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OPINIONS

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**Commonwealth of Pennsylvania v.
Kristian Blackwell**

Criminal Appeal—Grand Jury

Individual indicted by grand jury not entitled to grand jury materials after case has been nolle prossed.

No. CP-02-CR-07812-2018. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—February 10, 2022.

OPINION

On June 13, 2018, City of Pittsburgh Police Department filed charges against Appellant, Kristian Blackwell, and three other individuals as a result of an incident in which three juveniles were shot. The case proceeded to an indicting grand jury upon a finding that witness intimidation either had occurred or was likely to occur. Charges were filed on June 13, 2018. On September 25, 2019, the Commonwealth nolle prossed the case against all four defendants. On June 11, 2020, Appellant filed a Praecipe for Writ of Summons in the civil division of the Court of Common Pleas, listing the City of Pittsburgh and the Allegheny County Office of the District Attorney among the defendants. Next, Appellant, on September 27, 2021, filed a Motion seeking disclosure of all grand jury material relative to the criminal investigation. This Court denied the Motion on October 18, 2021. Appellant filed a Notice of Appeal on November 17, 2021, and a Concise Statement on December 22, 2021.

ERRORS COMPLAINED OF ON APPEAL

Appellant alleges this Court erred in denying the Motion for Disclosure of grand jury materials because the Court’s ruling was “a misapplication of the rules, statutes, case law and provisions” governing Grand Jury protections and “in contrast to its intent.” (Statement of Errors to be Raised on Appeal, p. 2).

DISCUSSION

Appellant asserts that this Court misapplied the rules regarding Grand Jury secrecy. The disclosure of grand jury materials is governed by Pa.R.Crim.Pro. 556.10, which states:

Rule 556.10. Secrecy; Disclosure

(B) Disclosure. No person may disclose any matter occurring before the grand jury, except as provided below.

(1) Attorney for the Commonwealth. Upon receipt of the certified transcript of the proceedings before the indicting grand jury, the supervising judge shall furnish a copy of the transcript to the attorney for the Commonwealth for use in the performance of official duties.

(2) Defendant in a Criminal Case. If a defendant in a criminal case has testified before the indicting grand jury concerning the subject matter of the charges against him or her, upon application of such defendant, the supervising judge shall order that the defendant be furnished with a copy of the transcript of such testimony.

(3) Witnesses

(a) A grand jury witness may disclose his or her testimony unless the attorney for the Commonwealth obtains an order from the supervising judge that the interests of justice dictate otherwise.

(b) The attorney for the Commonwealth may request that the supervising judge delay the disclosure of a grand jury witness’ testimony, but such delay in disclosure shall not be later than the conclusion of direct testimony of that witness at trial.

(4) Other Disclosures:

(a) Disclosure of grand jury material or matters, other than the grand jury’s deliberations and the vote of individual jurors, may be made to any law enforcement personnel that an attorney for the Commonwealth considers necessary to assist in the enforcement of the criminal law.

(b) Upon motion, and after a hearing into relevancy, the supervising judge may order that a transcript of testimony before an indicting grand jury, or physical evidence before the indicting grand jury, may be released to an investigative agency under such conditions as the supervising judge may impose.

(5) Pretrial Discovery. Pretrial discovery in cases indicted by a grand jury is subject to Rule 573. Pretrial discovery does not include testimony or other evidence that would disclose the identity of any witness or victim who has been intimidated, is being intimidated, or who is likely to be intimidated. Disclosure of such testimony or other evidence shall be only as ordered by the supervising judge.

Pa.R.Crim.Pro. 556.10 (B).

Since the charges against Appellant have been nolle prossed, he no longer qualifies as a “Defendant in a Criminal Case” and subsection 556.10 (B) (2) does not apply to him. Likewise, Appellant is neither “law enforcement personnel” or “an investigating agency,” so subsection 556.10 (B) (4) does not apply.

In Pennsylvania, grand jury proceedings have traditionally been conducted in secrecy, and for a salutary reason. The secrecy of grand jury proceedings is “indispensable to the effective functioning of a grand jury.” In re Investigating Grand Jury of Philadelphia Co. (Appeal of Philadelphia Rust Proof Company), 496 Pa. 452, 437 A.2d 1128, 1130 (1981). The grand jury serves multiple critical purposes:

(1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who

have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id.; Accord *Pirillo v. Takiff*, 462 Pa. 511, 341 A.2d 896, 905 (1975) (“The secrecy surrounding grand jury proceedings is a mechanism to ensure the safety and reputation of witnesses and grand jurors.”)

In re *Dauphin Cty. Fourth Investigating Grand Jury*, 19 A.3d 491, 502–03 (Pa. 2011). This Court correctly applied the letter and spirit of the Grand Jury rules in denying Appellant’s Motion for Disclosure.

CONCLUSION

For all the above reasons, no reversible error occurred, and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:

/s/Rangos, J.

Commonwealth of Pennsylvania v. Lucas Guggenheimer

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—Right to Evidentiary Hearing—Harmless Error—Miscarriage of Justice—Reopening Testimony.

The petitioner claimed ineffective assistance of counsel where counsel failed to move for mistrial on the charge of Carrying a Firearm Without a License. The trial court agreed that the Commonwealth failed to introduce direct evidence that petitioner did not have a license, but noted it was clear from charging documents that petitioner was under 21 and therefore not legally permitted to carry a concealed firearm. The trial court dismissed pursuant to P.A.R.Crim.P. 907 without granting an evidentiary hearing noting that had defense counsel moved for Judgment of Acquittal Pennsylvania law would have permitted the Commonwealth to re-open their case to introduce evidence of petitioner's age. Therefore, the trial court concluded the error was harmless and dismissed without an evidentiary hearing.

No. CC 2016-01624, 2016-01637. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Mariani, J.—April 6, 2022.

OPINION

This is a direct appeal wherein the Petitioner, Lucas Guggenheimer, appeals from the denial of his petition filed pursuant to the Post-Conviction Relief Act. At CC No. 201601624, the petitioner was convicted of Third Degree Murder and Firearms Not To Be Carried Without A License. Relative to the Third Degree Murder conviction, he was sentenced to a term of imprisonment of not less than 20 years nor more than 40 years. Relative to the firearm conviction, he was sentenced to a consecutive term of imprisonment of not less than two years nor more than four years. At CC No. 201601637, the Petitioner was convicted of Firearms Not To Be Carried Without A License and two counts of Recklessly Endangering Another Person. Relative to the firearm conviction, he was sentenced to no further penalty. Relative to the Recklessly Endangering Another Person counts, he was sentenced to consecutive terms of imprisonment of not less than one year nor more than two years. His aggregate sentence was a term of imprisonment of not less than 24 years nor more than 48 years. Petitioner filed a direct appeal at No. 802 WDA 2017. The Superior Court affirmed the judgment and sentence. No petition for allowance of appeal was filed. On August 20, 2020, Petitioner filed a petition for post-conviction relief. Counsel was appointed and an amended petition was filed. That petition was denied by this Court and this timely appeal follows.

On appeal, Petitioner claims that this Court erred in denying his PCRA petition without granting him a hearing to establish that trial counsel rendered ineffective assistance of counsel.

As this Court noted in its previous opinion, the facts of record are as follows:

On October 11, 2015, City of Pittsburgh police officers were dispatched to the 2800 block of Arlington Avenue for a 911 report of shots being fired. Upon arrival, police officers observed a male, Justin Granda (referred to herein as, “the victim”), lying on a sidewalk near the street. The victim had been shot several times and was deceased. The victim sustained four gunshot wounds to the rear area of his head and four gunshot wounds to his shoulder and his lower back. He was found lying face down with his head resting on the downside of the slope of the sidewalk. Ten spent PMC 9 millimeter Luger shell casings and three live PMC 9 millimeter Luger rounds were recovered from the scene of the shooting.¹ The cause of death was multiple gunshot wounds to the trunk and head and the manner of death was homicide. During the autopsy, 9 millimeter bullets and .32 caliber bullets were recovered from the victim’s body, indicating that two different firearms were used to kill the victim.

During the investigation, officers identified Sean Sperber as a possible witness. Sperber had received a telephone call from the victim in the late evening of October 10, 2015 during which the victim asked Sperber to supply him with marijuana. Sperber and the victim had worked together at a car dealership. The victim went to Sperber’s apartment along with the [Petitioner]. The apartment was located in Turtle Creek, Pennsylvania, in the eastern suburbs of the City of Pittsburgh. Sperber was married and had a child. His apartment was on the top floor of an apartment building. Because he did not want to bring the victim into his apartment to conduct a drug transaction with his wife and child present, Sperber walked outside of his apartment. He met the victim outside. When Sperber noticed the victim was with the [Petitioner], Sperber advised the victim that he was wary of conducting a drug transaction with someone he did not know. After seeing the [Petitioner] flash a substantial amount of cash, Sperber relented and allowed the victim and the [Petitioner] into his brother’s apartment, which was located on the first floor of the apartment building. After some discussion about the marijuana purchase, the [Petitioner] asked where the bathroom was located. As he walked to the

bathroom, the [Petitioner] pulled a firearm out and pointed it at Sperber's head. Sperber realized the [Petitioner] was going to rob him. When the victim saw what was happening, he reacted in a way which suggested he didn't know that the [Petitioner] was going to pull a gun and/or that he disapproved of the [Petitioner]'s actions.

A fight ensued between Sperber and the [Petitioner] as Sperber tried to gain control of the firearm. Sperber's brother came out from a bedroom and, thinking the victim was also a threat, was able to remove the victim from the apartment. During the altercation, the [Petitioner] discharged the firearm and shot Sperber's brother in his upper thigh, breaking his leg. The [Petitioner] attempted to fire the handgun again but it jammed. The [Petitioner] and Sperber struggled as the [Petitioner] tried to fix the jam. Eventually, the [Petitioner] was physically removed from the apartment. Sperber called 911. A cell phone and a spent 9 millimeter casing were later recovered from the scene. The cell phone belonged to the victim in this case. The spent 9 millimeter casing matched the casing found at the scene of the victim's subsequent shooting. Expert testimony confirmed that both casings were fired from the same firearm. On October 30, 2015, the [Petitioner] was arrested and charged with the homicide of the victim in this case and with the shooting of Sperber's brother.

Investigators also located a witness, Johanna Jones, who was driving a cab on October 10, 2015. Ms. Jones testified that she received a call from the [Petitioner], who she personally knew as "James." Ms. Jones had known the [Petitioner] for about six months prior to October 10, 2015. At approximately 11:00 p.m. that night, the [Petitioner] sent her a text message and asked her to pick him up. She picked him up in the Manchester section of the City of Pittsburgh. The [Petitioner] was with Amirae Benton when Ms. Jones arrived to pick him up. After the two men got into the cab, they asked Ms. Jones to drive them to another friend's house not far from Manchester. There, she picked up the victim. The [Petitioner] then gave Ms. Jones directions to another residence. Ms. Jones testified that she drove on the Parkway East highway to the Turtle Creek exit. Once they arrived at the Turtle Creek residence, the [Petitioner] told Ms. Jones that they would be in the house for only a few minutes and she could take them back. The [Petitioner] told Ms. Jones to "go up and come around and come back." The [Petitioner] and the victim exited the vehicle. Benton remained in the cab. Ms. Jones drove away. About fifteen minutes later, the victim and the [Petitioner] returned to the cab. They appeared "hurried," "out of breath" and "worked up." Ms. Jones was instructed by the [Petitioner] to drive the three men to the Arlington section of the City of Pittsburgh. While en route to Arlington, the victim complained that he had lost his cell phone at the Sperber residence. The [Petitioner] told the victim to "shut up" and that he'd get him another phone. Ms. Jones drove the men to Fernleaf Street in Arlington and dropped them off near Choung's Market. The [Petitioner] spoke to Ms. Jones about a week later and told her he'd be "laying low" for a while.

Cell phone tower records analysis demonstrated that between 11:00 p.m. on October 10, 2015 and 12:20 a.m. on October 11, 2015, the cell phone of Ms. Jones contacted or "pinged" cell phone towers located along a path consistent with her travel from Manchester to the east suburb of Turtle Creek and then back to Arlington. Cell phone tower records analysis also confirmed that between 11:32 p.m. on October 10, 2015 and 1:44 a.m. on October 11, 2015, the cell phone of the victim contacted or "pinged" cell phone towers located along a path consistent with travel from Arlington to the east suburb of Turtle Creek and that it remained in the area of Turtle Creek.

Luis Rodriguez testified that he resided in a house at 2228 Arlington Avenue. Mr. Rodriguez testified he was readying himself to go to bed in the very early hours of October 11, 2015 when he heard screaming coming from outside. He looked out his bedroom window and he observed two men chasing another man down the street, firing handguns at him. He could not see the firearms but he could hear the gunshots and see the flashes coming from the firearms. He believed he had heard two different, distinct sounding firearms. He never saw any flashes coming from the person being chased. The three men were running down Arlington Avenue toward Mr. Rodriguez's house. Mr. Rodriguez observed the person being chased fall down. The other two men caught up to him. Mr. Rodriguez then saw five flashes right over the victim's body. After the two men left the scene, Mr. Rodriguez went outside to check on the victim. The victim was gasping. Mr. Rodriguez tried to move the victim's head to help him breathe and he noticed the multiple bullet wounds in the victim's head. He got scared and ran back into his house.

Shortly after responding to the scene of the shooting, police officers encountered Amirae Benton near Spring Street about two blocks from where the victim was found. They had received a call that a male was seen fleeing the shooting scene and running toward that area. Benton was not arrested at that time.

Investigators retrieved surveillance footage from two local businesses. The surveillance footage disclosed that approximately seven minutes before the first 911 call about the shooting, the victim, the [Petitioner] and Benton were walking near Choung's Market in Arlington toward the location where the victim was found. The victim was walking closest to the curb of the sidewalk.

Petitioner claims on appeal is that trial counsel rendered ineffective assistance of counsel because he failed to move for judgment of acquittal relative to the firearms charge because the Commonwealth did not present evidence at trial that Petitioner did not possess a valid license to possess a firearm. It is well established that counsel is presumed effective and the petitioner bears the burden of proving ineffectiveness. *Commonwealth v. Cooper*, 596 Pa. 119, 941 A.2d 655, 664 (Pa. 2007). Under the federal constitution, to obtain relief on a claim of ineffective assistance of counsel, a petitioner must rebut that presumption and demonstrate that counsel's performance was deficient, and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As set forth in *Commonwealth v. Dennis*, 17 A.2d 297, 301 (Pa.Super. 2011),

[i]n our Commonwealth, we have rearticulated the *Strickland* Court's performance and prejudice inquiry as a three-prong test. Specifically, a petitioner must show: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001).

The standard remains the same for claims under Pennsylvania and federal law. A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any of these prongs. *Id.* at 221-222.

The threshold inquiry in a claim of ineffective assistance of counsel is whether the issue/argument/tactic which counsel has forgone and which forms the basis for the assertion of ineffectiveness is of arguable merit. *Commonwealth v. Ingram*, 404 Pa. Super. 560, 591 A.2d 734 (Pa.Super. 1991). Counsel cannot be considered ineffective for failing to assert a meritless claim. *Commonwealth v. Tanner*, 600 A.2d 201 (Pa.Super. 1991). Moreover, “[t]here is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary.” *Commonwealth v. Jones*, 942 A.2d 903, 906 (Pa. Super. 2008). Rule 907 of the Pennsylvania Rules of Criminal Procedure provides that PCRA petitions may be dismissed without a hearing if the PCRA court determines “that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings” Pa.R.Crim.P. 907(1).

This Court does not believe a hearing was necessary to resolve the instant PCRA petition. There is no question that the Commonwealth failed to present evidence at trial that Petitioner did not possess a license to possess a firearm. Petitioner's claim that trial counsel failed to move for judgment of acquittal on the firearms charge appears, at first blush, to have merit. However, in this Court's view, it is beyond dispute that had such a motion been made, the Commonwealth would have sought to reopen the record and admit the omitted evidence at trial. This Court would have accommodated that request. Proof of Petitioner's age would have been readily provable. There is no dispute he was under 21 years old at the time he possessed the firearm. Formal documents, including probation office records, vital records and charging documents contained Petitioner's date of birth. Law enforcement officers would have been able to testify as to his age. In *Commonwealth v. Tharp*, 575 A.2d 557, 558-559 (Pa. 1990), the Pennsylvania Supreme Court held that a trial court could reopen a case where the defendant sought a demurrer after the Commonwealth omitted evidence of a defendant's age during its case-in-chief in a corruption of minors prosecution:

Under the law of this Commonwealth a trial court has the discretion to reopen a case for either side, prior to the entry of final judgment, in order to prevent a failure or miscarriage of justice. *Commonwealth v. Evans*, 488 Pa. 38, 410 A.2d 1213 (1979); *Commonwealth v. Deitch Co.*, 449 Pa. 88, 295 A.2d 834 (1972); see also, *Commonwealth v. Staten*, 350 Pa.Super. 173, 504 A.2d 301 (1986); *Commonwealth v. Tabas*, 308 Pa.Super. 43, 454 A.2d 12 (1982); *Commonwealth v. Parente*, 294 Pa.Super. 446, 440 A.2d 549 (1982); *Commonwealth v. Ridgely*, 243 Pa.Super. 397, 365 A.2d 1283 (1976). The case law in this Commonwealth has recognized the discretion of the trial court to permit the Commonwealth to reopen its case for the purpose of meeting a demurrer interposed by the defense prior to its ruling upon that motion. See *Commonwealth v. Evans*, *supra*; *Commonwealth v. Mathis*, 317 Pa.Super. 226, 463 A.2d 1167 (1983); *Commonwealth v. Campbell*, 298 Pa.Super. 23, 444 A.2d 155 (1982).

In this case the trial judge permitted the Commonwealth to reopen its case to present direct evidence as to the appellant's age in order to further establish the age element of a charge for corruption of a minor. That offense requires that the defendant be at least eighteen years of age. 18 Pa.C.S. § 6301(a). Here, the appellant was thirty-one years of age at the time of trial. The Commonwealth initially failed to present any direct evidence of his age but relied on the circumstantial evidence. See *supra*, note 4. After the trial judge permitted the Commonwealth to reopen, testimony was offered by the arresting police officer who verified the age of the appellant through the appellant's driver's license.

Though Petitioner is able to prove that his trial counsel did not move for judgment of acquittal after the close of the Commonwealth's case, that error was harmless and he suffered no prejudice as a result of it. Had such a motion been made, the jury would have still been provided with evidence of his age and the result of this trial would not have changed.

For the foregoing reasons, this Court properly denied Petitioner's PCRA petition

BY THE COURT:
/s/Mariani, J.

Date: April 6, 2022

¹ According to trial testimony, live rounds are sometimes ejected from semiautomatic firearms when the firearms malfunction (“jam”).