NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. NELSON VAZQUEZ, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 640 EDA 2016

Appeal from the PCRA Order January 29, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009675-2010

BEFORE: SHOGAN, STABILE, and PLATT,* JJ.

MEMORANDUM BY SHOGAN, J.: **FILED APRIL 20, 2017**

Appellant, Nelson Vazquez, appeals from the order denying his petition for post-conviction relief filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. We affirm.

The trial court summarized the underlying facts of this case as follows:

> Police Officer Kober testified that on [March] 26, 201[0], at approximately 12:50 A.M., he went to "B" and Stella Streets in Philadelphia in response to a report of shots fired. When he arrived at the scene, he observed a male, later identified as fifteen (15) year old William Lyons, lying on the sidewalk at the bottom of the steps of a Chinese store at 3037 "B" Street. He saw that the male had been shot in the right side of his head.
>
> Police Officer Ramos testified that at approximately 12:50 A.M. on [March] 26, 201[0], he was responding to a police radio call of shots fired. As he crossed the intersection of "B" Street

---

* Retired Senior Judge assigned to the Superior Court.

and Elkhart Streets, he observed a black male, later identified as Perry Smith, lying on the sidewalk at the southwest corner of the intersection. Officer Ramos exited his patrol car and saw that the male had a gunshot wound to the chest. Officer Ramos and Police Officer Ginion placed Smith in their patrol car and took him to Temple Hospital. Lyons survived. Smith died.

While at the scene, Officer Ramos was approached by Emmanuel Rivera. Rivera inquired as to Lyons' condition. Rivera told Officer Ramos that "they shot at us." Rivera described one (1) of the males involved as [a] light skinned black male, approximately six (6) feet tall, wearing a black hat and black shirt. He described two (2) other males as being Hispanic, one of which had his hair in braids. He told Officer Ramos that the males ran westbound on Elkhart Street. Officer Ramos put out flash information to find the three (3) males. Officer Ramos turned Rivera over to Officer Kober. Rivera told Officer Kober that he had been with Lyons. Officer Kober had Rivera transported to East Detectives.

Meghan Macklin testified that on March 26, 2010 at approximately 12:50 A.M., she was driving in the area of "B" and Stella Streets with her boyfriend Robert Lombardo, looking to buy drugs. She saw four (4) to five (5) males standing in front of a Chinese store. One of the males yelled out that he had drugs to buy. She pulled her vehicle over on the west side of "B" Street across from the Chinese store and got out of her vehicle. She walked up to the Chinese store and told one of the males, who appeared to be fourteen (14) or fifteen (15) years old, (later identified as Emmanuel Rivera), that she wanted to buy seven (7) bags of heroin. Rivera ran across the street. She did not see exactly where he went.

As she was waiting for Rivera to return, she saw two (2) males inside the Chinese store, (later identified as William Lyons and Perry Smith). Lyons came out of the store with a pack of cigarettes. One of the males standing in front of the store asked him for a cigarette. As Lyons was taking a cigarette out of the pack, the male who had asked him for a cigarette, pulled out a black handgun, held it up to Lyons' neck and attempted to take the whole pack of cigarettes from Lyons. Ms. Macklin heard the male holding the gun call out to "B" or "D" to "watch his back." She then saw one of the other males that were standing in front of the store, pull out a black handgun. She heard at least two

(2) gun shots. She saw Lyons bleeding from his head. She then saw him collapse in front of the Chinese store. She saw Smith running up "B" Street toward Allegheny Avenue. She heard more shots being fired. She saw Smith run ten (10) to fifteen (15) feet and then collapse and start to convulse. She then saw the two (2) males who were shooting and a third male wearing a white shirt, run in the opposite direction that Smith ran, down "B" Street. Ms. Macklin ran back to her vehicle, got into the passenger side and drove away. After she left the scene, Mr. Lombardo called for an ambulance.

Approximately ten (10) hours later, Macklin contacted the police. She told the police that she had seen a shooting in the area of "B" Street and Allegheny. Macklin and Lombardo were taken to police headquarters and gave statements regarding the incident. Macklin was asked to look at photographs. She identified the photo of Lyons as the male that had the pack of cigarettes in his hand. She identified the photo of Emmanuel Rivera as the young male who ran across the street to get the heroin. She identified a photo of Smith as the male she saw collapse and convulse.

The next day at approximately 12:10 P.M., Macklin was again interviewed by police regarding the incident. After viewing photo arrays, she identified all three (3) Defendants. She identified a photo of [Appellant] as the male she saw approach Lyons with a gun. She identified a photo of Co-Defendant Marco Sanmarco as the male that had been standing next to her, who had pulled out the second gun and had fired shots at Lyons and Smith. She identified Co-Defendant Jonathan Rodriguez as the third male she saw running away with [Appellant] and Sanmarco. She testified that Rodriguez, [Appellant], and Sanmarco were the males standing together in front of the Chinese store when she pulled up in her vehicle and that they had been together the whole time she was present on the scene.

The Commonwealth played a video tape of the incident. Macklin testified that the incident as portrayed in [the] video tape was an accurate depiction of what occurred on the night of the incident.

Officer Thomas Fitzpatrick testified that on March 30, 2010, he was assigned to serve arrest warrants for Jonathan Rodriquez, [Appellant], and Marco Sanmarco. He went to 305 Indiana Avenue in Philadelphia to arrest Rodriquez. After

breaching the door, he found Rodriguez hiding in a closet of the back bedroom on the second floor. He then went to 2937 Mutter Street to arrest [Appellant]. [Appellant] was found sleeping in the front bedroom on the second floor. [Appellant] looked different from his police photo. [Appellant's] hair had been straightened and dyed red. At first [Appellant] told Officer Fitzpatrick that his name was Jose but later admitted that he was Nelson Vazquez. Officer Fitzpatrick then went to 3928 Bennington Street to arrest Marco Sanmarco. Sanmarco was not at that location. Rodriquez and [Appellant] were arrested and taken to the Homicide Unit.

Emmanuel Rivera testified that he was thirteen (13) years of age on the date of the incident. He testified that he was standing outside the Chinese store with Lyons and Smith. He saw [Appellant], Rodriquez and Sanmarco walk up and go into the Chinese store. He testified that he was "hustling" (selling drugs) with Lyons. He had just met Smith that same night. He testified that he knew "Baze" (Sanmarco) and "Boobie" (Rodriquez), for a long time and that he knew "M[o]yo" ([Appellant]) for four (4) months.

Rivera further testified that, a woman came up to him and asked for six (6) bags of "dope" (heroin). He went across the street to an alleyway where he kept the heroin. When he was coming back towards the Chinese store, he saw Sanmarco patting Smith's pockets and Smith fighting with Sanmarco. He saw that Rodriguez and [Appellant] had guns in their hands. He did not see Sanmarco with a gun. He heard two (2) gunshots that he believed came from the gun that Rodriquez was holding. He ran up Stella Street and hid behind a truck. After a few minutes, he ran back down Stella Street to check on Lyons. When he got to the corner of "B" and Stella Streets, he saw that the police had arrived on the scene. He asked a policeman on the scene if Lyons was still there. The policeman took Rivera to the police district.

Rivera was interviewed by Detective Aitkin. Rivera testified that he lied at first, when he told the detective that he did not know who was present at the time of the shooting, because he was scared.

When interviewed at the Homicide Division, Rivera identified all three (3) defendants from photos. On [Appellant's] photo he wrote "Moyo" and "shooter." On Sanmarco's photo he

wrote "Baze" and "went in Perry's (Smith's) pockets[,]" and on Rodriquez's photo he wrote "Boobie" and "shooter." Rivera told the detectives that he was standing outside the "chino" store on B Street with Lyons and Smith. Boobie, Baze, and Moyo came up to them and asked if the store sold cigarettes. They went into the store. At that point, a woman approached them and asked for six (6) bags of "dope." He ran across the street into an alleyway to get the dope. When he came out of the alleyway, he saw Baze taking a pack of cigarettes from Perry. He saw Baze hitting Perry and "checking his pockets." He saw Boobie start shooting at Perry. He saw Moyo ([Appellant]) shooting a gun in the direction of Lyons and Perry. Rivera was then shown a video wherein he identified himself, the woman who approached him to buy drugs and Lyons.

Robert Lombardo testified that on March 26, 2010, he drove with Meg[h]an Macklin, his ex-girlfriend, to "B" and Stella Streets in Macklin's mother's SUV to buy drugs. Macklin parked the SUV across the street from a Chinese store. He could see five (5) males standing outside the Chinese store. He identified one of the males as [Appellant]. He saw Macklin walk across the street and start talking to the males. He saw one of the males, he described as being "young," run across the street and into an alley. He saw one of the other males, go into and then exit the Chinese store. He then saw [Appellant] holding a silver revolver. He saw another male pull out a gun. He saw [Appellant] shoot the gun and then saw a male fall on the sidewalk. He saw [Appellant] fire the gun again. He saw Macklin run back across the street. He then saw the two (2) males who had fired guns and another male running away.

Macklin returned to the SUV, and jumped into the passenger's seat. Lombardo drove the SUV away from the scene and reported the shooting to the police. Later that morning, Lombardo called the police again. Lombardo and Macklin were taken to police headquarters to be interviewed.

Lombardo was interviewed by homicide detectives a second time on March 27, 2010, at approximately 12:05 P.M. At this interview, he was shown photographs and asked if he recognized anyone in the photos. He identified [Appellant] as one [of] the males that had pulled out a gun and had fired the gun.

Police Officer Brian Stark, assigned to the crime scene unit testified that he was called to the scene by the homicide unit. He recovered a 9-millimeter fired cartridge casing from the step of 3035 "B" Street which was next door to a Chinese store. He observed [a] blood-like substance appearing on the sidewalk from the front steps of the Chinese store to the curb line.

Dr. Gary Lincoln Collins testified that he is the acting Deputy Chief Medical Examiner for the Philadelphia Medical Examiner's Office. He reviewed the autopsy report and photos of the autopsy performed on Smith, a toxicology report and examined the clothing Smith was wearing. He testified that the autopsy was done by Assistant Medical Examiner, Dr. Chase Blanchard who is on extended family medical leave due to injuries she received as the result of a car accident. Dr. Collins testified that he was able to render an independent expert opinion as to the cause and manner of death of Smith. Dr. Collins opined that the cause of death was multiple gunshot wounds to Smith's torso and that the manner of death was homicide.

Dr. Collins testified that Smith sustained two (2) penetrating gunshot wounds to his abdomen or torso and that two (2) projectiles were recovered from his body. Dr. Collins testified that Smith sustained one (1) entrance wound to the right upper abdomen and a second entrance wound lower down his torso just across from his belly button. Dr. Collins opined that the weapon that fired the shots was positioned from six (6) inches to within two and one-half (2 ½) feet away from Smith.

Dr. Collins testified that both of the wounds Smith suffered were fatal, but not instantly fatal. Dr. Collins testified that the toxicology report showed that Smith had PCP in his system at a level where he would be "high" at the time he was killed. The two (2) bullets recovered during the autopsy of Smith were turned over to the police department by the medical examiner's office.

Detective John Cahill testified that he is assigned to the fugitive squad of the homicide unit. He was assigned to locate Sanmarco. On April 6, 2010, he along with U.S. Marshals went to 2222 N. 6th Street in Philadelphia where they found Sanmarco hiding in a closet of a second-floor back bedroom under a pile of clothes. Sanmarco told Detective Cahill that his name was "Sanjorgo" and that he had used the names "Marco Sanmarco"

> and "Marco Lopez." Sanmarco told him that he lived at 3927 Bennington Street. Sanmarco told him that his nicknames are "Baze" and "Skinny." Detective Cahill arrested Sanmarco.
>
> Officer Raymond Andrejcak of the Firearms Identification Unit testified that he examined the evidence that was recovered in this case: one (1) Remington 9-millimeter luger fired cartridge casing was recovered from the scene and two (2) .38 caliber/9-millimeter bullets were recovered from Smith's body. Officer Andrejcak testified that the bullets were fired from the same firearm, either a .38 caliber or a 9-millimeter. However, he was unable to determine if the firearm that ejected the fired cartridge casing was the same gun that fired the two (2) bullets.

Trial Court Opinion, 10/11/12, at 2–9 (citations omitted).

October 27, 2011, a jury convicted Appellant of the crimes of second-degree murder, attempted murder, conspiracy to commit robbery, robbery, aggravated assault, carrying a firearm on a public street or property in Philadelphia, and possession of an instrument of crime ("PIC").

On December 2, 2011, the trial court sentenced Appellant to serve a term of life imprisonment for the conviction of second-degree murder, concurrent terms of incarceration of ten to twenty years each for the convictions of attempted murder, conspiracy and robbery, and concurrent terms of imprisonment of two and one-half to five years each for the firearms violation and PIC. No further penalty was imposed for the conviction of aggravated assault. Appellant did not file post-sentence motions.

On February 21, 2014, this Court affirmed Appellant's judgment of sentence. ***Commonwealth v. Vazquez***, 97 A.3d 809, 63 EDA 2012 (Pa.

Super. filed February 21, 2014) (unpublished memorandum). The Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal on August 21, 2014. ***Commonwealth v. Vazquez***, 97 A.3d 744 (Pa. 2014).

Appellant filed a timely *pro se* PCRA petition on June 19, 2015. Appellant then retained private counsel who filed an amended PCRA petition. The PCRA court issued a notice of intent to dismiss Appellant's petition pursuant to Pa.R.Crim.P. 907 on December 29, 2015. On January 29, 2016, the PCRA court entered its order dismissing Appellant's PCRA petition. Appellant filed this timely appeal on February 24, 2016. Both Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

Appellant presents the following issues for our review:

> I. Did the PCRA Court err in finding no merit to Appellant's claim that Appellant was denied his rights under Article 1 §9 the Constitution of the Commonwealth of Pennsylvania and the Sixth Amendment to the Constitution of the United States of America to effective assistance of counsel in that counsel failed to file a motion seeking a competency hearing and/or to suppress witness Emmanuel Rivera's testimony; the PCRA Court ruling violated Appellant's Fourteenth Amendment rights?
>
> II. Did the PCRA Court err in finding no merit to Appellant's claim that his appellate counsel was constitutionally ineffective for failing to raise a claim that Appellant's Sixth Amendment rights under the Confrontation Clause and Article 1 §9 of the Pa Constitution were violated by the admission over counsel's objection to hearsay from the medical examiner[?]
>
> III. Did the PCRA Court err in finding no merit to Appellant's claim that appellate counsel was constitutionally ineffective

under the Sixth Amendment and Article 1 §9 of the Pa Constitution for failing to raise a claim that the prosecution violated his constitutional rights under *Brady v. Maryland* by not disclosing a complete copy of the videotape and for failing to provide copies of the autopsy photographs that the testifying Medical Examiner relied upon[?]

IV. Did the PCRA Court err in finding no merit to Appellant's claim that counsel was constitutionally ineffective under the Sixth Amendment and Article 1 §9 of the Pa Constitution for failing to file post-sentence motion thereby waiving a claim on direct appeal that the verdict was against the weight of the evidence[?]

V. Did the PCRA Court err in finding no merit to Appellant's claim that he was denied his rights under Article 1 §9 of the PA Constitution and the Sixth and Fourteenth Amendment[s] based upon the cumulative effect of counsels' [sic] trial/appellate ineffectiveness?

Appellant's Brief at 3-4.[1]

---

[1] As the Commonwealth properly notes in its brief:

> In his statement of questions involved, [Appellant] also raises a separate claim [numbered as issue VI] that the PCRA court erred in denying his petition without an evidentiary hearing (Brief for Appellant, 4). However, he fails to raise it in the body of his brief or offer argument in support. Accordingly, it is waived and unreviewable. Pa.R.A.P. 2119(a) (requiring claims to be presented in the argument section with discussion and citation to pertinent authorities); Commonwealth v. Delvalle, 74 A.3d 1081, 1086-87 (Pa. Super. 2013) (finding claims waived for failure to meaningfully develop them in body of brief). In any event, [Appellant] was not entitled to an evidentiary hearing because, as explained below, his claims were patently meritless. There was nothing for an evidentiary hearing to resolve. Commonwealth v. Payne, 794 A.2d 902, 906 (Pa. Super. 2002) ("if a defendant's petition is "without a trace of support," it may be dismissed without an evidentiary hearing[]").

(Footnote Continued Next Page)

When reviewing the propriety of an order denying PCRA relief, we consider the record "in the light most favorable to the prevailing party at the PCRA level." ***Commonwealth v. Stultz***, 114 A.3d 865, 872 (Pa. Super. 2015) (quoting ***Commonwealth v. Henkel***, 90 A.3d 16, 20 (Pa. Super. 2014) (*en banc*)). This Court is limited to determining whether the evidence of record supports the conclusions of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Rykard***, 55 A.3d 1177, 1183 (Pa. Super. 2012). We grant great deference to the PCRA court's findings that are supported in the record and will not disturb them unless they have no support in the certified record. ***Commonwealth v. Rigg***, 84 A.3d 1080, 1084 (Pa. Super. 2014).

As a prefatory matter, we observe that, excluding tables and appendices, Appellant's brief is more than forty pages long. Pursuant to Pa.R.A.P. 2135, a principal brief is limited to 14,000 words, and when the brief exceeds thirty pages, the appellant must certify with the appellate court that the brief complies with the word limitation. ***See*** Pa.R.A.P. 2135(d) (stating that "[a]ny brief in excess of the stated page limits shall include a certification that the brief complies with the word count limits"). Appellant has failed to include in his brief a certification that the brief does

(Footnote Continued) ———————————

Commonwealth's Brief at 9 n.4. We are constrained to agree that Appellant has abandoned any claim in this regard by failing to properly develop it in the argument portion of his appellate brief. Pennsylvania Rule of Appellate Procedure 2119(a).

not exceed 14,000 words. Because Appellant's violation of Pa.R.A.P. 2135 is not so defective as to preclude effective appellate review, we decline to dismiss the brief or quash the appeal. ***See Commonwealth v. McEachin***, 537 A.2d 883, 885 n.1 (Pa. Super. 1988) (declining to quash appeal under Pa.R.A.P. 2101 and Pa.R.A.P. 2135 where ninety-six-page brief was not so defective as to preclude effective appellate review). However, we caution Appellant's counsel that we will not hesitate to quash an appeal for violation of Pa.R.A.P. 2135. ***Cf. Commonwealth v. Spuck***, 86 A.3d 870 (Pa. Super. 2014) (finding issues to be waived and quashing appeal where Appellant violated various Rules of Appellate Procedure, including Pa.R.A.P. 2135).

We now address the issues presented in Appellant's brief. We observe that each of Appellant's claims challenges the effective assistance of his trial and appellate counsel. Our Supreme Court has long stated that in order to succeed on a claim of ineffective assistance of counsel, an appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's performance lacked a reasonable basis; and (3) that the ineffectiveness of counsel caused the appellant prejudice. ***Commonwealth v. Pierce***, 786 A.2d 203, 213 (Pa. 2001).

We have explained that trial counsel cannot be deemed ineffective for failing to pursue a meritless claim. ***Commonwealth v. Loner***, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*). Moreover, with regard to the second prong, we have reiterated that trial counsel's approach must be "so

unreasonable that no competent lawyer would have chosen it." ***Commonwealth v. Ervin***, 766 A.2d 859, 862-863 (Pa. Super. 2000) (quoting ***Commonwealth v. Miller***, 431 A.2d 233 (Pa. 1981)).

Our Supreme Court has defined "reasonableness" as follows:

> Our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had *some reasonable* basis designed to effectuate his client's interests. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis.

Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987) (quoting ***Commonwealth ex rel. Washington v. Maroney***, 235 A.2d 349 (Pa. 1967)) (emphasis in original).

In addition, we are mindful that prejudice requires proof that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. ***Pierce***, 786 A.2d at 213. "A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness." ***Commonwealth v. Daniels***, 963 A.2d 409, 419 (Pa. 2009) (citing ***Commonwealth v. Sneed***, 899 A.2d 1067 (Pa. 2006)). Thus, when it is clear that a petitioner has failed to meet the prejudice prong of an ineffective-assistance-of-counsel claim, the claim may be disposed of on that basis alone, without a determination of whether the first two prongs have

been met. ***Commonwealth v. Baker***, 880 A.2d 654, 656 (Pa. Super. 2005).

It is presumed that the petitioner's counsel was effective, unless the petitioner proves otherwise. ***Commonwealth v. Williams***, 732 A.2d 1167, 1177 (Pa. 1999). We are bound by the PCRA court's credibility determinations where there is support for them in the record. ***Commonwealth v. Battle***, 883 A.2d 641, 648 (Pa. Super. 2005) (citing ***Commonwealth v. Abu-Jamal***, 720 A.2d 79 (Pa. 1998)).

Furthermore, claims of ineffective assistance of counsel are not self-proving. ***Commonwealth v. Wharton***, 811 A.2d 978, 986 (Pa. 2002). "[A] post-conviction petitioner must, at a minimum, present argumentation relative to each layer of ineffective assistance, on all three prongs of the ineffectiveness standard…." ***Commonwealth v. D'Amato***, 856 A.2d 806, 812 (Pa. 2004). "[A]n underdeveloped argument, which fails to meaningfully discuss and apply the standard governing the review of ineffectiveness claims, simply does not satisfy Appellant's burden of establishing that he is entitled to relief." ***Commonwealth v. Bracey***, 795 A.2d 935, 940 n.4 (Pa. 2001).

In his first issue on appeal, Appellant argues that trial counsel was ineffective for failing to file a motion seeking a competency hearing and/or to suppress the testimony of Emmanuel Rivera ("Mr. Rivera"). Appellant's Brief at 11-23. Appellant asserts that, because Mr. Rivera was thirteen

years old when he witnessed the crime and fifteen years old when he testified at trial, defense counsel should have challenged his competency to testify. ***Id***.

In ***Commonwealth v. Moore***, 980 A.2d 647 (Pa. Super. 2009), this Court summarized the relevant law surrounding competency of young witnesses as follows:

> "In Pennsylvania, the general rule is that every witness is presumed to be competent to be a witness." ***Commonwealth v. Judd***, 897 A.2d 1224, 1228 (Pa. Super. 2006); ***see also*** Pa.R.E. 601(a). Despite the general presumption of competency, Pennsylvania specifically requires an examination of child witnesses for competency. ***See*** Pa.R.E. 601(b); ***Commonwealth v. Washington***, 554 Pa. 559, 722 A.2d 643, 646 (Pa. 1998) (stating that "[a] child's competency to testify is a threshold legal issue that the trial court must decide, and an appellate court will not disturb its determination absent an abuse of discretion."). The Supreme Court of Pennsylvania established that when a witness is under the age of fourteen, the trial court must hold a competency hearing. ***See Rosche v. McCoy***, 397 Pa. 615, 156 A.2d 307, 310 (Pa. 1959) (holding that "competency is presumed where the child is more than 14 years of age. Under 14 there must be a judicial inquiry as to mental capacity, which must be more searching in proportion to chronological immaturity."). The ***Rosche*** Court instructed that the following factors must be applied in determining competency:
>
> > There must be (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that [the child] is called to testify about and (3) a consciousness of the duty to speak the truth.

> ***Id***.; ***see also Commonwealth v. Hunzer***, 868 A.2d 498, 507-08 (Pa. Super. 2005) (concluding that pre-trial competency hearing for child witness to crime was proper).

Moore, 980 A.2d at 649-650. The Court in ***Moore*** ultimately concluded that because the witness in question was fourteen years old **at the time of trial** a competency hearing was not required. ***Id***. at 652.

Here, the PCRA court addressed Appellant's claim of ineffective assistance of counsel for failing to request a competency hearing for Mr. Rivera, who was fifteen years of age at the time of trial, as follows:

> In the instant case, the witness in question, Emmanuel Rivera, was thirteen years of age when the crime occurred and fifteen years of age when he testified at trial. [Appellant] claims that, due to [Mr.] Rivera's age and the various inconsistencies between his initial statement to police and his trial testimony, trial counsel should have demanded a competency hearing.
>
> A competency hearing was not required because [Mr.] Rivera was fifteen years old at the time of trial. *Com. v. Moore*, 980 A.2d 647, 652 (Pa. Super. 2009) (citing *Judd*, 897 A.2d at 1229 (stating that a competency hearing is not needed for a girl who is fifteen years old at the time of trial because her "ability to correctly remember the events in question is properly a question of credibility, and not of taint.")). Regardless, it was clear from [Mr.] Rivera's testimony that he had the capacity to communicate and understand questions; recall details of the crime and his ensuing statements to police; and that he understood his obligation to testify truthfully. *See* N.T. 10/17/11 at pp. 51-234; N.T. 10/18/11 at pp. 2-37. [Mr.] Rivera, at the age of thirteen, witnessed a homicide while on the corner dealing heroin from a stash hidden in an alleyway. He impressed the court as street savvy well beyond his years. The fact that [Mr.] Rivera had made prior inconsistent statements did not mean that a competency hearing was warranted. Indeed, a competency hearing is not concerned with credibility, which is strictly a question for the fact finder. *See Moore*, 980 A.2d at 652.

> Moreover, considering the extent of trial counsel's cross - examination of [Mr.] Rivera, during which he repeatedly challenged [Mr.] Rivera on each of his inconsistent statements, [Appellant] was in no way prejudiced by counsel's alleged failure. Since the witness was competent, trial counsel was not ineffective for failing to raise this issue. Accordingly, the PCRA court did not err in finding that this issue had no merit.

PCRA Court Opinion, 6/27/16, at 5-6. In light of the fact it is undisputed that Mr. Rivera was fifteen years old when he testified at trial, we are constrained to agree with the PCRA court that there was no merit to the underlying issue that a competency hearing should have been requested by trial counsel. Accordingly, Appellant's first allegation of ineffective assistance fails.

In his second issue, Appellant argues that his direct-appeal counsel was ineffective for failing to argue that the trial court erred in permitting the acting deputy medical examiner to testify, because he was not the medical examiner who performed the autopsy of the decedent. Appellant's Brief at 24-27. Appellant alleges that he was denied his constitutional right to confront the medical examiner who performed the autopsy and appellate counsel was ineffective for failing to raise the issue on direct appeal.

> The Confrontation Clause of the Sixth Amendment, made applicable to the States via the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." In ***Crawford*** [***v. Washington***], 541 U.S. [36,] 51 [(2004)], the Court held that the Sixth Amendment guarantees a defendant's right to confront those "who 'bear testimony'" against him, and defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Confrontation Clause, the High Court explained, prohibits out-of

> court testimonial statements by a witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.

Commonwealth v. Yohe, 79 A.3d 520, 530-531 (Pa. 2013) (certain citations omitted).

Our Supreme Court has held that "a medical expert who did not perform the autopsy may testify as to cause of death as long as the testifying expert is qualified and sufficiently informed[.]" ***Commonwealth v. Ali***, 10 A.3d 282, 306 (Pa. 2010). ***See also Commonwealth v. Mitchell***, 570 A.2d 532, 534 (Pa. Super. 1990) (stating that "Experts may offer testimony based on the reports of others. In homicide cases, pathologists may base their opinions on facts from autopsy reports prepared by others"). More recently, we have explained that, where the individual who performed the autopsy is unavailable to testify, a qualified testifying expert is one whose "testimony was based upon his own conclusions after his own independent review of the file." ***Commonwealth v. Buford***, 101 A.3d 1182, 1198 (Pa. Super. 2014).

We find this Court's decision in ***Buford***, 101 A.3d 1182, a case also involving a forensic pathologist testifying with the use of another doctor's autopsy report, to be instructive. In ***Buford***, the appellant made the following argument:

> Herein, Dr. Lieberman was called at trial as an expert in forensic pathology. He was called as a witness due to the fact that Dr. Hunt, the medical examiner who performed the autopsy was no longer employed by the Medical Examiner's Office in Philadelphia

> and it was claimed that [Dr. Hunt] was not available to testify. Dr. Lieberman testified that he reviewed the file. Dr. Lieberman apparently agreed with the findings contained in Dr. Hunt's report.
>
> * * *
>
> Dr. Lieberman's testimony was essentially hearsay. The admission of inadmissible hearsay must always equate with the denial of the right of confrontation. The fact that Dr. Lieberman was qualified and testified as an expert in forensic pathology does not cure the denial of [Buford's] right to confront Dr. Hunt.

Id. at 1198 (citations omitted). This Court rejected Buford's claim based upon the following analysis of the trial court in that case:

> [The a]ppellant challenges the testimony of Dr. Lieberman because he did not conduct the actual autopsy. The autopsy was conducted by former Medical Examiner, Dr. Hunt, who by the time of trial was with the Riverside, California Medical Examiner's Office. Dr. Lieberman, who at the time of trial was a Philadelphia Medical Examiner for 22 years, testified that prior to his testimony he reviewed Dr. Hunt's complete report, the photographs taken during the autopsy, the actual clothing worn by the decedent and other documents contained in the Medical Examiner's file. Contrary to [the a]ppellant's assertion, the record is clear that Dr. Lieberman did not simply recite the opinion of Dr. Hunt. His testimony was based upon his own conclusions after his own independent review of the file.

Id. at 1198 (citations omitted).

Here, the PCRA court offered the following pertinent discussion:

> The Medical Examiner who performed the autopsy on the decedent, Dr. Chase Blanchard, was on extended family medical leave due to injuries she received as the result of a car accident, and therefore, was not present to testify and thus unavailable for cross-examination. Expert testimony was supplied, instead, by Dr. Gary Collins.
>
> **Dr. Collins testified that in preparation for [Appellant's] trial, he reviewed Dr. Blanchard's notes,**

> **report, and photographs from the autopsy of the decedent. He also conducted an independent observation of the clothing the decedent was wearing at the time of the shooting. Based on his review, Dr. Collins rendered his own independent expert opinion as to the cause and manner of the decedent's death.** He was then extensively cross-examined as to his expert opinion. N.T. 10/18/11 at pp. 78-125. Since Dr. Collins came to an independent opinion and was cross-examined as to his opinion, counsel cannot be held ineffective for failing to raise a meritless claim on direct appeal.

PCRA Court Opinion, 6/27/16, at 8-9 (emphasis added).

Our review of the record reflects that Dr. Collins, who is Dr. Blanchard's supervisor, did not simply recite the opinion of Dr. Blanchard, who was unavailable to testify due to a personal injury. N.T., 10/18/11, at 100-125. Rather, in rendering his independent expert opinion, Dr. Collins explained that he reviewed Dr. Blanchard's notes and reports, the photographs of the autopsy, and the actual clothing worn by the victim. ***Id***. at 101-15. Because ***Buford*** is not materially distinguishable from the instant case, we conclude that the PCRA court properly held that Appellant's underlying claim lacked merit. Hence, Appellant's allegation that appellate counsel was ineffective for not arguing the trial court erred in permitting Dr. Collins to testify fails.

Appellant next argues that appellate counsel was ineffective for failing to argue that the Commonwealth violated Appellant's rights under ***Brady v. Maryland***, 373 U.S. 83 (1963). Appellant's Brief at 27-31. Specifically, Appellant contends that the Commonwealth failed to disclose to the defense a portion of the videotape depicting the scene of the shooting and also failed

to provide all copies of autopsy photographs that the medical examiner relied upon. Appellant claims that appellate counsel was ineffective in failing to raise these claims on direct appeal.

The PCRA court aptly addressed this challenge to the effective assistance of appellate counsel as follows, which we adopt as our own:

> In *Brady*, the United States Supreme Court held that "suppression by the prosecution of favorable evidence to an accused upon request violates due process where the evidence is material either to guilt or to punishment ..." *Com. v. Haskins*, 60 A.3d 538, 546-47 (Pa. Super. 2012) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)).
>
> To establish a *Brady* violation, a defendant must demonstrate that: (1) the evidence was suppressed by the Commonwealth, either willfully or inadvertently; (2) the evidence was favorable to the defendant; and (3) the evidence was material, in that its omission resulted in prejudice to the defendant. *Haskins*, 60 A.3d at 547 (citing *Com. v. Dennis*, 17 A.3d 297, 308 (Pa. 2011)). *Brady* does not require the disclosure of information "that is not exculpatory but might merely form the groundwork for possible arguments or defenses." *Com v. Lambert*, 884 A.2d 848, 856 (Pa. 2005). Similarly, *Brady* does not require the prosecution to disclose "every fruitless lead" considered during the investigation of a crime. *Lambert*, 884 A.2d at 857. *Brady* sets forth a limited duty, not a general rule of discovery for criminal cases. *Id*. at 854 (citing *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) for the proposition that "there is no general constitutional right to discovery in a criminal case, and *Brady* did not create one").
>
> The burden rests with the defendant to "prove, by reference to the record, that evidence was withheld or suppressed by the prosecution." *Haskins*, 60 A.3d. at 547 (quoting *Com. v. Paddy*, 15 A.3d 431, 451 (Pa. 2011)). The withheld evidence must have been in the exclusive control of the prosecution at the time of trial. No *Brady* violation occurs when the defendant knew, or with reasonable diligence, could have

> discovered the evidence in question. Similarly, no violation occurs when the evidence was available to the defense from a non–governmental source. *Paddy*, 15 A.3d at 451.
>
> Petitioner is unable to plead and prove that the Commonwealth possessed or intentionally withheld any video surveillance in this case. Trial counsel raised his concerns regarding the capabilities of the camera that captured portions of the incident and alleged that the video was somehow incomplete. The court inquired of the prosecutor, who explained that the complete video had been turned over to defense counsel prior to trial. The court accepted the prosecutor's statement as true. N.T. 10/17/11 at pp. 195-97. Petitioner's claim that there is a missing portion of the video that would exonerate him is pure speculation.
>
> Petitioner's *Brady* claim regarding the autopsy photographs is likewise without merit. The Commonwealth turned over the photos at the time of trial. Counsel objected to their late disclosure. The court overruled the objection. N.T. 10/18/11 at pp. 81-83. Since the autopsy photographs were neither exculpatory nor impeaching and the cause and manner of death was never at issue in this case, counsel cannot be held ineffective for failing to raise a meritless claim.

PCRA Court Opinion, 6/27/16, at 9-11.

In his fourth issue, Appellant argues that trial counsel was ineffective for failing to file post-sentence motions, thereby waiving a challenge that the verdict was against the weight of the evidence. Appellant's Brief at 31-41. In support of his claim, Appellant alleges that the potential for eyewitness misidentification was significant and obvious. ***Id***. at 33. Upon review, we conclude that this claim fails.

With respect to a claim that trial counsel was ineffective for failing to file post-sentence motions, we observe that in ***Commonwealth v. Reaves***, 923 A.2d 1119 (Pa. 2007), the defendant raised the same issue as does

Appellant. Our Supreme Court explained that while there are some limited situations in which prejudice may be presumed by counsel's inaction, the failure to file post-sentence motions is not one of those situations. ***Reaves***, 923 at 1128-1129.[2] The Supreme Court held that the defendant "failed to prove ***Strickland***[3]/***Pierce***[4] prejudice, that is, he failed to rebut the presumption of effectiveness by showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' ***Strickland***, 466 U.S. at 694." ***Reaves***, 923 A.2d at 1131.

> In ***Reaves***, [the Pennsylvania Supreme] Court declared that the failure to file post-sentence motions does not fall within the limited ambit of situations where a defendant alleging ineffective assistance of counsel need not prove prejudice to obtain relief.

Commonwealth v. Liston, 977 A.2d 1089, 1093 (Pa. 2009) (citing ***Reaves***, 923 A.2d at 1132). Where prejudice cannot be presumed, the defendant must plead and prove actual prejudice under ***Strickland*** by

---

[2] Our Supreme Court reaffirmed this holding in ***Commonwealth v. Liston***, 977 A.2d 1089 (Pa. 2009), stating, "Presumably, since post-sentence motions are optional . . . rarely will counsel be deemed to have been ineffective for failing to file them except, for example, when the claim involves the discretionary aspects of sentence or a challenge to a verdict on weight of the evidence grounds, claims which must be raised in the trial court to be preserved for purposes of appellate review." ***Liston***, 977 at 1094 n.10 (citation omitted).

[3] ***Strickland v. Washington***, 466 U.S. 668 (1984).

[4] ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987).

showing that both his "counsel's performance was deficient" and that the "deficient performance prejudiced the defense." ***Reaves***, 923 A.2d at 1127 (citing ***Strickland***, 466 U.S. at 687).

> The ***Strickland*** test for prejudice requires the defendant to prove **actual prejudice**, that is, a reasonable probability that, but for counsel's lapse, the result of the penalty proceeding would have been different. "In making this determination, a court hearing an ineffectiveness claim must consider the **totality of the evidence** before the judge or jury . . . . Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Ultimately, a reviewing court must question the reliability of the proceedings and ask whether "the result of the particular proceeding [was] unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."

Commonwealth v. Lesko, 15 A.3d 345, 383 (Pa. 2011) (citing ***Strickland***, 466 U.S. at 695-696) (internal citations omitted, emphasis in original).

The following principles govern our review of whether there is arguable merit to a claim that appellate counsel was ineffective for not challenging the weight of the evidence:

> [T]he weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact ... thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. Kim, 888 A.2d 847, 851 (Pa. Super. 2005) (quotation marks and citation omitted).

Here, assuming *arguendo* that Appellant actually requested that trial counsel file a post-sentence motion, he has failed to demonstrate any

prejudice based upon the failure to do so. Interestingly, Appellant does not specifically argue that, had counsel filed a post-sentence motion challenging the weight of the evidence, the result would have been different.

Our review of the record reflects that no post-sentence motions were filed on Appellant's behalf. However, appellate counsel did raise a challenge to the weight of the evidence in Appellant's Pa.R.A.P. 1925(b) statement filed pursuant to his direct appeal. Although the trial court found the issue to be waived for purposes of appeal, it did address the issue challenging the weight of the evidence and found that it lacked merit.

As the PCRA court aptly explains:

> The trial court addressed [Appellant's] weight of the evidence claim in its Opinion even though it had deemed the issue waived. *See* Trial Court Opinion at pp. 9-10. The [trial] court found that [Appellant's] claim had no merit because the evidence and testimony presented at trial overwhelmingly established [Appellant's] guilt. Since the jury's verdict did not "shock one's sense of justice,"[3] [Appellant] did not suffer prejudice as a result of trial counsel's failure to preserve this claim.
>
> [3] Petitioner's co-defendants, Jonathan Rodriguez and Marco Sanmarco, raised weight of the evidence claims in their respective appeals. The Superior Court did not find their claims convincing and affirmed their judgments of sentence. *See Com. v. Rodriguez*, [97 A.3d 809,] 407 EDA 2012 [(Pa. Super. filed February 21, 2014) (unpublished memorandum)]; *Com. v. Sanmarco*, [97 A.3d 803,] 511 EDA 2012 [(Pa. Super. filed February 18, 2014) (unpublished memorandum)].

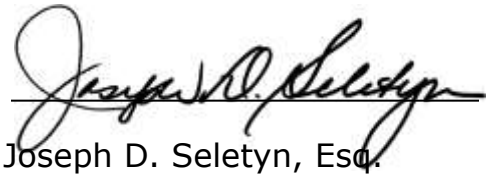
PCRA Court Opinion, 6/27/16, at 12. Thus, we are constrained to conclude that Appellant is not entitled to relief upon his claim that prior appellate

counsel was ineffective for failing to raise a challenge to the weight of the evidence.

In his final issue, Appellant argues that the cumulative effect of the errors alleged herein denied him a fair trial. Appellant's Brief at 41-42. However, we observe that our Supreme Court has repeatedly stated that "no number of failed claims may collectively attain merit if they could not do so individually." ***Commonwealth v. Lopez***, 854 A.2d 465, 471 (Pa. 2004) (quoting ***Commonwealth v. Williams***, 615 A.2d 716, 722 (Pa. 1992)). Because we have held that there were no errors warranting relief, Appellant's allegation of cumulative error fails.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/20/2017