**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>JAMES EDWARD BELL, JR.,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br><br>No. 2001 MDA 2012 |

Appeal from the PCRA Order October 12, 2012
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0005258-2007

BEFORE: BOWES, WECHT, and PLATT,* JJ.

MEMORANDUM BY BOWES, J.: **FILED NOVEMBER 12, 2013**

James Edward Bell, Jr., appeals from the order entered October 12, 2012, in which the court denied his first counseled PCRA petition filed pursuant to 42 Pa.C.S. §§ 9541-9546. We reverse and remand for a new trial.

The salient factual background is as follows. The Lancaster County Sheriff's Department, including Sergeant Christopher Leppler, were involved in serving a domestic relations warrant in the 100 block of South Queen Street, Lancaster. According to Sergeant Leppler, as the sheriffs approached the address for the domestic relations warrant, he witnessed Appellant briefly display his head from behind the door of 140 South Queen Street

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* Retired Senior Judge assigned to the Superior Court.

several times. Each time, Appellant looked at the sheriffs before ducking his head back inside the door. Sergeant Leppler initially believed that Appellant was another individual who was wanted for an outstanding warrant. After parking their vehicles, several deputies went to the address for the bench warrant. Sergeant Leppler and other deputies, however, approached Appellant. Appellant exited the vestibule of the building he was in, which Sergeant Leppler provided was 140 South Queen Street, and approached the sheriff's deputies. Appellant was asked for identification and Deputy Joseph Wilcox entered the empty vestibule that Appellant exited, again describing the vestibule as 140 South Queen Street.

Deputy Wilcox asserted that he entered the vestibule of 140 South Queen Street through an unlocked outer door. In contrast, Appellant maintained that Deputy Wilcox took Appellant's keys and attempted to enter 140 South Queen Street and could not. According to Appellant, the deputy was allowed into the building by another person, who was detained and transported to the police station with Appellant. Inside the vestibule, police discovered a baseball cap with sixteen baggies of crack cocaine. Law enforcement indicated that next to the cap were car keys and a cell phone charger. Appellant, however, asserted that police took his car keys and cell phone charger when he first approached them. Sergeant Leppler and Deputy Wilcox testified that the drugs were found in the vestibule at 140 South Queen Street, and Sergeant Leppler indicated that no one entered or

exited 140 South Queen Street between the time Appellant was first seen and his arrest.

Police Officer Jose Delatorre, who arrested Appellant, testified at trial that the location of the drugs was 140 South Queen Street. He also provided that he searched Appellant incident to his arrest and discovered two cell phones and $239.00 in small bills. The officer stated that he did not seize the money and that Appellant subsequently attempted to hide the currency in a drain in his detention cell.

Appellant was transported to the police station for booking by Police Officer David Kaminski. Officer Kaminski did not testify at trial but related at Appellant's PCRA hearing that he transported Appellant along with another individual, Joseph Greener. Sergeant Leppler, Deputy Wilcox, and Officer Delatorre each testified at trial that no other non-law-enforcement-official was ever in the vestibule of 140 South Queen Street during the time in question. Officer Delatorre also provided that Appellant was the only person placed in custody and no one else was transported with him. In sum, each law enforcement official who arrived at the scene testified that the drugs were discovered in the vestibule at 140 South Queen Street and the entire trial and testimony revolved around the seizure of the drugs at 140 South Queen Street. Indeed, the prosecutor began his opening statement by stating, "[o]n September 29, 2007, the defendant, James Edward Bell, Jr., was in the vestibule of 140 South Queen Street at 6:45 a.m. in the morning.

The vestibule of 140 South Queen Street is a large glassed-in area. You can see entirely into it and its width." N.T., 11/10/08, at 38.

Appellant himself testified that he was at 140 South Queen Street to retrieve a cell phone. As noted, he testified that another individual let the sheriffs into the vestibule and that police detained that person. Appellant testified that both he and this person were transported together and that those involved knew that the person located in the vestibule at 140 South Queen Street was arrested shortly after him and rode with him to the police station. Appellant indicated the person's name was Joe, described him as a white male, late thirties, and approximately Appellant's height.

A jury convicted Appellant of possession with intent to deliver ("PWID"), possession of drug paraphernalia, and tampering with physical evidence. The court, on February 27, 2009, imposed a sentence of two to five years incarceration for PWID and concurrent sentences of one year probation for the drug paraphernalia charge and two years concurrent probation for the tampering count. Appellant filed a timely motion for judgment of acquittal, which the court denied.

Subsequently, Appellant retained new counsel and requested permission to file a *nunc pro tunc* post-sentence motion, seeking modification of his sentence based on his eligibility for the Recidivism Risk Reduction Incentive ("RRRI") Program. The court denied that motion and Appellant appealed. This Court found Appellant's appeal timely, agreed that

Appellant was eligible for RRRI, and that he was improperly sentenced under the school zone mandatory.[1] Accordingly, we remanded the case for re-sentencing. On October 29, 2010, the court found Appellant RRRI eligible and re-imposed the aforementioned periods of incarceration and probation.

Thereafter, Appellant, represented by counsel, filed a timely PCRA petition and request for discovery on November 23, 2011. The Commonwealth filed an answer. The PCRA court granted Appellant's request for discovery on January 26, 2012. The Commonwealth filed a motion for reconsideration and requested leave to file an interlocutory appeal. The PCRA court declined to grant the Commonwealth's request for permission to file an interlocutory appeal. The Commonwealth did not appeal that decision. However, the PCRA court did issue an amended discovery order in response to the Commonwealth's position. Subsequently, on March 23, 2012, Appellant filed an amended petition and the court conducted evidentiary hearings on May 30 and May 31, 2012. The central issue presented in the amended petition regarded trial counsel's ineffectiveness for not investigating Joseph Greener, the person who Appellant alleged was

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[1] We note that the school zone mandatory sentencing statute in question is no longer constitutionally sound insofar as it permits a court to automatically increase a minimum sentence based on a preponderance of the evidence standard. ***See Alleyne v. United States***, 133 S.Ct. 2151 (2013). ***Alleyne*** held that facts leading to an increase in a mandatory minimum must be presented to a jury and proven beyond a reasonable doubt or a defendant's jury trial rights are infringed.

at the scene, allowed law enforcement into the building, and was transported with Appellant.

In contrast to his earlier trial testimony, Sergeant Leppler testified at the PCRA hearing that Appellant actually exited 136 South Queen Street. Deputy Wilcox continued to maintain he found the drugs at 140 South Queen Street, and indicated that no other person exited that address. When provided a report by Officer Kaminski indicating that Joseph Greener was arrested by Lancaster County Sheriffs at 140 South Queen Street, he responded that Mr. Greener may have been arrested by Lancaster police after the sheriffs relinquished the scene. Officer Delatorre could not recall whether Officer Kaminski transported Mr. Greener and Appellant together.

A county wide incident report showed that Officer Delatorre called in two arrests from 140 South Queen Street. Ultimately, the PCRA court found the report unreliable. Officer Delatorre, like Sergeant Leppler, also deviated from his testimony at trial and asserted that the drugs were found at 136 South Queen Street. He stated that he learned of his mistaken trial testimony during a conversation with the prosecutor prior to the PCRA hearing. According to Officer Delatorre, he erroneously placed the address of 140 South Queen Street on the criminal complaint, affidavit of probable cause, offense report, booking report, and evidence/property card.

Officer Kaminski, who was referred to at trial, but who did not testify, testified at the PCRA hearing that he did transport both Joseph Greener and

Appellant at the same time. An arrest report showed that Mr. Greener was arrested at 140 South Queen Street based on an outstanding warrant, and that the arrest was reported by Lancaster County Sheriffs. Mr. Greener could not testify at the PCRA hearing because he was deceased.

Based on the inconsistent testimony introduced by the law enforcement officials, Appellant requested leave to file an amended petition asserting a ***Brady***[2] violation. The court authorized Appellant to submit a second amended petition, which he did on June 22, 2012. The Commonwealth filed a response and the court denied Appellant's petition on October 12, 2012. The PCRA court filed an opinion in support of that decision that same date. This timely appeal ensued. Appellant presents two issues for our consideration.

> I. Was trial counsel ineffective for failing to produce evidence that Joseph Greener was arrested at 140 South Queen Street and transported to the police station with [Appellant], when deputy sheriffs had denied Mr. Greener's existence, denied that he opened the door to permit them to enter 140 South Queen Street, and denied that he was arrested and transported to the police station with [Appellant]?
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> II. Did the Commonwealth commit a ***Brady*** violation when it defended against allegations set forth in the PCRA [petition] by presenting testimony of Sergeant Leppler and prosecuting officer Jose Delatorre that their testimony at trial regarding the location of the offense was false?

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[2] ***Brady v. Maryland***, 373 U.S. 83 (1963).

Appellant's brief at 6.

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."

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; ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

Appellant’s claim is that trial counsel was ineffective in failing to produce evidence that Joseph Greener was arrested shortly after him at 140 South Queen Street and transported to the police station with him, where the officers involved denied any knowledge of Mr. Greener. Appellant argues that had trial counsel presented evidence that Mr. Greener was arrested at 140 South Queen Street immediately after Appellant, it would have supported his testimony at trial that Mr. Greener allowed the officers into the building. This, in turn, would have called into question the officers’ testimony at trial that they entered the vestibule at 140 South Queen Street through an open door. According to Appellant, “proof that Joseph Greener existed, that he fit [Appellant’s] description, that he was removed from 140 South Queen Street at a time when deputy sheriffs claimed that no one went into or out of 140 South Queen Street, destroys any reasonable confidence in the jury’s verdict.” Appellant’s brief at 31.

The PCRA court asserted that Appellant’s issue fails, in part, because the drugs in question were located at 136 South Queen Street not 140 South Queen Street as extensively testified to at trial. These factual findings do have support in the PCRA record based on Sergeant Leppler’s and Officer Delatorre’s PCRA testimony. Specifically, both men testified at the PCRA hearing that the drugs were found in the vestibule of an address with a

double front door, which the evidence established was 136 South Queen Street. At trial, both stated that law enforcement recovered the drugs at 140 South Queen Street. Sergeant Leppler, but not Officer Delatorre, testified at trial that 140 South Queen Street had a double front door, though it was in fact 136 South Queen Street that had the double doors. Based on our standard of review, we are bound by those facts.

However, the PCRA court's findings necessarily mean that it rejected the testimony of Deputy Sheriff (now Sergeant) Wilcox as it relates to where the drugs were seized since he testified it occurred both at 140 South Queen Street and at an address with a single front door. In addition, the officer who retrieved the drugs, Officer Delatorre, did not describe the building at trial and provided that he recovered the drugs at 140 South Queen Street. Accordingly, the PCRA court's binding factual findings are in direct opposition to the testimony at trial leading to Appellant's conviction and parts of the testimony at the PCRA hearing. This alone calls into question the reliability of the truth-determining process in Appellant's trial, since the jury convicted Appellant based on the extensive testimony that the drugs were found at 140 South Queen Street.

Additionally, the PCRA court's statement that Mr. Greener's arrest was not drug related is a *non-sequitur*. Appellant's position during the PCRA proceedings had little to do with the reason police arrested Mr. Greener, only that he was arrested at the same time police arrested Appellant. The

relevance of this information is that the officers involved denied arresting Mr. Greener at all, let alone at the same time. However, Officer Kaminski's testimony at the PCRA hearing demonstrated that Appellant and Mr. Greener were transported together, and that Mr. Greener was arrested outside 140 South Queen Street.[3]

Further, the fact that the record does not show who arrested Mr. Greener does not support the conclusion that Appellant's claim is meritless. It simply does not follow that, because it is impossible to determine which officer arrested Mr. Greener, trial counsel's investigation was not lacking. In actuality, highlighting the very ambiguity as to what occurred with Mr. Greener could call into question the memory and reliability of some of the officers' testimony at trial. Indeed, it is this uncertainty that could undermine the credibility of Sergeant Leppler and Deputy Wilcox that only Appellant was in the vestibule and that Mr. Greener did not open the door to police. This is not only because the two officers differed in their description of which vestibule the drugs were found, but because they denied knowledge of Mr. Greener's arrest.

How can it be said that no one entered the vestibule or that the vestibule was secured at all times when the testimony differed on which vestibule in which the drugs were found, and Mr. Greener may have been

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[3] There is no dispute that Mr. Greener lived in an apartment at 140 South Queen Street at the time of Appellant's arrest.

led through the vestibule at 140 South Queen Street by a law enforcement officer? In addition, the PCRA court's legal conclusion that there was no prejudice is premised on the trial testimony that the drugs were located with Appellant's belongings, which fails to account for the fact that this is part of the very testimony that Appellant was seeking to impeach. If the officers were mistaken about the vestibule they entered, about how they entered the vestibule, and who was present, then there is a reasonable probability that the jury could have chosen not to believe their testimony that the drugs were found with Appellant's belongings.

Moreover, the PCRA court did not truly confront Appellant's actual claim, which is that counsel conducted an inadequate investigation into this matter. The failure to investigate a witness is distinct from the failure to call a witness. ***Commonwealth v. Dennis***, 950 A.2d 945, 960 (Pa. 2008) (discussing ***Commonwealth v. Mabie***, 369 A.2d 369 (Pa. 1976), and ***Commonwealth v. Perry***, 644 A.2d 705 (Pa. 1994)); ***Commonwealth v. Jones**,* 437 A.2d 958 (Pa. 1981); ***see also Commonwealth v. Johnson***, 966 A.2d 523 (Pa. 2009). As our Supreme Court stated in ***Perry***, "Failure to prepare is not an example of forgoing one possible avenue to pursue another approach; it is simply an abdication of the minimum performance required of defense counsel." ***Id***. at 709. A claim that trial counsel did not conduct any investigation or interview known witnesses presents an issue of arguable merit where the record demonstrates that counsel did not perform an

investigation. ***Perry***, ***supra***, ***Jones, supra***; ***Mabie, supra***; ***Commonwealth v. Weiss***, 606 A.2d 439 (Pa. 1992), ***Commonwealth v. Hull***, 982 A.2d 1020 (Pa.Super. 2009), and ***Commonwealth v. Harris***, 785 A.2d 998 (Pa.Super. 2001); ***Commonwealth v. Gillespie***, 620 A.2d 1143 (Pa.Super. 1993). It can be unreasonable *per se* to conduct no investigation into known witnesses. ***Dennis***, ***supra*** at 960. A showing of prejudice, however, is still required. ***Id*** at 961.

Even construing the record in a light most favorable to the Commonwealth, it cannot be said that trial counsel performed more than a minimal investigation in this case. The attorney hired by Appellant, Kenneth Reidenbach, did not actually represent Appellant and assigned the case to an associate. At the time of the PCRA hearing, Mr. Reidenbach had been convicted of multiple bankruptcy fraud crimes. The associate admitted that Appellant did not expect him to represent him at trial, N.T., 5/30/12, at 150, and was confused when he appeared to represent him despite counsel having previously met with Appellant. Counsel acknowledged that Appellant informed him that another person was arrested at the same location as him shortly after his arrest. ***Id***. at 128-129. He stated that he did not remember investigating who that person was because he believed the person was merely transported with Appellant, and he did not think he subpoenaed any documents to substantiate Appellant's story. Trial counsel set forth that he walked by the scene but did not recall taking pictures of the

area. He testified that he could not recall investigating Appellant's version of events, and that he did not have sufficient funds to investigate.

While financial limitations could provide a reasonable basis for trial counsel's decision not to conduct investigatory work, to uncover the facts surrounding Mr. Greener, trial counsel would have only had to review discovery, interview Appellant, and utilize discovery documents, a minimal amount of work. Finally, since the PCRA court's decision itself calls into question the reliability of the evidence introduced at trial, we find that there is a reasonable probability that the outcome of the proceeding would have been different had trial counsel performed adequately. Therefore, Appellant is entitled to a new trial.

Although we find Appellant's first issue meritorious, we briefly address his second claim since it pertains to an allegation of Commonwealth malfeasance, which under extremely limited circumstances can preclude a new trial on Pennsylvania double jeopardy grounds. ***Commonwealth v. Smith***, 615 A.2d 321 (Pa. 1992). Specifically, Appellant argues that the Commonwealth failed to disclose that the crime occurred at 136 South Queen Street and not 140 South Queen Street, in violation of ***Brady***.

Appellant relied on 42 Pa.C.S. § 9543(a)(2)(i),[4] in leveling his ***Brady*** claim. A ***Brady*** issue can be forwarded under that section. ***See Commonwealth v. Galloway***, 640 A.2d 454 (involving interplay between § 9543(a)(2)(i) and § 9543(a)(2)(vi) and ***Brady*** claim relevant to hypnotically refreshed testimony); ***Commonwealth v. Simmons***, 804 A.2d 625 (Pa. 2001) (OAJC) (finding due process claims pertaining to Commonwealth suppression of evidence fell under § 9543(a)(2)(i)). Of course, a petitioner may also assert a ***Brady*** claim pursuant to 42 Pa.C.S. § 9543(a)(2)(vi). ***Commonwealth v. Tedford***, 960 A.2d 1, 30 n.19 (Pa. 2008); ***Commonwealth v. Bennett***, 930 A.2d at 1271 n.10 (Pa. 2007).

Appellant maintains that he could not have learned of the Commonwealth's change in position as to the location of his arrest. Appellant argues that the criminal complaint, the affidavit of probable cause,

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[4] 42 Pa.C.S. § 9543(a)(2)(i) provides:

> **(a) General rule.--**To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:
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> . . . .
>
> (2) That the conviction or sentence resulted from one or more of the following:
>
> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

the offense report, the arrest/booking report, and evidence control card all bore the same purported incorrect address, 140 South Queen Street. He points out that both the prosecuting officer and another officer testified at trial that the address contained in these documents was where the incident occurred. According to Appellant, trial counsel could not have had any basis to determine that the address was incorrect.

We agree with the PCRA court that Appellant would have known the correct address, but not that he could have learned of the Commonwealth's change in position. Indeed, the record demonstrates that Appellant's true position is that the officers actually testified to the correct address at trial, but concocted the mistaken address theory after-the-fact. In this respect, he only leveled a ***Brady*** claim in the alternative. ***See*** N.T., 5/31/12, at 196-197; ***id***. at 231 (PCRA counsel requesting to amend petition to raise ***Brady*** claim). Phrased differently, Appellant's position was that the officers testified accurately at trial, but if the PCRA court determined that the officers testified truthfully at the PCRA hearing about the location, they necessarily testified incorrectly at trial, and the Commonwealth should have disclosed that the trial testimony was in error.

In this regard, we add that ***Brady*** obligations continue throughout all stages of the judicial process, ***see Commonwealth v. Williams***, 732 A.2d 1167, 1175-1176 (Pa. 1999); therefore, if the prosecutor in the PCRA matter became aware that inaccurate evidence was introduced at trial, it should

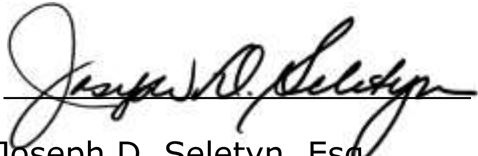
have been revealed prior to the PCRA hearing since such evidence had impeachment value. Certainly, the officers involved in this matter could have been impeached by the fact that they were mistaken or uncertain as to the address where the arrest and seizure of drugs occurred. Nonetheless, because the PCRA court determined that Sergeant Leppler and Officer Delatorre testified credibly at the PCRA hearing that they were incorrect at trial, and Appellant would have known the proper address, his ***Brady*** claim fails.

To summarize, trial counsel failed to adequately investigate the existence of Mr. Greener despite discovery documents and easily accessible evidence demonstrating support for Appellant's claims involving another individual being at the scene. The prejudice to Appellant is manifest since the PCRA court's own factual findings are in direct opposition to almost the entirety of the testimony taken at trial in regards to the place of where the drugs were discovered. Pointedly, the truth-determining process at trial cannot be considered reliable if the evidence being used to uphold the conviction is evidence that is in opposition to that presented to the jury. For all of the aforementioned reasons, we reverse.

Order reversed. Case remanded with instructions. Jurisdiction relinquished.

Judge Platt files a Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/12/2013