**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>JONATHAN F. HARRIS,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 357 EDA 2013 |

Appeal from the PCRA Order Entered January 11, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0409431-2002

BEFORE: BENDER, P.J., SHOGAN, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J. **FILED APRIL 15, 2014**

Appellant, Jonathan F. Harris, appeals from the January 11, 2013 order denying his first petition for relief filed under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546. Appellant presents three claims alleging that his counsel on direct appeal ("appellate counsel") was ineffective for failing to raise certain claims of error for appellate review. Appellant also asserts that the PCRA court erred by refusing to address matters raised in the third amendment to his PCRA petition. After careful review, we vacate the PCRA court's order denying relief and remand for further proceedings.

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* Former Justice specially assigned to the Superior Court.

The facts of this case are not nearly as complicated as its procedural history. The Commonwealth alleged that Appellant, a.k.a. "Johnny Cane," and his coconspirator, Shaun "Boo" Cherry, confronted victims Leon Bryant and Joseph "Mackie" Pratt outside the Gold Coast bar in West Philadelphia during the early morning hours of September 23, 2001. Appellant believed that Pratt had sucker-punched his friend. He approached Bryant's vehicle, where Bryant sat in the driver's seat and Pratt sat in the passenger seat. After a brief verbal exchange, Appellant jumped on top of the hood of the car and fired numerous shots from a .357-caliber semiautomatic handgun into the vehicle. Simultaneously, Cherry fired his .45-caliber semiautomatic handgun at the vehicle from the side. Seven shots struck Bryant. The vehicle rolled slowly down Lancaster Avenue until a witness, Antwain Ball, reached into the vehicle and turned off the engine. Ball and his sister tried unsuccessfully to speak with Bryant but he soon lost consciousness. Bryant was pronounced dead upon his arrival at the hospital. Both Cherry and Pratt were shot and killed in separate incidents before they were questioned by police regarding this shooting.

Appellant was initially tried on August 4, 2003, for the murder of Bryant, the attempted murder of Pratt, and several other lesser crimes including possessing an instrument of crime (PIC), recklessly endangering Pratt (REAP), and criminal conspiracy. Appellant's first trial, in which he acted *pro se* with the assistance of back-up counsel, resulted in his acquittals for first degree murder and voluntary manslaughter. However,

the jury failed to reach a verdict on attempted murder, third degree murder, PIC, criminal conspiracy, and REAP.

Appellant was retried on December 15, 2003, when he again acted *pro se* with the assistance of back-up counsel. The second jury convicted Appellant of PIC and criminal conspiracy and acquitted him of REAP and attempted murder. However, the second jury deadlocked on third degree murder. Following that verdict, the trial court sentenced Appellant to 10 – 20 years' incarceration for criminal conspiracy and a consecutive term of 2½ - 5 years' incarceration for PIC, and also granted the Commonwealth's motion to *nolle pros* the third degree murder charge.

Appellant appealed and, in a memorandum decision, this Court awarded Appellant a new trial after determining that the trial court had conducted an inadequate colloquy regarding Appellant's decision to represent himself at the second trial. ***Commonwealth v. Harris***, 885 A.2d 576 (Pa. Super. 2005) (unpublished memorandum). In response to this Court's granting Appellant a new trial and vacating the judgment of sentence, the Commonwealth successfully moved to withdraw the *nolle pros* regarding the charge of third degree murder.

Thus, Appellant's third trial concerned the reinstituted charge of third degree murder, PIC, and criminal conspiracy. On January 25, 2007, the jury convicted Appellant of all three offenses. On January 30, 2007, the trial court sentenced Appellant to 20 – 40 years' incarceration for third degree murder, a consecutive term of 20 – 40 years' incarceration for criminal

conspiracy, and a consecutive term of 2½ - 5 years' incarceration for PIC. Appellant filed a counseled appeal, and this Court affirmed his judgment of sentence on August 11, 2009. ***Commonwealth v. Harris***, 979 A.2d 387 (Pa. Super. 2009). Appellant filed a petition for allowance of appeal to our Supreme Court but ultimately abandoned that appeal when he withdrew his petition before it was decided.

On March 4, 2010, Appellant filed a timely PCRA petition, his first, alleging his appellate counsel (following his third trial), Attorney Joseph S. O'Keefe, provided ineffectiveness assistance of counsel (IAC). Appellant again sought to act *pro se*. Therefore, the PCRA court conducted a ***Grazier***[1] hearing on March 4, 2010. The court determined that Appellant knowingly, voluntarily, and intelligently decided to represent himself. The PCRA court then conducted a hearing on November 27, 2012. However, that hearing was limited to argument concerning Appellant's satisfaction of the prejudice prong pertaining to one of his IAC claims. No evidence was admitted and Attorney O'Keefe did not provide testimony. On January 11, 2013, the PCRA court issued an order denying Appellant's petition for relief. Appellant filed a timely appeal from that order, and now presents the following questions for our review:

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[1] ***Commonwealth v. Grazier***, 713 A.2d 81, 82 (Pa. 1998) ("When a waiver of the right to counsel is sought at the post-conviction and appellate stages, an on-the-record determination should be made that the waiver is a knowing, intelligent, and voluntary one.").

> I. WAS APPELLANT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE [ASSISTANCE OF] COUNSEL, DUE TO APPELLATE COUNSEL'S FAILURE TO RAISE ON DIRECT APPEAL THE ISSUE OF COLLATERAL ESTOPPEL PURSUANT TO ***ASHE V. SWENSON***[,[2]] DENYING APPELLANT HIS FIFTH AMENDMENT … DOUBLE JEOPARDY [RIGHT]?
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> 2. WAS APPELLANT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE [ASSISTANCE OF] COUNSEL, DUE TO APPELLATE COUNSEL'S FAILURE TO RAISE ON DIRECT APPEAL … THAT APPELLANT WAS DENIED HIS SPEEDY TRIAL RIGHTS?
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> 3. DID THE PCRA COURT ERR BY CONCLUDING THAT THE EVIDENCE WAS OVERWHELMING TO DENY APPELLANT RELIEF THAT HIS DUE PROCESS RIGHTS WERE VIOLATED, WHEN THE TRIAL COURT DENIED APPELLANT THE OPPORTUNITY TO PRESENT PORTIONS OF APPELLANT'S PRIOR TESTIMONY … [THAT WOULD] … REBUT THE MISLEADING PORTIONS READ IN BY THE COMMONWEALTH?
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> 4. DID THE PCRA COURT ERR BY FAILING TO ADDRESS APPELLANT'S THIRD AMENDED PETITION?

Appellant's Brief at 4.

Our standard of review of challenges to a PCRA court's order dismissing a PCRA petition is well-settled:

> We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. This Court may affirm a PCRA court's decision on any grounds if the record supports it. Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary.

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[2] ***Ashe v. Swenson***, 397 U.S. 436 (1970).

***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa. Super. 2012) (internal citations omitted). Due to our disposition in this matter, we will not address Appellant's claims *ad seriatum*.

Appellant asserts that the PCRA court erred when it failed to address matters raised in his third amended PCRA petition (hereinafter "third amendment"). Appellant believes that, because he filed his third amendment before the PCRA court entered the order denying him PCRA relief, the PCRA court was obligated to address the additional matters raised therein. However, the record indicates that this issue was not presented in Appellant's Pa.R.A.P. 1925(b) statement of errors complained of on appeal. As such, we conclude that Appellant has waived this claim. ***See Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998) ("Any issues not raised in a 1925(b) statement will be deemed waived.").

Appellant's remaining allegations of PCRA court error concern claims that Attorney O'Keefe provided IAC during Appellant's direct appeal (from his third trial) by failing to submit certain issues for appellate consideration. Our review of IAC claims is governed by the following standard of review:

> We begin with the presumption that counsel rendered effective assistance. 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). In 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***, 515 Pa. 153, 158–59, 527 A.2d 973, 975 (1987).

***Commonwealth v. Dennis***, 17 A.3d 297, 301 (Pa. 2011) (internal citation omitted).

As previously noted, the PCRA court only held a hearing for the purpose of permitting Appellant to make legal arguments pertaining to the prejudice prong of the third IAC issue enumerated above. ***See*** N.T., 11/27/12, at 2. As such, Attorney O'Keefe has never testified regarding whether he had a reasonable basis for his omissions during the direct appeal from Appellant's third trial.

After reviewing the record, the arguments of the parties, and the opinion of the PCRA court, we believe that the remaining issues before us are legally and factually complex, involve at least one issue of first impression, and are not easily resolvable based upon the limited record before us. Specifically, we conclude that our review of the PCRA court's order denying relief has been hindered by the absence of Attorney O'Keefe's testimony regarding whether he had a reasonable basis for failing to raise the claims underlying Appellant's allegations of IAC. We also believe that Attorney O'Keefe's testimony may serve to aid in our analysis of other prongs of Appellant's IAC claims, even if only to render moot the more difficult legal questions arising out of the arguable merit and prejudice prongs of Appellant's claims should it be determined that Attorney O'Keefe

had a reasonable basis for his omissions. Accordingly, because we consider it "just under the circumstances" of this case, we vacate the PCRA court's order and remand for a hearing on Appellant's IAC claims.[3] We acknowledge that the PCRA court has already ruled on the arguable merit and prejudice prongs of some of these claims. However, we do not wish to restrict the PCRA court's reconsideration of these prongs should it determine, after the hearing at which Attorney O'Keefe testifies, that the record warrants such action. Remand is appropriate in this instance, at least in part, because "[a]s a general rule, a lawyer should not be held ineffective without first having an opportunity to address the accusation in some fashion[,]" and "[t]he ultimate focus of an ineffectiveness inquiry is always upon counsel, and not upon an alleged deficiency in the abstract." ***Commonwealth v. Colavita***, 993 A.2d 874, 895 (Pa. 2010).

Order ***vacated***. Case ***remanded***. Jurisdiction ***relinquished***.

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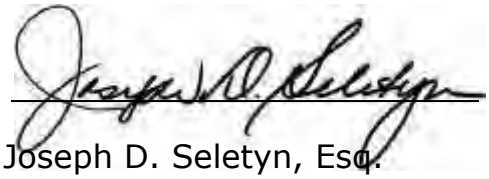
[3] Under the authority of 42 Pa.C.S. § 706 ("Disposition of appeals"), "[a]n appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances."

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014