum are without merit. The Commonwealth filed its Answer on September 16, 2005 and in its Answer the Commonwealth stated that it had no objection to a hearing on the issue of ineffective assistance of counsel. The Commonwealth answered further that Defendant's claims of obstruction by a government official and a sentence greater than the lawful maximum are wholly without merit. By Order dated September 19, 2005, this Court set the matter down for hearing on December 5, 2005.

The Court held an evidentiary hearing on December 5, 2005 on Defendant's PCRA Petition and his Motion to Correct Illegal Sentence. At the end of the December 5, 2005 hearing, the Court ordered Defendant to file a brief in support of his claims not later than January 4, 2006. The Court gave the Commonwealth until January 18, 2006 to reply to Defendant's Brief. Both parties timely filed briefs.[4]

By Order of Court dated February 28, 2006, we denied Defendant's Motion to Correct Illegal Sentence and we granted Defendant leave to appeal nunc pro tunc.[5] On March 21, 2006, Defendant filed a Notice of Appeal Nunc Pro Tunc. Defendant timely filed his Statement of Matters Complained of on Appeal Pursuant to Rule of Appellate Procedure 1925(b) on April 4, 2006.

Discussion

Defendant sets forth the following in his Statement of Matters Complained of on Appeal Pursuant to Rule of Appellate Procedure 1925(b):

1. "The evidence at trial, when viewed in the light most favorable to the Commonwealth as the verdict winner, was insufficient to sustain the conviction against the Appellant [Defendant] for Aggravated Assault."
2. "Appellant's [Defendant's] trial counsel rendered prejudicial ineffective assistance of counsel when he failed to request a jury instruction on the charge of Simple Assault which, under the circumstances of this case, would have been a lesser-included offense of the Charge of Aggravated Assault filed against the Appellant [Defendant]."

We will address each in turn.

A. The Sufficiency of the Evidence

Defendant asserts that, when viewing the evidence in the light most favorable to the Commonwealth, it is insufficient to support a conviction for Aggravated Assault. Defendant argues that the evidence did not establish that he attempted to cause serious bodily injury beyond a reasonable doubt. In support thereof, Defendant states that the victim sustained a laceration to her head and her nose, that the victim answered the phone in the middle of the altercation between Defendant and the victim and that as a result of Defendant striking her with a statue the victim passed out, presenting Defendant with the opportunity to cause serious bodily injury. Defendant argues that these facts demonstrate that he did not have the intent to cause serious bodily injury because had he so desired he could have cause serious bodily injury.

When reviewing the sufficiency of the evidence presented to support a conviction, a court must find "viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt." Commonwealth v. Nahavandian, 849 A.2d 1221, 1229 (Pa. Super. Ct. 2004). Here, the Commonwealth charged Defendant with Aggravated Assault, alleging that Defendant attempted to cause serious bodily injury. 18 Pa.C.S.A. §2701(a)(3). 18 Pa.C.S.A. §2301 defines "serious bodily injury" as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

The evidence at trial showed that Defendant threatened to kill the victim, January 24, 2005 R. at 22; that he struck the victim with a statue in the head at least eight (8) times, January 24, 2005 R. at 24-25; that he choked the victim, January 24, 2005 R. at 25; and that as a result the victim passed out and Defendant left her alone, January 24, 2005 R. at 25-26. From these facts, the jury could infer that Defendant intended to inflict serious bodily injury on the victim.

The Commonwealth did not charge Defendant under the subsection of the Aggravated Assault statute in which it must prove that the defendant inflicted serious bodily injury. The Commonwealth charged Defendant with Aggravated Assault by attempting to inflict serious bodily injury. "[T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proof or proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." Nahavandian, 849 A.2d at 1229-1230. Here, the evidence supported such a conviction by the jury.

B. The Ineffectiveness of Trial Counsel for Failing to Request a Jury Instruction on Simple Assault[6]

Defendant asserts that his trial counsel was ineffective for failing to request a jury instruction on Simple Assault. Specifically, Defendant argues that the victim's injuries as established at trial did not amount to "serious bodily injury" as defined in the statute and that the prosecuting attorney admitted as much in her closing statement to the jury. Since we granted Defendant leave to appeal *nunc pro tunc*, we will not reach the merits of Defendant's claim that Mr. Sheldon was ineffective for failing to request a jury instruction on simple assault. Rather, we issue an advisory opinion pursuant to Commonwealth v. Miller, 868 A.2d 578 (Pa. Super. Ct. 2005), in which we act as an evidentiary tribunal and we will address, but not reach, the merits of Defendant's second ineffectiveness claim.

Counsel is presumed to be effective. Commonwealth v. Breakiron, 729 A.2d 1088 (Pa. 1999). Defendant bears the burden of overcoming that presumption and establishing ineffective assistance of counsel. Commonwealth v. Speight, 677 A.2d 317 (Pa. 1996). Under the PCRA, a defendant is entitled to relief if his counsel's act or omission "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. §9543(a)(2)(ii). To sustain a claim for ineffective assistance of counsel, a defendant must establish (1) the issue underlying the claim of ineffectiveness has arguable merit; (2) counsel did not have a reasonable basis for the act or omission in question; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999); Commonwealth v. Douglas, 645 A.2d 226, 230 (Pa. 1994).

In his Amended Post-Conviction Relief Act Petition, Defendant alleged that his trial counsel was ineffective for failing "to request a jury instruction on the charge of Simple Assault." Defendant's Amended Post-Conviction Relief Act Petition, 7a. We held a hearing on Defendant's Amended Post-Conviction Relief Act Petition. Mr. Sheldon testified at the hearing and he attempted to offer explanations as to why he did not request an instruction on simple assault. We found Mr. Sheldon's testimony to be incredible and we found Mr. Sheldon's attitude to be cavalier. Mr. Sheldon appeared to hold the jury's conviction in disbelief.

Specifically, Mr. Sheldon seemed to offer two explanations for his decision not to ask for a simple assault charge. We note that neither of these explanations appeared to have been well thought out or part of an overall strategy. In fact, we think both explanations were developed subsequent to Defendant's conviction.

Mr. Sheldon's first explanation was that he utilized an "all or nothing" approach to the trial. Any conviction would cause Defendant to lose the security clearance he needed for employment. Ms. Sheldon testified that because he advanced a self-defense argument at trial he could not argue for simple assault. We do not believe this to be the case. A criminal defendant may put forth two or more alternate theories as part of his defense. Commonwealth v. McQuire, 488 A.2d 1144 (Pa. Super. Ct. 1985) (where a defendant presents two mutually exclusive theories, the jury may believe that the evidence supports one, but not the other). Here Defendant could have argued that he acted in self-defense or, if the jury failed to believe he acted in self-defense, that he did not attempt to inflict serious bodily injury. Further, Mr. Sheldon's request for a simple assault instruction out of the presence of the jury would not have undermined any arguments he made to the jury in open court.

Mr. Sheldon's second explanation was that he did not think the Court would give a simple assault charge. It seems Mr. Sheldon could have best served his client by asking for the instruction. Simply requesting the instruction would in no way harm Defendant or Defendant's case. Further, we think an argument could have been made that the evidence at trial supported a simple assault instruction. Had such an argument been made and the simple assault instruction given, we think there is a reasonable probability that the jury would have convicted Defendant of simple assault as opposed to aggravated assault. We believe (1) there is arguable merit to the claim that a simple assault instruction should have been requested; (2) Mr. Sheldon did not have a reasonable basis for failing to request the jury instruction; and (3) but for Mr. Sheldon's failure to request the simple assault instruction, there is a reasonable probability that the jury would have convicted Defendant of simple assault rather than aggravated assault.

Conclusion

Defendant's conviction is supported by sufficient evidence.

Although we have not reached the merits of Defendant's claim regarding his trial counsel's ineffectiveness for failing to request a jury instruction on simple assault, we believe Defendant's claim contains merit.

We respectfully urge the Superior Court to find that the jury's conviction was supported by sufficient evidence and to find Defendant's trial counsel ineffective.

ORDER OF COURT

May 2, 2006, the Clerk of Courts is directed to transmit the record of these proceedings along with this Opinion and Order to the Superior Court.

[1] The majority of this section is taken from our February 28, 2006 Opinion.

[2] When the Court received the Petition, it had not yet been filed. The Petition was filed after the Court issued its Order of June 27, 2005 and presented the Order and the attached Petition to the Clerk for filing. Thus, the Petition is stamped filed June 29, 2005.

[3] On or about August 8, 2005, Defendant sought a continuance. The Court granted his request and ordered that he file his Amended Petition not later than September 12, 2005. The Court ordered the Commonwealth to file its Answer not later October 2, 2005.

[4] The Commonwealth sought an extension of time for filing its brief. The Court granted its request and extended the time for filing until February 1, 2006.

[5] In our Opinion of that date, we issued an advisory opinion to the Superior Court on trial counsel's ineffectiveness. As Defendant raises the issue of his trial counsel's effectiveness in this appeal, we will address that issue again below.

[6] The majority of this section is taken from our February 28, 2006 Opinion.