NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JAMAR REESE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 191 WDA 2014

Appeal from the PCRA Order May 8, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015069-2007,
CP-02-CR-0015074-2007

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.: **FILED NOVEMBER 20, 2014**

Jamar Reese appeals from the order of the Court of Common Pleas of Allegheny County dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA").[1] Upon review, we affirm on the opinion authored by the Honorable Randal B. Todd.

Reese was charged at two separate criminal actions in connection with armed robberies committed on September 30, 2007. After consolidation, the matters proceeded to a nonjury trial on March 12 and 16, 2009.[2] Mark

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[1] 42 Pa.C.S. §§ 9541-9546.

[2] At that time, Reese was to be tried for a third robbery, which had occurred on September 16, 2007. The Commonwealth requested a continuance because the victim of that crime was unable to appear for trial. The trial court denied the Commonwealth's requested continuance and granted Reese a judgment of acquittal following the close of evidence in the matter.

Lancaster, Esquire, represented Reese in the nonjury trial. The court found Reese guilty of the two September 30, 2007 robberies. This Court affirmed Reese's judgment of sentence on August 10, 2010, and on December 17, 2010, our Supreme Court denied Reese's petition for allowance of appeal.

On March 3, 2011, Reese filed a *pro se* PCRA petition. The PCRA court appointed counsel to represent Reese and, on September 9, 2011, counsel filed an amended petition. Counsel filed a second amended PCRA petition on June 18, 2012. On July 18, 2012, the Commonwealth filed a response to Reese's second amended PCRA petition, conceding that an evidentiary hearing was necessary. An evidentiary hearing took place on May 2, 2013. After consideration of the arguments by counsel and all of the evidence presented, the PCRA court dismissed Reese's petition. This timely appeal followed.

On appeal, Reese presents the following issues for our review:

> 1. Whether the PCRA court erred when it dismissed [Reese's] claim that trial counsel was ineffective for failing to subpoena and call character witnesses and eyewitnesses at trial.
>
> 2. Whether the PCRA court erred when it dismissed [Reese's] claim that his trial counsel was ineffective for consenting to the dismissal of charges at CC No. 200712070, which would have revealed that [Reese] could not have possibly committed the robbery he was charged with at CC No. 200715069 and CC No. 200715074.

Brief of Appellant, at 6.

This Court's standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by

evidence of record and is free of legal error. ***Commonwealth v. Burkett***, 5 A.3d 1260, 1267 (Pa. Super. 2010) (citations omitted). In evaluating a PCRA court's decision, our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level. ***Id*.** We may affirm a PCRA court's decision on any grounds if it is supported by the record. ***Id*.**

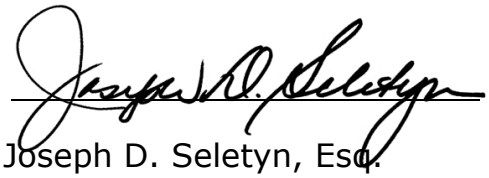
Reese's issues both raise claims of ineffectiveness of counsel. Our standard of review when faced with such claims is well settled. First, we note that counsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant. ***Commonwealth v. Thomas***, 783 A.2d 328, 332 (Pa. Super. 2001) (citation omitted). In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show, by a preponderance of the evidence, ineffective assistance of counsel 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. ***Commonwealth v. Turetsky,*** 925 A.2d 876, 880 (Pa. Super. 2007) (citation omitted). A petitioner must show: (1) that the underlying claim has merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors or omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Id*.** (citation omitted). The failure to prove any one of the three prongs results in the failure of petitioner's claim. "The threshold inquiry in ineffectiveness claims is whether the

issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1041-42 (Pa. Super. 2007), citing ***Commonwealth v. Pierce***, 645 A.2d 189, 194 (Pa. 1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Id.***, citing ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa. Super. 2004).

We have reviewed the transcripts, briefs, the relevant law and the well-reasoned opinion of Judge Todd, and find that the opinion of the trial court thoroughly, comprehensively and correctly disposes of the issues Reese raises on appeal. Specifically, the record belies both of Reese's claims in that the Court dismissed the charges against Reese stemming from the September 16 incident, *sua sponte*, and the trial court extensively reviewed counsel's testimony that the witnesses requested by Appellant had no information with regard to the September 30 robberies. Accordingly, we affirm based on Judge Todd's opinion. Counsel is directed to attach a copy of the trial court opinion in the event of further proceedings in this matter.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/20/2014

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	)	CRIMINAL DIVISION
v.	)	NO: CC200715069 CC200715074
JAMAR REESE,	)	CC200515070
Defendant.	)	

OPINION

Todd, J.

January 21, 2014

This is an appeal by Petitioner, Jamar Reese, from an order of May 8, 2013 dismissing Petitioner's PCRA after a hearing held on May 2, 2013. Petitioner filed a Notice of Appeal on June 7, 2013. On June 17, 2013 an order was entered directing Petitioner to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. §1925(b). On July 8, 2013 Petitioner filed his Concise Statement that set forth the following:

> "a. The trial court erred when it dismissed Appellant's claim that his trial counsel was ineffective for failing to subpoena and call character witnesses at trial.
>
> b. The trial court erred when it dismissed Appellant's claim that his trial counsel was ineffective for failing to subpoena and call Ms. McLenda as an eyewitness at trial.
>
> c. The trial court erred when it dismissed Appellant claim that his trial counsel was ineffective for consenting to the dismissal of the charges at CC 2007715070, which would have showed that Appellant could not have possibly committed the robbery in the above-captioned case."

BACKGROUND

This matter arises out of Petitioner's convictions related to two separate robberies that occurred on September 30, 2007. The factual background and evidence produced at trial was set forth in the 1925(b) Opinion filed in this matter which set forth the following:

> "The evidence established that at approximately 4:30 p.m. on September 30, 2007 a phone order for the delivery of food was placed with the China Sea restaurant from a home phone that was later determined to belong to Joanne Reese, Defendant's mother, at her residence at 2547 Maple Avenue on the Northside. (T., p. 46) The address given for the delivery was 2524 Maple Avenue. (T., p. 33) The delivery person, Jacyln Poremski, proceeded with the delivery but could not find the address and called the number and spoke to a man who gave her directions to the address. (T., p. 34) When she arrived she went to the front porch and knocked on the door. She then saw two men come from the side of the house. One of the men had a gun which he pointed at her and demanded her money. (T., p. 34) She gave the gunman the money in her pocket, which was only $15.00, and then told him that the rest of the money was in her car. (T., p. 35) The gunman followed her to her car while pointing the gun at her and then took her remaining money. (T., p. 35) He also demanded her cell phone, which she turned over to him. The men then fled the scene. Poremski immediately call the police from another phone that she had and identified the gunman as an African-American male, wearing a black hoodie sweatshirt, 16 to 17 years old and 5'7" to 5'8" in height. (T., p. 42)
>
> The second robbery occurred at approximately 7:30 p.m. after a call was placed to Pizza Parma for a delivery at 38 Kenwood Drive. (T., p. 12) Kenwood Drive and Maple Avenue are only a short distance apart. It was later determined that the call to Pizza Parma came from the phone that had been stolen from Poremski. (T., p. 14 & 36) The delivery person, Ala Aqra, proceeded to Kenwood Drive and upon arriving at the address saw two African-American men come from the side of the house. (T., p. 15) The men were wearing black hoodies and they approached the passenger side of the vehicle. As Aqra lowered the passenger side window and spoke to them one of the men pulled out a gun, pointed it at his head and demanded his money. (T., p. 19) Aqra was then ordered to get out of the car and as he did the gunman walked around to the driver's side where Aqra was standing, all the while pointing the gun at him. (T., p. 20) Aqra had an unobstructed view of the gunman's face which was not covered. (T., p. 21) The gunman took his money and demanded Aqra's phone, however Aqra could not locate the phone and the two men then ran from the scene. Aqra described the gunman as an African-American male in his early twenties with short hair and wearing earrings. Aqra immediately upon leaving the scene notified the police.

Based on the investigation that determined that the call to China Sea originated from the home phone of Defendant's mother, Detective Johnson developed Defendant as a possible suspect in the case. (T., p. 47) On October 1, 2007 both Poremski and Aqra separately viewed a photo array which included a photo of the Defendant. Both identified Defendant as the gunman. Both testified that they had ample opportunity to identify Defendant at the time of the robberies and identified him without hesitation from the photo array. (T., p. 24 & 38) The Commonwealth also called Detective Johnson who conducted the investigation and developed the Defendant as a suspect. (T., p. 47) Detective Johnson testified that he compiled the photo array, which contained the Defendant's photo, and presented the array to the victims, both of whom identified the Defendant immediately without any improper suggestion. (T., p. 48)

Defendant testified in his own defense and presented several witness, including three alibi witnesses. He testified that on September 30, 2007 he lived on Sandusky Street on the Northside and not at his mother's residence at 2527 Maple Avenue. (T., p. 67) Defendant testified that on the date of the robberies he went to the home of his girlfriend, La'Char Robinson, who lived on Belleau Street on the Northside in the very early afternoon to watch the Steeler football game and that he remained there all day, never leaving until approximately midnight. (T., p. 68) La'Char Robinson testified that Defendant and two other friends, John Marshall and Tyrone Williams, regularly came to her house to watch the football games during the season and that on the day of the robberies Defendant was present from early in the afternoon until late at night. (T., p. 131) John Marshall and Tyrone Williams also testified they were present at Robinson's house throughout the day watching the football game and the Defendant was present the entire day, including the times when the robberies occurred. (T., pp. 112 and 122) Marshall also testified as to Defendant's reputation in the community for honesty and truthfulness. (T., p. 120)

Defendant also called his sister, Heartnee Reese, who was 15 years old at the time, who testified that on the day of the robberies she was leaving her home on Maple Street when a friend from the neighborhood, James Bivens, approached her and asked if he could use the phone in her house to order some food. (T., pp. 90-91) When she told him that she was leaving the house, he told her he was not ordering it for there. (T., p. 91) She then allowed him to use the phone and told him to leave it in the hallway after he was done. She then left and did not see him use the phone. (T., pp. 92-93) She then identified a photograph of Bivens wearing a black hooded sweatshirt. She described Bivens as eighteen years old, five foot eight and 150 pounds. She also testified he frequently wore black hoodies. (T., p. 94)

Defendant's mother, Joanne Reese, testified that on the day of the robbery she left her house in the early afternoon to go to a Steeler football party but she could not find the house where the party was located and then returned to her home. When she arrived home, she found her home phone lying out in the hallway on the floor, which she thought unusual. She tried to call her daughter but she didn't answer and then noted that the last number dialed was a Northside number. She didn't, however, call the number. (T., p. 100) She also testified that

> when she learned that her son was arrested for the robberies, she obtained statements from various individuals in the community and tried to present them to the police and the district attorney's office but they showed no interest in them and she ultimately gave them to her son's defense counsel. (T., pp. 102-103)

In addition to the charges set forth above, Defendant was also charged at CC 200715070 with the robbery of a pizza delivery driver which occurred on September 16, 2007. The three cases were consolidated for trial. On March 12, 2009 when the cases were called for trial, the prosecutor moved for a postponement of the case at CC 200715076 stating that:

> "The Commonwealth would respectfully ask for a short postponement. The victim in this case has recently given birth to a child and has indicated to the detective that she cannot make it in today. By my calculation, there have been six defense postponements in one Commonwealth postponement." (T.,p 3)

Defendant's trial counsel, Mark Lancaster, replied that the defense postponements were "because the Commonwealth needed additional time to research the statements being made by defense witnesses" and further noting that one of the postponements was the result of Petitioner's being in jail on the case. (T.,p. 3) The Commonwealth's motion for postponement was then immediately denied. (T.,p. 3) After a brief recess the Commonwealth renewed its request for apostponement on case number CC 200715070. The prosecutor stated:

> "At this time I would renew my request for postponement on that case. The officer has indicated to me that the victim was present during prior court proceedings, but is unable to come in contact with him at this time." (T., p. 5)

The Commonwealth's motion was again denied without any response by defense counsel.

The trial proceeded on the two cases involving the robberies that occurred on September 30, 2007. At the conclusion of all of the testimony, Petitioner's counsel moved for a judgment of acquittal at CC 200715070 stating:

> "With respect to the case at 200715070, the case from which no evidence was presented, the Commonwealth's motion to postpone was denied, the cases were

> co-joined, in the absence of any evidence I move for a judgment of acquittal with respect to that case." (T.,p. 143)

The Commonwealth made no argument in response and the motion was granted. Defendant was found guilty of both the September 30 robberies. The Judgment of Sentence was affirmed by the Superior Court on August 10, 2010 and on December 17, 2010 the Supreme Court denied Petitioner's Petition for Allowance of Appeal.

On March 3, 2011, Petitioner filed a pro se PCRA . On March 29, 2011 counsel was appointed to represent Petitioner and on September 9, 2011 counsel filed an Amended PCRA Petition. On October 11, 2011, the Commonwealth filed its Answer to the Amended Post -- Conviction Relief Act Petition. On December 19, 2011, a Notice of Intent to Dismiss without a Hearing was filed. On January 12, 2012, Petitioner filed a pro se response to the Notice of Intention to Dismiss. On January 18, 2012 an order was entered directing the Commonwealth to respond to Petitioner's pro se response. On February 28, 2012, the Commonwealth filed a "Motion to Clarify or Grazier Hearing." On March 7, 2012 an order was entered directing counsel to file second amended PCRA petition.

In his second amended PCRA petition, Petitioner alleged that trial counsel was ineffective for failing to subpoena and call eyewitnesses to the crime to testify on Petitioner's behalf. Specifically, petitioner alleged that Petitioner's mother, Joanne Reese

> " provided letters and clearly articulated to the Commonwealth, Police, and defense counsel that there were eyewitnesses to the robberies in question, namely Jeanae McLenda (sic) and Ra'Onda Gilmore, who were willing and available to testify at any hearing, and requested subpoenas for the witnesses on four (4) separate occasions. (T.T. 102-04) (Copies of the letters are attached hereto as Appendix B). The testimony of these witnesses would have provided evidence that Petitioner was not the gunman, the names of the actual perpetrators, and corroborated the testimony of witnesses Heartnee and Jamar." (Second Amended PCRA Petition, p. 9)

Petitioner also asserted that trial counsel was ineffective,

> ". . . when he failed to consent to the Commonwealth's oral Motion for Continuance based on the unavailability of the victim, who recently gave birth. Counsel's failure to consent resulted in the dismissal of CC 200715070, which prohibited the admission of evidence proving that Petitioner did not commit that crime; and therefore, could not have committed the crimes in the remaining two (2) cases" (Second Amended PCRA Petition, p. 11)

In support of his allegations, Petitioner appended written statements from Jeanae McLendon and Raonda Gilmore. In their written statements McClendon and Gilmore, referring to events on September 16, 2007, indicated that they were with a group of individuals who ordered the delivery of pizza to a house on Sheldon Street on the North Side of Pittsburgh. Their statements further indicated that when the delivery person arrived two of the men with them, "Mike" and "Markey" robbed the pizza delivery driver at gunpoint. (Appendix "B" Second Amended PCRA Petition) Their statements make no reference to any knowledge or information concerning the robberies of September 30, 2007.

On July 18, 2012 the Commonwealth filed a response to the PCRA petition conceding that an evidentiary hearing was necessary and further requesting a certification regarding the witnesses pursuant to 42 Pa.C.S.A. §9545(d). Petitioner subsequently filed an appropriate witness certification on November 2, 2012. On January 18, 2013 an order was entered scheduling an evidentiary hearing on February 28, 2013.[1] On March 21, 2013 the Commonwealth filed a Motion To Dismiss PCRA Petition For Lack of Jurisdiction alleging that Petitioner was claiming ineffectiveness of counsel related to the action at CC 200715070 and, as that action had been dismissed and Petitioner was not serving a sentence of imprisonment

[1] The evidentiary hearing was delayed until May 2, 2013 due to the unavailability of trial counsel who had been suspended from the practice of law in Pennsylvania for one year pursuant to an order of the Supreme Court of November 22, 2011. Trial counsel suspension was unrelated to his representation of Petitioner. At the time of the PCRA hearing, counsel testified via telephone from Grand Junction, Colorado. (H.T., p. 34)

probation or parole for that crime, he was not eligible for relief under the PCRA and the Court lacked jurisdiction to entertain the petition.

At the PCRA hearing Petitioner called Jeanae McLendon who testified that on September 16, 2007 she was at a park on Charles Street on the North Side of Pittsburgh with some friends and acquaintances when they decided to order pizza. McLendon called and requested deliver to a home at a nearby address, not her home address, so she and her friends could then walk back to the park and eat the food. (H. T., p. 7) McLendon testified that they ordered the pizza from Mandy's pizza and then waited near the address she had given for the delivery of the food. After waiting approximately 30 to 40 minutes a male driver arrived and McLendon approached the driver and paid for the pizza when two of the men who in the group she was with, "Markie" and "Mike", suddenly approached her "took the pizza off of me and took the money off him and had guns drawn." (H. T., p. 10) McLendon testified that she did not know Markie and Mike's last names as "They didn't grow up with us." (H.T., p. 7) She described "Mike" as an African-American teenager approximately 5'10" or 5'11" tall. She could not approximate his weight and could only describe him as having low-cut hair with no distinguishing facial features or tattoos. (H.T., p. 11) McLendon testified that "Markie" was an African-American who was "skinny and a little shorter than Mike." (H.T., p. 12) McLendon testified that when Mike pulled out the gun he pointed it at her and took the food and robbed the driver. (H.T., p. 12) She testified that she then heard gunshots and ran with the other girls. McLendon testified that she was questioned by police and repeatedly denied any involvement in the robbery. (H.T., p. 13) McLendon testified that Petitioner, who was friends with her older brother, had no involvement with the robbery of the pizza delivery driver on September 16, 2007. (H.T., pp. 6, 13) McLendon also identified her statement which had been appended to the amended PCRA petition. McLendon also testified

that she spoke with Petitioner's trial counsel about testifying and appeared on "several occasions" but was never called to testify. (H.T. p. 17) McClendon acknowledged, however, that she was present in the courtroom when the case involving the robbery of September 16 was dismissed. (H.T., p. 18)

Petitioner then called his mother, Joanne Reese, who testified that she provided information to trial counsel concerning potential witnesses. Mrs. Reese testified as follows:

> Q. Did you bring any information to him about potential witnesses?
> A. Yes. Well, I had told Mark that – – I had told Mark that these kids had been doing this. And I know and went out and I took out a petition to people that know me and know my son?
> Q. Who is "these kids"?
> A. *Jeanae, Raonda, Mercedes, Mike, Markie. There is like 10 of them altogether. They've been doing robberies all summer long. That is what they do.*
> Q. Okay.
> A I went out and I knew people that knew me that know my son, and I got a petition and ask them if they read it and acknowledge it and if they would sign it and willing to come into testify to the fact that they know my son would never do nothing like that.
> Q. To testify as a character witness?
> A. Right. (H.T., pp. 20-21). (Emphasis added)

Mrs. Reese then identified the petition listing the names of persons willing to testify as character witnesses for her son and indicated the trial counsel failed to call any of them. (H. T., p. 23)

Petitioner then testified that he discussed potential witnesses with trial counsel including Jeanae McLendon, Raonda Gilmore and his mother. Petitioner testified that McLendon was not called because trial counsel told him that the "case got thrown out, she would not be able to take the stand." (H.T., p. 25) Petitioner alleged that when the Commonwealth moved for the postponement of the case based on the failure of the victim to appear because she had recently had a baby, this was an error because the victim in the case was, in fact, a male. Petitioner testified that when this was brought to counsel's attention, counsel stated: "Oh. Well, I made a

mistake. That is just at least one of them got thrown out." (H.T., p. 25) Petitioner indicated that he then told trial counsel "Mark, we needed that case to show the motive of all these little boys that was doing everything." (H. T., p. 25) Petitioner asserted that he wanted McLendon to testify with respect to what she saw on September 16 and that when the District Attorney said that the female victim could not appear because she had just given birth, trial counsel "took it upon himself to ask for an acquittal thinking that was the one on September 30 and not on the 16th." (H. T.,p 26) Petitioner contended that had trial counsel given him the correct information he would've objected to the dismissal of the case involving the robbery on the 16th asserting:

> "Because, like, the whole thing was to show them the motive (sic) operandi on all three of the cases. There saying I did all three of them. Then I need this one to show I didn't do the other two. The one on the 16th to show I didn't do the other two." (H. T., p. 27)

On cross examination Petitioner acknowledged that in his petitions and trial testimony he asserted that the actual perpetrator of the robberies was a man by the name of James Bivens and that McLendon testified that it was two men named Mike and Markie. (H. T., p. 29) Petitioner testified, "They are all friends. They part of like a gang called Tray (phonetic) They all young boys. They all around that area. They all hang together. (H.T. p. 33)

Petitioner also called, trial counsel, Mark Lancaster who testified via telephone. Mr. Lancaster testified that he was privately retained to represent Petitioner, that he met with him approximately a half dozen times prior to trial and that a number of witnesses had been brought to his attention. (H.T., pp.35-36) Mr. Lancaster testified that he was aware of Jeanae McLendon as a potential witness and that he spoke to her before trial and subpoenaed her to attend trial. Mr. Lancaster testified that, "Mr. Wholey was the prosecutor. Mr. Reese was facing three charges. On one, he didn't have his witnesses and that case was dismissed." (H.T., p. 37)

Mr. Lancaster testified that prior to the dismissal of the case he was aware that McLendon was the eyewitness for the case that was being dismissed and that he did not plan on calling her to testify on any of the other cases as "She had no information with respect to the other two cases." (H.T., p. 38) Mr. Lancaster testified that he and Petitioner were unaware until the day of trial that the victim from the September 16 robbery would not appear and that, while he believed that he spoke to Petitioner about the case being dismissed prior to its dismissal, he could not be sure. (H.T., p. 39)

Mr. Lancaster further testified that he believed that there were alibi witnesses who were "honest and forthright and would clear his name." (H. T., p. 38) He testified that he did not believe that McLendon was necessary as a witness in the remaining cases. Finally, Mr. Lancaster testified that he could not recall, without reviewing the trial transcripts, whether or not there were potential character witnesses that he failed to call at the time of trial. (H. T., p. 39) After consideration of the arguments by counsel and consideration of all the evidence the PCRA petition was dismissed. This timely appeal followed.

DISCUSSION

Initially, the Commonwealth's Motion to Dismiss for Lack of Jurisdiction must be considered. The Commonwealth alleges that Petitioner's claims of ineffectivenss relate to trial counsel's conduct at case CC200715074 which was dismissed. Further, the Commonwealth argues that since the post conviction statute, §9543(a)(1)(i), requires that a petitioner must be currently serving a sentence of imprisonment, probation or parole for the crime in order to be eligible for relief, the instant petition must be dismissed. The Commonwealth refers to *Commonwealth v. Ahlborn*, 699 A.2d 718 (Pa. 1997) for the proposition that if a petitioner is not

currently serving a sentence for the challenged crime the denial of relief is required regardless of an collateral consequences to the petitioner. In *Ahlborn*, the Court held that the dismissal of the petitioner's PCRA petition was appropriate where the petitioner had completed his sentence despite the fact that the petitioner argued that he might still suffer collateral consequences such as his driver's license suspension or the possibility of future sentencing or recidivist enhancements. However, in the instant case, Petitioner is still serving a sentence of imprisonment and is not claiming only collateral consequences. In addition, Petitioner asserts that counsel's conduct was ineffective as it pertained to one of three cases that were joined for trial and that counsel's conduct prejudiced him in relation to the cases in which he was convicted and for which he is currently incarcerated. Therefore, the Commonwealth's Motion to Dismiss for Lack of Jurisdiction is without merit.

In order for a petitioner to be entitled to relief on the basis that trial counsel was ineffective, a petitioner must show by a preponderance of the evidence ineffective assistance of counsel 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. *Commonwealth v. Brady*, 741 A.2d. 758, 763 (Pa. Super. 1999) This standard requires a petitioner to show: (1) that the claim is of arguable merit; (2) that counsel had no reasonable, objective basis for his actions; and (3) that, but for the errors or omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different, that is, that the petitioner was prejudiced by the alleged ineffectiveness of counsel. *Commonwealth v. Kimball*, 724 A.2d 326, 333 (1999). Counsel is presumed to be effective, however, and the burden rests with the petitioner to overcome that presumption. *Commonwealth v. Pierce*, 527 A.2d 973, 975 (1987), *Commonwealth v. Pirela*, 580 A.2d 848, 850 (1990), *appeal denied*, 594

A.2d 658 (1991). If a petitioner fails to meet any one of these three prongs, relief should not be granted. *Commonwealth v. Wells*, 578 A.2d 27, 32 (Pa. Super. 1990)

In the instant case, Petitioner has failed to meet his burden of establishing that counsel was ineffective. Petitioner's contention that trial counsel was ineffective in failing to either object to the dismissal of the September 16 charges or in consenting to their dismissal is misplaced because the dismissal of the September 16 charges was going to occur regardless of Petitioner's position. The Commonwealth represented that the victim necessary to prosecute the case was not going to be available, whether that victim was a male or female, or the reason for his or her unavailability. A review of the record indicates that the Court did not elicit Petitioner's position on the matter and immediately denied the Commonwealth's motion for a continuance based on the fact that the victims and several witnesses, both prosecution and defense, were present and ready to proceed on the other cases. Consequently, in the absence of any testimony being presented to prosecute the September 16 charges, the Motion for Judgment of Acquittal at the close of all of the evidence pursuant to Pa.R.Crim.P. 606 (A)(2) was a formality.

In addition, even assuming that the Commonwealth's request for a postponement of the September 16 case was either consented to or not opposed by trial counsel, it is absolutely clear that counsel would have had a reasonable basis and strategy for doing so. In fact, there would be no reasonable basis to object to the Court's denial of the postponement. The denial of the Commonwealth's request for a postponement relieved Petitioner of criminal liability on the robbery charge of September 16. Petitioner's claim is that counsel's ineffectiveness precluded the introduction of evidence that he did not carry out the September 16 robbery, however, this claim assumes that McLendon's testimony would be found credible at trial **and** sufficient to counter any potential identification of Petitioner if the victim of that crime testified.

Interestingly, Petitioner's mother included McLendon as one of the perpetrators of the September 16 robbery stating, "*Jeanae, Raonda, Mercedes, Mike Markie.* There is like ten of them all together. *They've been doing robberies all summer long.* That is what they do." (H.T., p. 20) In addition, contrary to McLendon's assertion that the two men robbed the pizza delivery driver without warning, the statement from Raonda Gilmore, appended to the PCRA Petition, stated that "*About five minutes before the food came* me and Mercedes started walking down the street cause (sic) *we really didn't want to be involved in the robbery.*" (Second Amended PCRA Petition, Appendix "B") Consequently, if testimony of this nature were elicited at trial, McLendon's overall credibility would certainly be called into question. Clearly counsel had prepared by interviewing McLendon and subpoenaing her for trial as she acknowledged that she was present in the courtroom when the case was dismissed. However, unlike the charges related to the September 30 robberies, Petitioner apparently had no alibi witnesses for the September 16 robbery similar to those who testified on his behalf at trial. Therefore, faced with the option of proceeding to trial and relying on McLendon's testimony to clear Petitioner or objecting to the denial of the motion to postpone, which would lead to the termination of the prosecution, trial counsel's only reasonable strategy would be to object to the postponement. Indeed, if counsel had consented to the postponement and the victim later appeared and Petitioner was convicted of the September 16 robbery, despite McLendon's testimony, a clear claim of ineffectiveness of counsel could be asserted for having failed to take the opportunity to have the prosecution terminated. In addition, Mr. Lancaster testified that he determined, appropriately, that McLendon had no information concerning the September 30 robberies and there was no reason to call her as a witness at the trial of the September 30 robberies. In fact, McLendon's testimony would be irrelevant to the September 30 robberies and an objection on the basis of relevancy

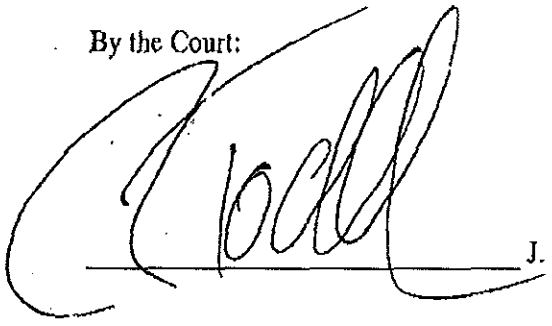
would have been sustained. Mr. Lancaster testified that his strategy involved relying on the testimony of Petitioner, his mother, sister and the various alibi and character witnesses. This was an appropriate strategy under the circumstances. The mere fact that this trial strategy ultimately proved unsuccessful does not render it unreasonable. *Commonwealth v. Rizzuto*, 566 Pa. 40, 777 A.2d 1069, 1085 (2001).

Petitioner asserts that the Commonwealth's strategy was "guilty in one, guilty in all." While it is clear that the Commonwealth alleged that Petitioner was guilty of all three offenses, there was no requirement that Petitioner be found guilty of all three offenses. The fact that some doubt could have been raised about Petitioner's role in any one of the robberies would not preclude him from being found guilty in one or more of the other robberies. Therefore, there was no error in failing to call McLendon to testify concerning a case for which Petitioner was not on trial. The crime alleged, the robbery of a fast food delivery driver, is neither unique nor rare. In addition, as noted at the time of the entry of the verdict in this case, the two victims who testified were very emphatic and had no hesitation in their identification of Petitioner. Based on a review of the entire record in this case, trial counsel was not ineffective related to the Commonwealth's request for a postponement or in making a motion for judgment of acquittal or in failing to present McLendon's testimony.

Petitioner also claims that counsel was ineffective in failing to call a number of character witnesses who were identified by Petitioner prior to trial. The trial record reflects, however, that character testimony was presented through John Marshall. Mr. Marshall, in addition to being an alibi witness, testified that he was best friends with Petitioner for approximately ten years and that he knew of Petitioner's reputation for truthfulness and honesty. (T., p. 120) Consequently, counsel did present character testimony and other character witnesses would have been

cumulative. A defendant is not prejudiced by the failure of counsel to present merely cumulative evidence . *Commonwealth v. Spotz*, 896 A.2d 1191, 1229 (2006) In addition, given the nature of the identification testimony as discussed above and the fact that specific alibi witnesses were not found credible, there is no reasonable probability that the outcome of the trial would have been different based on additional character witnesses. Therefore, Petitioner has failed to establish any prejudice by any alleged failure to present additional character witnesses. *Commonwealth v. Kimball*, 724 A.2d 326, 333 (1999). There being no other meritorious claims, Petitioner's PCRA petition was appropriately dismissed.

By the Court:



J.