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PLJ

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Opinions

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Commonwealth of Pennsylvania v. Kevin Hamilton

Criminal Appeal—Sufficiency—Suppression—Four Corners—Trash Pull—Miranda—Confidential Informant

Various claims raised on appeal after defendant had admitted to police that he flushed heroin and crack cocaine down toilet while entry was made into his home.

No. CC 2016-14385. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—June 26, 2018.

OPINION

The Defendant has appealed from the judgment of sentence entered on November 16, 2017. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with two (2) counts of Possession of a Controlled Substance with Intent to Deliver,[1] two (2) counts of Possession of a Controlled Substance[2] and one (1) count each of Criminal Use of a Communication Facility,[3] Tampering with or Fabricating Physical Evidence[4] and Possession of Drug Paraphernalia.[5] He appeared before this Court on June 22, 2017 for a hearing on his Pretrial Motion to Suppress, but that Motion was denied at the conclusion of the hearing. He next appeared before this Court on November 16, 2017 for a stipulated non-jury trial. At its conclusion, this Court found the Defendant not guilty of the Possession with Intent to Deliver charges and guilty of the remaining charges. The Defendant waived a Pre-Sentence Report and was immediately sentenced to a term of imprisonment of one (1) to two (2) years. No Post-Sentence Motions were filed. This appeal followed.

On appeal, the Defendant raises several claims of error, which are discussed as follows:

1. Sufficiency of the Evidence

Initially, the Defendant argues that the evidence was insufficient to support the convictions for Criminal Use of a Communication Facility and Tampering with Physical Evidence. A review of the record reveals that these claims are meritless.

When reviewing a challenge to the sufficiency of the evidence, the court must determine "whether, 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…[An appellate court] may not weigh the evidence and substitute [its] judgment for the fact finder. In addition…the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding appellant'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…Furthermore, the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." *Commonwealth v. Lewis*, 911 A.2d 558, 563 (Pa.Super. 2006).

Briefly, the evidence presented at the stipulated non-jury trial established that the Pittsburgh Police Department executed a search warrant at the Defendant's home at 147 Orchard Street following information provided by a confidential informant and police corroboration through surveillance and two (2) trash pulls. Following the execution of the search warrant the Defendant asked to speak with Detective Churilla, and told the detective that when the police initially entered his home, he had flushed crack cocaine and heroin down the toilet. He also stated that the drugs found during the search were his and the flip phone was his "dirty phone." Subsequent examination of the flip phone revealed text messages related to the sale of drugs.

Our Crimes Code defines Criminal Use of a Communication Facility as follows:

> *§7512. Criminal use of communication facility*
>
> *(a). Offense defined. - A person commits a felony of the third degree of that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L. 233, No. 64) known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.*
>
> *…*
>
> *(c). Definition. - As used in this section, the term "communication facility" means a public or private instrumentality used or useful in the transmission of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part, including, but not limited to, telephone, wire, radio, electromagnetic, photoelectronic or photo-optical systems or the mail.*

18 Pa.C.S.A. §7512.

In order to sustain a conviction for Criminal Use of a Communication Facility, our courts have held that "[t]he Commonwealth must prove, beyond a reasonable doubt that: (1) Appellants knowingly and intentionally used a communication facility; (2) Appellants knowingly, intentionally or recklessly facilitated an underlying felony; and (3) the underlying felony occurred." *Commonwealth v. Moss*, 852 A.3d 374, 382 (Pa.Super. 2004). Here, the Commonwealth established, through the Defendant's admission and its own investigation, that the cell phone recovered during the search belonged to the Defendant and that he used it to arrange the sale of illegal drugs. The evidence was clearly sufficient to establish the elements of Criminal Use of a Communication Facility and so this claim must fail.

Regarding the Tampering with Physical Evidence claim, our Crimes Code defines it as follows:

> ***§4910. Tampering with or fabricating physical evidence***
>
> *A person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:*
>
> *(1). alters, destroys, conceals or removes any record, document or thing with intent to impair its veracity or availability in such proceeding or investigation;*

18 Pa.C.S.A. §4910

Here, the Defendant admitted to the police that he flushed heroin and crack cocaine down the toilet while entry was being made into his home. In *Commonwealth v. Govens*, 632 A.2d 1316 (Pa.Super. 1993), our Superior Court specifically addressed the flushing of drugs with regard to the intent element of the statute. It stated that "[t]he trier of fact can reasonably infer that appellant had become aware that his drug dealing was under investigation when he heard the police knock at his door and announce their presence. Appellant's reaction, by running into the bathroom and attempting to get rid of the evidence, readily confirms his awareness of a police investigation and his intent to impede the same. In this regard, we agree with the Commonwealth that 'it is absurd to suggest that [appellant] attempted to destroy the evidence for any reason other than to keep it out of the hands of police… Certainly, by destroying evidence to avoid arrest, [appellant] necessarily demonstrated his intent to impair a police investigation.'" *Commonwealth v. Govens*, 632 A.2d 1316, 1329 (Pa.Super. 1993).

As noted above, the Defendant admitted to flushing heroin and crack cocaine down the toilet as the police were entering his home to execute the search warrant. As in *Govens*, there is no reasonable argument that the Defendant flushed the drugs with any intent other than to keep them from being discovered by the police. By admitting his awareness of the police entry into his home and his reactionary flushing of the cocaine and heroin, the Defendant also admitted his intent to keep those drugs from discovery by the police. The evidence was sufficient to establish the elements of the claim for Tampering with Physical Evidence. This claim must also fail.

2. Suppression - Probable Cause

Next, the Defendant avers that this Court erred in denying his Motion to Suppress, because "based on the 'four corners' of the search warrant, it was issued based on information that failed to establish probable cause." This claim is meritless.

When reviewing a challenge to the trial court's denial of a suppression motion, the appellate court "is limited to determine whether the suppression courts factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, [the appellate court] may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, [the appellate court is] bound by those findings and may reverse only if the court's legal conclusions are erroneous… Where, as here, the appeal of the determination for he suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, 'whose duty it is to determine of the suppression court properly applied the law to the facts'… Thus, the conclusion of law of the courts below are subject to [the appellate court's] plenary review." *Commonwealth v. Jones*, 988 A.2d 649, 654 (Pa. 2010).

At the conclusion of the suppression hearing, defense counsel presented a detailed "four corners" argument, wherein he averred that the information from the confidential informant was not reliable, subsequent surveillance was inconclusive and the warrant did not provide any specifics on the field testing of the garbage.

In *Commonwealth v. Gagliardi*, 128 A.3d 790 (Pa.Super. 2015), our Superior Court discussed the use and corroboration of a confidential informant in establishing probable cause to obtain a search warrant. It stated: "[a] determination of probable cause based upon information received from a confidential informant depends upon the informant's reliability and basis of knowledge viewed in a common sense, non-technical manner. Thus, an informant's tip may constitute probable cause where police independently corroborate the tip, or where the informant has provided accurate information of criminal activity in the past, or where the informant whims participated in the criminal activity. The corroboration by police of significant details disclosed by the informant in the affidavit of probable cause meets the *Gates* threshold… ('Information received from an informant whose reliability is not established may be sufficient to create probable cause where there is some independent corroboration by police of the informant's information…') The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause. Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable causation in the belief that a search should be conducted." *Commonwealth v. Gagliardi*, 128 A.3d 790, 795 (Pa.Super. 2015), citing *Commonwealth v. Clark*, 28 A.3d 1284, 1288 (Pa. 2011).

Here, the affidavit of probable cause noted that the confidential informant has provided information in four (4) other cases, one (1) of which resulted in a guilty plea and three (3) of which were still pending at the time of the application. The affidavit noted that the confidential informant "has been with Quincy Leonard when he went to 147 Orchard St. and picked up several bricks of heroin from Kevin, LNU. The CI stated that the bricks of heroin were wrapped in porno paper." The informant identified the Defendant from a photograph. Thereafter, the police confirmed the information with surveillance, two (2) trash pulls and field testing of items therein.

At the conclusion of the suppression hearing, this Court placed its findings and conclusions on the record. It stated:

> THE COURT: Okay. Mr. Sweeney, I agree with you that individually these items would not lead to a good search warrant. However, looking at the totality of the circumstances, I believe the warrant is good. There was a tip from a known person whose veracity with dealing drugs was verified. There was a photo of the defendant shown to this person. There was a trash pull where there was residue found, and, again, I don't know very many people that take their garbage down the block, and if that were the only thing we had, then I would worry about it. There was also surveillance set up by the officers and a second trash pull. So I do think that the warrant is good.

(Suppression Hearing Transcript, p. 20-21).

As the record reflects, this Court appropriately considered the totality of the circumstances in evaluating whether there was sufficient probable cause for the issuance of the search warrant. This court properly considered the confidential informant's past history, the information he provided and the police corroboration of that information. This Court's findings of fact and conclusions of law were supported by the record and so this claim of error must also fail.

3. Suppression - Miranda

Finally, the Defendant argues that this Court erred in denying his Motion to Suppress in regard to statements made at the time of the search. He argues that he was in custody and had been subjected to interrogation but had never been informed of his *Miranda* rights. A review of the record reveals that this claim is also meritless.

"The principles surrounding *Miranda* warnings are…well-settled. The prosecution may not use statements stemming from a custodial interrogation of a defendant unless it demonstrates that he was appraised of his right against self-incrimination and his right to counsel… Thus, *Miranda* warnings are necessary any time a defendant is subject to a custodial interrogation. As the United States Supreme Court explained, 'the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent'… Moreover, in evaluating whether *Miranda* warnings are necessary, a court must consider the totality of the circumstances… In conducting the inquiry, we must also keep in mind that not every statement made by an individual during a police encounter amounts to an interrogation. Volunteered or spontaneous utterances by an individual are admissible even without *Miranda* warnings… Similarly, *Innis* does not 'place the police under a blanket prohibition from informing a suspect about he nature of the crime under investigation or about the evidence relating to the charges against him.'" *Commonwealth v. Gaul*, 912 A.2d 252, 258 (Pa. 2006), internal citations omitted. Moreover, "since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can only extend to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Commonwealth v. Umstead*, 916 A.2d 1146, 1150 (Pa.Super. 2007), citing *Rhode Island v. Innis,* 446 U.S. 291, 300-301 (1980).

At the suppression hearing, the following occurred:

Q. (Ms. Konoval): Now, without getting into further details about the search itself, the items discovered, did you speak to the defendant after you searched the master bedroom?

A. (Det. Churilla): He asked to speak to me.

Q. He asked to speak to you?

A. Yes.

Q. Did you hear him ask to speak to you?

A. Yes.

Q. Were you back in the living room?

A. I came down the steps, and at this time I informed the other detectives there that we needed to get both of them dressed - both of them would be himself and then his girlfriend at the time who was living with him - that it there was narcotics recovered.

Q. So let me just clarify. You came down the stairs after searching the master bedroom, and you said to other detectives, we need to get both of them - referring to the defendant and a female who was in the house - dressed?

A. Yes.

Q. You said that based on what?

A. Because the narcotics - the narcotics were found in the master bedroom itself. So that's why - target in the investigation was both names on the search warrant is Mr. Hamilton and his girlfriend.

Q. Did you say anything else before the defendant spoke to you?

A. I can't recall.

Q. Did you say anything to him directly before he spoke to you?

A. No.

Q. Did you say anything to his girlfriend directly?

A. Not that I can recall.

Q. Were there any people in that house when S.W.A.T. made entry other than the defendant and his girlfriend?

A. There was his children were there.

Q. About how old are they?

A. I would say from being an infant to maybe being teenagers.

Q. After you told another detective we need to get them both dressed, what happened?

A. He asked - he wanted to say something to me.

Q. Did he speak to you directly? Did he speak to another officer?

A. He spoke to me directly.

Q. Do you remember the exact words he used?

A. Can I talk to you?

Q. What did you say?

A. I said yeah.

Q. What did he say?

A. Basically, pretty much said, listen. Everything is mine. She has nothing to do with this. Basically taking responsibility for what was found in the house.

(S.H.T. p. 7-9).

As the record reflects, Detective Churilla was giving directions to his fellow officers regarding getting the Defendant and his girlfriend dressed so that they could be taken to jail. The statement was not made or addressed to the Defendant. The Defendant's subsequent statement was spontaneously volunteered and was not made in response to an interrogation. Given the spontaneous and volunteered nature of the statement, it is clearly admissible despite the fact that the Defendant had not yet been read his *Miranda* warnings. Given these facts and circumstances, this Court was well within its discretion in denying the Motion to Suppress. This claim must also fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on November 16, 2017 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

[1] 35 P.S. §780-113(a)(30)

[2] 35 P.S. §780-113(a)(16)

[3] 18 Pa.C.S.A. §7512(a)

[4] 18 Pa.C.S.A. §4910(1)

[5] 35 P.S. §780-113(a)(32)

Commonwealth of Pennsylvania v. Adam Pastories

Criminal Appeal—PCRA—SVP—Untimely—Muniz—Retroactivity

Because the Pa. Supreme Court has not held that Commonwealth v. Muniz has retroactive effect, the petitioner's PCRA petition is untimely.

No. CC 201203065, 201511675. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—July 9, 2018.

OPINION

The Defendant has appealed from this Court's Order of April 10, 2018, which dismissed his Amended Post Conviction Relief Act Petition without a hearing. However, a review of the record reveals that because the Petition is untimely, this Court lacks the jurisdiction to address it. The Petition was, therefore, properly dismissed.

The Defendant was charged at CC 201203065 with two (2) counts each of Aggravated Indecent Assault[1] and Indecent Assault.[2] He appeared before this Court on May 21, 2012 and, pursuant to a plea agreement with the Commonwealth, pled guilty to one (1) count of Indecent Assault and the remaining charges were withdrawn. He was immediately sentenced pursuant to the agreement to a term of imprisonment of six (6) to 12 months with a term of probation of two (2) years. No Post-Sentence Motions were filed and no direct appeal was taken.

Thereafter, the Defendant was charged at CC 201511675 with two (2) counts of Failure to Comply with Registration Requirements.[3] He appeared before his Court on March 3, 2016 and pled guilty to both counts. He was immediately sentenced to a term of imprisonment of four (4) to eight (8) years. No Post-Sentence motions were filed and no direct appeal was taken.

No further action was taken until January 17, 2018, when the Defendant filed a pro se Post Conviction Relief Act Petition. Scott Coffey, Esquire, was appointed to represent the Defendant and an Amended Petition was filed on February 23, 2018. After giving the appropriate notice of its intent to do so,[4] this Court dismissed the Amended Petition without a hearing on April 10, 2018. This appeal followed.

On appeal, the Defendant has raised two (2) claims of error. However, a review of the record reveals that the Petition was untimely filed and, therefore, was properly dismissed.

Pursuant to 42 PA.C.S.A. §9545(b), any and all PCRA Petitions, "including a second or subsequent petition, shall be filed within one year of the date the judgment of sentence becomes final…" 42 Pa.C.S.A. §9545(b)(1). In this case, the Defendant's judgments of sentence became final on June 20, 2012 (CC 201203065) and April 4, 2016 (CC 201511675), when he failed to file a direct appeal. Therefore, in order to be timely, any PCRA Petitions should have been filed by June 20, 2013 and April 4, 2017, respectively. The instant Petition, filed on January 17, 2018, is well outside of that time limitation for both informations. However, the Amended Petition avers that the Petition is timely due to *Commonwealth v. Muniz*, 169 A.3d 1189 (Pa. 2017), wherein our Supreme Court held that the retroactive application of SORNA's registration requirements violated the *ex post facto* clauses of the United States and Pennsylvania constitutions.

The Post Conviction Relief Act states, in relevant part:

§9545. Jurisdiction and proceedings.

(b) Time for filing petition. –

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment became final, unless the petition alleges and the petitioner proves that:

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided by this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. §9545(b)(iii).

In *Commonwealth v. Murphy*, 180 A.3d 402 (Pa.Super. 2018), our Superior Court interpreted the effect of *Muniz* on an otherwise-untimely PCRA Petition. In *Murphy*, the defendant's judgment of sentence became final in 2009. In October, 2017, the defendant attempted to challenge the lifetime registration requirement of SORNA based on our Supreme Court's decision in *Muniz*. However, our Superior Court found that *Muniz* did not operate to save an otherwise-untimely PCRA Petition. It held, "we acknowledge that **this Court** has declared that '**Muniz** created a substantive rule that retroactively applies in the collateral context.' **Commonwealth v. Rivera-Figueroa**, 174 A.3d 674, 678 (Pa.Super. 2017). However, because Appellant's PCRA Petition is untimely (unlike the petition at issue in **Rivera-Figueroa**), he must demonstrate that the Pennsylvania Supreme Court has held that **Muniz** applies retroactively in to satisfy section 9545(b)(1)(iii)… Because at this time, no such holding has been issued by our Supreme Court, Appellant cannot rely on **Muniz** to meet that timeliness exception." *Commonwealth v. Murphy*, 180 A.3d 402, 405-406 (Pa.Super. 2018), *emphasis in original*.

Given the Murphy Court's finding that *Muniz* has not been held to apply retroactively, it is clear that the Defendant cannot rely on the *Muniz* decision as a basis for the retroactive constitutional right exception to the time limitation provisions of the Post Conviction Relief Act.

Inasmuch as the Defendant has failed to satisfy the requirements of the retroactive Constitutional right exception to the Post Conviction Relief Act, his Petition was properly classified as untimely. See *Commonwealth v. Wojtaszek*, 951 A.2d 1169 (Pa.Super. 2008). "Given the fact that the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner." *Commonwealth v. Mazzarone*, 856 A.2d 1208, 1210 (Pa.Super. 2004). See also *Commonwealth v. Bennett*, 842 A.2d 953, 956 (Pa.Super. 2004) and *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999). As such, this Court is bound by the time limitation provisions of the Act and, therefore, properly dismissed the Defendant's Amended Post Conviction Relief Act Petition.

Accordingly, for the above reasons of fact and law, this Court's Order of April 10, 2018, which dismissed his Amended Post Conviction Relief Act Petition without a hearing must be affirmed.

BY THE COURT:
/s/McDaniel, J.

[1] 18 Pa.C.S.A. §3125(a)(4) - 2 counts

[2] 18 Pa.C.S.A. §3126(a)(4) - 2 counts

[3] 18 Pa.C.S.A. §4915.1(a)(1) and §4915.1(a)(2)

[4] This Court originally dismissed the Petition without giving notice of its intent to do so on March 13, 2018. However, three (3) days later, upon realizing the error, this Court vacated the Order of March 13, 2018 and issued the appropriate Notice of Intent.

Commonwealth of Pennsylvania v. Jeremy Hensel

Criminal Appeal—Probation Violation—Sentencing (Discretionary Aspects)—RRRI

Court asks for remand of case so that it can make a RRRI determination on the record.

No. CC 201411315, 201411316, 201503974. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—July 9, 2018.

OPINION

The Defendant has appealed from the judgment of sentence entered on February 13, 2018 following the revocation of his probation. A review of the record reveals that the judgment of sentence should be affirmed, but that the case should be remanded for additional proceedings.

The Defendant was charged with the following crimes: At CC 201411315 with two (2) counts of Terroristic Threats[1] and one (1) count each of Simple Assault,[2] Defiant Trespass[3] and Harassment;[4] At CC 201411316 with Simple Assault,[5] Theft by Unlawful Taking,[6] Defiant Trespass,[7] Disorderly Conduct[8] and Harassment;[9] and at CC 201503974 with Terroristic Threats.[10] He appeared before this Court on June 10, 2015 and, pursuant to a plea agreement with the Commonwealth, pled guilty to Terroristic Threats (1 count), Simple Assault and Defiant Trespass at CC 201411315 and to Simple Assault and Defiant Trespass at CC 201411316. Pursuant to the agreement, the remaining charges from those informations were withdrawn. He was immediately sentenced at those informations to a term of imprisonment of 112 days time served, with a subsequent term of probation of two (2) years. No Post-Sentence Motions were filed and no direct appeal was taken. Thereafter, the Defendant appeared before this Court on August 5, 2015 and, pursuant to a plea agreement with the Commonwealth, pled guilty to the sole count of Terroristic Threats at CC 201513974. He was immediately sentenced to a term of probation of two (2) years. Again, no Post-Sentence Motions were filed and no direct appeal was taken.

On February 13, 2018, the Defendant appeared before this Court for a probation violation hearing. Upon finding that the Defendant was in violation of the terms of his probation, this Court revoked the Defendant's probation and imposed consecutive terms of imprisonment of two (2) to four (4) years at CC 201411315, one (1) to two (2) years at CC 201411316 and two (2) to four (4) years at CC 201503974. Timely Post-Sentence Motions were filed and were denied on March 13, 2018. This appeal followed.

On appeal, the Defendant raises several claims of error, which this Court has re-ordered and addresses as follows:

1. Excessive Sentence

Initially, the Defendant argues that this Court erred in imposing an excessive sentence and in not considering the various sentencing factors when crafting its sentence. A review of the record demonstrates that this claim is meritless.

It is well-established that review of a sentence imposed following the revocation of probation proceeds according to the standard applicable to all sentences. "Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, abused its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." *Commonwealth v. Booze*, 952 A.2d 1263, 1278 (Pa.Super. 2008), internal citations omitted. "When imposing a sentence of total confinement, the sentencing judge must state the reasons for the sentence in open court…Furthermore, the sentencing judge must explain any deviation from the sentencing guidelines…Nevertheless, a lengthy discourse on the trial court's sentencing philosophy is not required." *Commonwealth v. McVay*, 849 A.2d 270, 275 (Pa.Super. 2004), internal citations omitted.

Additionally, it bears mention that "upon revocation of probation, a sentencing court possesses the same sentencing alternatives that it had at the time of the initial sentencing." *Commonwealth v. Byrd*, 663 A.2d 229, 231 (Pa.Super. 1995). See 42 Pa.C.S.A. §9771. Moreover, "it is well established that the sentencing alternatives available to a court at the time of initial sentencing are all of the alternatives statutorily available under the Sentencing Code…[and] at any revocation of probation hearing, the court is similarly free to impose any sentence permitted by the Sentencing Code..." *Commonwealth v. Wallace*, 870 A.2d 838, 842-43 (Pa. 2005), internal citations omitted.

At the time of the pleas, this Court noted that the maximum sentence for Terroristic Threats was five (5) years and the maximum sentence for Simple Assault was two (2) years. (Sentencing Hearing Transcript, 6/10/15, p. 4 and Sentencing Hearing Transcript 8/5/15, p. 3). At the revocation hearing, this Court imposed terms of imprisonment of two (2) to four (4) years at the Terroristic Threats charge and one (1) to two (2) years at the Simple Assault charge, which sentences were well below the maximum sentencing guidelines.

Moreover, at the revocation hearing, this Court noted that it had read and considered both a Pre-Sentence Report and a Behavior Clinic Report (Probation Violation Hearing Transcript, p. 7). "Where pre-sentence reports exist, [the appellate court] shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. *Commonwealth v. Macias*, 968 A.2d 773, 778 (Pa.Super. 2009). This Court then placed its reasons for imposing sentence on the record. It stated:

> THE COURT: The record will reflect that the Court has reviewed the Behavior Clinic report. I've ordered, read and considered the presentence report. The defendant has a prior record score of 4.
>
> I have reviewed five probation violation reports and have received many, many letters from the defendant. The record will also reflect that July 5th of 2017 was a Gagnon 1.
>
> …
>
> Okay. So we went over where we are. This is a Stage 2 hearing. Mr. Henzel, you have been referred to JRS, but you didn't in fact comply with any of them. You can't even seem to cooperate while you are in the Allegheny County Jail.
>
> …
>
> You were referred to the DRC, the Day Reporting Center. And you were listed to go to the CBT program, which you failed to do. You were eventually placed in a CRR program, but were then 302'd for threatening to kill others at the CRR program.
>
> You have threatened your probation officer with some pretty serious accusations. Your record for six months, when you were a minor, you had sexual intercourse with your six-year old sister, and in fact stabbed her. You have another assault in 2013. And then you have three assaults in 2013; two cases with one victim, and the third case with another victim.
>
> In 2013, you called your sister, after eight years, and this would be the sister that you were adjudicated for sexually assaulting her, and threatened her and her family.
>
> Every action that you have been involved in involves anger, danger and violence. If you are in the jail in your cell and you want to be angry and violent, that's up to you. But out in society, you can't do that.
>
> You have refused every single effort that we have given you to rehabilitate yourself. You have never been employed for any length of time. You never did well under county supervision. You are a danger to the community, and apparently anyone whom crosses your path.
>
> I understand that you may have some mental health issues; however, I see you making no effort to deal with those issues. All you do is get angry, and you assault, and you are violent.

(Probation Violation Hearing Transcript, pp. 7-8, 9-11).

As demonstrated by the record, this Court clearly placed ample reasons for its sentence on the record. The sentence imposed was within the guideline range available at the time of the initial sentencing and therefore, was legal. The sentence imposed was not in violation of the Sentencing Guidelines, either due to its length or the reasons contained in the record for its imposition. The sentence was legal and did not constitute an abuse of discretion. Therefore, this claim must fail.

2. Sentencing Credit

Next, the Defendant argues that this Court erred in failing to award him sentencing credit for four (4) days - June 2 and 3, 2014 and August 22 and 23, 2017. This Court's review of the record reveals that the Defendant is correct and that he is due credit for those four (4) days. This Court has filed a Corrected Order of Sentence herewith and believes that resolves this claim of error in its entirety.

3. RRRI Eligibility

Finally, the Defendant argues that his sentence is illegal because this Court failed to make a determination of his RRRI eligibility. The case should be remanded for further proceedings as discussed below.

The Recidivism Risk Reduction Incentive Act states, in relevant part:

§4505. Sentencing

(a) Generally. – At the time of sentencing, the court shall make a determination whether the defendant is an eligible offender.

18 Pa.C.S.A. §4505 and

§4503. Definitions

"Eligible offender." A defendant or inmate convicted of a criminal offense who will be committed to the custody of the department and who meets all of the following eligibility requirements:

(1) Does not demonstrate a history of present or past violent behavior…

…(3) Has not been found guilty of or previously convicted of or adjudicated delinquent for or an attempt or conspiracy to commit a personal injury crime as defined under Section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act…

18 Pa.C.S.A. §4503.

As noted above, at the probation violation hearing, this Court noted the Defendant's extensive criminal history including a juvenile adjudication for Rape and Aggravated Assault and adult convictions for Simple Assault and Terroristic Threats. It is clear that the Defendant is not RRRI eligible due to the nature of the present charges and prior convictions. However, this Court concedes that it failed to specifically state that he was not RRRI eligible at the revocation hearing. As such, the case should be remanded for a new sentencing hearing during which this Court will make a specific finding as to the Defendant's RRRI ineligibility.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on February 13, 2018 should be affirmed but the case should be remanded for an on-the-record determination of the Defendant's RRRI ineligibility.

BY THE COURT:
/s/McDaniel, J.

[1] 18 Pa.C.S.A. §2706(a)(1) - 2 counts

[2] 18 Pa.C.S.A. §2701(a)(1)

[3] 18 Pa.C.S.A. §3503(b)(1)

[4] 18 Pa.C.S.A. §2709(a)

[5] 18 Pa.C.S.A. §2701(a)(1)

[6] 18 Pa.C.S.A. §3921(a)

[7] 18 Pa.C.S.A. §3503(b)(1)

[8] 18 Pa.C.S.A. §5503(a)(2)

[9] 18 Pa.C.S.A. §2709(a)

[10] 18 Pa.C.S.A. §2706(a)(1)

Commonwealth of Pennsylvania v. Isaiah Hereford

Criminal Appeal—PCRA—Homicide (1st Degree)—Identification—Ineffective Assistance of Counsel—Waiver—After-Discovered Evidence

Multiple issues raised in defendant's PCRA petition after convictions for three counts of murder in the first degree.

No. CC 2010-10538. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—July 12, 2018.

OPINION

The Defendant has appealed from this Court's Order of January 10, 2018, which dismissed his counseled Post Conviction Relief Act Petition following an evidentiary hearing. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, this Court's Order should be affirmed.

The Defendant was charged with Criminal Homicide,[1] Criminal Attempt,[2] Aggravated Assault,[3] Robbery,[4] Burglary,[5] Carrying a Firearm Without a License,[6] Possession of a Firearm by a Minor,[7] Criminal Conspiracy[8] and Recklessly Endangering Another Person (REAP)[9] in relation to events that occurred when he was 17 years old. Prior to trial, the REAP counts were withdrawn. A jury trial was subsequently held before this Court from August 1-4, 2011. Following the close of the Commonwealth's case, this Court granted the Defendant's Motion for Judgment of Acquittal at the Possession of a Firearm by a Minor charge. At the conclusion of the trial, the Defendant was convicted of three (3) counts of first-degree murder and all remaining charges.

On November 1, 2011, the Defendant appeared before this Court and was sentenced to three (3) concurrent terms of life imprisonment, plus two (2) additional concurrent terms of imprisonment of five (5) to ten (10) years. No Post-Sentence Motions were filed and a direct appeal was taken. Thereafter, the Defendant filed a timely Concise Statement of Matters Complained of on Appeal at this Court's direction, raising sufficiency, weight of the evidence, evidentiary and decertification issues. However, while this Court's review was pending, the United States Supreme Court issued its decision in *Miller v. Alabama*, 132 S.Ct. 2455 (US. 2012),

holding that mandatory life sentences without the possibility of parole were illegal for those offenders who committed their crime prior to the age of 18. In light of *Miller*, this Court conceded that the Defendant should be re-sentenced, and by Order of the Superior Court dated June 4, 2013, the judgment of sentence was vacated and the case was remanded for resentencing. The proscribed re-sentencing hearing was held before this Court on December 15, 2014, at which time the Defendant was sentenced to three (3) consecutive terms of imprisonment of 15 years to life, for an aggregate total of 45 years to life. Timely Post-Sentence Motions were filed and were denied on January 7, 2015. The judgment of sentence was affirmed by the Superior Court on May 3, 2016 and the Defendant's subsequent Petition for Allowance of Appeal was denied on September 27, 2016.

While his appeals were pending, the Defendant filed a pro se Post Conviction Relief Act Petition. Chris Eyster, Esquire, was appointed to represent the Defendant, and he subsequently filed a counseled PCRA Petition on September 25, 2017. An evidentiary hearing was held on January 10, 2018 and at its conclusion, this Court denied relief and dismissed the Petition. This appeal followed.

Briefly, the evidence presented at trial established that on the evening of June 14, 2010, Brittany Poindexter went to her brother's apartment in the Crawford Village housing complex in the McKeesport area for what turned out to be a surprise 18th birthday party. The party went on for several hours, with both family and friends present, and eventually guests began to leave. By the early morning hours of June 15, 2010, only five (5) people were left: Brittany, her brother Jahard, Jahard's boyfriend/roommate Marcus Madden, Brittany's boyfriend Tre Madden and their friend, Angela Sanders. Shortly after 1:00 a.m., someone knocked on the screen door of the apartment; it was generally presumed that the person was there to buy a cigarette, since Jahard and Marcus sold cigarettes and marijuana out of the apartment. Marcus got up to open the door and when he did, two (2) men entered holding guns. The men told everyone to "get down" and asked "where's the money?" When Jahard got up to get the money, the men started shooting. Jahard Poindexter, Tre Madden and Angela Sanders were killed in the gunfire and Marcus Madden was shot and injured. At trial, Marcus Madden identified the Defendant as the first man who entered the apartment with a gun and one of the shooters.

On appeal, the Defendant raises several claims of error, which are addressed as follows:

1. Issues Relating to Expert Witness on Eyewitness Identification

Initially, the Defendant argues that counsel was ineffective for failing to call an expert witness in eyewitness identification or to file a pre-trial motion seeking permission to call such an expert. Similarly, he avers that this Court denied him a fair PCRA hearing by failing to allow him to call the proposed expert witness at the evidentiary hearing. His claims are meritless.

The Defendant relies on *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), wherein our Supreme Court held that "the admission of expert testimony regarding eyewitness identification is no longer per se impermissible in our Commonwealth, and join the majority of jurisdictions which leave the admissibility of such expert testimony to the discretion of the trial court." *Commonwealth v. Walker*, 92 A.3d 766, 792-793 (Pa. 2014). He argues that counsel should have presented the testimony of psychologist Dr. Margaret Reardon, who would have explained the nature of memory and factors that can influence the accuracy of eyewitness identifications, or that he should have sought permission to do so. He argues counsel should have raised the *Walker* case in support of her testimony. He argues that this Court further erred in not allowing Dr. Reardon to testify at the evidentiary hearing.

At the time of trial in 2011, it was the law of this Commonwealth that expert testimony regarding the reliability of eyewitness identification was unequivocally not permitted. Therefore, the Defendant was not permitted to introduce such expert testimony at trial and any pre-trial attempt to do so would have been unsuccessful, as this Court would have been constrained to deny the motion. Although the *Walker* decision did allow such testimony following its decision on May 28, 2014, *Walker* was not made retroactive. As this Court explained at the evidentiary hearing:

> THE COURT: Okay. Maybe this will help us get to the end of it. Okay. After the Walker argument - first of all, our trial date was August 1st of 2011. Allocate was on April of 2011, prior to the trial date. The Walker case was not decided until May 28 of 2014, some two-and-a-half years after the allocatur petition went to the Supreme Court.
>
> There is no - the case in fact would not have allowed this testimony to be permitted, nor would I have - the Court - have granted this petition in August of 2011. This is not the law of the land, and there's no retroactivity. So the fact of Dr. Reardon testifying or not is a nonissue in this case.
>
> Do you want to proceed on other grounds? You may, Mr. Eyster.
>
> MR. EYSTER: Just for the record, Your Honor, we intended to call Dr. Reardon, and the Court indicated that you weren't going to allow us to do that.
>
> THE COURT: I did, because I know Dr. Reardon is a professional, that she's very busy. Rather than to have her come her and sit all day, as a courtesy to the doctor, I indicated that I had already reviewed the case and that I would not allow her testimony, although I have read her entire report as well as most of her CV.
>
> It has nothing to do with Dr. Reardon. It has to do with the law on August 1st of 2011.

(E.H.T. p. 38-39).

Inasmuch as expert testimony regarding eyewitness identification was absolutely barred at the time of trial, counsel was not ineffective for failing to present such testimony or for failing to make a pretrial motion seeking permission to present that testimony, as such a motion would have been denied. Because counsel will never be ineffective for failing to raise a meritless claim, there is no basis for a finding of ineffectiveness here. Similarly, because such testimony was absolutely barred at trial, there was no basis for allowing Dr. Reardon to testify at the evidentiary hearing, as this Court explained. This claim is also meritless.

2. Ineffective Assistance of Counsel - Witness Gina Simmons

The Defendant also argues that trial counsel was ineffective for failing to discover and call Gina Simmons at trial. A review of the record reveals that this claim is meritless.

At trial, the Defendant presented an alibi defense. He testified that at the time of the shooting, he was with his girlfriend, Montaeya White, at her residence located at 645 North Grandview Avenue in McKeesport. He now avers that trial counsel was ineffective for failing to discover and present the testimony of witness Gina Simmons, who lived two (2) doors down from Montaeya White, at 635 North Grandview Avenue.

A careful examination of the record reveals that this issue was previously raised in the context of this Court's denial of Post-Sentence Motions based on after-discovered evidence[10] and it was the sole issue raised on the aforementioned direct appeal. The Superior Court undertook an extensive analysis of the claim and concluded that the testimony of Gina Simmons did not meet the four-prong test for a new trial based on after-discovered evidence. Specifically, it found that the Defendant had proffered no explanation for his failure to produce her testimony sooner even though she was a neighbor and he had a court-appointed private investigator, that her testimony would have been cumulative of the testimony of the Defendant, Montaeya White and Tiara Snyder, that it would have been improper impeachment of Marcus Madden and "it was not of such a nature and quality that it would likely compel a different verdict if a new trial had been granted." (Superior Court Opinion, 232 WDA 2015, p. 20).

In his PCRA Petition, the Defendant re-raises the same after-discovered evidence claim concerning Gina Simmons' testimony, this time through the lens of an ineffectiveness claim against trial counsel J. Richard Narvin, Esquire for both failing to discover her existence and for failing to supervise the private investigator such that he would have discovered her existence. However, a careful examination of the record reveals that the Defendant has failed to establish the elements of his ineffectiveness claim.

As it specifically relates to a claim for ineffectiveness for the failure to call a witness, the petitioner must establish that "(1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial." *Commonwealth v. Matias*, 63 A.3d 807, 810-811 (Pa.Super. 2013). At the evidentiary hearing, Gina Simmons testified that after hearing the shots, she looked out her bedroom window where she was able to see a parking lot. A few minutes after she heard the shots, she saw two (2) black males running away from where the shots had been fired. Fifteen minutes later, once the police had arrived, she went outside and spoke to the Defendant and Montaeya.

Regarding the first prong, it is clear that Ms. Simmons "existed" and is not a phantom creation. However, the Defendant is unable to establish the second and fourth prongs, that she was available and willing to testify for him at trial.

During the evidentiary hearing, Ms. Simmons testified that she was present when the Defendant was arrested and the she was aware he was tried and convicted in the killings, but stated that she did not come forward because she was scared:

Q. (Ms. Pettit): So you didn't know [the investigator] was coming; just one days someone knocked on your door?

A. (Ms. Simmons): No, no, his father.

Q. Whose father?

A. Isaiah. He said, I understand - how he know, I didn't know. I don't know.
He said, I understand that you have some information about my son's case.

Q. Okay.

A. I said, what information?

He said, I heard you were looking out the window. You seen things.

I said, yes, I did.

And he said, well, is it okay if my son's attorney contacts you for questioning?
I said, sure.

Now, if you don't know why I didn't say anything in the beginning, it's because I have children.

…

Q. So you were aware that he was arrested and charged with murder?

A. Yes.

Q. Were you aware that he was convicted of murder?

A. Yes, I was.

Q. Were you aware that he was originally sentenced to life in prison without the possibility of parole?

A. I knew he was sentenced to life. The details, I did not know.

Q. Okay. So what happened between the incident and the date that the investigating officer came to your house that you were no longer afraid to share what you allegedly knew?

A. Well, evidently whoever it was didn't think that I knew who did it because they weren't coming and bothering me. Nobody even knows I'm appearing for court now, but I was not going to put my life and my children's lives in jeopardy by saying I seen someone running up the hill and seeing it wasn't Isaiah, because they may find - not Isaiah but the person that did it, they think I seen them, they might come out after me and my family.

Q. But you don't have these fears today?

A. No, I don't.

…

Q. So, Ms. Simmons, you actually went down to the crime scene, checked that out. You went over, and you talked with the defendant fifteen minutes after you heard gunshots. Yet, you did nothing for two years to come forward and say that you had information that you believe could have helped the defendant?

A. For two years, no, I didn't. I was dealing with my own problems. As I said before, I am not going to put my children's lives in jeopardy.

(Evidentiary Hearing Transcript, pp. 17-18, 20-21, 22-23).

As Ms. Simmons stated repeatedly, she was too afraid for herself and her children to come forward and testify on the Defendant's behalf. Thus, there is no reasonable argument that she was both available and willing to testify for the Defendant at trial and this Court cannot so find. As such, the Defendant has failed to establish the second and fourth prongs of the ineffectiveness test.

As to the third prong, that counsel knew or should have known of the witness, the Defendant presented the testimony of trial counsel, who testified that he failed to adequately supervise his investigator. He stated:

> Q. (Mr. Eyster): Was there any reason why you didn't find [Gina Simmons] prior to the trial, or your investigator?
>
> A. (Mr. Narvin): Well, maybe I was - I failed in adequate supervision of the investigator, because I would think one of the things I would be required to do would be to canvas the neighborhood and find people.
>
> You know, those are certainly generally my instructions. I certainly wanted him to obtain as much helpful information as possible, but again, as to the precise details of what I told him, I do not recall.

(E.H.T., p. 28-29).

On cross-examination, Attorney Narvin testified that had the Defendant notified him about Gina Simmons, he would have followed up on it:

> Q. (Ms. Pettit): Okay. Do you recall if your client told you that he had a conversation with someone named Gina Simmons, the neighbor?
>
> A. (Mr. Narvin): I have no current recollection of that, but I would have hoped that he had told me that I would have done something about it.
>
> Q. Would you agree with me that it would be your normal course of conduct to follow up on something like that if a client tells you that?
>
> A. I would agree that's correct.

(E.H.T., p. 42-43).

A careful examination of Attorney Narvin's testimony reveals it is not as unequivocal as the Defendant now portrays it to be. While Attorney Narvin states that he may not have supervised his investigator properly because he did not obtain Ms. Simmons' statement, we also know from Ms. Simmons' testimony that she was scared and was not willing to give a statement or testimony prior to trial. Thus, it seems entirely plausible that Attorney Narvin did not, in fact, fail to supervise his investigator properly, as the investigator could not find what did not want to be found. Again, given Ms. Simmons' admitted unwillingness to testify and Mr. Narvin's testimony regarding his normal course of conduct in following-up on helpful witnesses, the Defendant fails in establishing that Mr. Narvin knew or should have known of her existence prior to trial.

Finally, as to the last element of the ineffectiveness test, that the absence of Ms. Simmons' testimony was so prejudicial as to have denied the Defendant a fair trial, this Court refers to and incorporates the Superior Court's analysis in it's May 3, 2016 Memorandum Opinion. After noting that the testimony was cumulative of that presented by the Defendant, Montaeya Williams and Tiara Snyder, the Court determined that the absence of the evidence was not so prejudicial as to require a new trial. It stated:

> Our review of the certified record reflects that the alleged after-discovered evidence that is possibly exonerating to Appellant is the portion of Ms. Simmons's statement placing Appellant on his girlfriend's porch fifteen minutes after the gunshots were heard in the neighborhood.[2] [3] However, appellant testified at trial and personally declared that it was only a five-minute walk from the scene of the shootings to his girlfriend's home. N.T., 8/1-4/11, at 511. Therefore, testimony reveals that Appellant had ample time to participate in the commission of the crime, take the admitted five-minute walk to his girlfriend's house, and then be observed by Ms. Simmons on the porch of the girlfriend's home fifteen minutes after the crime occurred. Hence, we conclude that this evidence is not of such a nature and character that it would likely compel a different verdict if a new trial had been granted.
>
> [2] For ease of reference, we reproduce that portion of the statement below:
>
> > Around 15 min later I went outside to see what was going at that time I saw [Appellant] and his girlfriend ont [sic] the porch of 645 N. Grandview Ave.
>
> Amended Post-Sentence Motion, 1/31/12 (Docket Entry 32).
>
> [3] With regard to the portion of Ms. Simmons's statement indicating that she saw two men running when she looked outside of her window after hearing gunshots, and her belief that neither of the men were Appellant, there is no indication that those two men were the perpetrators of the instant crime. Consequently, we conclude that portion of Ms. Simmons's statement is not exonerating.

(Memorandum Opinon, p. 19-20).

Having found that Ms. Simmons' statement was not exonerating and would not have resulted in a different verdict, our Superior Court has already found that the absence of her testimony did not establish prejudice. As such, the Defendant has also failed to establish the last element of the ineffectiveness test.

Having utterly failed to establish the requirements of his claim for the ineffective assistance of counsel for failing to call Gina Simmons at trial, this claim must fail.

3. Ineffective Assistance of Counsel - Closing Argument

Next, the Defendant argues that counsel was ineffective for failing to argue that co-Defendant DeAnthony Kirk's note which stated "my co-de[fendant] wasn't their [sic] neither but he doesn't know me at all" was exculpatory during his closing argument. Again, this claim is meritless.

Generally, in order to establish a claim for the ineffective assistance of counsel, "a PCRA Petitioner must demonstrate, by a preponderance of the evidence, that: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) there is a reasonable probability that the result of the proceedings would have been different absent such error." *Commonwealth v. Gibson*, 19 A.3d 512, 525-26 (Pa. 2011). "The law presumes that counsel was not ineffective, and the appellant bears the burden of proving otherwise…[I]f the issue underlying the charge of ineffectiveness is not of arguable merit, counsel will not be deemed ineffective for failing to pursue a meritless issue… Also, if the prejudice prong of the ineffectiveness standard is not met, 'the claim may be dismissed on that basis alone and [there is no] need [to] determine whether the [arguable merit] and [client's interests] prongs have been met.'" *Commonwealth v. Khalil*, 806 A.2d 415, 421-2 (Pa.Super. 2002). "With regard to the reasonable basis prong, [the appellate court] will conclude that counsel's chosen strategy lacked a reasonable basis only if the petitioner proves that the alternative strategy not elected offered a potential for success substantially greater than the course acutely pursued." *Commonwealth v. Busanet*, 54 A.3d 35, 46 (Pa. 2012).

Thus, in order to establish that Mr. Narvin was ineffective for failing to argue the letter in his closing argument, he would need to establish that the letter was exculpatory, that Mr. Narvin lacked a reasonable basis for failing to argue it during closing arguments and that he would have been acquitted had Mr. Narvin so argued. At the evidentiary hearing, under questioning by defense counsel, Mr. Narvin conceded that he lacked a reasonable basis for failing to include the letter in his closing argument, although a careful review of the record demonstrates that Mr. Narvin had no recollection of the letter or the reason he didn't argue it in his closing argument:

Q. (Mr. Eyster): Now, Mr. Narvin, do you remember that the co-defendant was DeAnthony Kirk in this case?

A. (Mr. Narvin): I do.

Q. And do you remember that there was a letter that was authored by Mr. Kirk that was introduced at the trial?

A. Vaguely, not specifically, but I know what you are speaking of.

Q. Okay, and arguably there was contained in that letter exculpatory evidence regarding Mr. Hereford; is that correct?

A. Well, I don't know what is in the letter, so I can't answer that question, but my understanding is that there is an argument to be made for the fact that he was writing to indicated that Mr. Hereford had nothing to do with the crime. So that would be considered exculpatory.

…

Q. Do you recall that letter?

A. No. Actually, I have no current recollection of the letter.

…

Q. There was a statement contained herein that Kirk did not know Mr. Hereford; is that correct?

A. That's correct.

Q. Did you have any reasonable basis for failing to make that argument at the time of trial relative to that statement?

A. Do you mean did I omit it for my closing to the jury?

Q. Yes. Did you omit that?

A. I'm assuming from your question that I did, and if I did, I had no reasonable basis for doing so. I think it would have been a good point to argue.

…

Q. (Ms. Pettit): Regarding this last document that Mr. Eyster showed you, do you recall if this was actually admitted as an exhibit at trial?

A. (Mr. Narvin): I'm sorry, I do not recall. You know, it was presented to me as admitted as Commonwealth's evidence. I do not recall it being admitted. I have no current recollection of it.

(E.H.T., pp. 39-41, 43).

As the record reflects, Mr. Narvin stated repeatedly that he had no independent recollection of the letter or its admission and thus was not in a position to opine on his reasonable basis or lack thereof for including it in his closing argument.

Additionally, the Defendant has failed to establish the necessary prejudice to support a claim for the ineffective assistance of counsel. At trial, the Defendant presented an alibi defense and the testimony of Montaeya White and Tiara Snyder in support of that alibi. The jury did not credit that testimony, and chose instead to credit the testimony of victim and eyewitness Marcus Madden. Moreover, the letter was introduced into evidence by the Commonwealth and the jury did see it. Given the jury's choice to credit the testimony of Marcus Madden over the testimony of the Defendant and his two (2) alibi witnesses while already being aware of the letter, there is no reasonable argument that an additional mention of it during closing arguments would have resulted in a different verdict. As the Defendant has failed to establish prejudice, he has failed to establish his claim of ineffectiveness. See *Khalil, supra*. This claim must also fail.

4. Ineffective Assistance of Counsel - Affidavit of Probable Cause

Finally, the Defendant argues that counsel was ineffective in failing to argue that the charges should have been dismissed because the affidavit of probable cause was based on false information from an unreliable source. However, a careful review of the record reveals that because the Defendant failed to raise this claim in his PCRA Petition, it is not cognizable at this time.

The Post Conviction Relief Act contains a strict waiver provision which states:

§9544. Previous litigation and waiver

(b) Issues waived. – For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.

42 Pa.C.S.A. §9544(b).

In interpreting the waiver provision of the Post Conviction Relief Act, our Supreme Court has "stressed that a claim not raised in a PCRA Petition cannot be raised for the first time on appeal. We have reasoned that 'permitting a PCRA Petitioner to amend new claims to the appeal already on review would wrongly subvert the time limitation and serial petition restrictions of the PCRA… The proper vehicle for raising this claim is not the instant appeal, but rather a subsequent PCRA Petition.'" *Commonwealth v. Santiago*, 855 A.2d 682, 691 (Pa. 2004).

At the evidentiary hearing, the Defendant attempted to raise this claim by reading a statement into the record after counsel had finished his presentation. However, at that time, this Court advised the Defendant that because he had not raised the claim up until that point, it was not able to rule on it. (E.H.T. p. 45-46). Similarly, including the issue in the Concise Statement is not a remedy for having not raised it up to this point, and does not now put the issue before this Court. The Concise Statement is not a vehicle to add claims for the Superior Court's consideration when he did not afford this Court an opportunity to review and rule on it. As such, this claim has been waived.

Accordingly, for the above reasons of fact and law, this Court's Order of January 10, 2018, which dismissed his counseled Post Conviction Relief Act Petition without a hearing must be affirmed.

BY THE COURT:
/s/McDaniel, J.

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[1] 18 Pa.C.S.A. §2501(a) – 3 counts

[2] 18 Pa.C.S.A. §901(a) – 2 counts

[3] 18 Pa.C.S.A. §2702(a)(1) – 2 counts

[4] 18 Pa.C.S.A. §3701(a)(1)(I)

[5] 18 Pa.C.S.A. §3502(c)(1)

[6] 18 Pa.C.S.A. §6101(a)(1)

[7] 18 Pa.C.S.A. §6110.1(a)

[8] 18 Pa.C.S.A. §903(a)(1)

[9] 18 Pa.C.S.A. §2705 – 2 counts

[10] This Court incorporates its Opinion dated May 20, 2015 herein;