NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN RUSSELL FIELD, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 560 MDA 2013

Appeal from the PCRA Order March 8, 2013
in the Court of Common Pleas of Lebanon County
Criminal Division at No.: CP-38-CR-0001515-2007

BEFORE: PANELLA, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED APRIL 15, 2014**

Appellant, John Russell Field, appeals *pro se* from the amended order of March 8, 2013,[1] dismissing his first petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm the order of the PCRA court in part and remand in part.[2]

On July 10, 2008, a jury found Appellant guilty of rape, two counts of indecent assault, sexual assault, and selling or furnishing liquor or malt or brewed beverages to minors. On November 5, 2008, the court sentenced

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* Retired Senior Judge assigned to the Superior Court.

[1] Although dated March 7, 2013, a review of the docket indicates that the order on appeal was filed on March 8, 2013. We have changed the caption accordingly.

[2] Our previous order, remanding this case for a ***Grazier*** hearing, has been withdrawn, for the reasons explained in this memorandum.

him to not less than five nor more than ten years' incarceration on the rape charge and not less than three months nor more than two years' incarceration on the indecent assault charge, to be served concurrently with the rape charge, plus fines.[3] The court further ordered that this sentence be served consecutively to his sentence for another conviction at Docket No. CP-38-CR-1516-2007. (***See*** N.T. Sentencing, 11/05/08, at 13-14). Appellant filed a post-sentence motion, which the trial court denied on March 9, 2009. This Court affirmed the judgment of sentence on June 15, 2010. (***See Commonwealth v. Field***, 4 A.3d 686 (Pa. Super. 2010) (unpublished memorandum)). Appellant did not seek review in our Supreme Court.

On February 28, 2011, Appellant timely filed a *pro se* first PCRA petition. The PCRA court appointed counsel and held a hearing on February 2, 2012. Subsequently, Appellant filed a petition for waiver of counsel on June 15, 2012, and the PCRA court filed a rule to show cause why the petition should not be granted on June 18, 2012. The Commonwealth did not oppose, and counsel did not respond. On February 25, 2013, the PCRA court entered an order and opinion concluding that Appellant was not entitled to post-conviction relief. On March 8, 2013, the PCRA court filed an amended order denying Appellant's PCRA petition. Appellant filed a *pro se*

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[3] Although the sentencing transcript is dated October 29, 2010, a review of the docket indicates that the sentencing hearing took place on November 5, 2008.

motion for reconsideration, which the PCRA court denied. Appellant timely appealed *pro se* on March 27, 2013.[4] On June 25, 2013, this Court received the PCRA court record and opinion, and a review of the certified docket indicates that the last entry was made on May 21, 2013. No supplemental record was issued at that time.

On February 11, 2014, this Court remanded to the PCRA court to conduct a ***Grazier*** hearing[5] within thirty days to determine if Appellant had knowingly, intelligently, and voluntarily waived his right to counsel. ***See Commonwealth v. Stossel***, 17 A.3d 1286, 1289-90 (Pa. Super. 2011) ("[W]hen a first-time petitioner indicates in his *pro se* petition that he does not wish to be represented by an attorney, the PCRA court must still conduct a ***Grazier*** hearing, eliciting information in accordance with Rule 121 and [***Commonwealth v.***] ***Robinson***, [970 A.2d 455, 456 (Pa. Super. 2009),] before permitting the petitioner to proceed *pro se*.").

On February 26, 2014, this Court received a letter from Appellant, dated February 14, 2014. The letter directed our attention to a ***Grazier*** hearing apparently held by the PCRA court via video conference on July 18, 2013. (***See*** Application for Reconsideration, 2/26/14, at Exhibit 1 (***Grazier***

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[4] Pursuant to the PCRA court's order, Appellant filed a Rule 1925(b) statement on April 18, 2013. The court adopted its March 7, 2013 opinion by reference on April 19, 2013. ***See*** Pa.R.A.P. 1925.

[5] ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998).

Hearing Order)). We directed the PCRA court to provide a supplemental record, which we received on March 17, 2014. On review of the supplemental record, it confirmed Appellant's contention that, after he appealed to this Court, the PCRA court did, in fact, conduct a ***Grazier*** hearing on July 18, 2013, and issued an order on July 19, 2013 that Appellant "freely, knowingly, intelligently and voluntarily waived his right to counsel[.]" (Order, 7/19/13, at 2).[6]

As a general matter, the trial court many not proceed further in a case after an appeal is taken. ***See*** Pa.R.A.P. 1701. Here, although it had been divested of its jurisdiction to proceed in the underlying matter, the PCRA court satisfied the requirements under ***Grazier*** to determine that Appellant had knowingly, intelligently, and voluntarily waived his right to counsel. Therefore, "in the interests of justice and to promote judicial economy an appellate court may 'regard as done that which ought to have been done' and proceed in the matter." ***Grossi v. Travelers Personal Ins. Co.***, 79 A.3d 1141, 1145 (Pa. Super. 2013). Thus, we will proceed to a review of the merits of Appellant's petition.

Appellant raises five claims in two questions for our review:

1. Ineffective Assistance of Counsel

   A. Did the PCRA [c]ourt erred [sic] when it failed to find Trial Counsel ineffective for failing to present three

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[6] We have also vacated our previous remand order because the PCRA court's ***Grazier*** hearing renders it moot.

character witnesses, as requested by Appellant, who were available, present, and willing to testify?

B. Did the PCRA [c]ourt erred [sic] when it failed to find Trial Counsel ineffective for failing to file a pre-trial motion to dismiss Counts V through XI when the two-year Statute of Limitations for those misdemeanor charges had expired?

C. Did the PCRA [c]ourt erred [sic] for failing to find Trial Counsel ineffective for his failure to file a Motion *In-Limine* or object at trial to the introduction and admission of a novelty sex-toy (fuzzy, leopard print handcuffs) which had no relevance and was highly prejudicial?

D. Was the PCRA [c]ourt at fault when it failed to find Trial Counsel ineffective for failing to file a Motion *In-Limine* or object at trial to the introduction and admission of a photagrapgh [sic] of a second sex-toy (red plastic handcuffs) which had no probative value and was extremely prejudicial?

2. Time Credit

Did the PCRA [c]ourt erred [sic] when it failed to find the Trial Court at fault for failing to give Appellant 33 days of pre-trial confinement?

(Appellant's Brief, at 4).

Our standard of review is well-settled: "When reviewing the denial of post-conviction relief, this Court is limited to examining whether the [PCRA] court's determination is supported by the evidence of record and whether it is free of legal error." ***Commonwealth v. Rivera***, 816 A.2d 282, 287 (Pa. Super. 2003), *appeal denied*, 828 A.2d 350 (Pa. 2003) (citation and quotation marks omitted).

In his first question, Appellant raises four allegations of ineffective assistance of trial counsel. (***See*** Appellant's Brief, at 13-26).

> Generally, this Court follows the ***Pierce***[7] test adopted by our Supreme Court to review an appellant's claim of ineffective assistance of counsel:
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> > [T]he petitioner must show: (1) that his claim of counsel's ineffectiveness has merit; (2) that counsel had no reasonable strategic basis for his action or inaction; and (3) that the error of counsel prejudiced the petitioner—*i.e.*, that there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. We presume that counsel is effective, and it is the burden of Appellant to show otherwise.

Commonwealth v. Allen, 48 A.3d 1283, 1285-86 (Pa. Super. 2012) (citations omitted). "A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs." ***Commonwealth v. Busanet***, 54 A.3d 35, 45 (Pa. 2012), *cert. denied*, 13 S. Ct. 178 (2013). Furthermore, "[i]n accord with these well-established criteria for review, [an appellant] must set forth and individually discuss substantively each prong of the [***Pierce***] test." ***Commonwealth v. Fitzgerald***, 979 A.2d 908, 910 (Pa. Super. 2009), *appeal denied*, 990 A.2d 727 (Pa. 2010) (citation omitted).

In his first sub-issue, Appellant argues that trial counsel was ineffective "for failing to call three character witnesses, as requested by Appellant, who were available, present, and willing to testify." (Appellant's Brief, at 13). We disagree.

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[7] ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987).

> Where a[n appellant] claims that counsel was ineffective for failing to call a particular witness, we require proof of that witness's availability to testify, as well an adequate assertion that the substance of the purported testimony would make a difference in the case. With respect to such claims, our Court has explained that:
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> > the [appellant] must show: (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the witness or should have known of the witness's existence; (4) that the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) that the absence of the testimony prejudiced appellant.
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> Thus, trial counsel will not be found ineffective for failing to investigate or call a witness unless there is some showing by the appellant that the witness's testimony would have been helpful to the defense. A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy.

Commonwealth v. Michaud, 70 A.3d 862, 867-68 (Pa. Super. 2013) (citations and quotation marks omitted). However,

> Failure to present available character witnesses may constitute ineffective assistance of counsel. Our Court has stated: It has long been the law in Pennsylvania that an individual on trial for an offense against the criminal law is permitted to introduce evidence of his good reputation in any respect which has "proper relation to the subject matter" of the charge at issue. Evidence of good character is to be regarded as evidence of substantive fact just as any other evidence tending to establish innocence and may be considered by the jury in connection with all the evidence presented in the case on the general issue of guilt or innocence. Evidence of good character offered by a defendant in a criminal prosecution must be limited to his general reputation for the particular trait or traits of character involved in the commission of the crime charged. In a case where the crime charged is one of violence, evidence of reputation for non-violent behavior is admissible.
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> Furthermore, in a case where there are only two direct witnesses involved, credibility of the witnesses is of paramount

> importance, and character evidence is critical to the jury's determination of credibility. Evidence of good character is substantive, not mere makeweight evidence, and may, in and of itself, create a reasonable doubt of guilt and, thus, require a verdict of not guilty.

Commonwealth v. Harris, 785 A.2d 998, 1000 (Pa. Super. 2001), *appeal denied*, 847 A.2d 1279 (Pa. 2004) (citations and most quotation marks omitted).

Here, Appellant claims ineffective assistance for failure to call his mother, Judith Springer, his sister, Crystal Simmons, and his friend, Jordonna Martin, as character witnesses after he indicated that they were available and willing to testify regarding his "non-violent demeanor, and his trait for truthfulness." (Appellant's Brief, at 14 (record citation omitted)). Appellant was convicted of rape and sexual assault, crimes of violence. Therefore, testimony regarding his non-violent character was relevant. ***See Harris***, ***supra*** at 1001. Furthermore, there were only two direct witnesses involved: Appellant and the victim. Accordingly, character testimony regarding Appellant's reputation for truthfulness was also relevant as it concerns credibility. ***See id.*** Thus, Appellant's claim of ineffective assistance of counsel is of arguable merit, and we turn to a discussion of whether there was any reasonable basis for trial counsel's failure to present these witnesses. ***See Allen***, ***supra*** at 1285-86.

> [A] decision by counsel not to take a particular action does not constitute ineffective assistance if that decision was reasonably based, and was not the result of sloth or ignorance of available alternatives. The decision not to present a particular defense is a tactical one and will not

> be deemed ineffective stewardship if there is a reasonable basis for that position.
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> Thus, it is well settled that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . .

Commonwealth v. Jones, 636 A.2d 1184, 1189 (Pa. Super. 1994), *appeal denied*, 668 A.2d 1125 (Pa. 1995) (citations and quotation marks omitted).

Here, as noted by the PCRA court, trial counsel testified at the PCRA hearing that he chose not to call Judith Springer and Crystal Simmons because he "did not perceive that calling family members as character witnesses was valuable in terms of the overall defense." (PCRA Court Opinion, 2/25/13, at 9 (citing N.T. PCRA Hearing, 2/02/12, at 49)). In addition, he stated that, after speaking with Jordonna Martin, "it was [his] opinion that she would not meet the threshold foundation to offer character testimony." (N.T. PCRA Hearing, 2/02/12, at 49).

Furthermore, trial counsel stated that he did not call character witnesses, first, because he was concerned that it would open the door to evidence of pending charges against Appellant in Dauphin County with similar fact patterns. (***Id.*** at 50-51). Second, counsel believed that testimony about Appellant's law-abiding character would contradict Appellant's consent defense, in which he conceded that he provided alcohol to the underage eighteen-year-old victim who he claimed consented to have sex with him. (***Id.*** at 51-52). Thus, trial counsel explored the utility of these potential character witnesses and determined, "after thorough investigation of law and facts relevant to plausible options," ***Jones***, ***supra*** at

1189, that the tactical decision not to call them would assist Appellant's trial strategy. Accordingly, trial counsel's strategy had a reasonable basis, and the record supports the PCRA court's determination that trial counsel was not ineffective for declining to call these three witnesses. ***See Busanet***, ***supra*** at 45; ***Michaud***, ***supra*** at 867-68. This argument is without merit.

In his second sub-issue, Appellant alleges ineffective assistance of counsel "for failing to file a pre-trial motion to dismiss counts V through XI when the two-year statue [sic] of limitations for those misdemeanor charges had expired." (Appellant's Brief, at 19). We disagree.

Appellant alleges ineffective assistance of counsel for failure to seek dismissal of the misdemeanor charges against him at Counts 5 through 11 of the criminal information, which include: one count of unlawful restraint, 18 Pa.C.S.A. 2902(a)(1); three counts of indecent assault, 18 Pa.C.S.A. § 3126(a)(1), (2), and (4); one count of false imprisonment, 18 Pa.C.S.A. § 2903; one count of tampering with or fabricating physical evidence, 18 Pa.C.S.A. § 4910(1); and one count of selling or furnishing liquor or malt or brewed beverages to minors, 18 Pa.C.S.A. § 6310.1(a). (***See*** Criminal Information, 9/25/07, at 1-2).

Preliminarily, we observe that Appellant was acquitted of Counts 5, 6, 9, and 10. (***See*** N.T. Trial, 7/10/08, at 176). Accordingly, to the extent that he challenges counsel's failure to seek dismissal of charges of which he was later acquitted, he cannot prove that "the error of counsel prejudiced the petitioner—*i.e.*, that there is a reasonable probability that, but for the

error of counsel, the outcome of the proceeding would have been different." ***Allen***, ***supra*** at 1286. Therefore, Appellant's allegation of ineffective assistance of counsel as it applies to Counts 5, 6, 9, and 10 lacks merit, because he cannot prove prejudice. ***See Busanet***, ***supra*** at 45.

Next, we address the convictions at Counts 7 and 8, for indecent assault, 18 Pa.C.S.A. § 3126(a)(1) and (4); and Count 11, selling or furnishing liquor or malt or brewed beverages to minors, 18 Pa.C.S.A. § 6310.1(a). Appellant is correct that the limitation period for these charges had expired when prosecution commenced.[8] He asserts that, had trial counsel filed a motion to dismiss, it would have been granted. (***See*** Appellant's Brief, at 19). Section 5552 provides, in relevant part: "Except as otherwise provided in this subchapter, a prosecution for an offense must be commenced within two years after it is committed." 42 Pa.C.S.A. § 5552(a). The incident at issue occurred on May 1 and 2, 2004, and the criminal complaint was filed against Appellant on June 6, 2007, more than three years later. Therefore, Appellant's allegation has underlying merit, and we

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[8] The PCRA court erroneously states that the indecent assault counts fell under an exception to the statute of limitations for "[a]ny sexual offense committed against a minor who is less than 18 years of age[.]" 42 Pa.C.S.A. § 5552(c)(3); (***see also*** PCRA Ct. Op., at 13-14). However, the victim was eighteen years old at the time of the incident, and thus this exception does not apply. (***See Commonwealth v. Field***, No. 555 MDA 2009, unpublished memorandum at *2 (Pa. Super. 2010)). Nonetheless, we may affirm the determinations of the PCRA court on any basis. ***See Commonwealth v. McCulligan***, 905 A.2d 983, 988 (Pa. Super. 2006), *appeal denied*, 918 A.2d 743 (Pa. 2007).

turn to a discussion of whether trial counsel had a reasonable basis for his failure to file a motion to dismiss. ***See Allen***, ***supra*** at 1285-86.

At the PCRA hearing, trial counsel testified:

> A. Well, the overall plan would be to, you know, in a rape case it's either he didn't do it or it was consensual. And, ultimately, after [Appellant] reviewed the discovery and looked at the evidence, he said it was me and it was consensual. . . .
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> So, the game plan would be to push, push for a consent resolution and try to suggest to the jury that the rape charge was made up . . . .
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> * * *
>
> Q. Was there some hope on your part too that the very worst case scenario you could get some sort of split verdict?
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> A. Well, split—I know [Appellant] had an issue earlier in this Petition with the furnishing argument, but he had—but to my way of thinking, it's better to give the furnishing up, which is a misdemeanor, than deal with the rape. And so, yeah, the misdemeanor I never really looked at from the standpoint of Statute—the Statute of Limitations.
>
> If there is an issue as to that, you know, I own that. I am responsible for it. But I know, you know, I never really focused on that because if you wanted a compromised verdict, which many juries ultimately give, I didn't want all or nothing because the facts really didn't make that out.
>
> Q. So looking at potential for a compromised or split verdict, the furnishing alcohol to minors could have been very helpful for you?
>
> A. Yes. In fact, I conceded that, I believe.
>
> Q. And I believe you had indicated that in your experience that's something that's worked in many—in many cases for the jury to issue a compromised verdict and you concede and they acquit on others?
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> A. I don't recall my closing, but I may have. I don't remember if he was charged with corruption, but you know, I

> may have even conceded that if she was underage. So, you know, to the degree that, you know, in this community if you looked to try to focus on something as a compromise I think that's a much more legitimate thing for a jury to latch on to [than] to say he comes here with absolutely no responsibility.
>
> Q. And these things that you were talking about, are these things would you have shared and expressed with [Appellant]?
>
> A. I believe so.

(N.T. PCRA Hearing, 2/02/12, at 54-57). Thus, trial counsel reasoned that, based on his experience, it would benefit Appellant's consent defense to have lesser charges which could result in a split verdict. Accordingly, trial counsel's strategy had a reasonable basis, and the record supports the PCRA court's determination that trial counsel was not ineffective for failing to seek dismissal of Counts 7, 8, and 11. ***See Busanet***, ***supra*** at 45; ***Michaud***, ***supra*** at 867-68. This argument is without merit.

Appellant argues in his third sub-issue that trial counsel was ineffective "for his failure to file [a] motion *in-limine* or object at trial to the introduction and admission of a novelty sex-toy (fuzzy leopard-print handcuffs) which had no relevance and was highly prejudicial." (Appellant's Brief, at 21). We disagree.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Pa.R.E. 401. "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402.

"Whether relevant evidence is unduly prejudicial is a function in part of the degree to which it is necessary to prove the case of the opposing party." ***Commonwealth v. Selenski***, 18 A.3d 1229, 1233 (Pa. Super. 2011) (citation omitted). It is well-settled that witness credibility is of "critical importance" in rape cases, as is evidence affecting the credibility of that witness. ***Cf. Commonwealth v. Hanford***, 937 A.2d 1094, 1101 (Pa. Super. 2007), *appeal denied*, 956 A.2d 432 (Pa. 2008). Finally, trial counsel cannot be deemed ineffective for failure to object to "clearly admissible" evidence. ***Commonwealth v. Rivera***, 816 A.2d 282, 295 (Pa. Super. 2003), *appeal denied*, 828 A.2d 350 (Pa. 2003).

Here, the PCRA court observed:

> At trial, [the victim] had limited memory of this incident and was unable to fully describe the course of events at [Appellant's] house. She was unable to give the police the address of [Appellant's] home. When she was asked to describe [Appellant's] bedroom, she testified that she remembered seeing a set of leopard handcuffs hanging on the railing of his bed. (N.T. 7/10/08 at 46). During the search of [Appellant's] house conducted by police several years after the incident, the leopard-print handcuffs and another set of red handcuffs were found in [Appellant's] bedroom.
>
> The leopard-print handcuffs were relevant to identification of the premises where the offenses occurred and went directly to [the victim's] credibility in this regard and to her whole description of the course of events.

(PCRA Ct. Op., at 18). We agree with the PCRA court that the leopard-print handcuffs were highly probative of the victim's credibility. ***See Selenski***, ***supra*** at 1233; ***Hanford***, ***supra*** at 1101. Therefore, they were relevant

and admissible, and the PCRA court observed that "[h]ad [counsel] objected, his objection would have been overruled." (PCRA Ct. Op., at 18); ***see also*** Pa.R.E. 402. Accordingly, the PCRA court properly determined that trial counsel was not ineffective for failing to object. ***See Rivera***, ***supra*** at 295. This argument does not merit relief.

In his fourth allegation of ineffective assistance, Appellant similarly argues that trial counsel was ineffective "for failing to file [a] motion *in-limine* or object at trial to [the] introduction and admission of a photograph of a second, novelty sex-toy (red plastic handcuffs), which had no probative value and was highly prejudicial." (Appellant's Brief, at 26). We disagree.

> Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact. In addition, evidence is only admissible where the probative value of the evidence outweighs its prejudicial impact. However, where the evidence is not relevant there is no need to determine whether the probative value of the evidence outweighs its prejudicial impact. Instead, once it is determined that the trial court erred in admitting the evidence, the inquiry becomes whether the appellate court is convinced beyond a reasonable doubt that such error was harmless.
>
> Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Stokes, 78 A.3d 664, 654 (Pa. Super. 2013) (citations and quotation marks omitted).

Here, Appellant challenges the admission of a photograph of red handcuffs, which he claimed were owned by his ex-wife, which were presented at trial as a fruit of the search of his home but irrelevant to the underlying incident. (***See*** Appellant's Brief, at 26). Trial counsel testified at the PCRA hearing that he did not object to the admission of the red handcuffs at trial because he did not think that there was anything about them that was "somehow outrageous or prejudicial that required [him] to object." (N.T. PCRA Hearing, 2/02/12, at 57). Furthermore, Appellant conceded that he did not say anything to trial counsel when the handcuffs were admitted at trial. (***Id.*** at 23). The PCRA court determined that:

> if any possible prejudice resulted from their admission, such prejudice was minimal. Once one set of handcuffs was admitted as relevant, any information regarding the second set was of no consequence to the defense. Had [trial counsel] objected to their admission, any discussion on the issue may well have called undue attention to the evidence and served only to increase the overall importance of the handcuffs in the minds of the jurors.

(PCRA Ct. Op., at 19). We agree that "the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence[.]" ***Stokes***, ***supra*** at 654. Therefore, failure to object to the admission of the photograph of red plastic handcuffs did not prejudice Appellant, and he cannot carry his burden of proof that the underlying claim merits relief. ***See Allen***, ***supra*** at 1285-86.

This allegation of ineffectiveness by trial counsel lacks merit. ***See Busanet***, ***supra*** at 45. Appellant's first question does not merit relief.

In his second question, Appellant argues that "the PCRA court erred when it failed to find the trial court at fault for failing to give Appellant [credit for] 33 days of pre-trial confinement." (Appellant's Brief, at 27). We agree.

> It is well-settled that if an alleged sentencing error is thought to be the result of an erroneous computation of sentence by the Bureau of Corrections, the appropriate recourse would be an original action in the Commonwealth Court challenging the Bureau's computation. However, where an appellant challenges the trial court's failure to award credit for time served prior to sentencing, the claim involves the legality of sentence.

Commonwealth v. Hollawell, 604 A.2d 723, 725 (Pa. Super. 1992) (citations and emphases omitted). "A challenge to the legality of a sentence is cognizable under the PCRA." ***Commonwealth v. Stemple***, 940 A.2d 504, 507 (Pa. Super. 2008) (citation omitted).

The Sentencing Code provides, in relevant part:

> **§ 9760. Credit for time served.**
>
> After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:
>
> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of conduct on which such a charge is based. Credit shall include credit for the time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

42 Pa.C.S.A. § 9760(1).

> The principle underlying section 9760 is that a defendant should be given credit for time spent in custody prior to sentencing for a particular offense. If a defendant . . . remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence. Where an offender is incarcerated . . . all time spent in confinement must be credited to either the new sentence or the original sentence. The Department of Corrections, an executive agency, has no power to change sentences, or to add or remove sentencing conditions, including credit for time served; this power is vested in the sentencing court.

Commonwealth v. Mann, 957 A.2d 746, 749 (Pa. Super. 2008) (citations and quotation marks omitted).

Here, Appellant argues that he never received any credit for time served for a conviction at Docket No. CP-38-CR-1516-2007 while he awaited trial in the instant case. (***See*** Appellant's Brief, at 27-28). Thus, his challenge to the failure to award credit for time served prior to trial is cognizable under the PCRA. ***See Stemple***, ***supra*** at 507.

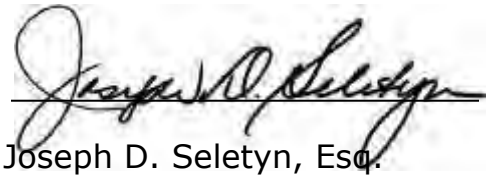
Both the PCRA court and the Commonwealth concede that Appellant "should receive credit for any time he served in this action prior to his conviction toward the sentence ultimately imposed in this action." (PCRA Ct. Op., at 27 (emphasis omitted); ***see also*** Commonwealth's Brief, at 16-17). They believe that Appellant has merely identified an error in the computation of his sentence, which raises a claim properly brought before the Commonwealth Court. (***See*** PCRA Ct. Op., at 27-28; Commonwealth's Brief, at 16-17); ***see also Hollawell***, ***supra*** at 725. However, a review of both the sentencing transcript and sentencing order reveal that the trial court

failed to award credit for time served. (***See*** N.T. Sentencing, 11/05/08, at 12-18; ***see also*** Sentencing Order, 11/05/08, at 1-2). Thus, the error lies not with the Department of Corrections, which "has no power to change sentences, or to add or remove sentencing conditions, including credit for time served," but with the sentencing court. ***Mann***, ***supra*** at 749 (citation omitted). Therefore, "the sentencing court must issue a sentencing order granting time-served." ***Id.*** at 752.

Accordingly, we vacate our previous remand order and affirm the PCRA court order to the extent that it denies Appellant's claims of ineffective assistance of trial counsel, because they lack merit. However, we are constrained to vacate the judgment of sentence and remand the case to the sentencing court for resentencing in order to award credit for time served.

Order of February 11, 2014 vacated. PCRA order affirmed in part. Judgment of sentence vacated. Case remanded for resentencing consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014