

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
IAN CHRISTOPHER BRENNER,	:	
	:	
Appellant	:	No. 1313 MDA 2012

Appeal from the PCRA Order entered June 26, 2012, in the Court of Common Pleas of York County, Criminal Division, at Nos. CP-67-CR-0002170-2006.

BEFORE: MUNDY, OLSON, and STRASSBURGER\*, JJ.

MEMORANDUM BY STRASSBURGER, J.:

**FILED MAY 31, 2013**

Ian Christopher Brenner (Appellant) appeals from the order entered June 26, 2012, denying his petition filed pursuant to the Post Conviction Relief Act (PCRA).<sup>1</sup> For the reasons that follow, we reverse and remand for a new trial.

The pertinent factual and procedural history of this action has previously been summarized as follows

On October 19, 1995, around 9:30 pm, Daneik Burns [("Burns")] walked down Duke Street to meet up with his friend, Alicia, around Allison’s bar. When he arrived at Allison’s bar he sat down on the front of a car, which was parked on Duke Street, to speak with Alicia. While [Burns] was sitting on the car, he saw someone up the street crouching across the street. Furthermore, [Burns] testified that, when the man got to the corner of Newton Street, the man stood up and started yelling and then fired a shot. After [Burns] heard a couple shots fired

<sup>1</sup> 42 Pa.C.S. §§ 9541-9546.

\* Retired Senior Judge assigned to the Superior Court.

he ran to King Street. [Burns] testified that, at this point, the shooter was walking towards him. While [Burns] was running, the window of the car he had been sitting on was shot.

[Burns] testified that, before he started running, he saw the shooter's face and identified him as [Appellant]. [Burns] testified that he recognized [Appellant] from seeing him around the barbershop and around town. Furthermore, [Burns] testified that, the first gunshot was fired in the direction of [Jeffrey Mable ("Mable")]. [Burns] testified that prior to the shooting, [Mable] started walking away until he heard the man on the corner yell something. At that point, [Mable] looked back in the direction of the shooter and that is when shots were fired in the direction of [Mable].

Before the shooting occurred, Alfonso King, Sr. and his friend, Dwayne, drove over to Allison's bar on Duke Street in York City and parked in front of the bar. When Mr. King got out of the car he saw one of his friends, Mecca, standing in that area by the step. Mr. King said "Hi" to him and then a man he knew as [Mable] walked past. Mr. King said "Hi" to [Mable] and then heard someone say "Hey. Yo." Mr. King then turned around and saw a flash from a gun and heard a gunshot fired. Mr. King was then shot in the left wrist and forearm. Mr. King testified that the gunshots came from the alley behind him, around Newton Street. At the time Mr. King was shot, [Mable] was standing in front of him. Therefore, [Mable] was facing the shooter at the time the shots were fired. When the shots were fired, [Mable] ducked in front of Mr. King. Mr. King then ran to hide in a nearby doorway and [Mable] ducked behind some steps. Mr. King then heard four more gunshots. Mr. King testified that he never saw the shooter's face because it was so dark, but did see someone wearing a hooded sweatshirt or coat that covered his face.

Around the same time, Anthony Zawadzinski was walking down Duke Street, past Allison's bar toward Sunrise Restaurant when he heard gunshots and saw a man, who was bleeding from his wrist, run by. Mr. Zawadzinski testified that, when he heard the shots he started running to his car and while he was running, he was shot in the leg.

On the same night, around 9:30 pm, Tina Ashley was sitting on her front step talking with her friends, Anna Witter and a man

named Tony. Ms. Ashley testified that Tony was sitting on the side of her step closest to Allison's Bar. At one point, Ms. Ashley said Tony looked up towards the alley and said, "Oh sh - -" Ms. Ashley and Ms. Witter turned to look and saw a man standing there with a gun. That man then started to shoot. Ms. Ashley testified that, after the first shot they dove into her house and closed the door, while more shots were being fired. Once they were inside, Ms. Witter stood against the wall and slid down the wall and said, "Tina, I'm hit." Ms. Witter was later pronounced dead due to a gunshot wound to the chest.

At trial, Apollonia Snyder testified that, several days before the shooting, she and [Appellant] were driving around, going to bars. While they were driving, Ms. Snyder heard [Appellant] talking on his cell phone to someone named "Man," about how he was going to shoot [Mable] when he saw him. Ms. Snyder testified that, while [Appellant] was talking on the phone, he was playing with a gun in his lap.

Charles Maner testified that he was in York County Prison at the same time [Appellant] was and had spoken to him about the shooting. Mr. Maner testified that [Appellant] had confessed to him that he accidentally shot a woman and felt bad about it. Furthermore, Mr. Maner testified that [Appellant] said the reason he fired shots that night was because he was trying to shoot the person who shot him earlier that month.

The jury found [Appellant] guilty of murder in the first degree with respect to Anna Witter, guilty of aggravated assault - - bodily injury with a deadly weapon with respect to Alfonso King, Jr., and criminal attempt homicide with respect to Mable. [N.T., 9/14/06, at 121-22.] The jury found [Appellant] not guilty of aggravated assault - - bodily injury with a deadly weapon with respect to Anthony Zawadzinski. **Id.** The trial court sentenced [Appellant] to life imprisonment on October 23, 2006, and he filed a timely notice of appeal.

The trial court ordered [Appellant] to file a statement pursuant to Pa.R.A.P. 1925(b) within fourteen days, *i.e.*, on or before December 11, 2006. After requesting an extension of time to do so, [Appellant] filed his 1925(b) statement on January 8, 2007. In a memorandum decision dated December 8, 2008, this Court concluded that the requested extension of time did not meet the requirements of **Commonwealth v. Gravely**, 918

A.2d 761 (Pa. Super. 2007), and accordingly affirmed the judgment of sentence based upon a finding that the late-filed Rule 1925(b) statement resulted in a waiver of all issues on appeal. On May 27, 2009, the Supreme Court of Pennsylvania vacated the **Gravelly** decision, establishing new guidelines for extensions of time to file Rule 1925(b) statements. By *per curium* [sic] order dated October 27, 2009, the Supreme Court vacated our December 8, 2008 memorandum and remanded the appeal to this Court "for consideration on the merits."

**Commonwealth v. Brenner**, 2129 MDA 2006 , unpublished memorandum at 1-5 (Pa. Super. filed April 6, 2010) (quotations and citation omitted). Via the memorandum on April 6, 2010, we affirmed Appellant's judgment of sentence. **Id.** On November 16, 2010, our Supreme Court denied Appellant's petition for allowance of appeal. **Commonwealth v. Brenner**, 13 A.3d 474 (Pa. 2010).

On February 3, 2012, Appellant filed a timely, counseled PCRA petition. Hearings were held on the petition April 13, 2012 and May 14, 2012. On June 26, 2012, the PCRA court denied Appellant's petition. This appeal followed. Both Appellant and the trial court have complied with the directives of Pa.R.A.P. 1925.

On appeal, Appellant presents for our consideration the following issues:

[1.] Whether the [PCRA] court erred in denying Appellant's claim that trial counsel was ineffective for failing to interview and call eyewitnesses to the shooting who would have presented exculpatory evidence, where such failure prejudiced Appellant?

[2.] Whether the [PCRA] court erred in denying Appellant's claims regarding Commonwealth witness, Charles Maner, to wit: 1) trial counsel was ineffective for failing to investigate and

cross-examine Maner with his open convictions for drug trafficking, et al. to prove his motive to lie; 2) the Commonwealth violated Appellant's due process rights pursuant to **Brady v. Maryland**[, 373 U.S. 83 (1963)] in failing to disclose consideration afforded to Maner; and 3) Maner lied under oath at trial?

[3.] Whether the [PCRA] court erred in denying Appellant's claim that trial counsel was ineffective for failing to obtain an accurate and complete trial transcript prior to filing an appeal in this matter, where such failure prejudiced Appellant?

[4.] Whether the [PCRA] court erred in denying Appellant's claim that trial counsel was ineffective for opening the door to testimony by the U.S. Attorney's Office, where such failure prejudiced Appellant?

[5.] Whether the [PCRA] court erred in denying Appellant's claim that trial counsel was ineffective for failing to call any character witnesses, where such failure prejudiced Appellant?

[6.] Whether the [PCRA] court erred in preventing eye witnesses from fully testifying at the PCRA hearing?

Appellant's Brief at 4-5.

In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. **Commonwealth v. Johnson**, 966 A.2d 523, 532 (Pa. 2009). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. **Commonwealth v. Boyd**, 923 A.2d 513 (Pa. Super. 2007). If the record supports a post-conviction court's credibility determination, it is binding on the appellate court. **Commonwealth v. Knighten**, 742 A.2d 679, 682 (Pa. Super. 1999). To

be entitled to relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the errors enumerated in section 9543(a)(2) of the PCRA. Such errors include the ineffectiveness of counsel. **See** 42 Pa.C.S. § 9543(a)(2)(ii).<sup>2</sup>

Additionally, in reviewing the PCRA court's denial of Appellant's claims of ineffective assistance of counsel, we bear in mind that counsel is presumed to be effective. **Commonwealth v. Martin**, 5 A.3d 177, 183 (Pa. 2010). To overcome this presumption, Appellant bears the burden of proving the following: "(1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance." **Id.** Appellant's claim will be denied if he fails to meet any one of these three prongs. **Id.** Specifically, when an appellant claims counsel is ineffective for failing to call character witnesses, the appellant must demonstrate that

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<sup>2</sup> Section 9543(a)(2) requires, in relevant part, that the conviction or sentence resulted from one or more of the following:

\* \* \*

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

42 Pa.C.S. § 9543 (a)(2)(ii).

witnesses existed, they were available and willing to testify on his behalf at the trial, his counsel had an awareness of, or a duty to know of, the witnesses, and their proposed testimony was necessary to avoid prejudice. ***Commonwealth v. Copenhefer***, 719 A.2d 242, 254 (Pa. 1998).

Keeping the above standards in mind, we now address Appellant's claims on appeal. However due to our disposition of Appellant's fifth issue, we address it first.

In his fifth issue, Appellant alleges that trial counsel was ineffective for failing to call character witnesses. Appellant presented two witnesses at the PCRA hearing whose affidavits were attached to his petition and who ultimately testified that had Appellant's trial counsel contacted them they would have been available and willing to testify at trial as to Appellant's character as a moral and law-abiding citizen. **See** PCRA petition, 2/3/2012, Exhibit "F" – Affidavit of Robert A. Redmen Jr., and Exhibit "G" – Affidavit of Brandon Deshields. **See also** N.T., 4/13/2012, at 81-88, and 150-156. Appellant claims that he was prejudiced by counsel's failure to call these witnesses. Appellant's Brief at 39-40.

It is well-established that

[f]ailure to present available character witnesses may constitute ineffective assistance of counsel. **See *Commonwealth v. Weiss***, [606 A.2d 439 (Pa. 1992)]; ***Commonwealth v. Gillespie***, [620 A.2d 1143 (Pa. Super. 1993)]. Our Court has stated: "It has long been the law in Pennsylvania that an individual on trial for an offense against the criminal law is permitted to introduce evidence of his good reputation in any respect which has 'proper relation to the

subject matter' of the charge at issue." **Commonwealth v. Luther**, [463 A.2d 1073, 1077 (Pa. Super. 1983)]. Evidence of good character is to be regarded as evidence of substantive fact just as any other evidence tending to establish innocence and may be considered by the jury in connection with all the evidence presented in the case on the general issue of guilt or innocence. **Id.** Evidence of good character offered by a defendant in a criminal prosecution must be limited to his general reputation for the particular trait or traits of character involved in the commission of the crime charged. **Id.** In a case where the crime charged is one of violence, evidence of reputation for non-violent behavior is admissible. **See [Luther, supra]**.

**Commonwealth v. Harris**, 785 A.2d 998, 1000 (Pa. Super. 2001).

Moreover, "[i]n a case such as this, where there are only two direct witnesses involved, credibility of the witnesses is of paramount importance, and character evidence is critical to the jury's determination of credibility."

**Commonwealth v. Hull**, 982 A.2d 1020, 1025 (Pa. Super. 2009) (quoting **Weiss**, 606 A.2d at 442). In fact, when character evidence is offered, "[a] criminal defendant must receive a jury charge that evidence of good character (reputation) may, in and of itself, (by itself or alone) create a reasonable doubt of guilt and, thus, require a verdict of not guilty."

**Commonwealth v. Neely**, 561 A.2d 1, 3 (Pa. 1989).

The first step toward establishing ineffectiveness of counsel is to determine whether Appellant's claim has arguable merit. In this instance, character testimony was not only appropriate as Appellant was convicted of first-degree murder, a crime of violence, but the Commonwealth's evidence hinged upon the credibility of the witnesses in this case. Burns testified that



he was on the street the night of the shooting and momentarily witnessed a man with a hoodie pulled up around his face pull a gun and shoot into the crowd. Burns was the only eyewitness at trial to identify the shooter as Appellant. Maner was the only other Commonwealth witness to testify at trial who implicated Appellant in the shooting. Maner testified that while in jail with Appellant, Appellant confessed to being sorry for accidentally killing a woman the night of the shooting. Conversely, Appellant's witnesses testified that Appellant was not at the scene but at another location at the time of the incident. In this case, it was Appellant's version against that of two Commonwealth witnesses. Therefore, evidence of Appellant's character was crucial and would have served as substantive evidence which could have created a reasonable doubt of guilt.

Because there is arguable merit to the claim of ineffectiveness, we proceed to whether there was any reasonable basis for the failure of trial counsel to present character testimony.

A chosen strategy will not be found to have been unreasonable unless it is proven that the path not chosen offered a potential for success substantially greater than the course actually pursued. Finally, to prove prejudice, a defendant must show that but for counsel's error, there is a reasonable probability, i.e., a probability that undermines confidence in the result, that the outcome of the proceeding would have been different.

***Commonwealth v. Miller***, 987 A.2d 638, 648-49 (Pa. 2009).

At the PCRA hearing, Mark Keenheel, Appellant's trial and direct appeals counsel, testified that his failure to call character witnesses on

behalf of Appellant at trial “was a mistake, plain and simple.” N.T., 4/13/2012, at 174. Attorney Keenhell stated that he never discussed character witnesses with Appellant, although he realized he could have called them and, in fact, had done so in previous trials. **Id.** Thus, we find that counsel could offer no reasonable basis for failing, in this instance, to call character witnesses on Appellant’s behalf.

Next, we must determine whether Appellant suffered prejudice as a result of this failure. “Our Supreme Court stated in [**Weiss, supra**] that character evidence is vital to the jury’s determination of credibility, and that by creating a reasonable doubt, that evidence may produce acquittal.” **Harris**, 785 at 1002. Accordingly, we find “the lack of character evidence likely prejudiced Appellant.” **Id.**

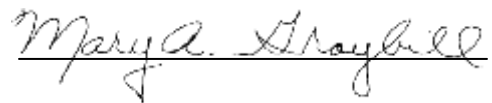
In conclusion, we hold that Appellant’s claim is of arguable merit, trial counsel had no reasonable basis for his inaction, and as such Appellant was prejudiced by counsel’s failure to call character witnesses. To the extent that the PCRA court dispels Appellant’s argument on the basis that counsel was not made aware of any character witnesses by Appellant prior to trial, we find this reasoning flawed. In this case, Appellant had no previous criminal record, and when asked at the PCRA hearing why he did not provide such a list of names to counsel he stated, “I didn’t - - know that even had anything to do with my case.” N.T., 5/14/2012, at 33. In a case such as this, where counsel fails even to discuss the possibility of using character

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witnesses, we cannot fault the client for failing to provide names of character witnesses.<sup>3</sup> **See generally Luther** 463 A.2d at 1078-79.

Judgment of sentence reversed. Case remanded for a new trial.  
Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in cursive script that reads "Mary A. Straybill". The signature is written in black ink and is positioned above the printed name.

Deputy Prothonotary

Date: 5/31/2013

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<sup>3</sup> Due to our resolution of this issue, we need not address the remaining issues presented by Appellant.