NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMES STEPHEN MOORE,	:	
Appellant	:	No. 454 WDA 2018

Appeal from the PCRA Order March 7, 2018
in the Court of Common Pleas of Westmoreland County
Criminal Division at No(s): CP-65-CR-0001608-2012

BEFORE: GANTMAN, P.J.E., McLAUGHLIN, J., and MUSMANNO, J.

MEMORANDUM BY MUSMANNO, J.: FILED JUNE 20, 2019

James Stephen Moore ("Moore") appeals, pro se, from the Order denying his first Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

On June 24, 2013, following a jury trial, Moore was convicted of numerous drug-trafficking and distribution offenses, including corrupt organizations, criminal conspiracy, delivery of controlled substances, hindering apprehension or prosecution, and possession with intent to deliver a controlled substance.[2] Thereafter, Moore was sentenced to an aggregate term of 20 to 40 years in prison. He was subsequently resentenced under the

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[1] See 42 Pa.C.S.A. §§ 9541-9546.

[2] See 18 Pa.C.S.A. §§ 911, 903, 5105; 35 P.S. § 780-113(a)(30).

dictates of United States v. Alleyne, 570 U.S. 99 (2013), to an aggregate term of 15 to 30 years in prison on September 28, 2015.[3] Moore did not file a direct appeal of the latter sentence.

Moore filed the instant, timely PCRA Petition on September 21, 2016. The PCRA court appointed counsel, who subsequently filed a Motion to withdraw as counsel and a Turner/Finley[4] "no-merit" letter. After issuing a Pa.R.Crim.P. 907 Notice of Intent to Dismiss, and determining that Moore's PCRA Petition was without merit, the PCRA court permitted Moore's counsel to withdraw from representation. The PCRA court formally denied Moore's PCRA Petition by an Order entered on March 7, 2018. This timely appeal followed.

On appeal, Moore raises the following questions for our review:

1. [Did] trial counsel render[] ineffective assistance of counsel in failing to object to voir dire being held in [a] room inaccessible to the public[,] which violated guaranteed rights under the First and Sixth Amendments to the United States Constitution, and Article I, Section[s] 7[] and 9 of the Constitution of Pennsylvania[?]

2. [Was Moore] denied his right under the Sixth and Fourteenth Amendments to the U.S. Constitution in that the panel from which [Moore's] jury was selected[] was not representative of a fair cross section of the community, thereby denying [Moore] equal protection of the law and a fair trial[,] [such that] trial counsel was ineffective for failing to object to the panel not being fairly representative of the community[?]

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[3] The trial court amended its resentencing Order on February 4, 2016. Moore did not file a direct appeal therefrom.

[4] See Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988), and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988) (en banc).

3. [Was] trial counsel [] ineffective for failing to request [a] cautionary instruction regarding Jimmy Lee Knight's [("Knight")] testimony that [Moore] offered him $5,000.00 not to testify[;] [did] trial counsel's inactions in not requesting other crime instruction den[y] [Moore] a fair trial[?]

4. [Was] trial counsel ineffective for failing to object [to] and request [a] curative instruction in reference to Desiree Wilson['s] [("Wilson")] testimony regarding bad act[?] [sic]

5. [Was] trial counsel constitutionally ineffective for failing to investigate and request [a] continuance at trial, to prepare a defense and effectively cross-examine Commonwealth witnesses, [and] call witnesses Chauncy Bray [("Bray")] and Kristin Weinghtman [("Weingthman")] [?]

Brief for Appellant at 3.

Each of Moore's claims challenges the effectiveness of his trial counsel. The applicable standards of review regarding the denial of a PCRA petition and ineffectiveness claims are as follows:

> Our standard of review of a PCRA court's denial of a petition for post[-]conviction relief is well-settled: We must examine whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. The PCRA court's findings will not be disturbed unless there is [a lack of] support for the findings in the certified record.
>
> * * *
>
> It is well-established that counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error. The PCRA court may deny an ineffectiveness claim if the petitioner's evidence fails to meet a single one of these prongs. Moreover, a PCRA petitioner bears the burden of demonstrating counsel's ineffectiveness.

Commonwealth v. Franklin, 990 A.2d 795, 797 (Pa. Super. 2010) (citations omitted).

In his first claim, Moore asserts that his trial counsel was ineffective for failing to object to unconstitutional voir dire proceedings. Brief for Appellant at 10. According to Moore, the proceedings violated his right to a speedy, public trial, because public access extends to jury selection. Id. Specifically, Moore alleges that the proceedings were held in too small of a room, such that his family and friends could not fit in the room. Id. at 10-11. Further, Moore argues that even if the room was spacious enough to accommodate the public, the public would have been prevented from observing the proceedings. Id. at 11 (wherein Moore claims that his counsel "informed [him] that any family or friends who arrive at the courthouse may be turned away."). Moore emphasizes that the PCRA court "held that the claim has arguable merit, as [he] had a right to a public trial." Id.; see also PCRA Court Opinion, 3/7/18, at 8.

In its Opinion, the PCRA court set forth the relevant law, addressed Moore's claim, and concluded that Moore was not entitled to relief. See PCRA Court Opinion, 3/7/18, at 7-10. In particular, the PCRA court concluded that "there was certainly a reasonable basis for [trial counsel] not to lodge an objection with [the judge] regarding the small space reserved for conducting individual voir dire[,] … as there were no courtrooms available." Id. at 8-9. Further, the PCRA court emphasized that Moore failed to illustrate any

resulting prejudice. Id. at 9-10. We agree with the PCRA court's cogent analysis, which is supported by the record. See id. Therefore, we affirm on this basis as to Moore's first issue. See id. at 7-10.

In his second claim, Moore challenges trial counsel's effectiveness for failing to object to the composition of the prospective jury panel. Brief for Appellant at 13-16. Moore, who is African American, claims that the "panel was comprised of all-whites … [and that] his trial counsel failed to object to the [] panel not being fairly representative of the community of Westmoreland County…." Id. at 13. Moore asserts that, despite not having the "facts necessary to prove" such a claim, he "pretty much established a prima facie showing that his jury was selected in violation of clearly established precedent…." Id. at 15-16. With respect to the effectiveness of his counsel, Moore states that counsel "could not have been acting reasonabl[y] for not objecting [sic] to the [] panel not [sic] being reflective of [the county.]" Id.

In its Opinion, the PCRA court set forth the relevant law, addressed Moore's claim, and concluded that Moore's underlying claim was without arguable merit. See PCRA Court Opinion, 3/7/18, at 5-6. In particular, the PCRA court pointed out that

> [Moore] states only that "African Americans comprised [] 2.3% of the entire Westmoreland County population as of 2013." He does not aver how Westmoreland County's selection process is not fair [sic] and reasonable to the number of African [] Americans in the community, nor does he argue that the county systematically excludes African [] Americans from the jury selection process.

Id. at 6. We agree with the PCRA court's cogent analysis, which is supported by the record. Therefore, we affirm on this basis as to Moore's second issue. See id. at 5-6.

In his third claim, Moore alleges that his trial counsel was ineffective for failing to request a cautionary instruction to the jury, after evidence was introduced at trial demonstrating that Moore had offered Knight, a witness for the Commonwealth, a bribe to refrain from testifying or to alter his testimony. Brief for Appellant at 17-19. Moore claims that his counsel objected to admission of the evidence, but that the objection was overruled. Id. at 17-18. In light of this, Moore asserts that his "[t]rial counsel could not have no [sic] reasonable basis for not [sic] requesting this important instruction to remedy any harm to [Moore] regarding the improper remarks." Id. at 18. Moore further claims that he was prejudiced by trial counsel's failure, insofar as the "jury was allowed to consider evidence that was highly prejudicial in determining [Moore's] guilt, when this evidence should have been considered with a caveat." Id. at 19.

This Court previously addressed this issue, on direct appeal, in Commonwealth v. Moore, 118 A.3d 442 (Pa. Super. 2015) (unpublished memorandum). There, we stated that

> [w]ith regard to [] Knight's pertinent testimony, [Moore] objected once to the leading nature of one question, which the trial court sustained. He did not contest the introduction of evidence that he offered [] Knight $5,000 not to testify. Accordingly, his issue is waived. Further, even if the issue was not waived, we would find

> no error in its admission[,] since [the] testimony was admissible to establish consciousness of guilt.

Id. (unpublished memorandum at 22).

The underlying claim is without merit. We agree with this Court's previous determination that the testimony could be used to establish consciousness of guilt. Additionally, it is conceivable that trial counsel could have reasonably chosen, as a matter of strategy, to forego a cautionary instruction because the testimony was properly admitted, or because it may serve to "emphasize what might otherwise have gone relatively unnoticed by the jury." Commonwealth v. Johnson, 179 A.3d 1105, 1119 (Pa. Super. 2018); see also id. (stating that "[i]n the context of an ineffectiveness claim, counsel's failure to request a cautionary instruction regarding evidence of other crimes or prior bad acts does not constitute per se ineffectiveness; rather, in order to obtain relief under such a claim, a defendant must still satisfy each of the three prongs of the test for ineffective assistance of counsel. … It is well-settled law that the decision whether to seek a jury instruction implicates a matter of trial strategy.") (citation and quotation marks omitted). As such, Moore is not entitled to relief on this claim.

In his fourth claim, Moore contends that his trial counsel was ineffective for failing to object to Wilson's testimony and to request a curative instruction regarding the same. Brief for Appellant at 20-21. Again, Moore baldly asserts that his trial counsel could not have had a reasonable basis for his actions. Id. at 21. Moore alleges that he was prejudiced by his trial counsel's inaction

because the testimony was "only admitted to blacken [his] character" and "interfered with the jur[y's] ability to view the evidence objectively." Id.

Moore is not entitled to relief on this claim, as it lacks arguable merit and he did not suffer prejudice as a result of its admission. We agree with the PCRA court's cogent analysis in this regard,[5] which is supported by the record, and are unable to afford Moore relief on this claim. See PCRA Court Opinion, 3/7/18, at 11-13.

In his final claim, Moore asserts that his trial counsel was ineffective for failing to "investigate potential witnesses, [] Bray and … Weinghtman, as to their involvement in the alleged conspiracy." Brief for Appellant at 22. Specifically, Moore claims that had trial counsel interviewed these witnesses, he would have realized that they would have testified to selling drugs only for themselves, not as part of a conspiracy with Moore. Id. at 23. Moore also argues that his trial counsel was "not in the position to defend against a [multi-defendant] indictment with [] myriad [] Commonwealth witnesses in the small amount of time that he was allotted to try the case." Id. at 24. Again, Moore baldly states that trial counsel had "no reasonable basis for not [sic] investigating [known] witnesses. Had trial counsel conducted a meaningful interview with [Moore], he could have learn[ed] [of] the facts regarding this

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[5] We note, in addition to the reasoning provided by the PCRA court, the Commonwealth's contention that the evidence was introduced to "demonstrate [the] violence used to enforce discipline" by the conspired drug enterprise. See Commonwealth's Brief at 14.

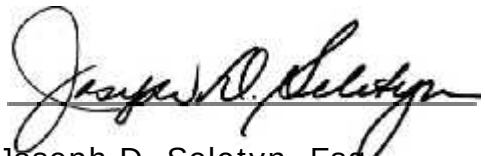
case." Id. Moore also relies on "the record [being] cold as to [trial] counsel's strategy[,]" in making his request for an evidentiary hearing "to be convened to probe counsel's thought process as to his actions to not investigate." Id.

Moore fails to provide any relevant authority supporting his position, as well as any meaningful argument as to how trial counsel's actions could not have been the result of reasonable trial strategy. It is not the role of this Court to generate Moore's arguments for him. See Commonwealth v. Fears, 86 A.3d 795, 804 (Pa. 2014) (providing that "[w]en an appellant fails to meaningfully discuss each of the three ineffectiveness prongs, he is not entitled to relief, and we are constrained to find such claims waived for lack of development.") (citation and quotation marks omitted). Accordingly, Moore's final claim is waived.

Based upon the foregoing, we affirm the Order of the PCRA court.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/2019

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IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA - CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)
)
vs.)
)
JAMES MOORE,) No. 1608 C 2012
)
)
Defendant.)

OPINION OF THE COURT AND NOTICE OF INTENT TO DISMISS

AND NOW, this 21 day of November, 2017, upon consideration of Defendant's petition filed pursuant to the Post Conviction Relief Act, (42 Pa.C.S. §9541, *et seq.)* and upon consideration of the no-merit letter submitted by Attorney Jay Kober, court-appointed PCRA Counsel for Defendant, it appears to this Court that there may be no genuine issue of material fact, no entitlement to relief and no purpose to be served in further proceedings for the following reasons:

FACTUAL AND PROCEDURAL HISTORY:

Defendant was charged by criminal information with crimes associated with a high-level narcotics trafficking network in Westmoreland County and the surrounding areas.[1] Defendant's case was consolidated with codefendants Chauncy Lamar Bray (case

[1] Defendant was charged with one count of Corrupt Organizations, 18 Pa.C.S.A. §911(b)(3), one count of Corrupt Organizations, 18 Pa.C.S.A. §911(b)(4), one count of Criminal Conspiracy, 18 Pa.C.S.A. §903(a)(1), twelve counts of Delivery of Controlled Substances, 35 P.S. §780-113(a)(30), four counts of Possession with Intent to Deliver a

no. 1593 C 2012) and Dominick William Haynes (case no. 1600 C 2012). A jury was selected on June 5, 2013, and a jury trial commenced on June 17, 2013 in front of the Honorable Senior Judge Paul H. Millen. On June 24, 2013, a jury found Defendant guilty at all counts excluding two counts of Delivery of a Controlled Substance and two counts of Possession with Intent to Deliver a Controlled Substance. Defendant was sentenced on October 3, 2013 to an aggregate period of 20-40 years incarceration.

Defendant filed post-sentence motions, which were denied by the trial court on February 5, 2014. The Superior Court affirmed the verdict of the jury on January 9, 2015, but remanded the case for resentencing as per ***United States v. Alleyne***. 570 U.S. ____ (2013). Defendant filed a petition for allowance of appeal with the Supreme Court on February 4, 2015, which was denied on July 29, 2015. Defendant was resentenced on September 28, 2015 to an aggregate period of 15-30 years incarceration. A direct appeal was not filed with the Superior Court.

Defendant filed the instant PCRA petition on September 21, 2016. The Court appointed Attorney James Robinson to appoint Defendant on October 20, 2016. On November 30, 2016, the Court granted Attorney James Robinson leave to withdraw as counsel, as it was determined that Attorney Robinson previously represented a codefendant, Tyrone Nelson Leonard (case no. 1848 C 2012). The Court appointed Attorney Emily Smarto in his stead. Defendant filed a Motion for Change of Appointed Counsel on February 1, 2017, averring that new counsel Emily Smarto represented yet

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Controlled Substance, 35 P.S. §780-113(a)(30), and one count of Hindering Apprehension or Prosecution, 18 Pa.C.S.A. §5105(a)(1).

another codefendant, Jody Lynn Miller (1601 C 2012) at the preliminary hearing level. The Court granted his motion on February 17, 2017, and appointed Attorney Jay Kober to represent Defendant. Attorney Kober filed a no-merit letter and motion to withdraw as counsel on September 14, 2017.

In his *pro-se* petition for post-conviction relief, Defendant raises the following issues: first, that he was denied his rights under the Sixth and Fourteenth Amendments as his jury panel was not representative of a fair cross section of the community, as all jury members were Caucasian. He also states that his trial counsel, Attorney Michael DeMatt, was ineffective for failing to object to the jury panel. Second, he avers that trial counsel was ineffective for failing to object to individual voir dire being held in a conference room rather than a courtroom. Third, he states that trial counsel was ineffective for failing to request a cautionary instruction regarding a witness's testimony that Defendant offered him $5,000 not to testify. Last, Defendant states that counsel was ineffective for failing to object and request a curative instruction in reference to another witness's bad act testimony is reference to Defendant.

ELIGIBILITY FOR RELIEF:

The requirements for eligibility for relief under the Post-Conviction Relief Act are set forth both in the Act itself (42 Pa.C.S. §9541, *et. seq.*) and in the Rules of Criminal Procedure (Pa.R.Crim.P. Rules 901 and 902). Generally speaking,

> PCRA petitioners, to be eligible for relief, must, *inter alia*, plead and prove their assertions by a preponderance of the evidence. Section 9543(a). Inherent in this pleading and proof requirement is that the petitioner must not only state what his issues are, but also he must

> demonstrate in his pleadings and briefs how the issues will be proved. Moreover, allegations of constitutional violation or of ineffectiveness of counsel must be discussed "in the circumstances of the case." Section 9543(a)(2)(i-ii). Additionally, the petitioner must establish by a preponderance of evidence that because of the alleged constitutional violation or ineffectiveness, "no reliable adjudication of guilt or innocence could have taken place." Section 9543(a)(2)(i-ii). Finally, petitioner must plead and prove that the issue has not been waived or finally litigated, §9543(a)(3), and if the issue has not been litigated earlier, the petitioner must plead and prove that the failure to litigate "could not have been the result of any rational, strategic or tactical decision by counsel." Section 9543(a)(4).
> ***Commonwealth v. Rivers***, 786 A.2d 923, 927 (Pa. 2001).

Moreover, because Defendant is raising a claim of ineffective assistance of counsel, he must plead and prove, by a preponderance of the evidence:

> (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.
> ***Comm. v. Reed,*** 971 A.2d 1216, 1221 (Pa. 2009) (citing ***Comm. v. Pierce,*** 527 A.2d 973, 975 (Pa. 1987)).

Finally, a PCRA petition, including second and subsequent petitions, must be filed within one year of the date that the judgment of sentence becomes final. *42 Pa.C.S. §9545(b)(1); Pa.R.Crim.P. Rule 901.* The Pennsylvania Supreme Court "has repeatedly stated that the PCRA timeliness requirements are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely PCRA petitions." ***Comm. v.***

Ligons, 971 A.2d 1125, 1164 (Pa. 2009) (citing ***Comm. v. Rienzi***, 827 A.2d 369, 371 (Pa. 2003)).

In this case, Defendant was resentenced on September 28, 2015. Defendant filed the instant petition on September 21, 2016. Thus, Defendant's petition is facially timely, and the Court has jurisdiction to entertain Defendant's claims.

ANALYSIS:

I. WHETHER DEFENDANT WAS DENIED A FAIR TRIAL AS THE JURY PANEL WAS COMPOSED OF ALL CAUCASIAN MEMBERS?

Defendant first asserts that he was "denied his right under the Sixth and Fourteenth amendments . . . in that the [jury panel] was not representative of a fair cross section of the community." He states that because the jury was composed only of Caucasians, and he is African-American, a new trial is warranted. Defendant also ties this claim into his ineffectiveness claim, averring that his counsel was ineffective for failing to object to this inequality. Pennsylvania's appellate courts have held that to establish a *prima facie* violation of the requirement that a jury array fairly represent the community, the defendant must prove that:

> (1) the group allegedly excluded a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such people in the community; and (3) this under-representation is due to systematic exclusion of the group in the jury selection process. *See* ***Comm. v. Johnson***, 838 A.2d 663, 682 (Pa. 2003); ***Comm. v. Johnson***, 815 A.2d 563, 575 (Pa. 2002).

The Pennsylvania Supreme Court has held that where a county drew its jury pool from a list of licensed drivers in the county, such a scheme was "statutorily permissible."

Comm. v. Lopez, 559 Pa. 131, 149 (Pa. 1999). Further, it determined that a defendant's argument that the selection process was unconstitutional, "fail[ed] to present even a semblance of statistical proof that the jury pool selection procedure utilized . . . unfairly misrepresents the number of non-Caucasians, youthful, elderly, and disabled citizens in the community." ***Id.***

Here, as evidenced by Attorney Kober's attachment to his no-merit letter, Westmoreland County has a similar jury pool selection process as that in ***Lopez***. As stated:

> Every year, the Jury Service Center receives a list from Harrisburg of over 200,000 potential jurors from Westmoreland County. Those names are drawn from multiple sources including, voter registration, driver's license[s], tax records and welfare records . . . Each month, the Jury Service Center along with the President Judge randomly draws the names of jurors . . .

Defendant states only that "African Americans comprised only 2.3% of the entire Westmoreland County population as of 2013." He does not aver how Westmoreland County's selection process is not fair and reasonable in relation to the number of African-Americans in the community, nor does he argue that the county systematically excludes African-Americans from the jury selection process. If anything, his contention that African-Americans compose only 2.3% of the population of Westmoreland County only supports the position the jury pool was representative of the community at large. Because his argument is wholly without merit, it is unnecessary to examine his claim through an ineffective assistance of counsel lens.

II. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE RELOCATION OF VOIR DIRE?

Defendant next states that although voir dire was originally scheduled to take place "in an open courtroom located within the Westmoreland County Courthouse,"

> Honorable Millin informed all present parties that another matter was scheduled to commence in the very same courtroom, and there were no other courtroom available to conduct voir dire and jury selection . . . The room to be utilized for said proceeding was approximately 15 feet in length, 20 feet in width. It contained a conference table large enough for approximately 8 to 10 people to be comfortably seated. No room/space was designated nor available for public spectators, media, nor [Defendant's] family and supporters.

Defendant further avers that although he lodged his objections to Attorney Michael DeMatt, DeMatt informed him that "the public, whether family, friends, or media were not permitted to be present during jury selection and voir dire whether held in a large space or not." As a result, Defendant states that his failure to object "resulted in [Defendant's] right to a public voir dire and jury selection being eviscerated for no reason other than a lack of available open courtrooms." He also declares that two family members, Aleah Banks and Nichelle Moore, arrived at the courthouse and were told that they could not observe the voir dire proceedings because they were not occurring in open court.

First, as Defendant states that his right to a public trial was violated by Attorney DeMatt's ineffectiveness, it must be determined whether his assertion has arguable merit. In determining whether a procedure violated Defendant's right to a public trial, a court

must keep in mind that such right serves two general purposes: (1) to prevent an accused from being subject to a star chamber proceeding; and (2) to assure the public that standards of fairness are being observed. ***Comm. v. Berrigan***, 501 A.2d 226 (Pa. 1985). Moreover, confidence in our system of jurisprudence is enhanced by the openness of judicial proceedings. ***Id.*** at 232. Although the right to a public trial is applicable to voir dire proceedings, a trial judge may, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. ***Comm. v. Harris***, 703 A.2d 441, 445 (Pa. 1997).

Assuming, *arguendo*, that Attorney DeMatt informed Defendant that no family or friends could be present during voir dire, and court staff informed Defendant's family members that they could not observe the jury selection process for the sole reason that they did not occur in open court, there is arguable merit to Defendant's claim. Certainly, as discussed, *supra*, the right to a public trial is applicable to voir dire proceedings. Attorney DeMatt's alleged statements to Defendant, if true, would be factually inaccurate.

Although there is arguable merit to Defendant's claim, the claim still fails the second prong of the ineffectiveness test. Notwithstanding Attorney DeMatt's alleged statements to Defendant, there was certainly a reasonable basis for Attorney DeMatt not to lodge an objection with Judge Millen regarding the small space reserved for conducting individual voir dire. The Court notes that it is standard practice in Westmoreland County to conduct individual voir dire in such a space as is described by

Defendant. Moreover, Judge Millen noted in open court that he was conducting individual voir dire in a conference room because there were no courtrooms available. Defendant's family members may have been told that they were not permitted to observe voir dire because there was not adequate space for their presence.

Defendant also fails the third prong of the ineffectiveness test, as he cannot successfully aver that he suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error. The Superior Court has held that "a finding that [a defendant] is entitled to a new trial cannot be made unless it can be concluded that the alternatives not chosen offered a potential for success substantially greater than the tactics actually utilized, resulting in prejudice...." ***Comm. v. Garvin***, 485 A.2d 36, 39 (Pa.Super. 1984).

Other than Defendant's separate contention that the jury selected caused him prejudice by being completely composed of Caucasians, Defendant does not state how his proceeding would have ended differently had two of his family members been permitted to observe voir dire, or had it been open to the general public. Even had Attorney DeMatt asked Judge Millen to relocate the proceedings to an open courtroom, a judge is permitted to impose reasonable limitations on access to a trial; here, he stated in open court that there were not any open courtrooms available at the time. As noted, *supra*, individual voir dire in Westmoreland County is usually usually conducted in a room described by Defendant. Defendant's family certainly could have requested a transcript of the individual voir dire proceedings. Defendant even notes in his petition

that he is "not alleging that the Court ordered voir dire a 'closed proceeding.' However, the lack of space and seating for the public in the room the Court ordered the proceeding to be held in rendered the proceeding closed to the public." Although it is unfortunate that Defendant's family were not able to observe individual voir dire as they desired, Defendant's argument fails two prongs of the ineffectiveness test, and does not represent grounds for a new trial.

III. WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A CAUTIONARY INSTRUCTION REGARDING JIMMY LEE KNIGHT'S TESTIMONY?

Defendant next avers that trial counsel was ineffective after failing to request a cautionary instruction regarding witness Jimmy Knight's statement that Defendant offered him $5,000 not to testify. This issue is waived, as this issue has been previously litigated at the Superior Court level. Where the Superior Court has "thoroughly discussed" a claim in affirming the judgment of sentence, the issues have been finally litigated and are not subject to further review. ***Comm. v. Bond***, 630 A.2d 1281, 1282 (Pa.Super. 1993). Here, the Superior Court stated:

> With regard to Mr. Knight's pertinent testimony, Appellant objected once to the leading nature of one question, which the trial court sustained. He did not contest the introduction of evidence that he offered Mr. Knight $5,000 not to testify. Accordingly, his issue is waived. ***Further, even if the issue was not waived, we would find no error in its admission since Mr. Knight's testimony was admissible to establish consciousness of guilt.*** *See* ***Comm. v. Rega***, 933 A.2d 997, 1009 (Pa. 2007) (emphasis added).
> No. 338 WDA 2014.

As noted by the Superior Court, Knight's testimony was admissible to establish consciousness of guilt, and Attorney DeMatt's decision not to request a cautionary instruction regarding the testimony was consistent with its proper admission at trial.

IV. WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND REQUEST A CURATIVE INSTRUCTION REGARDING DESIREE WILSON'S BAD ACT TESTIMONY?

Last, Defendant avers that Attorney DeMatt was ineffective because he failed to object and/or request a curative instruction when witness Desiree Wilson testified that Kristen Weightman mismanaged Defendant's money and was smacked by Defendant. Defendant avers that the evidence was used as "character assassination, which is what Rule 404(b) is designed to prevent." This issue was raised with the Superior Court, who determined that Defendant failed to object: specifically, "[Defendant] earlier objected to Ms. Wilson's testimony regarding Ms. Weightman accepting $250 in counterfeit money for heroin, but did not object to her testimony that Appellant smacked Ms. Weightman. Thus, the issue is not preserved. Pa.R.A.P. 302(a)." No. 338 WDA 2014.

Desiree Wilson testified at trial that Kristen Weightman was her best friend, and that she knew her to be romantically involved with Defendant. (TT 460). She stated that Weightman sold heroin for Defendant, and would sometimes do so at Wilson's residence. (TT 478). The relevant testimony is as follows:

> **Wilson:** [Weightman] messed up [Defendant's] money a lot.
> One time I was at work, and she got, like $250 in fake fifties
> **ADA**: Fake fifty dollar bills?
> **Wilson**: Uh-huh.
> **ADA**: In exchange for heroin?

> **Attorney DeMatt**: I would object to this as hearsay. She said she was at work. She's – I said I object to hearsay because she said she was at work. So she's obviously getting this information from another source.
> [Judge reserves ruling]
> . . .
> **Wilson**: Yes. And she brought the money to my work, and I seen the fake – the fake money, and I told [Weightman], I said. . . how did you not know this was fake? I mean, anybody could really know that it was fake. And she was like, well, it was dark. So and then [Defendant] had came [sic] to my house that morning, and there was a problem upstairs in my bedroom, well, my son's bedroom, and he came down the steps and left.
> **ADA**: What do you mean by a problem?
> **Wilson**: Um, there – I heard him smack [Weightman].
> **The Court**: Well, I better rule on the objection. The objection is overruled. You may go ahead.
> (TT 479-80).

After this testimony, Assistant District Attorney James Lazar clarified:

> **ADA**: You heard – you weren't there to see it, correct?
> **Wilson**: No.
> **ADA**: You just heard someone getting smacked?
> **Wilson**: Uh-huh.
> (TT 480).

The above testimony was primarily introduced to establish that Weightman and Defendant worked together to sell heroin. Pa.R.E. 404(b) states that "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Had Defendant been charged with physically abusing Weightman, the above testimony may have been excluded as per Pa.R.E. 404(b), as it tended to show that Defendant abused Weightman on a certain occasion, and would have fallen within the gambit of 404(b). Here, the Assistant District Attorney elicited that Wilson did not see Defendant hit

Weightman, but only heard "someone getting smacked." Weightman's testimony was introduced for the purpose of establishing a conspiracy between Weightman and Defendant to sell drugs. Thus, there is no merit to the claim that Attorney DeMatt should have objected to the testimony as per Pa.R.E. 404(b).

Also, as noted by Attorney Kober in his no-merit letter, said testimony was a minute part of the Commonwealth's case, and the exclusion of this evidence would not have resulted in a verdict of not guilty on any of the charges. Thus, there is no merit to Defendant's claim, Attorney DeMatt acted reasonably, and even had the evidence been excluded, there is not a likelihood that the outcome of the trial would have been different. Defendant is not entitled to a new trial based on this contention.