NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. GREGORY DEYOUNG, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 320 EDA 2012

Appeal from the PCRA Order December 16, 2011
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0001158-2003

BEFORE: BOWES, GANTMAN, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: **FILED SEPTEMBER 17, 2013**

Gregory DeYoung appeals from the order entered by the PCRA court denying his first counseled PCRA petition filed pursuant to 42 Pa.C.S. § 9541-9546. After careful review, we affirm.

The PCRA court comprehensively outlined the factual background in this case as follows.

> On December 16, 2002, June Dennis went to the Villager Lodge in Bristol Township, Pennsylvania to check on her friend John George because she and his family had been unable to contact him by telephone. Ms. Dennis knocked on the door to room 124. Through an opening in the room's curtain, she could see John George's legs and blood on the floor.
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> Detective Victor J. Tunis of the Bristol Township Police Department responded to the Lodge. Upon entering the room, Detective Tunis observed a white male, approximately 45 years old, lying on his back. The decedent had sustained severe trauma to his face and his clothing was blood-stained. Detective Tunis observed a copper-colored projectile in the

room. He also noted blood on the bed, curtains, carpet, and blood splatter on the bed's headboard, the ceiling tile, and the northern, southern, and western walls. An 85 foot trail of blood ran from the threshold of room 124 to the end of the motel complex, stopping at the stone parking lot. The blood trail continued on the sidewalk in front of the First Spanish Assembly of God church, approximately 450 feet from room 124. A total of $442.00 was recovered from the room. Blood-stained money was found under the victim, on the bed, and around the room.

Surveillance footage from the Villager Lodge recorded on December 15, 2002 at approximately 4:58 a.m. showed two individuals walking on the motel sidewalk. The individuals approached room 124, knocked and entered. At approximately 5:00 a.m., the curtain in the room opened slightly and light from inside was visible. At approximately 5:02 a.m., the two individuals left the room and walked in the direction of the First Spanish Assembly of God church.

On December 15, 2002, Defendant went to the emergency room at Capital Health System, Mercer Campus in Trenton, New Jersey. He was admitted with a traumatic injury to the right forearm and was taken to the operating room for reconstructive surgery. The treating doctor noted that the cut to the forearm was consistent with a knife wound. The doctor also noticed an infection on Defendant's left forearm and that an injury to Defendant's right small finger was consistent with a gunshot wound. Due to Defendant's injuries, he required multiple days of hospitalization. However, Defendant left the hospital without being discharged on December 17, 2002.

On December 15, 2002, Margaret Pitman, a friend of Defendant, was told to come to Mercer Hospital with clean clothes for Defendant, and was given his blood covered belongings to take home. Pitman washed a pair of sweatpants, a pair of jeans, a pair of boxers, socks, sneakers, and a black pouch which appeared to be a knife pouch. She threw away a red t-shirt because it was too ripped and bloody to wear.

At the Villager Lodge, Detective Timothy Fuhrmann of the Bristol Township Police Department spoke to John George's family members in order to develop any leads. The first lead was to Margaret Pitman's house in Morrisville, Pennsylvania. There police discovered Defendant's laundered clothing.

On December 17, 2002, Forensic Pathologist Ian Hood, M.D. performed an autopsy on the decedent. Dr. Hood testified that there were over fifty blunt-force and stab wounds to decedent's body. At least forty of those wounds were found on his head and neck, with about a dozen of the wounds to decedent's face. Dr. Hood testified that decedent's most serious injuries were the stab wounds to the right side of his neck. One stab wound was to the roof of the tongue and the other struck his internal carotid artery. The decedent died of hemorrhagic shock, due to the lack of blood volume, from all of his injuries. The manner of death was homicide caused by multiple stab wounds and blunt-force injuries.

On December 18, 2002 a search warrant was executed at Kim Mitchell's house on Olsen Avenue in Yardley, Pennsylvania. When the police knocked and announced, they heard a gunshot inside. A semi-automatic weapon, a Lorcin .380 caliber, was retrieved from the house. A firearms expert confirmed that a discharged bullet found in the motel room had been fired from this weapon.

A red Ford Ranger pickup truck was recovered from a nearby street. Detective Fuhrmann observed a plastic bag placed over the driver's seat and another bag placed on the bottom of the driver's seat. Detective Fuhrmann also noticed what appeared to be blood on the steering wheel and on the "shifter boot." In addition, the dashboard and the outside of the vehicle had residue from a cleaning agent. The same residue was found in a bucket and a sponge in the bed of the truck. The truck was impounded and blood samples were processed.

On December 18, 2002, Co-defendant Edward Boback was arrested at the Olsen Avenue house, and subsequently, tried separately. While being transported to the hospital, Boback direct the police to the parking lot of the First Spanish Assembly of God church. Police found tire tracks consistent with the Ford Ranger pickup truck and blood and leaves alongside the tracks.

On December 19, 2002, Defendant was arrested and interviewed by Detectives Fuhrmann and Timothy Carroll. Defendant's injured right forearm and hand were bandaged. His left arm had minor injuries from punctures or lacerations and he also had an injured finger. Defendant spoke in a calm, coherent

tone and never appeared to be under the influence of drugs or alcohol.

In his statement, Defendant admitted to selling drugs. The decedent was a regular customer purchasing $100.00-$200.00 worth of drugs daily. Defendant explained that the decedent had given him $4,000.00 to purchase powder cocaine because the decedent wanted to finance Defendant as a drug dealer. He also stated that John George had taken half the powdered cocaine that he purchased and still expected to be paid the full amount.

On December 12, 2002, the decedent ordered Defendant to pay the money owed by December 15, 2002. The decedent demanded $1,000.00 or he would kill Defendant and everyone at the Olsen Avenue house where Defendant and Co-defendant Boback were residing.

According to his statement, Defendant called decedent and claimed that he was coming over with the money. Defendant admitted that he had a gun and a knife in the [Ford] pickup truck. Defendant drove the truck that Aram Cortino had given him as collateral for drugs. Defendant admitted that he and Co-defendant Boback had discussed what they would do if the decedent answered the door with a weapon. They parked at the nearby church because Defendant knew the truck was stolen and was aware that police frequently check motel parking lots. Defendant admitted that only he and Co-defendant Boback went into the room.

In his statement, Defendant admitted to striking the decedent, but claim[ed] he never stabbed him. Defendant claimed that Co-defendant Boback had the gun, brass knuckles and knife, and that Boback stabbed the decedent. Defendant said, "I hoped he was dead." Defendant maintained that he tried to break up Boback and the decedent and was cut by Boback in the process. Defendant also explained that Edward Boback accidentally shot Defendant in the finger. After the murder, they drove to the house on Olsen Avenue. Defendant admitted that he lied at the Trenton hospital about how he received his injuries.

A forensic serology report confirmed evidence of human blood on the Lorcin pistol, the brass knuckles, the sneakers from

> Defendant and Co-defendant Boback, the bedspread, the interior of the pickup truck, and the leaf collected from the church parking lot.
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> Michelle L. Terwilliger, an expert in DNA analysis, testified that a blood sample from the right front door handle of the Ford Ranger truck and a leaf from the church parking lot matched Co-defendant Boback's DNA profile. The blood from the headlight switch knob from the truck and from a sneaker was consistent with a mixture and blood sample from Defendant could not be excluded as a contributor to those two DNA mixtures. The DNA profile obtained from Defendant matched the blood sample on the sidewalk at the motel and the sample from the bedspread.

PCRA Court Opinion, 5/24/12, 1-4 (quoting Trial Court Opinion, 11/23/05, 1-7) (internal citations omitted).

At trial, the person who loaned Appellant the Ford truck, Cortino, testified against Appellant. Cortino and Appellant knew each other through drug transactions and Cortino permitted Appellant to use a truck that Cortino had stolen because he owed Appellant $300.00 as a drug debt.[1] Cortino was originally approached by Bucks County Detective Carroll and Detective Martin McDonough. At the time, Cortino was located in the Westmoreland County Correctional Facility on unrelated charges. In exchange for his cooperation, Cortino asked police to help him with his pending charges in Westmoreland County. The detectives informed him that they could not make any promises but would relay that he cooperated if he chose to do so. Subsequently, Cortino pled guilty in Westmoreland County to theft, receiving

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[1] Cortino testified that he purchased the truck himself, but that it was in an ex-girlfriend's name and that she reported it stolen.

stolen property, and acquisition of controlled substance by fraud and the Westmoreland County court sentenced him to a county sentence of one day less a year to one day less two years. Documents indicated that his sentence was below the guideline ranges because he was cooperating in this matter.

Cortino eventually was paroled from his county sentence and returned to Bucks County. On September 11, 2004, police in Bucks County arrested him for retail theft. Prior to trial, defense counsel and his investigator interviewed Cortino in prison. Cortino testified at trial while still incarcerated in Bucks County. He indicated that Appellant had asked him to help him kill the victim as payment for Cortino's drug debt. Trial counsel cross-examined Cortino vigorously about his forty year criminal history. Counsel also questioned Cortino on whether he was promised anything in return for his testimony. Cortino denied the existence of any specific deal and Detectives Carroll and McDonough testified that they refused to promise him anything other than to inform those who asked that he cooperated. The detectives testified that no one from Westmoreland County had contacted them about Cortino's cooperation. Cortino was later sentenced for the retail theft to ten days to four months incarceration and the sentencing guidelines form indicated that he cooperated in a murder prosecution.

The jury convicted Appellant of first-degree murder, burglary, possession of an instrument of crime ("PIC"), and conspiracy to commit each

of the aforementioned crimes, but declined to impose the death penalty. Accordingly, the trial court sentenced Appellant to life imprisonment for the murder conviction and a concurrent sentence of four to eight years for the burglary on December 8, 2004. Trial counsel filed a timely post-sentence motion and requested to withdraw because Appellant sought to raise claims of trial counsel's ineffectiveness. The court appointed substitute counsel on January 12, 2005. The court did not address Appellant's original post-sentence motion within 120 days of its filing. After numerous continuances for purposes of conducting a hearing on the post-sentence motion and for the receipt of trial transcripts, new counsel filed a supplemental post-sentence motion on September 15, 2005, which raised various trial counsel ineffectiveness claims. The Commonwealth filed a motion to dismiss the post-trial motion based on its untimeliness, which the court denied.[2] The court conducted an evidentiary hearing on September 16, 2005, and denied relief on several of Appellant's claims. It held the matter open, however, and received additional evidence on September 23, 2005. Thereafter, it denied the remaining issues Appellant raised in his post-sentence motions and Appellant appealed.

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[2] Our decision today should not be read as an endorsement of the trial court's consideration of a post-sentence motion filed outside the ordinary ten-day paradigm.

A panel of this Court concluded that Appellant's direct appeal was timely filed based on a breakdown in the operation of the courts since the clerk of courts did not enter an order indicating that his original post-sentence motion was deemed denied by operation of law on April 19, 2005. The panel concluded that the order entered on September 23, 2005, triggered Appellant's ability to appeal. Among the issues Appellant raised on direct appeal were four ineffectiveness claims that the trial court addressed in the evidentiary hearings.[3] We agreed that those claims were properly raised on direct appeal, and affirmed on December 13, 2006. ***Commonwealth v. DeYoung***, 918 A.2d 784 (Pa.Super. 2006) (unpublished memorandum). Appellant did not timely seek allowance of appeal, and the Pennsylvania Supreme Court denied his request to petition for allowance of appeal *nunc pro tunc* on March 8, 2007.

Appellant filed a timely *pro se* PCRA petition on November 30, 2007. The court appointed PCRA counsel on January 11, 2008. Initial PCRA

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[3] The specific claims were

> whether trial counsel rendered ineffective assistance of counsel by failing to permit Appellant to testify on his own behalf; failing to object to Appellant's statement being read to the jury during deliberations; failing to object to the improper and leading questions on direct examination of witness Aram Cortino; and failing to present evidence concerning Appellant's intoxication at the time of police questioning?

Commonwealth v. DeYoung, 918 A.2d 784 (Pa.Super. 2006) (unpublished memorandum at 4) (quoting Appellant's direct appeal brief).

counsel withdrew due to a conflict and the court assigned substitute PCRA counsel, who also withdrew because he represented Appellant at trial. Appellant's third PCRA attorney filed an amended petition on October 23, 2009, which included layered claims of trial/appellate counsel ineffectiveness. The PCRA court directed the Commonwealth to file an answer on March 1, 2010, and it complied. Current counsel entered her appearance on March 1, 2010, and second PCRA counsel withdrew. Counsel submitted an amended petition, on November 1, 2010, and requested discovery on that same date. In the petition, counsel layered claims of ineffective assistance of appellate and trial counsel. The Commonwealth filed a response to the discovery motion on November 29, 2010. Appellant continued to seek discovery, submitting a motion to compel discovery on December 23, 2010.

The court scheduled a hearing, but the hearing was continued multiple times at Appellant's request. Ultimately, the court conducted evidentiary hearings on May 2, 2011 and June 13, 2011. During the hearings, the prosecutor in this case, Cortino's attorney, and Detectives Carroll and McDonough testified. Each person testified consistently that Cortino was promised only that they would advise Cortino's sentencing judges or other prosecutors of his cooperation if he testified truthfully. The prosecutor acknowledged sending a letter on behalf of Cortino to the Westmoreland County courts, after Appellant's trial, and well after that court had already

sentenced Cortino. Appellant's trial counsel also testified at the PCRA proceedings. He indicated that while he had no evidence of an agreement between Cortino and the Commonwealth, he believed Cortino received leniency as a result of his cooperation based on Cortino's own statement to him pre-trial.

At the conclusion of those hearings, the court provided the parties an opportunity to submit briefs. Appellant filed his brief on July 27, 2013, and the Commonwealth submitted a responsive brief on September 9, 2011. The PCRA court denied Appellant's petition on December 16, 2011. This timely appeal ensued. The PCRA court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the court authored its Pa.R.A.P. 1925(a) decision. The matter is now ready for this Court's review. Appellant presents two issues for our consideration.

> 1. Was trial counsel ineffective for failing to investigate, discover, and present evidence regarding the criminal history record of the Commonwealth's chief witness, Aram Cortino and did the PCRA court err in denying Appellant relief?
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> 2. Was Appellant denied due process of law and his right of confrontation when the prosecutor: (a) knowingly failed to disclose exculpatory evidence of the Commonwealth's deal for leniency with witness Aram Cortino, in exchange for false testimony against Appellant; (b) knowingly failed to correct Cortino's false testimony; and, (c) knowingly presented false testimony and argument that Cortino "did not get anything" in exchange for his false testimony; and did the PCRA court err in denying Appellant relief?

Appellant's brief at 4.

This Court analyzes PCRA appeals "in the light most favorable to the prevailing party at the PCRA level." ***Commonwealth v. Rykard***, 55 A.3d 1177, 1183 (Pa.Super. 2012). Our "review is limited to the findings of the PCRA court and the evidence of record" and we do not "disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error." ***Id***. Similarly, "[w]e 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." ***Id***. (citations omitted). "[W]here the petitioner raises questions of law, our standard of review is *de novo* and our scope of review is plenary." Finally, we "may affirm a PCRA court's decision on any grounds if the record supports it." ***Id***.

Here, Appellant's initial issue concerns the effectiveness of trial counsel. "To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." ***Id***. at 1189-1190 (citing ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1127 (Pa. 2011)). Where the petitioner "fails to plead or meet any elements of the above-cited test, his claim must fail." ***Commonwealth v. Burkett***, 5 A.3d 1260, 1272 (Pa.Super. 2010).

An issue will have arguable merit if the facts upon which the claim is based are true and the law on which the claim is premised could afford relief. ***See Commonwealth v. Jones*** , 876 A.2d 380, 385 (Pa. 2005) ("if a petitioner raises allegations, which, even if accepted as true, do not establish the underlying claim. . ., he or she will have failed to establish the arguable merit prong related to the claim"). Phrased differently, a claim has arguable merit where the factual averments, if accurate, could establish cause for relief. Whether the "facts rise to the level of arguable merit is a legal determination." ***Commonwealth v. Saranchak***, 866 A.2d 292, 304 n.14 (Pa. 2005).

The test for deciding whether counsel had a reasonable basis for his actions or inactions is whether no competent counsel would have chosen that action or inaction, or the alternative not chosen offered a significantly greater potential chance of success. ***Commonwealth v. Colavita***, 993 A.2d 874 (Pa. 2010). Counsel's decisions will be considered reasonable if they effectuated his client's interests. ***Commonwealth v. Miller***, 987 A.2d 638 (Pa. 2009). "Prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Commonwealth v. Steele****,* 599 Pa. 341, 961 A.2d 786, 797 (2008). A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.' ***Commonwealth v. Rathfon****,* 899 A.2d 365, 370 (Pa.Super. 2006)." ***Burkett***, ***supra*** at 1272.

Preliminarily, we must determine if Appellant waived his current trial counsel ineffectiveness claim by failing to raise it on direct appeal where he raised multiple other ineffectiveness issues during direct appeal under a then extant exception to ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), and this Court addressed those claims. In ***Grant***, our Supreme Court ruled that ineffective assistance of counsel claims would no longer be waived if not raised at the first opportunity and should be deferred until PCRA review. Subsequently, in ***Commonwealth v. Bomar***, 826 A.2d 831 (Pa. 2003), the High Court crafted a narrow exception to the general rule in ***Grant***, allowing ineffectiveness claims to be raised on direct appeal if the issues were raised in a timely post-sentence motion, developed at a hearing, and ruled on by the trial court.[4] The Court in ***Bomar*** was not afforded an opportunity to reflect on whether a defendant waived ineffectiveness claims that were not raised on direct appeal where he raised and the court addressed other ineffectiveness matters in a post-***Grant*** case.

The author of ***Bomar***, Justice now-Chief Justice Castille, in calling for limiting that decision, has lamented that in the capital review context, "a

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[4] This Court has further limited ***Bomar*** based on later Supreme Court pronouncements and now requires a defendant to waive PCRA review of trial counsel/plea counsel ineffectiveness claims in order to potentially secure review of ineffectiveness claims on direct appeal. ***Commonwealth v. Barnett***, 25 A.3d 371 (Pa.Super. 2011) (*en banc*). Our Supreme Court also granted *allocatur* in ***Commonwealth v. Holmes***, 996 A.2d 479 (Pa. 2010), to determine whether waiver of PCRA rights is required to obtain unitary review.

defendant afforded such hybrid direct review faces no existing impediment in the PCRA, the Criminal Rules, or the caselaw to pursuing a second round of collateral claims under the PCRA, after a first round of direct/unitary review concludes." ***Commonwealth v. Rega***, 933 A.2d 997, 1030 (Pa. 2007) (Castille, J. concurring). Such new ineffectiveness claims, though, are required to be layered, ***see Commonwealth v. Sileo***, 32 A.3d 753 (Pa.Super. 2011) (*en banc*), something Appellant failed to do on appeal. Nonetheless, the PCRA court did not dispose of Appellant's issue based on inadequate layering of the claim. In circumstances where a petitioner does not adequately layer a claim before the PCRA court and the court did not direct amendment or dismiss on these grounds, our Supreme Court has looked through to the underlying trial counsel claim where counsel's appellate brief insufficiently addressed a layered claim. ***See Commonwealth v. Walker***, 36 A.3d 1, 8-9 (Pa. 2011); ("we now conclude the better practice is not to reject claims of [direct] appellate counsel's ineffectiveness on the grounds of inadequate development in the [PCRA] appellate brief if the deficiencies in the brief mirror those in the PCRA pleadings, unless the PCRA court invoked these deficiencies as the basis for its decision and afforded an opportunity to amend."); ***Id***. at 18 (Castille, C.J. concurring).

Admittedly, ***Walker*** occurred under the pre-***Grant*** framework and PCRA counsel therein did raise layered claims, but did not brief them

adequately. Further, the PCRA petition filed in ***Walker*** occurred prior to our Supreme Court's decision in ***Commonwealth v. McGill***, 832 A.2d 1014 (Pa. 2003), which explained the proper manner to layer a claim. Instantly, Appellant filed his petition post-***McGill*** and has not raised a layered claim on appeal.[5] Based on the plain language of the PCRA statute's waiver provision,[6] his trial counsel claim was technically waived since he could have raised it along with his other ineffectiveness claims. ***See Chmiel***, ***supra*** at 1128.[7] Remaining cognizant of the differences between this case and

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[5] As noted, Appellant did layer his claims in his November 1, 2010 petition, ***see*** Amended Petition, 11/1/10, at 16-17 ¶ 63-67, but withdrew on the record his claims of ineffective post-sentencing/appellate counsel. ***See*** N.T., 5/2/11, at 51-52. Appellant initially argued to the PCRA court that appellate counsel was ineffective in failing to investigate the issue, but then agreed to withdraw the layered claim on the basis that ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), precluded waiver.

[6] 42 Pa.C.S.A. § 9544(b) reads, "**(b) Issues waived.--**For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding."

[7] We are cognizant that ***Commonwealth v. Chmiel***, 30 A.3d 1111 (Pa. 2011), is a pre-***Grant*** case and the defendant was required to raise ineffectiveness claims for the first time on appeal since he had new counsel. However, we see little justification for its reasoning not to apply where a defendant did not have to raise his ineffectiveness claims on direct appeal, but elected to do so. In this regard, the ***Chmiel*** Court specifically held,

> In post-sentence motions and on direct appeal while represented by counsel different from counsel representing him at trial, Appellant raised numerous ineffectiveness claims against trial counsel that were fully litigated by the trial court. Because this

(Footnote Continued Next Page)

Walker, which noted that it was seeing "post-***McGill*** cases where PCRA courts have failed to allow for amendment," ***id***. at 8, we address Appellant's trial counsel claim in the alternative. ***See e.g. Commonwealth v. Simpson***, 66 A.3d 253, 261 (Pa. 2013) ("The PCRA court did not endorse or even discuss the Commonwealth's assertions of waiver, and did not engage in any procedural default analysis. A judge "shall" order amendment of a defective PCRA petition, Pa.R.Crim.P. 905(B), thus, we may infer the PCRA court did not agree that the instant petition or advocacy was inadequate. Therefore, in this matter, we decline to find waiver based on any alleged inadequacies.").

Appellant argues that trial counsel was ineffective in failing to investigate, discover, and present evidence pertaining to Cortino's criminal history. Specifically, Appellant alleges that counsel rendered ineffective assistance by failing to uncover the Westmoreland County court documents that set forth that he received a below the standard sentencing guidelines range sentence based on continued cooperation in this case. According to Appellant, trial counsel knew that Cortino received leniency in his

(Footnote Continued) ———————————

> circumstance constituted an exception to the ***Grant*** rule, we reviewed and disposed of Appellant's raised ineffective assistance of trial counsel claims on direct appeal. Any other claim of trial counsel ineffectiveness that Appellant failed to raise on direct appeal has been waived.

Id. at 1128 (internal citations omitted).

Westmoreland County case because Cortino had informed him of this fact, but neglected to uncover the Westmoreland County sentencing records.

Appellant submits that counsel had a duty to undertake a reasonable investigation and that trial counsel "could have easily discovered Cortino's Westmoreland County sentencing records by making a simple phone call to the Westmoreland County Clerk of Court or sending an investigator to Greensburg to look up the record." Appellant's brief at 19. Since Appellant's trial strategy as it related to Cortino was to impeach Cortino's credibility, he contends that counsel had no reasonable basis for not seeking out this information. He highlights that trial counsel admitted during the PCRA hearing that he did not attempt to obtain these documents and alleges that Cortino was the Commonwealth's star witness.

Appellant continues that the documents are impeachment evidence that could have been used to demonstrate Cortino received favorable treatment in exchange for his testimony. Because impeachment evidence can be exculpatory, Appellant maintains that "[i]f the jury had heard about the leniency received by Cortino in Westmoreland County, they could have concluded that Cortino was fabricating evidence in exchange for the favorable treatment he already received in Westmoreland County and was hoping to receive in the form of early parole in Westmoreland County." Appellant's brief at 20-21.

The Commonwealth counters that the jury heard that Cortino was a career criminal and he even testified in a prison uniform. It avers that Cortino's rap sheet was introduced at trial, that he admitted to being in the criminal justice system for forty years, and acknowledged selling drugs and being a drug user. The Commonwealth highlights that the jury knew Cortino had pending charges in Bucks County and pending violations of parole in Westmoreland County. Further, it points out that the jury was aware that Cortino knew of the murder shortly after it occurred but did not speak to police until he was in custody, when he asked for a deal. The Commonwealth notes that the Bucks County detectives refused "to make him any promises." Commonwealth's brief at 18. It continues that no one from Westmoreland County contacted Bucks County regarding Cortino's case and that Cortino was upset that no one from Bucks County spoke on his behalf. In addition, the Commonwealth argues that the Westmoreland County records show that Cortino's guilty plea was non-negotiated, and that the Westmoreland County prosecutor stated on the record in that case that the prosecutor had to withdraw participation in making a recommendation.

We hold that Appellant is not entitled to relief because he cannot establish actual prejudice. Initially, we note that even if there was no deal between Cortino and the Commonwealth, the documents in question could have been used by trial counsel to attempt to impeach Cortino by inferring that he was testifying to curry favor with the Commonwealth. ***See***

Commonwealth v. Evans, 512 A.2d 626 (Pa. 1986). Thus, contrary to the Commonwealth's apparent belief, it is not dispositive of the issue if no explicit deal existed. For these same reasons, we agree that the claim has arguable merit, *i.e.*, the documents did exist and they could have been used for impeachment purposes. Trial counsel also did not provide a reasonable basis for not using these public documents since his goal was to impeach Cortino and argue that he was testifying in exchange for leniency.

Nevertheless, and even assuming *arguendo* that there was a deal between the prosecution and Cortino, the evidence against Appellant consisted of far more than Cortino's testimony. Appellant placed himself in the room with the victim while the victim was being attacked. In his statement to police, Appellant acknowledged attacking the victim, although he claimed he did not stab him. DNA evidence confirmed that Appellant was at the scene and Appellant admitted that he owed the victim a substantial amount of money.

Appellant was admitted to a hospital with wounds after the attack and a surveillance video confirmed Appellant and his co-defendant's entry into the victim's room. Even if Appellant did not stab the victim, his co-conspirator did, and the court instructed the jury as to conspiratorial liability. Moreover, while trial counsel did not specifically impeach Cortino with the documents in question, he thoroughly cross-examined Cortino about his criminal history. The jury was well aware of Cortino's criminal background

and that when he did offer to come forward, he sought promises from the Commonwealth. In sum, there is no reasonable probability that the outcome of Appellant's trial would have been different had counsel additionally impeached Cortino with the documents showing that he received a below guidelines sentence based on cooperation with the Commonwealth.

Appellant's second issue is a ***Brady***[8] claim and is related to his first. He argues that he was denied due process of law and his right of confrontation based on prosecutorial misconduct. In advancing this position, he maintains that the Commonwealth failed to disclose its agreement with Cortino, and knowingly presented false testimony from Cortino and declined to correct that testimony. According to Appellant, the Commonwealth and Cortino had a deal in place in exchange for Cortino's testimony, which the Commonwealth did not disclose. Appellant asserts that the prosecutor's questioning of Cortino six times during trial if he received a benefit for his testimony presented false testimony, and that the prosecutor in his summation misled the jury when informing it that Cortino did not receive anything in exchange for his cooperation.

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[8] In ***Brady v. Maryland***, 373 U.S. 83 (1963), the United States Supreme Court held that defendants have a federal constitutional right to material exculpatory evidence. ***Brady*** claims are cognizable under the PCRA. ***Commonwealth v. Simpson***, 66 A.3d 253, 264 n.16 (Pa. 2013). "The duty to disclose under ***Brady*** encompasses impeachment evidence as well as exculpatory evidence." ***Id***. at 266.

To circumvent the PCRA waiver provision, Appellant paradoxically submits that he could not have known of this deal until 2007, despite his allegation that trial counsel was ineffective in neglecting to uncover public court documents before trial that arguably support his claim. ***Compare Simpson***, ***supra*** at 268 n.20 (reasoning that a ***Brady*** claim will fail if trial counsel is aware of the ***Brady*** material). Indeed, Appellant in his brief argues that Appellant did not know that Cortino received leniency in exchange for his cooperation until 2007, ***see*** Appellant's brief at 23, while at the same time setting forth that trial counsel was told, pre-trial, by Cortino that there was a promise of leniency. ***See id***. at 17-18.

The Commonwealth responds by first reiterating the PCRA court's finding of waiver. The PCRA court opined that Appellant's prosecutorial misconduct claims premised on ***Brady*** could have been raised on direct appeal since the outcome of Cortino's Westmoreland cases was public record and Cortino was extensively cross-examined about those cases and his cooperation with the Commonwealth. The court pointed out that Appellant did not raise these concerns in his post-sentence motions or during his direct appeal. The Commonwealth adds that Appellant did not allege the ineffectiveness of direct appeal counsel to overcome waiver.

In the alternative, the PCRA court concluded that Appellant's issue was without merit and unsupported by the record. In this regard, the PCRA court found that Appellant did not meet his burden of demonstrating that a deal

for leniency existed. It continued that a prosecution witness may be extensively questioned about his potential bias in favor of the prosecution even without an express agreement. The court noted that trial counsel questioned Cortino about receiving leniency and the jury was aware that the Commonwealth told Cortino that it would inform his sentencing judges of his cooperation following Appellant's trial.

In addition, the Commonwealth contends that Appellant cannot establish a ***Brady*** violation because no deal existed between it and Cortino. The Commonwealth maintains that it fully disclosed its discussions with Cortino and that Cortino's own Buck County attorney confirmed that there was no express undisclosed deal. It characterizes Cortino's testimony that he received nothing in exchange for his testimony as at most an inaccuracy, since he may have garnered a benefit from the Westmoreland County courts, but that he did not receive any promises other than those disclosed and testified to at trial from the Bucks County District Attorney's Office. Since the prosecution in Bucks County was unaware of the nature of Cortino's plea in Westmoreland County, it posits that there was no false testimony to correct. Further, it asserts that Appellant cannot establish prejudice based on the additional evidence introduced at trial and because Cortino was aggressively cross-examined and his testimony impeached with respect to his criminal history.

This Court comprehensively outlined the law pertinent to ***Brady*** claims in a PCRA matter, stating,

> "A ***Brady*** violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. No violation occurs if the evidence at issue is available to the defense from non-governmental sources. More importantly, a ***Brady*** violation only exists when the evidence is material to guilt or punishment, *i.e.*, when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' "
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> ***Commonwealth v. Tedford****,* 598 Pa. 639, 960 A.2d 1, 30 (2008) (citations omitted). The burden of proof is on the defendant to establish that the Commonwealth withheld evidence. ***Commonwealth v. Ly****,* 602 Pa. 268, 980 A.2d 61 (2009). A prosecutor is not required to deliver his entire file to defense counsel, nor is a prosecutor's duty to disclose such that it would provide a defendant with a right to discovery. ***Id****.* To satisfy the prejudice element of a ***Brady*** violation, the evidence withheld must be material to guilt or punishment. ***Id****.* Materiality extends to evidence that goes to the credibility of a witness. ***Id****.* However, the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense. ***Commonwealth v. Miller****,* 987 A.2d 638 (Pa. 2009).
>
> Where the alleged withheld ***Brady*** evidence would not affect the outcome of the trial in light of other evidence linking the defendant to the crime, the petitioner is not entitled to PCRA relief. ***Commonwealth v. Buehl****,* 540 Pa. 493, 658 A.2d 771, 776 (1995); ***Commonwealth v. Copenhefer****,* 553 Pa. 285, 719 A.2d 242, 259 (1998). In determining the materiality of alleged withheld evidence, the court must view the evidence in relation to the record as a whole.

Burkett, ***supra*** at 1267 -1268. Additionally, as our Supreme Court recently held, "a witness's assumption that he will benefit from cooperating in the

prosecution of the defendant, without more, is insufficient to establish that an agreement existed, and does not trigger ***Brady*** disclosure requirements." ***Commonwealth v. Busanet***, 54 A.3d 35, 49 (Pa. 2012).

Appellant is entitled to no relief for a host of reasons. First, his arguments that he could not have learned of the alleged deal until 2007 are wholly inconsistent with the first issue he raised in this appeal. Thus, we agree with the PCRA court that his underlying ***Brady*** issue is waived. ***See Tedford***, ***supra*** at 30. Here, trial counsel indicated he was told by Cortino about receiving leniency in exchange for his testimony, but trial counsel did not preserve a ***Brady*** issue at trial. Additionally, Appellant's own amended petitions alleged that appellate counsel was aware of the underlying issue and did not allege trial counsel's ineffectiveness. Furthermore, no ***Brady*** claim can exist where the information is public record; thus, the Commonwealth had no duty to disclose the court documents that Appellant purports support his claim. As he has not alleged ineffective assistance of counsel, and the evidence in support of his position is not after-discovered, he cannot overcome the PCRA waiver provision.

Appellant also failed to prove that an express agreement existed, and therefore, if he alleged a layered ineffective assistance of counsel claim, he could not establish arguable merit. ***Busanet***, ***supra*** at 49 (when Commonwealth does not have an obligation to disclose impeachment evidence, the ***Brady*** claim is meritless). In this regard, Appellant's evidence

established nothing more than what the Commonwealth disclosed and that no explicit agreement existed. Cooperating with the Commonwealth in the hopes of leniency does not *ipso facto* mean an express agreement exists. Rather, in the common situation where no explicit agreement is reached between a witness and the prosecution, trial counsel is permitted to vigorously cross-examine the witness and argue to the jury that they may infer the lack of credibility of such a witness based on the circumstances. This occurred in the present case. In addition, the Commonwealth proffered that no emails from Detective's Carroll or McDonough were located via an archived email search of their accounts to Westmoreland County officials. Finally, even assuming that an alleged undisclosed deal existed and was withheld by the Commonwealth, no prejudice resulted because the jury was well aware of Cortino's motive to falsely testify against Appellant to obtain leniency in his own cases, and extensive additional evidence, detailed above, was introduced establishing Appellant's culpability.

Order affirmed.

Judge Musmanno Concurs in the Result.

Judgment Entered.

Prothonotary

Date: 9/17/2013