

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

WILLIAM R. CASE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3225 EDA 2013

Appeal from the PCRA Order of October 31, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0712531-2000

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

FILED APRIL 17, 2014

William Case appeals the October 31, 2013 order denying his petition for relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46, after an evidentiary hearing. We adopt the PCRA court's well-reasoned Pa.R.A.P. 1925(a) opinion, and we affirm.

The PCRA court detailed the factual history of this case as follows:

On April 16, 1997, Eugene Blocker and Joseph Smith went to the area of 61st and Reinhard Streets in Philadelphia to purchase drugs. When they arrived at that location, Charlie Thompson directed them to an alley near an abandoned house. When Blocker and Smith entered the alley, [Case] began shooting at them. Both men were struck in the back. Blocker fell and died from his wounds. Smith managed to get back to his car and drive away before losing consciousness. He subsequently died as a result of his wounds.

Police interviewed several eyewitnesses to the shooting. Thompson told the police that [Case] was the shooter. Brenda Adams, who was standing on the porch of a home belonging to Virginia Johnson near the scene of the shooting, also identified

[Case] as the shooter. Elwood Brown, who drove to the scene with Blocker and Smith, was unable to identify the shooter but gave police information about the victims.

At trial, the Commonwealth called Brenda Adams. Ms. Adams initially recanted her identification. However, after a brief recess in the proceedings, Adams reaffirmed her identification of [Case] as the shooter. The Commonwealth also called Charlie Thompson. Mr. Thompson recanted his statement to police and claimed it had been coerced. At that point, the Commonwealth introduced into evidence Thompson's original written statement to the police, in which he identified [Case] as the shooter. Finally, the Commonwealth presented a letter written by [Case] in which he admitted to the murders. Although this letter was anonymously written, a forensic document examiner identified the handwriting as that of [Case]. Moreover, the return address on the letter belonged to [Case's] aunt.

PCRA Court Opinion ("P.C.O."), 11/18/2013, at 2-3.

The PCRA court further set forth the procedural events leading up to the instant appeal as follows:

On April 15, 2002, following a capital jury trial before the Honorable John J. Poserina, [Case] was convicted of two counts of first[-]degree murder^[1] and of violating the Uniform Firearms Act (VUFA).^[2] The jury could not reach a unanimous verdict with regard to the imposition of the death penalty. Judge Poserina imposed consecutive life sentences on the murder bills and a concurrent prison term of two-and-a-half (2 ½) to five (5) years on the VUFA bill.

Following the reinstatement of his direct appeal rights *nunc pro tunc*, [Case] file an appeal [to this Court], which affirmed his judgment of sentence on August 24, 2009. The Pennsylvania Supreme [Court] denied [Case's] request for allocatur.

¹ 18 Pa.C.S. § 2502(a).

² Specifically, Case was convicted of carrying a firearm on public streets or public property in Philadelphia, 18 Pa.C.S. § 6108.

On or about April 14, 2010, [Case] filed the instant PCRA petition. J. Scott O'Keefe, Esq., was appointed to represent [Case] and filed an amended petition on his behalf. When Mr. O'Keefe became a judge, Janis Smarro, Esq., was appointed in his place. Ms. Smarro subsequently filed two additional amended PCRA petitions. On November 29, 2012, the Commonwealth filed a motion to dismiss.

The court denied the Commonwealth's motion to dismiss and, on July 8, 2013, conducted an evidentiary hearing. Both Fred Harrison, Esq., who represented [Case] at trial, and Virginia Johnson, a defense witness, testified during the hearing. At the conclusion of this hearing, the court directed both parties to submit proposed Findings of Fact and Conclusions of Law.

After reviewing the relevant Notes of Testimony from [Case's] trial and evidentiary hearing as well as the pleadings filed by the parties, [the PCRA] court dismissed the instant PCRA petition for lack of merit.

P.C.O. at 1-2.

On November 8, 2013, Case filed a notice of appeal. On November 12, 2013, the PCRA court directed Case to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Case timely complied on November 19, 2013, and the PCRA court issued its Rule 1925(a) opinion.

Case presents the following issues for our review:

- I. Is [Case] entitled to post-conviction relief in the form of a new trial as a result of the ineffective assistance of counsel?
 - A. Is [Case] entitled to post-conviction relief in the form of a new trial as a result of ineffective assistance of trial counsel for failing to interview Virginia Johnson and present her as a witness at trial?
 - B. Is [Case] entitled to post-conviction relief in the form of a new trial as a result of ineffective assistance of trial

counsel for failing to object, to request a mistrial or to request a cautionary instruction after Commonwealth witness Brenda Adams testified that [Case] always carried a weapon?

- C. Is [Case] entitled to post-conviction relief in the form of a new trial as a result of ineffective assistance of trial counsel for failing to request the trial court to instruct the jury with regard to Charles Thompson's immunized testimony?
- D. Is [Case] entitled to post-conviction relief in the form of a new trial as a result of ineffective assistance of trial counsel for failing to request the trial court to instruct the jury with regard to Charles Thompson's prior conviction for robbery?
- E. Is [Case] entitled to post-conviction relief in the form of a new trial as a result of ineffective assistance of trial counsel for failing to request the trial court to instruct the jury with regard to Brenda Adams' cooperation and plea for leniency?

Brief for Case at 4-5.

Our review of a PCRA court order dismissing a petition under the PCRA is subject to the following standard:

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

Commonwealth v. Rykard, 55 A.3d 1177, 1183 (Pa. Super. 2012) (quoting ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa. Super. 2012)) (internal citations omitted).

Each of Case's issues implicate the effectiveness of trial counsel, which is governed by the following standard:

In Pennsylvania, counsel is presumed effective, and a defendant bears the burden of proving otherwise. In order to be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel's action or inaction. When determining whether counsel's actions or omissions were reasonable, we do not question whether there were other more logical course of actions which counsel could have pursued: rather, we must examine whether counsel's decisions had *any* reasonable basis. Further, to establish prejudice, a petitioner must demonstrate that but for the act or omission in question, the outcome of the proceedings would have been different. Where it is clear that a petitioner has failed to meet any of the three, distinct prongs . . . , the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met.

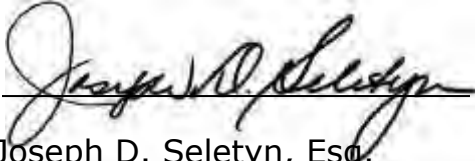
Commonwealth v. Steele, 961 A.2d 786, 796-97 (Pa. 2008) (citations and internal quotation marks omitted; emphasis in original).

We have reviewed the arguments that Case presents in his brief, the applicable law, the above legal standards, the certified record, and the PCRA court's opinion, including the court's credibility determinations and application of the governing law to the facts presented at trial and the evidentiary hearing. Having done so, we agree with the PCRA court that

Case has not demonstrated that he is entitled to PCRA relief, and affirm the PCRA court's October 31, 2013 order denying Case's PCRA petition. In doing so, we adopt the PCRA court's reasoning, as set forth in its Rule 1925(a) opinion, as our own. A copy of the court's opinion is attached hereto for convenience.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/17/2014

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH

VS.

WILLIAMS CASE

FILED:

NOV 18 2013

Criminal Appeals Unit
First Judicial District of PA

CP-51-CR-0712531-2000

OPINION IN SUPPORT OF ORDER DISMISSING PCRA PETITION

By: The Honorable Benjamin Lerner

PROCEDURAL HISTORY

On April 15, 2002, following a capital jury trial before the Honorable John J. Poserina, petitioner was convicted of two counts of first degree murder and of violating the Uniform Firearms Act (VUFA). The jury could not reach a unanimous verdict with regard to the imposition of the death penalty. Judge Poserina imposed consecutive life sentences on the murder bills and a concurrent prison term of two-and-a-half (2 ½) to five (5) years on the VUFA bill.

Following the reinstatement of his direct appeal rights *nunc pro tunc*, petitioner filed an appeal to the Superior Court, which affirmed his judgment of sentence on August 24, 2009. The Pennsylvania Supreme denied petitioner's request for allocator.

On or about April 14, 2010, petitioner filed the instant PCRA petition. J. Scott O'Keefe Esq. was appointed to represent petitioner and filed an amended petition on his behalf. When Mr. O'Keefe became a judge, Janis Smarro, Esq., was appointed in his place. Ms. Smarro subsequently filed two additional amended PCRA petitions. On November 29, 2012, the Commonwealth filed a Motion to Dismiss.

CP-51-CR-0712531-2000 Comm. v. Case, William
Opinion



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The court denied the Commonwealth's Motion to Dismiss and, on July 8, 2013, conducted an evidentiary hearing. Both Fred Harrison, Esq., who represented petitioner at trial, and Virginia Johnson, a defense witness, testified during the hearing. At the conclusion of this hearing, the court directed both the parties to submit proposed Findings of Fact and Conclusions of Law.

After reviewing the relevant Notes of Testimony from petitioner's trial and evidentiary hearing as well as the pleadings filed by the parties, this court dismissed the instant PCRA petition for lack of merit.

FACTS

The evidence and testimony presented at petitioner's trial established the following facts:

On April 16, 1997, Eugene Blocker and Joseph Smith went to the area of 61st and Reinhard Streets in Philadelphia to purchase drugs. When they arrived at that location, Charlie Thompson directed them to an alley near an abandoned house. When Blocker and Smith entered the alley, petitioner began shooting at them. Both men were struck in the back. Blocker fell and died from his wounds. Smith managed to get back to his car and drive away before losing consciousness. He subsequently died as a result of his wounds.

Police interviewed several eyewitnesses to the shooting. Thompson told the police that petitioner was the shooter. Brenda Adams, who was standing on the porch of a home belonging to Virginia Johnson near the scene of the shooting, also identified petitioner as the shooter. Elwood Brown, who drove to the scene with Blocker and Smith was unable to identify the shooter but gave police information about the victims.

At trial, the Commonwealth called Brenda Adams. Ms. Adams initially recanted her

identification. However, after a brief recess in the proceedings, Adams reaffirmed her identification of petitioner as the shooter. The Commonwealth also called Charlie Thompson. Mr. Thompson recanted his statement to police and claimed it had been coerced. At that point, the Commonwealth introduced into evidence Thompson's original written statement to the police, in which he identified petitioner as the shooter. Finally, the Commonwealth presented a letter written by petitioner in which he admitted to the murders. Although this letter was anonymously written, a forensic document examiner identified the handwriting as that of petitioner. Moreover, the return address on the letter belonged to petitioner's aunt. Based upon this evidence, the jury found petitioner guilty as charged

ISSUE(S)

Petitioner raises the following claims:

1. Trial counsel was ineffective for failing to investigate or call as a witness Virginia Johnson as a defense witness;
2. Trial counsel was ineffective for failing to request numerous jury instructions.
3. Trial counsel was ineffective for failing to object to or request a cautionary instruction after Brenda Adams testified that petitioner always carried a weapon;
4. Trial counsel was ineffective for failing to call petitioner to the stand in his own defense;
5. Petitioner is entitled to a new trial as a result of after discovered evidence from Steve Lawhorn (he would have refuted the authorship of the letter alleged to have been written by petitioner);

6. Petitioner is entitled to a new trial as a result of after discovered evidence from Robert Dumas (he would have refuted Brenda Adams identification); and

7. Trial counsel was ineffective for failing to investigate or call as a witness Joy Bell;

See Petitioner's Amended PCRA Petition of September 12, 2012.

PCRA Evidentiary Hearing

On July 8, 2013, this court conducted an evidentiary hearing with regard to petitioner's claims. Petitioner's trial counsel, Fred Harrison, Jr., Esquire, testified that he did not interview or have any contact with Virginia Johnson prior to trial. (N.T 7-9-13, pp.7-8). On April 19, 2012, Ms. Johnson told PCRA counsel's investigator that Brenda Adams was with her at her residence when the shooting occurred, and that neither one saw anyone fire a gun and/or shoot anyone. Counsel testified that, despite what Ms. Johnson told the investigator, he would not have called Ms. Johnson as a witness at trial. Mr. Harrison stated that he had no reason to disbelieve that portion of Brenda Adams' statement to police that Virginia Johnson was not present on the porch when she (Adams) witnessed the shooting across the street. (N.T 7-9-13, pp. 8-9, 25-27, 38). Counsel further testified that, despite doubting whether Brenda Adams actually had observed the shooting, he felt that Adams would have said something if anyone else was present with her on the porch. As counsel stated, "if you're giving a story and if you want something or someone to support it, you would say, by the way, I was on the porch with X, Y, Z and they could have told you the same thing." (N.T 7-9-13, p. 27). Counsel also pointed out that Ms. Adams had said nothing to indicate that Ms. Johnson was with her on the porch. (Id). Further, the investigator sent to the neighborhood by counsel to check out possible witnesses "did not report anything back that would be of any significance." (N.T 7-9-13, pp. 7-8).

As to his decision not to request a jury instruction to consider Brenda Adams' incarceration and cooperation in assessing her credibility, Mr. Harrison testified that his decision was based on the grounds that she was due to be released a mere seven months after petitioner's trial, and that there was no evidence that her testimony was motivated by any threats or promises made by law enforcement. (N.T 7-9-13, p. 15). Counsel further testified that his decision to forego the instruction was consistent with his theory of the case that Ms. Adams' testimony was incredible due to numerous inconsistencies. (N.T 7-9-13, pp. 13-15).

Counsel further testified that he decided not to request a jury instruction with regard to Commonwealth witness Charles Thompson's grant of immunity because Thompson recanted his statement to police at trial. Thus, "the grant of immunity didn't make any difference." (N.T 7-9-13, pp. 18-19). In regard to his decision not to request the jury be instructed on Thompson's prior robbery conviction and the fact that he was awaiting sentencing thereon at the time of petitioner's trial, counsel initially testified that he should have asked for such an instruction. However, counsel later clarified his trial strategy on this issue. Mr. Harrison testified that he did not want the jury to discredit Thompson's trial testimony since, in his opinion, it was helpful to the defense and damaging to the prosecution. (N.T 7-9-13, pp. 15, 19, 24). As to his failure to object to or request a mistrial or a cautionary instruction concerning Brenda Adams' testimony that petitioner always carried a gun however, counsel stated, "I don't know why I missed that." (N.T 7-9-13, pp. 9-10).

Virginia Johnson testified that when she and Ms. Adams heard gunshots, Ms. Adams ran out to the porch about a minute before Ms. Johnson got there. (N.T 7-9-13, pp. 52, 75). Once outside, Ms. Johnson claimed that she saw her brother (Robert Dumas), petitioner and two of their friends on a porch across the street. Johnson claimed that she saw them running towards the shots and yelled

out for them to stay still. (N.T 7-9-13, p. 53). When asked how she was able to remember details of the incident so many years later, Ms. Johnson simply stated that, despite the frequency of gunshots in the neighborhood, it was unusual to hear them in the morning. (N.T 7-9-13, p. 57).

Further, although Ms. Johnson initially testified that she had no idea that anyone had been shot, she later testified that she knew someone was killed but did not know that petitioner had been charged with and convicted of the murders of Eugene Blocker and Joseph Smith until an investigator told her in 2011. (N.T 7-9-13, pp. 47-49, 71). Her testimony on this point was confusing and inconsistent. She stated: "I didn't – I knew somebody was killed. Like I said, somebody was hurt. I didn't know they had died and I didn't know that they had blamed him." (N.T 7-9-13, p. 71). Ms. Johnson further claimed she had no knowledge that Ms. Adams, her close friend, had given a statement to police and then testified against petitioner at trial. This testimony was incredible considering Ms. Johnson was friendly with, and in regular contact with, members of petitioner's family as well as with Ms. Adams. (N.T 7-9-13, pp. 48, 61-62, 73).

DISCUSSION

Petitioner's first three claims were the subject of the evidentiary hearing. They will be addressed at length below. Petitioner's remaining claims, which had no arguable merit, did not warrant an evidentiary hearing or post-conviction relief¹.

¹ Petitioner claimed that trial counsel was ineffective for failing to call him to the stand. Trial counsel advised petitioner that the Commonwealth would impeach him with his prior record, which included *crimin falsi*, if he took the stand. Counsel's advice was proper strategy designed to protect his client's interests. Moreover, the trial court conducted a colloquy regarding petitioner's right to testify. Petitioner stated on the record that he had discussed the case with counsel, that he was aware of his rights and that he did not wish to testify. This claim has no merit and does not warrant an evidentiary hearing.

Petitioner also presented two after discovered evidence claims. The first involved a statement from Steven Lawhorn. According to petitioner, Lawhorn would have provided testimony regarding the authorship of the incriminating letter presented at trial. He would also have testified that the Commonwealth attempted to withhold evidence about the true author of the letter.

At trial, the Commonwealth presented the testimony of a forensic handwriting analyst. This expert concluded that the handwriting on the letter belonged to the petitioner. The return address on the letter was to a house that belonged to petitioner's aunt, and a photo of petitioner was mailed with the letter. The letter was claimed by Lawhorn, who was incarcerated at the time at a juvenile detention center in New Jersey. Lawhorn was uncooperative when questioned about the letter during petitioner's trial. He gave conflicting and incredible testimony. In light of the overwhelming evidence regarding petitioner's authorship of the inculpatory letter, Lawhorn's proffer is not persuasive. This claim has no merit and warrants no consideration.

Petitioner's second after discovered evidence claim involves an affidavit from Robert Dumas. Dumas claimed in his affidavit that he was with Brenda Adams inside Virginia Johnson's home when the shooting occurred. According to petitioner, Dumas testimony would have refuted Brenda Adam's identification of petitioner as the shooter.

Dumas stated he was asleep on the couch at his sister's (Virginia Johnson) house. When he woke up he saw Brenda Adams also sleeping on the floor. He then went outside and saw the police at the crime scene. This statement is being offered solely to impeach Brenda Adams testimony that she was on the porch when the shooting occurred. Considering Dumas statement that he was asleep, it's unlikely his testimony would have exculpated petitioner. The Commonwealth presented the testimony of two eyewitnesses that positively identified petitioner as the shooter. Finally, it is important to note that Dumas' statement directly contradicts that of Virginia Johnson. Ms. Johnson stated in her affidavit and during her evidentiary hearing testimony that that her brother was outside hanging out with the petitioner when the shooting occurred. Thus, if Dumas was outside when the shooting occurred, he was not inside sleeping and could not account for the whereabouts of Brenda Adams at the time of the shooting.

Finally, petitioner claimed that trial counsel should have investigated or called Joy Bell as a defense witness because she was in the car with the victims moments before the shooting and subsequently gave a statement to police. In that statement, which was part of discovery, Bell told police that she went to the scene with the decedents and another man to buy drugs. The decedents got out of the car and left her and the other man behind. According to Bell, she heard two gunshots. Smith then ran out of the alley, jumped into the driver's seat and sped away. Petitioner claims that this "testimony" would have refuted Charles Thompson's statement to the police and his identification of petitioner as the shooter.

The law in Pennsylvania presumes that counsel was effective. Commonwealth v. Cross, 535 Pa. 38, 634 A.2d 173 (1993). When evaluating claims of ineffective assistance of counsel, the first issue to be determined is whether the issue underlying the claim has arguable merit. Commonwealth v. Johnson, 527 Pa. 118, 122, 588 A.2d 1303, 1305 (1991). If the claim has merit, it must be determined whether counsel's course of action or inaction had a reasonable basis to further the defendant's interests. Commonwealth v. Copenhefer, 526 Pa. 555, 587 A.2d 1353 (1991). If no reasonable basis for counsel's course of action exists, appellant will be granted relief only if he demonstrates that counsel's improper course of conduct prejudiced him. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Commonwealth v. Pierce, 515 Pa. 153, 159, 527 A.2d 973, 975 (1987). Prejudice in this context has been defined to mean that an appellant must establish that, but for the arguably ineffective act or omission of counsel, there is a reasonable probability that the outcome of the proceeding would have been different. Commonwealth v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996); Commonwealth v. Douglas, 537 Pa. 588, 645 A.2d 226 (1994). Appellant bears the burden of proving all three prongs of this standard. Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992).

Petitioner first claims that trial counsel was ineffective for not investigating or calling Virginia Johnson as a defense witness. He avers that counsel should have interviewed or called Virginia Johnson to refute Brenda Adams' testimony identifying petitioner as the shooter.

Petitioner did not attach an affidavit from Ms. Bell. Thus, the court could not ascertain whether she would have been ready, willing and able to testify on petitioner's behalf. Moreover, without any such affidavit, it is unclear that she would have offered the testimony petitioner hopes she would have.

According to petitioner, Virginia Johnson and Adams were inside Johnson's house when the shooting occurred. Thus, Adams could not have seen who shot the victims.

In order to prevail on a claim of ineffectiveness for failing to present a witness, the defendant must show: 1) the existence and availability of the witness; 2) counsel's actual awareness of, or duty to know of, the witness; 3) the witness' willingness and ability to cooperate and appear on the defendant's behalf; and 4) the necessity of the proposed testimony in order to avoid prejudice. Commonwealth v. Stanley, 534 Pa. 297, 298, 632 A.2d 871, 872 (1993); Commonwealth v. Petras, 368 Pa. Super. 372, 377, 534, A.2 483, 485 (1987). The duty to investigate may include a duty to interview certain potential witnesses; and a prejudicial failure to fulfill this duty, unless pursuant to a reasonable strategic decision, may lead to a finding of ineffective assistance. Commonwealth Johnson, 966 A.2d 523, 535-536 (Pa. 2009).

This court found Ms. Johnson's testimony at the evidentiary hearing well intentioned but incredible for several reasons. First, Ms. Johnson did not provide any information regarding the shooting to anyone until 2011, when she was approached by a defense investigator. When asked how she was able to remember the details of an incident that had occurred fifteen years earlier, Ms. Johnson simply stated that, despite the frequency of gunshots in the neighborhood, it was unusual to hear gunshots in the morning. (N.T 7-9-13, p. 57). Second, Ms. Johnson stated, with confidence, that she remembered being nine months pregnant with her son, who is now 19 years old, when the shooting occurred. However, during cross-examination, she could not explain how that was possible considering the shooting happened 16 years ago. (N.T 7-9-13, pp. 67-69). Third, Ms. Johnson's ability to recall events at the time of the shooting was rendered even more suspect when she denied knowing that anyone had been shot on the morning in question or that anyone she knew had been

arrested for the shooting. Ms. Johnson testified that she knew petitioner and petitioner's family. She also testified that she knew someone was killed, but did not know that petitioner had been charged with and convicted of the murders of Eugene Blocker and Joseph Smith until an investigator told her in 2011. (N.T 7-9-13, pp. 47-49, 71). Her testimony on this point was contradictory, particularly when she stated "I didn't – I knew somebody was killed. Like I said, somebody was hurt. I didn't know they had died and I didn't know that they had blamed him." (N.T 7-9-13, p. 71). Finally, Ms. Johnson testified that when she went outside she saw her brother, petitioner and two of their friends on a porch across the street. Johnson claimed that she saw them running towards the shots and yelled out for them to stay still. (N.T 7-9-13, p. 53). When Ms. Johnson spoke with the investigator in 2011, however, she never mentioned this crucial observation. Ms. Johnson's explanation for this glaring omission was that "[b]ecause he was asking me so many questions, you know. So I just didn't, you know, remember." (N.T 7-9-13, pp. 63-64). When asked why she failed to contact the investigator after later remembering petitioner's presence on the porch across the street, Ms. Johnson said: "I did not because I have eight children and about eight grandchildren and that's – like everything leaves my mind and it's on them." (N.T 7-9-13, p. 64).

"Credibility determinations are the province of the PCRA court." Commonwealth v. Batlle, 883 A.2d 641, 648 (Pa.Super. 2005). A PCRA court's credibility determinations will be upheld where there is support for them in the record. Commonwealth v. Johnson, 966 A.2d 523, 529 (PA 2009); Commonwealth v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79, 93-94 (1998), cert. denied, 528 U.S. 810 (1999). Here, the court had ample opportunity to hear Ms. Johnson's testimony and observe her demeanor. Ms. Johnson's testimony may have been well intentioned in an attempt to help a family friend. Nevertheless, her inconsistent and confused testimony was incredible. In this

court's opinion, a jury would not have found Ms. Johnson's testimony either particularly helpful or believable. Ms. Johnson's absence as a witness at trial did not prejudice petitioner. Even if trial counsel should have investigated, found and interviewed Ms. Johnson, the problems which this court observed concerning her credibility may very well have persuaded counsel not to use her as a witness. Moreover, even if she had testified similarly to the way she testified at the PCRA evidentiary hearing, it is highly unlikely that her testimony would have led to a different result when viewed in the context of the entire record.

Petitioner next alleges that trial counsel was ineffective for failing to request two jury instructions with regard to the testimony of Commonwealth witness Charles Thompson. First, petitioner alleges that counsel should have asked the court to instruct the jury that it should view Thompson's trial testimony with caution because he had been given immunity by the prosecution. Second, petitioner claims that a cautionary instruction was required because Thompson had a prior *crimin falsi* on his record.

Counsel testified at the hearing that he decided not to request a jury instruction with regard to Thompson's grant of immunity because Thompson had recanted his statement to police at trial, and so, "the grant of immunity didn't make any difference." (N.T 7-9-13, pp. 18-19). In regard to his decision not to request jury instructions on Thompson's prior robbery conviction and the fact that he was awaiting sentencing thereon at the time of petitioner's trial, although counsel initially testified that he should have asked for such an instruction, he ultimately stated that he did not want the jury instructed to discredit Thompson's testimony since that testimony was helpful to the defense and damaging to the prosecution. (N.T 7-9-13, pp. 15, 19, 24). Counsel's strategy in not requesting these instructions had a reasonable basis to advance petitioner's interests. Further, in view of the fact that

Thompson's trial testimony was favorable to petitioner, he was not prejudiced by the absence of instructions advising the jury that it could discredit Thompson's testimony. Accordingly, petitioner is due no relief on this claim. He has failed to satisfy two prongs of the ineffectiveness test.

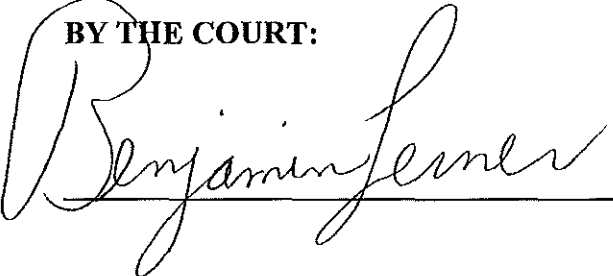
Next, petitioner claims that trial counsel was ineffective for failing to request that the jury be instructed to consider Brenda Adams' incarceration and cooperation when assessing her credibility. Specifically, petitioner claims counsel should have requested an instruction that her testimony be viewed with caution because she was attempting to curry favor with the Commonwealth.

Mr. Harrison testified that he decided not to request such an instruction because there simply was no evidence that Adams' trial testimony was motivated by either threats or promises made by law enforcement. (N.T 7-9- there was 13, p. 15). Counsel further testified that he did not request the instruction because it would have been inconsistent with his theory of the case that Ms. Adams' testimony was incredible due to numerous inconsistencies. (N.T 7-9-13, pp. 13-15). Accordingly, absent evidence at trial which would have warranted such an instruction, this issue lacks arguable merit. Additionally, counsel's strategy in not requesting these instructions had a reasonable basis to advance petitioner's interests. Thus, no relief is due on this issue.

Finally, petitioner alleges that trial counsel was ineffective for failing to object to the Brenda Adams' testimony that petitioner always carried a gun. As to counsel's failure to object or request a mistrial or a cautionary instruction concerning this testimony, counsel admitted quite candidly, "I don't know why I missed that." (N.T 7-9-13, pp. 9-10). However, in light of the overwhelming evidence of petitioner's guilt, he cannot demonstrate a reasonable probability that the outcome of the trial would have been different had counsel objected and/or requested a mistrial or requested a cautionary instruction.

For all the foregoing reasons, PCRA relief is denied and the instant PCRA petition is dismissed for lack of merit.

BY THE COURT:



DATE:

