IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 00-10,232**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
THOMAS PARKER,	**:**	
Defendant	**:**	**1925(a) Opinion**

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

This opinion is written in support of this Court's Judgment of Sentence dated October 10, 2000 and docketed October 13, 2000. The relevant facts are as follows.

On December 26, 1999, Jason Bentley and Jennifer Arthur were in Apartment 104 at 25 S. Montour Street in Montoursville when they heard a knock on the door. Mr. Bentley answered the door and three black males forced their way into the apartment. One individual jumped on Mr. Bentley and began punching him and another individual held a knife to Ms. Arthur's throat while the third individual began going through the apartment looking for items to steal. A mac card and $40 were taken from Mr. Bentley's person and a shotgun, rifle, shells for the rifle and a paintball gun were taken from the residence.

Ismail Baasit and Thomas Parker were identified by the police as possible suspects. A photograph of Baasit was shown to Mr. Bentley, who identified Baasit as one of the three individuals involved in the incident. Baasit was Mirandized and interviewed by the police. In his interview, Baasit stated: (1) he knocked on the door of the apartment; (2)

Thomas Parker and Tremont Hill forced their way into the apartment; (3) Parker was the individual who jumped Mr. Bentley; (4) Tremont Hill was the individual who grabbed Ms. Arthur; and (5) Baasit looked through the house for items to steal, taking a rifle, shotgun and paintball gun.

On or about January 21, 2000 the police filed the following charges against the defendant: burglary, conspiracy to commit burglary, robbery-commit or threat to commit a first or second degree felony, criminal trespass, aggravated assault, robbery-take property, theft, receiving stolen property, unlawful restraint, possession of an instrument of crime, false imprisonment, recklessly endangering, and simple assault.

On June 1, 2000, immediately prior to jury selection, the defendant decided to plead guilty. The defendant entered an open plea to all the charges before the Honorable Dudley N. Anderson.

On October 10, 2000, the defendant came before the undersigned for sentencing. The Court sentenced the defendant to an aggregate term of imprisonment of six to sixteen years incarceration in a state correctional institution. On October 19, 2000, the defendant filed a Motion for Reconsideration of Sentence, which was denied by the Court on October 27, 2000.

The defendant filed a timely notice of appeal. In his statement of matters complained of on appeal, the defendant asserts plea counsel was ineffective in the following respects: (1) failing to request pre-trial discovery; (2) failing to file pre-trial motions, including a motion to suppress the statements of a co-defendant; (3) advising the defendant to enter a plea of guilty when counsel had not requested pre-trial discovery nor

filed pre-trial motions; and (4) failing to file a motion to dismiss prior to trial, where the only evidence against the defendant was a self-serving statement of a co-defendant. The defendant also contends the Court erred by accepting the defendant's plea where it was not knowing, intelligent and voluntary.

The law presumes that counsel was effective and the defendant bears the burden of proving otherwise. To establish a claim of ineffective assistance of counsel, the defendant must satisfy a three-prong inquiry: (1) whether the underlying claim is of arguable merit; (2) whether or not counsel's acts or omissions had any reasonable strategic basis; and (3) whether there is a reasonable probability that the outcome of the proceedings would have been different, but for the errors and omissions of counsel. Commonwealth v. Kimball, 555 Pa. 299, 312, 724 A.2d 326, 333 (1999); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). Furthermore, in making assertions of ineffectiveness, the claimant must allege facts sufficient upon which a court can conclude that trial counsel may have been ineffective; such claims will not be considered in a vacuum. Commonwealth v. Durst, 522 Pa. 2, 4, 559 A.2d 504, 505 (1989).

It is difficult for the court to address the ineffective assistance claims since these claims were first raised in this appeal and the court has not had an opportunity to hear the facts related thereto. Nevertheless, the Court will address the defendant's specific claims of ineffectiveness to the best of its abilities.

Although no formal request for discovery was filed by counsel on behalf of the defendant, this does not necessarily mean counsel failed to request pre-trial discovery. Discovery can be conducted on an informal basis through the cooperation of counsel and,

in fact, is encouraged by the Court. It appears at least some informal discovery was conducted, because defense counsel stated at the sentencing hearing that the defendant cooperated with the authorities and gave them a complete statement acknowledging his involvement. N.T., October 10, 2000, at 11. Therefore, this claim may be without merit. Even if it was of arguable merit, however, given the nature of the statement, it is unlikely that the result would have been different.

With respect to the claim counsel was ineffective for failing to file a motion to suppress the statements of the co-defendant Ismail Baasit, the Court also rejects this claim. First, the record does not reflect any basis to suppress the statement. The police investigation led them to believe Baasit and the defendant were involved in these crimes. The police obtained a photograph of Baasit and placed it in a photo array.[1] Jason Bentley, one of the victims, picked Mr. Baasit out of the photo array, indicating Baasit was one of the individuals involved in the burglary. Mr. Baasit was given his Miranda rights, waived them and spoke to the police. Mr. Baasit implicated himself, the defendant and Tremont Hill in the burglary. See Affidavit of Probable Cause. There is no readily apparent illegality in the way the police obtained Mr. Baasit's statement.

The Court recognizes that if Baasit would not testify at the defendant's trial, the Bruton rule may preclude admission of his statement against the defendant. However, Mr. Baasit was very cooperative with the police. Not only did he provide information to the police regarding this offense, but he also gave them information regarding the individuals

[1]Baasit was in prison at this time. Presumably, the police obtained the photo from the prison or booking photographs.

selling heroin in Lycoming County. See Sentencing Transcript of Ismail Baasit, Lyc. County no. 00-10,207. Therefore, it is likely Baasit would have testified against the defendant. Even if he didn't, it is doubtful a successful suppression motion would have changed the outcome given the defendant's own statement to the police acknowledging his involvement.

Additionally, the defendant's statement to the police would provide a reasonable basis for his attorney to advise him to enter a guilty plea.

The defendant's assertion that counsel should have filed a motion to dismiss prior to trial also is without merit. First, the co-defendant's statement was not the only evidence as the defendant himself made a statement to the police acknowledging his involvement. Second, provided the co-defendant would testify at the defendant's trial, the defendant would not be entitled to dismissal. The co-defendant's statement would be sufficient for the case to go to trial. At most, the defendant would be entitled to a jury instruction regarding the testimony of the co-defendant. Finally, the defendant's own statement makes a different outcome in this case unlikely.

The defendant also contends the Court erred in accepting his plea, because it was not knowing, intelligent and voluntary. A determination of whether a guilty plea can withstand a voluntariness challenge must be based on the totality of circumstances surrounding the guilty plea. See Commonwealth v. Iseley, 419 Pa.Super. 364, 615 A.2d 408, 415 (1992), appeal denied, 534 Pa. 653, 627 A.2d 730 (1993). Case law also requires that the guilty plea colloquy include a demonstration that the defendant understands the nature of the charges. Commonwealth v. Campbell, 451 Pa. 465, 304

A.2d 121 (1973). To demonstrate the defendant's understanding of the charge, the record must disclose that the elements of the crimes charged were outlined in understandable terms. Commonwealth v. Belleman, 446 A.2d 304 (Pa.Super. 1982), citing Commonwealth v. Ingram, 455 Pa. 198, 203-204, 316 A.2d 77, 80 (1984).

The Court reviewed the transcript of the guilty plea hearing held before Judge Anderson on June 1, 2000. In the written guilty plea colloquy, the defendant acknowledge his attorney explained to him all the elements of the crimes to which he was pleading guilty.[2] The defendant's attorney, James Protasio also filed a certification that: (1) he thoroughly explained each and every element of each and every crime to which the defendant expressed a desire to enter a plea of guilty; and (2) he believed the defendant understood all the elements of the crimes to which he was pleading guilty. Despite the above, the Court believes the oral guilty plea colloquy does not fully comport with the strict mandates of Rule 319 of the Pennsylvania Rule of Criminal Procedure, the comment thereto, and the cases decided according to that Rule. Therefore, the Court has no objection if the Superior Court remands the matter back to this Court to hold a hearing to determine if the defendant wants to withdraw his guilty plea or if the Superior Court decides to enter an Order allowing withdrawal of the guilty plea.[3]

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[2]The written guilty plea colloquy is attached to the guilty plea order. The defendant's acknowledgment that his attorney explained all the elements to him can be found on page 2 of the written colloquy. The attorney's certification is attached to the last page of the written guilty plea colloquy.

[3]The Court does not know what remedy the defendant is seeking. Although the Court indicated counsel's advise to plead guilty was reasonable given the defendant's statement to the police, the Court is not opposed to the withdrawal of the plea.

DATE: _____

By The Court,

_____
Kenneth D. Brown, J.

cc: Diane Turner, Esquire
Matthew Ziegler, Esquire
Law Clerk
Work file
Superior Court (original & 1)
Gary Weber, Esquire (Lycoming Reporter)