

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 97-11,838

VS :

GAMAL SUMMERS :

OPINION IS SUPPORT OF ORDER  
IN COMPLIANCE WITH RULE 1925(A)  
OF THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order dated February 22, 1999 in which the Defendant was sentenced to undergo incarceration for an aggregate minimum of twelve months and an aggregate maximum of thirty-two months. This sentence was imposed after the Defendant was found guilty by a jury of one count of aggravated assault and two counts of simple assault. The evidence presented at the trial is as follows:

On September 24, 1997, the Defendant was visiting his wife and newborn child in the Williamsport Hospital. The Defendant approached Heather McCormick, RN, just after she came in for the 11:00 p.m. shift, to inform her that he was going outside to smoke. Ms. McCormick told the Defendant that he would not be allowed to stay through the night. Ms. McCormick suggested that the Defendant return to the room and take five minutes to say goodnight to his wife and son, then he could smoke his cigarette on the way home. The Defendant then informed her that "he was going back to the room then and smoke in the bathroom then" (N.T. 11/18/98, p.9). Ms. McCormick testified that she followed the Defendant to the room and upon finding that he did go into the bathroom, she returned to the nurse's station and called security.

Ms. McCormick accompanied Security Officers Michael Cillo, Jr., and Matthew Douglas to the room. Once in the room, Officers Cillo and Douglas knocked on the

bathroom door and informed the Defendant that he should come out. The Defendant told the officers that he was going to the bathroom (Id., p.12). After waiting for approximately five minutes, Officer Cillo put a master key into the locked bathroom door, but before he unlocked the door the Defendant burst out of the bathroom. As the Defendant confronted the officers, he flailed his arms, yelled at the officers, and put some personal items into an overnight bag. Officers Cillo and Douglas escorted the Defendant down the hallway. Ms. McCormick followed closely behind. As Ms. McCormick approached the nurse's station, the Defendant broke away from the officers lunged toward her. At that point she heard the Defendant tell her that she shouldn't have called security, and that he was going to get her. Both Officer Cillo and Officer Douglas heard the Defendant tell Ms. McCormick that he was "going to finish this right now" (Id., p.48).

The officers physically grabbed the Defendant and forced him through the maternity ward doors. Once outside the ward, the officers wrestled the Defendant to the ground to restrain him. Officer Douglas testified that at one point, Officer Cillo was on top of the Defendant, and the Defendant tried to throw Officer Cillo head-first into the door frame. He added "we managed to avert that and continued to wrestle and almost got thrown through a glass display case that's rights [sic] next to the door frame." (Id., p.83). A few minutes later he saw the Defendant bite Officer Cillo's arm. Officer Cillo was bitten on both forearms (Id., p. 50). The bite on his left arm broke the skin and required treatment in the emergency room. Officer Cillo testified that it was some of the most excruciating pain he had experienced, and that the arm was swollen and discolored for at least a week (Id., p.52).

Ms. McCormick watched the three men scuffle for some time before she called for additional help, and eventually called 911. She testified that during the ten minute wait for the police to arrive, the Defendant continued to fight with the officers on the floor. It was not until the three officers from the Williamsport Bureau of Police arrived that the Defendant was finally secured. Ms. McCormick testified that she was afraid then and for days after because of the Defendant's comment.

Mrs. Summers testified on behalf of the Defense. She testified that one of the nurses had told her husband that he could stay with her until she fell asleep. She testified that she stood outside the door to her room until they had escorted her husband to the elevator. She did not witness anything unusual as they passed by the nurse's station, but she heard her husband tell the nurse that she shouldn't have called the security guards because he was leaving anyway. She then went back into the room to check on the baby. When she looked out the door again, she saw the guard on the floor on top of her husband. She testified that her husband was "moving in a circular motion kicking his feet so the other guard couldn't also hold him down" (Id., p.112). She testified that during the scuffle, her husband complained that the guard was choking him. She testified that at some point she picked up her husband's bag that had spilled all over the floor, and returned to her room to call her mother. On cross-examination she testified that she was not exactly sure what her husband had said to the nurse, but she added that if he *had* called the nurse a "f-ing B" the guards would have immediately put him in a choke-hold, and not waited until they got to the elevators. She further testified that she had no idea what had happened to cause the officers to wrestle her husband to the floor.

The Defendant testified that when he first confronted Ms. McCormick, he told her that a nurse from the previous shift and a doctor had told him that he could not stay overnight, but that he could stay late. Ms. McCormick kept insisting, however, that he take five minutes to say goodbye to his wife and son, then he should smoke his cigarette on the way home. He testified that after he came out of the bathroom, he felt violated, and was very upset. He testified that he bit the officer the first time because he was being choked, and the second time because the officer grabbed his genitals. He further testified that he was deliberately putting his hands in front of his body to avoid being handcuffed because he did not feel that he needed to be handcuffed (Id., p.144).

On appeal, Defendant first argues that his counsel was ineffective for failing to file a pretrial motion to dismiss the case due to a violation of Pennsylvania Rule of Criminal Procedure 1100. The standard of review for allegations of ineffective assistance of counsel is well established and quite narrow. Ineffectiveness claims are subject to a three-part analysis. First, it must be demonstrated that the underlying claim is of arguable merit. Next, it must be determined whether counsel's choice of action had some reasonable basis designed to effectuate his or her client's interests. Finally, a showing must be made of how counsel's choice of action prejudiced the client. Commonwealth v. Clark, 430 Pa. Super. 270, 634 A.2d 254, (1993), Commonwealth v. Tavares, 382 Pa. Super. 317, 555 A.2d 199, (1989).

Instantly, the Court finds that the Defendant's underlying claim has no arguable merit. Rule 1100 provides that trial in a court case in which a written complaint is filed against the defendant, where the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed. Instantly, the written

complaint in this matter was filed on October 27, 1997. The trial commenced on November 18, 1998. Although 386 days had passed from the filing of the complaint to the commencement of trial, Rule 1100 provides that in determining the period for commencement of trial, there shall be excluded therefrom:

...

(3) such period of delay at any stage of the proceedings as results from:

(ii) any continuance granted at the request of the defendant or the defendant's attorney.

In the instant case, the defense requested a continuance on January 28, 1998. In this Court's Order dated January 28, 1998, the Court notes that upon motion of the Defense, without opposition from the Commonwealth, this case is continued to the July 1, 1998 pre trial list. This continuance covered a total of 163 days. The defense further requested a continuance from the July 10, 1998 trial term to the August 10, 1998 trial term. This continuance covered a total of 30 days. Therefore, excluded from the 386 days are 193 days, leaving a balance of 193 days. The Defendant's argument that the time had elapsed under Rule 1100 is therefore without merit.

The Defendant next argues that the evidence was insufficient to support the verdict of guilty regarding the charge of simple assault-physical menace against Heather McCormick. "The test of the sufficiency of the evidence in a criminal case is whether, viewing the evidence admitted at trial in the light most favorable to the Commonwealth and drawing all reasonable inferences in the Commonwealth's favor, there is sufficient evidence to enable the trier of fact to find every element of the [crime] charged beyond a reasonable doubt." Commonwealth v. Jones, 449 Pa. Super. 58, 672

A.2d 1353, 1354, (Pa. Super. 1996), citing, Commonwealth v. Carter, 329 Pa. Super. 490, 495-96, 478 A.2d 1286, 1288 (1984); Commonwealth v. Peduzzi, 338 Pa. Super. 551, 555, 488 A.2d 29, 31-32 (1985).

Applying the foregoing standard, in order to have found the Defendant guilty of simple assault, the Commonwealth must have proven beyond a reasonable doubt that the Defendant attempted to put Ms. McCormick in fear of imminent serious bodily injury by engaging in a physical act which was menacing or frightening. 18 Pa.C.S.A. § 2701(a)(3). Instantly, the Court finds that the Defendant's actions of lunging at her and telling her that he was going to end things right then and there, was sufficient to have put Ms. McCormick in fear of imminent serious bodily injury. The Court therefore rejects the Defendant's argument.

The Defendant next argues that the evidence was insufficient to support a verdict of guilty as to the charges of simple assault and aggravated assault against Officer Cillo. In order to have found the Defendant guilty of simple assault against Officer Cillo, the Commonwealth must have proven beyond a reasonable doubt that the Defendant attempted to cause or intentionally, knowingly or recklessly caused bodily injury to Officer Cillo. 18 Pa.C.S.A. § 2701(a)(1). Instantly, the Court would find that the Defendant's acts of trying to throw Officer Cillo head-first into the door frame when coupled with the fact that the Defendant bit Officer Cillo in both of his arms, breaking the skin on one of his arms, was sufficient to have proven that the Defendant intentionally caused bodily injury to Officer Cillo.

In order to have found the Defendant guilty of aggravated assault against Officer Cillo, the Commonwealth must have proven beyond a reasonable doubt that the

Defendant attempted to cause or intentionally or knowingly caused bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty, 18 Pa.C.S.A. § 2702. Emergency medical services personnel is one of the persons enumerated in subsection (c) of the statute. Subsection (d) of Section 2702 defines the term "emergency medical services personnel" as including, but not limited to, "doctors, residents, interns, registered nurses, licensed practical nurses, nurse aides, ambulance attendants and operators, paramedics, emergency medical technicians *and members of a hospital security force while working within the scope of their employment.*" Instantly, the Court finds that the Commonwealth proved beyond a reasonable doubt that the Defendant, by biting and breaking the skin on Officer Cillo's arm, caused bodily injury to one of the persons enumerated in the statute.

The Defendant next alleges that the Commonwealth failed to disprove the defense of justification beyond a reasonable doubt. His claim necessarily requires a finding that Defendant's version of the events in question is more credible than the testimony presented by the Commonwealth at trial. Commonwealth v. Gonzales, 415 Pa. Super. 564, 609 A.2d 1368 (1992). However, the credibility of the self-defense testimony, that he only bit Officer Cillo's arm because he was being choked and because the officer had grabbed his genitals, was for the jury which could believe all, some or none of it. Commonwealth v. Ignatavich, 333 Pa. Super. 617, 482 A.2d 1044 (1984); Commonwealth v. London, 461 Pa. 566, 337 A.2d 549 (1975). The jury was properly instructed on the elements of self-defense and the Commonwealth's burden of proof. The Court therefore finds the Defendant's argument without merit.

The Defendant next claims that the verdict of guilt is against the weight of the evidence. In reviewing such a claim, the test is not whether the Court would have decided the case in the same way, but whether the verdict was so contrary to the evidence as to shock one's sense of justice. Only in this situation is the award of a new trial imperative, so that right may be given an opportunity to prevail. Id.; Commonwealth v. Taylor, 324 Pa. Super. 420, 471 A.2d 1228 (1984); Commonwealth v. Gonce, 320 Pa. Super. 19, 466 A.2d 1039 (1983). Instantly, the Court cannot conclude that the verdict was so contrary to the evidence that the award of a new trial is imperative so that right may be given an opportunity to prevail. All three Commonwealth witnesses testified consistently with regard to the Defendant's actions of lunging at Ms. McCormick and telling her that he was going to end things right then. The testimony was also consistent with regard to the Defendant's actions of resisting and biting Officer Cillo on his arms. The Defendant further admitted that he had bit the officer, and that he had



resisted and fought the security officer because he did not feel that he needed to be restrained. Under these circumstances, the Court finds the Defendant's argument that the verdict is against the weight of the evidence without merit.

Dated: \_\_\_\_\_

By The Court,

Nancy L. Butts, Judge

xc: Demetrius W. Fannick, Esquire  
Daniel Holmes, Esquire  
Honorable Nancy L. Butts  
Law Clerk  
Gary Weber, Esquire  
Judges

NLB/kz