

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
JAMAL L. RICE	:	
	:	
Appellant	:	No. 1037 EDA 2022

Appeal from the PCRA Order Entered March 10, 2022
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0004185-2014

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
JAMAL L. RICE	:	
	:	
Appellant	:	No. 1038 EDA 2022

Appeal from the PCRA Order Entered March 10, 2022
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0004186-2014

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
JAMAL L. RICE	:	
	:	
Appellant	:	No. 1039 EDA 2022

Appeal from the PCRA Order Entered March 10, 2022
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0004197-2014

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

MEMORANDUM BY LAZARUS, J.:

FILED JANUARY 18, 2024

Jamal L. Rice appeals from the order,¹ entered in the Court of Common Pleas of Philadelphia County, dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546.² After careful review, we affirm in part, reverse in part, and remand for further proceedings.

This Court set out the facts of this case on a *nunc pro tunc* direct appeal as follows:

On February 14, 2014, Rice and his girlfriend, Monique Lawson, met Lawson's friend, Nashia Freeman, at a train station. All three went to Lawson's home, where they began to smoke cannabis. Rice and Lawson laced their cannabis with Phencyclidine (PCP). At some point after smoking the drugs, Freeman asked Rice to buy her cigarettes and started to hand Rice money. Rice then retrieved a firearm from his waistband and aimed it at Freeman. Lawson stepped between Rice and Freeman, begging Rice to stop. During this exchange, Freeman was able to retreat to the basement, where she hid in a crawlspace. Freeman testified that she could hear Rice and Lawson arguing upstairs, and that she heard a gunshot. She then heard Rice tell Lawson to "get up," before a second gunshot went off.

A neighbor called the police after a bullet went through his second[-]floor window and hit his bedroom wall. When police arrived at the scene, there was shattered glass on the steps and sidewalk outside Lawson's residence. When the officers asked to come inside, Rice let them in. Both Rice and Lawson claimed nothing was out of the ordinary. The officers saw Freeman flashing lights through the floorboards and calling for help.

¹ The March 10, 2022 order was issued with respect to all three docket numbers. **See** Order, 3/10/22.

² On April 27, 2022, Rice filed three timely notices of appeal, one for each of the above-captioned docket numbers, in compliance with our Supreme Court's holding in **Commonwealth v. Walker**, 185 A.3d 969 (Pa. 2018).

Freeman confirmed that Rice and Lawson had ingested PCP and informed the officers that she would not come out of hiding until Rice was disarmed. Police retrieved the gun from Rice and the matching casings on the living room floor, as well as the bullet from the neighbor's residence.

Rice was tried in a [consolidated] nonjury trial before the Honorable Timika Lane, who found him guilty of [discharging a firearm into an occupied structure, possession of an instrument of a crime (PIC), and reckless endangerment of another person (REAP) in the case docketed at CP-51-CR-0004197-2014 (4197-2014); prohibited possession of a firearm, firearms not to be carried without a license, PIC, simple assault, and REAP in the case docketed at CP-51-CR-0004185-2014 (4185-2014); and aggravated assault, PIC, simple assault, and REAP in the case docketed at CP-51-CR-0004186-2014 (4186-2014)]. On March 30, 2016, the court sentenced him to three and one[-]half to seven years of imprisonment for discharge of a firearm into an occupied structure, to run consecutively with five years of probation for [PIC] in [04197-2014]. Rice was sentenced to five to ten years [of] imprisonment for prohibited possession of a firearm, two and one[-]half to five years [of imprisonment] for firearms not to be carried without a license, and eleven and one[-]half months to twenty-three months [of imprisonment] for [PIC], to run consecutively with a sentence of one to two years [of imprisonment] for simple assault in [185-2014]. Lastly, he was sentenced to twenty years of imprisonment for the merged charges of aggravated assault and simple assault, to run consecutively with a sentence of five years of probation for [PIC] in [4186-2014].

Commonwealth v. Rice, No. 585 EDA 2017, at 1-3 (Pa. Super. filed Aug. 22, 2018) (unpublished memorandum decision).

Rice did not file a direct appeal. On January 18, 2017, Rice filed a PCRA petition alleging ineffective assistance of counsel for failure to file a timely appeal. Rice's appellate rights were reinstated, *nunc pro tunc*, and he filed a timely appeal, *nunc pro tunc*, on February 13, 2017. On appeal, Rice challenged the sufficiency and weight of the evidence for the charges of PIC

and aggravated assault. This Court affirmed, ***see id.***, and on March 13, 2019, the Supreme Court denied allowance of appeal. ***See Commonwealth v. Rice***, 204 A.3d 367 (Pa. 2019) (Table).

On March 22, 2019, Rice filed a *pro se* PCRA petition. Counsel was appointed and filed an amended PCRA petition on November 29, 2021. On February 10, 2022, the PCRA court issued a notice of intent to dismiss pursuant to Pa.R.Crim.P. 907. Rice, while still represented by counsel, filed a *pro se* response on February 25, 2022, in opposition to the notice of dismissal.³ On March 10, 2022, the PCRA court formally dismissed Rice's PCRA petition.

On March 29, 2022, Rice filed timely *pro se* notices of appeal, followed by counseled notices of appeal on April 11, 2022.⁴ Rice, through counsel, subsequently filed a timely court-ordered Pa.R.A.P. 1925(b) concise statement

³ Pennsylvania courts have long prohibited hybrid representation. ***See, e.g., Commonwealth v. Jette***, 23 A.3d 1032, 1036 (Pa. 2011). When a defendant or appellant is represented by counsel, the court will not consider *pro se* filings. ***Commonwealth v. Ali***, 10 A.3d 282, 293 (Pa. 2010).

⁴ The counseled notice of appeal was timely as the 30 days ended on a Saturday. ***See*** 1 Pa.C.S.A. § 1908 ("[w]henver the last day of any such time period shall fall on a Saturday or Sunday . . . such day shall be omitted from the computation."); Pa.R.A.P. 903 (notice of appeal to be filed within 30 days after entry of order from which appeal is taken). Moreover, the timely filing of a *pro se* notice of appeal when the defendant has counsel, while technically an improper hybrid filing, will perfect an appeal. ***See Commonwealth v. Bankhead***, 217 A.3d 1245, 1246 n.3 (Pa. Super. 2019).

of errors complained of on appeal. On January 6, 2023, Rice was appointed new counsel for the purposes of this appeal.⁵

Rice sets forth the following issues on appeal:

[1.] Did the PCRA court err in dismissing [Rice's] PCRA petition where there was after-discovered evidence regarding [Lieutenant] Marc Rutizer, while a sergeant, falsifying police department records and receiving an 8-day suspension for doing so [and where] this evidence[, had it] been introduced at trial[,] would have changed the trial's result?

[2.] Did the PCRA court err in dismissing the PCRA petition as trial counsel was ineffective for failing to preserve the sentencing issue in a motion to reconsider sentence where the trial court abused discretionary aspects of sentencing in entering an excessive consecutive in nature sentence that was much more than necessary to protect the public, rehabilitate [Rice,] and vindicate the complainants?

[3.] Did the PCRA court err in dismissing the PCRA petition as trial and direct appellate counsel were ineffective for failing to preserve and pursue the claim that the three separate convictions for [PIC] merged?

[4.] Was PCRA counsel ineffective for failing to preserve certain arguments outlined in [Rice's] initial PCRA petition, specifically, that [] trial counsel was ineffective for failing to adequately investigate witnesses and evidence prior to trial?

Appellant's Brief, at 7 (footnotes omitted) (reordered for ease of disposition).

⁵ On August 18, 2022, we remanded this consolidated appeal to the trial court for a determination as to whether counsel had abandoned Rice prior to filing a brief pursuant to our Court's briefing schedule. The trial court held a hearing and issued a response that counsel did not abandon Rice and would file a brief on Rice's behalf. We issued a new briefing schedule on September 23, 2022, and counsel again failed to file any correspondence or brief for this matter. Accordingly, on December 27, 2022, we again remanded the matter to the trial court and directed the removal of counsel and the appointment of new counsel within twenty-one days. **See** Order, 12/27/22.

The standard of review of an order denying a PCRA petition is whether that determination is supported by the evidence of record and is free of legal error. ***Commonwealth v. Johnston***, 42 A.3d 1120, 1126 (Pa. Super. 2012). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

We begin with Rice's claim that he is entitled to relief under the PCRA's after-discovered evidence provision. ***See*** 42 Pa.C.S.A. § 9543(a)(2)(vi).⁶ It is well-settled that a new trial based upon after-discovered evidence will only be granted if the evidence: (1) has been discovered after trial and could not have been obtained at or prior to trial through reasonable diligence; (2) is not cumulative; (3) is not being used solely to impeach credibility; and (4) would likely compel a different verdict. ***Commonwealth v. D'Amato***, 856 A.2d 806, 823 (Pa. 2004). ***See also Commonwealth v. Buehl***, 508 A.2d 1167, 1182-83 (Pa. 1986).

Rice argues that he is entitled to relief based on evidence that Lieutenant Marc Rutizer, a sergeant at the time of Rice's arrest, falsified police paperwork in 2001, in an unrelated matter, and was suspended from duty for eight days as a result. ***See*** Appellant's Brief, at 31. Rice states that the information was only disclosed in July of 2021 and that he subsequently amended his PCRA petition to reflect this information. ***See id; see also*** Third Amended Petition

⁶ Appellant improperly refers to 42 Pa.C.S.A. § 9545(b)(1)(ii) as the statutory basis for his after-discovered evidence claim. ***See Commonwealth v. Burton***, 158 A.3d 618, 628-29 (Pa. 2017) (differentiating after-discovered evidence and newly-discovered fact(s) for the purposes of the PCRA).

Under the Post-Conviction Relief Act, 11/29/21, at ¶ 2E. Rice further argues that this information is not cumulative because it was not addressed at trial, **see generally** N.T. Trial, 12/4/15, and it is not being used solely to impeach because it would have allowed Rice to attack the veracity of the police paperwork in his case. **See** Appellant's Brief, at 31-32. Rice suggests that this evidence would have changed the outcome of his trial had the factfinder been aware of Lt. Rutizer's misconduct and the potential that the paperwork pertaining to Rice's case was falsified. **Id.**

The PCRA court, in its Rule 1925(a) opinion, found that Rice's claim failed to satisfy the after-discovered evidence test, because he failed to prove how this information would have changed the outcome of the trial. **See** Pa.R.Crim.P. 907 Notice, 2/10/22. We agree with the PCRA court's analysis.

A review of the record reveals that police officers Robert Tavaréz and Michael Gentile responded to the scene on February 15, 2014. **See** N.T. Trial, 12/4/15, at 33. Officer Tavaréz testified as to what he observed and his interactions with Rice. **Id.** at 34-42. Officer Tavaréz gave detailed testimony about finding Freeman in the crawl space, **id.** at 37-38, recovering a gun from Rice, **id.** at 38, and interviewing a neighbor about projectiles in his home. **Id.** at 42-44. Officer Tavaréz also testified that he reviewed the Preliminary Arraignment System (PARS) report the same night as the incident and verified the report with his signature. **Id.** at 49-50. Finally, the parties stipulated as to the testimony of Detective Larry Aitken, who investigated the case, and the Commonwealth placed on the record the facts to which Det. Aitken would have

testified. **See id.** at 51-53 (wherein Commonwealth and Rice stipulated to Det. Aitken's testimony). Lieutenant Rutizer's only involvement with Rice's case was that he approved Rice's arrest report as prepared by Det. Aitken. **See** Commonwealth's Response to Defendant's PCRA Petition, 1/7/22, at 16.

We will not disturb the PCRA court's denial of a PCRA petition absent clear legal error. **See Johnston, supra.** Here, the record contains sufficient evidence for the court's finding of guilt and that Rice failed to show how Lt. Rutizer's misconduct in an unrelated matter would have changed the outcome of his trial. **Id.** As such, we conclude that the court did not err in denying Rice's after-discovered evidence PCRA claim.

Rice's second, third, and fourth claims all assert challenges to the effectiveness of his prior attorneys. When a petitioner claims that he has received ineffective assistance of counsel, relief will only be granted with a showing, by a preponderance of the evidence, that:

his conviction or sentence resulted from the [i]neffective 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. Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner. To obtain relief, a petitioner must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the petitioner. A petitioner establishes prejudice when he demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . [A] properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel's act or omission.

Commonwealth v. Johnson, 966 A.2d 523, 532-33 (Pa. 2009) (citations and quotation marks omitted). Moreover, if any of the three prongs are not satisfied, the entire claim fails. ***Commonwealth v. Jones***, 942 A.2d 903, 906 (Pa. Super. 2008) (citation omitted).

In addition, when raising a layered claim of ineffective assistance, a petitioner must first assert that trial counsel was ineffective in some way and that appellate or PCRA counsel was also ineffective for not raising the issue at the first opportunity. We have held that when “determining a layered claim of ineffectiveness, the critical inquiry is whether the first attorney that the defendant asserts was ineffective did, in fact, render ineffective assistance of counsel. If that attorney was effective, then subsequent counsel cannot be deemed ineffective for failing to raise the underlying issue.” ***Commonwealth v. Burkett***, 5 A.3d 1260, 1270 (Pa. Super. 2010).

We first turn to Rice’s argument that trial counsel was ineffective for failing to file post-sentence motions, specifically for reconsideration of sentence, thereby waiving Rice’s ability to raise the discretionary aspects of his sentence on direct appeal. ***See*** Appellant’s Brief, at 15. Rice argues that trial counsel had no reasonable strategy for failing to file a motion for reconsideration of sentence and that Rice had a meritorious claim showing the sentencing court abused its discretionary authority and entered an excessive aggregate sentence. ***Id.*** at 15, 18. Rice further argues that this failure amounts to the constructive denial of counsel and is *per se* ineffective. ***Id.*** at 17.

The courts of this Commonwealth have outlined the narrow situations where counsel has been held to be ineffective *per se*:

Commonwealth v. Halley, [] 870 A.2d 795 ([Pa.] 2005) (counsel did not file a Pa.R.A.P. 1925(b) statement and waived all issues, thereby denying the defendant his constitutional right to direct appeal); ***Commonwealth v. Liebel***, [] 825 A.2d 630 ([Pa.] 2003) (attorney did not file a petition for allowance of appeal, as requested by the defendant, and denied his client the right to seek discretionary review with our Supreme Court); ***Commonwealth v. Lantzy***, [] 736 A.2d 564, 572 ([Pa.] 1999) (lawyer did not file a direct appeal, despite defendant's request); ***see also Commonwealth v. Burton***, [] 973 A.2d 428 (Pa. Super. 2009) (filing of an untimely 1925(b) statement); ***Commonwealth v. Bennett***, [] 930 A.2d 1264 ([Pa.] 2007) (not filing an appellate brief so defendant did not obtain direct review).

Commonwealth v. Rosado, 150 A.3d 425, 427-28 (Pa. 2016) (citing ***Commonwealth v. Brown***, 18 A.3d 1147 (Pa. Super. 2011)). On the other hand, narrowing the reviewable issues on appeal has not been held to be ineffectiveness *per se*. ***See Commonwealth v. Reaves***, 923 A.2d 1119, 1128-29 (Pa. 2007). Moreover, our Supreme Court stated that "the failure to file for sentencing reconsideration . . . does not waive any and all appellate issues; it waives only those claims subject to issue preservation requirements which were not otherwise already properly preserved." ***Id.*** at 1129. In such a case, prejudice is not presumed, and an appellant must make a showing of actual prejudice as ***Strickland v. Washington***, 466 U.S. 668 (1984),⁷

⁷ To assure relief under ***Strickland***, an appellant must plead and prove that "counsel's performance was deficient" and that the "deficient performance prejudiced the defense." ***Id.*** at 687. To prove prejudice, the appellant must show that "there is a reasonable probability that, but for counsel's (Footnote Continued Next Page)

requires. ***Id.*** at 1130. Here, like in ***Reaves***, Rice waived only his claims subject to issue preservation that were not properly preserved. Trial counsel failed to file post-sentence motions, which waived Rice's potential challenges to the discretionary aspect of sentencing. Thus, we must determine whether Rice was actually prejudiced by counsel's failure.⁸

Claims challenging the discretionary aspects of sentencing are not appealable as of right; rather, a defendant's appeal is considered a petition for permission to appeal. ***Commonwealth v. Williams***, 562 A.2d 1385, 1386-87 (Pa. Super. 1989) (en banc). Before this Court can address such a discretionary challenge, an appellant must invoke this Court's jurisdiction by: (1) filing a timely notice of appeal; (2) properly preserving the issue at sentencing or in a motion to reconsider and modify sentence; (3) including in his brief a concise statement of reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f); and (4) raising a substantial question that the sentence appealed from is not appropriate under the Sentencing Code. ***Commonwealth v. Swope***, 123 A.3d 333, 337 (Pa. Super. 2015); ***see also*** Pa.R.A.P. 902, 903; Pa.R.Crim.P. 720. The existence of a substantial question must be determined on a case-by-case basis. ***Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 545 (Pa. Super. 1995).

unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. ***See also Reaves***, 923 A.2d at 1127; ***Johnson, supra***.

⁸ We note that in this case, Rice did initially fail to file a direct appeal, but his direct appeal rights were reinstated, *nunc pro tunc*, and a timely appeal followed.

This issue was not properly preserved, providing the basis for Rice's ineffectiveness claim. Thus, we begin by determining whether Rice has raised a substantial question. Rice argues that the court abused its discretion in imposing his sentence and entered an excessive sentence in the aggregate, thereby raising a substantial question. **See** Appellant's Brief, at 18. Rice points to the fact that the court sentenced him to the statutory maximum for four charges and ran each sentence consecutively. **Id.** at 21-22; **see also** N.T. Sentencing, 3/30/16, at 18-19.⁹ Rice also argues the court failed to consider his rehabilitative needs and that his sentence was purely punitive. **See** Appellant's Brief, at 20. As this claim raises a substantial question, we will review the merits. **See Swope**, 123 A.3d at 339 (substantial question raised where defendant challenged consecutive sentences as excessive and claimed court failed to consider rehabilitative needs and mitigating factors).

Our standard of review of the discretionary aspects of a sentence is as follows:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias[,] or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Shugars, 895 A.2d 1270, 1275 (Pa. Super. 2006).

⁹ In addition, Rice's aggregate sentence of 19½ to 39 years' incarceration was nearly twice the sentence requested by the Commonwealth. **See** N.T. Sentencing, 3/30/16, at 12-13.

Pursuant to the Pennsylvania Sentencing Code, an appellate court must vacate a sentence if the trial court erroneously applied the Sentencing Guidelines, if the circumstances of the case would cause the application of the guidelines to be clearly unreasonable, or if the court sentenced outside the guidelines in an unreasonable manner. **See** 42 Pa.C.S.A. § 9781(c). In reviewing the record on appeal from a discretionary aspects of sentencing claim, we consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.

Id. at § 9781(d).

Instantly, Rice takes issue with four penalties imposed. First, for his persons not to possess conviction,¹⁰ the court sentenced Rice to five to ten years' imprisonment. Second, for his simple assault conviction,¹¹ the court sentenced Rice to one to two years' imprisonment. Third, for his aggravated assault conviction,¹² the court sentenced Rice to ten to twenty years' imprisonment. Fourth, for his discharge of a firearm into an occupied

¹⁰ 18 Pa.C.S.A. § 6105.

¹¹ **Id.** at § 2701.

¹² **Id.** at § 2702.

structure conviction,¹³ the court sentenced Rice to three and one-half to seven years' imprisonment. Given the applicable offense gravity scores and Rice's prior record score, the standard-range sentences were as follows: (1) persons not to possess, a minimum of 60 to 72 months; (2) aggravated assault, 78 to 90 months; (3) discharge of a firearm, 60 to 72 months, all plus or minus 12 months for an aggravated or mitigated sentence. Finally, the standard-range sentence for simple assault was 6 to 16 months, plus or minus 3 months for an aggravated or mitigated sentence. **See** 204 Pa. Code § 303.16.

Rice argues that he was sentenced to the statutory maximum. However, his minimum sentences for persons not to possess, simple assault, and discharge of a firearm all fall squarely within either the standard or mitigated ranges of the sentencing guidelines.¹⁴ **See** 204 Pa. Code § 303.9(e). Moreover, we have also stated that a court may deviate from the guidelines as long as the reasons for the deviation are placed on the record. **See Commonwealth v. Garcia-Rivera**, 983 A.2d 777, 780 (Pa. Super. 2009).¹⁵

¹³ **Id.** at § 2707.

¹⁴ We note that the sentencing court imposed the statutory maximum for the upper end of the four sentences with which Rice takes issue. **See** 18 Pa.C.S.A. §§ 1103-1104. Rice's minimum sentence for persons not to possess and simple assault were within the standard range, Rice's minimum sentence for aggravated assault was within the aggravated range, and Rice's minimum sentence for discharge of a firearm was within the mitigated range.

¹⁵ We set forth the following standard in **Garcia-Rivera**:
(Footnote Continued Next Page)

At sentencing, the court inquired into Rice's prior record score, confirmed the correct offense gravity scores, and had the benefit of a presentence investigation report (PSI).¹⁶ **See** N.T. Sentencing, 3/30/16, at 5. Further, the court placed its reasoning on the record as follows:

THE COURT: And I heard everything you said today. I heard all the different tangents you went on. You never apologized. What I remember, I remember when she testified of how fearful she was. You had her crying in a crawl space for her life. She was too afraid to come out until she was certain it was the police. . . . You put another family in jeopardy. All of this by your actions. You may not take responsibility, but you're going to have a sentence that's going to reflect what you did.

Id. at 17-18.

The court's reasons for the sentence imposed, in conjunction with the court's review of the PSI, were sufficient to demonstrate that the court properly considered all relevant factors when imposing Rice's sentence.

The sentencing court is permitted to deviate from the sentencing guidelines; however, the court must place on the record its reasons for the deviation. In sentencing outside of the guidelines, the court must demonstrate that it understands the sentencing guidelines ranges. Where the trial judge deviates from the sentencing guidelines . . . he [or she] must set forth on the record, at sentencing, in the defendant's presence, the permissible range of sentences under the guidelines and, at least in summary form, the factual basis and specific reasons which compelled the court to deviate from the sentencing range.

Id. at 780 (internal citations omitted). **See also** 42 Pa.C.S.A. § 9721(b).

¹⁶ Where the sentencing court has the benefit of reviewing a PSI, we presume that the judge was "aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Hallock***, 603 A.2d 612, 616 (Pa. Super. 1992).

Accordingly, Rice's claim that the court imposed an excessive sentence and failed to consider the appropriate factors, including mitigating factors and rehabilitative needs, lacks merit. Because Rice's claim as to the discretionary aspects of sentencing fails, so, too, does his claim that trial counsel was ineffective for failing to file post-sentence motions on that issue. **See Johnson, supra; Jones, supra.**

Rice's second claim is that both trial and direct appellate counsel were ineffective for failing to preserve and pursue a claim that Rice's three PIC convictions merged. **See** Appellant's Brief, at 28. Rice argues that all three of his PIC charges and convictions stem from his use of a single instrument of crime, one firearm, used at the same time and in one criminal episode. **Id.** at 29. As such, the charges were duplicative and should have merged, and the failure of both trial and direct appellate counsel to raise or pursue this claim amounted to ineffective assistance of counsel. **Id.** at 29-30.

Pursuant to statute, "[a] person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally." 18 Pa.C.S.A. § 907(a). For PIC charges, "it is the actor's **criminal purpose** that provides the touchstone of his liability[.]" Model Penal Code § 5.06 comment (emphasis added). Our Supreme Court has stated that this purpose "may be inferred from the circumstances surrounding the possession." **Commonwealth v. Andrews**, 768 A.2d 309, 318 (Pa. 2001) (citation omitted). Merger "is a rule of statutory construction, and the analysis is the same as that for double jeopardy, requiring a comparison of the

elements of the pertinent offenses.” **Id.** at 313 (citation omitted). In addition, “merger applies only in the context of greater and lesser included offenses[.]” **Id.** In **Andrews**, the defendant robbed the staff of three apartment buildings, at gunpoint, over a period of two days. **See id.** at 310. Finding no merit to Andrews’ claim that double jeopardy applied to his three conspiracy to commit robbery convictions, the Court found that there was “sufficient evidence from which the jury could conclude that Andrews’ intention to employ the firearm criminally was [] separately developed as part of each conspiratorial agreement.” **Id.** Therefore, Andrews’ claim that the charges should have merged failed. **See id.**

Rice argues that his case differs from **Andrews** because, in the instant case, the events all occurred at a single time, in a single location, with the same alleged firearm, and with all complainants in the same vicinity. **See** Appellant’s Brief, at 29. As such, Rice states that the facts are distinguishable from **Andrews** and there was no reasonable basis for trial and appellate counsel to fail to make this argument. **Id.** Rice further argues that there is a reasonable probability that such an argument would have been successful in a post-trial motion or on direct appeal. **Id.**

Here, the trial court, acting as the trier of fact, heard testimony from both Freeman and Officer Tavarez. Freeman testified that Rice pointed a gun at her and, when Lawson intervened, she ran to a crawl space to hide. **See** N.T. Trial, 12/4/15, at 17-18. Freeman further testified that, from the crawl space, she could see and hear Rice and Lawson shouting, during which time

she heard two gunshots. ***Id.*** at 19. Freeman heard Lawson say, “if you love me no, no, no please” and “please get up[,] come on, don’t do this to me . . .” ***Id.*** at 20-21. Officer Tavaréz testified that he and his partner recovered a gun from Rice when they responded to the scene, noticed shell casings on the carpet in the living room, and identified a projectile that had gone through a second property across the street. ***See id.*** at 38, 41-43.

The trial court found there was sufficient evidence presented to support three PIC convictions: that Rice possessed a firearm with the criminal purpose to (1) assault Freeman, (2) assault Lawson, and (3) recklessly fire into an occupied structure. ***See id.*** at 65; ***see also*** Trial Court Opinion, 6/13/22, at 7. Just as in ***Andrews***, it is clear that there was sufficient evidence from which the trial court could conclude that Rice developed a separate intention to employ the firearm criminally with respect to Freeman, Lawson, and the neighbor’s home. ***See Andrews, supra.*** Therefore, Rice’s claim that the charges should have merged fails, as does his claim that trial and appellate counsel were ineffective for failing to preserve and pursue the claim. ***See Johnson, supra; Jones, supra.***

Rice’s fourth claim is that PCRA counsel was ineffective for failing to raise and preserve his argument that trial counsel was ineffective for failing to investigate evidence and witnesses prior to trial. Rice correctly states that claims of PCRA counsel’s ineffectiveness may be raised at the first opportunity to do so, including on appeal. ***See Commonwealth v. Bradley***, 261 A.3d 381, 401 (Pa. 2021). Rice argues that trial counsel failed to investigate the

complaining witnesses in the instant matter and that, had he done so, there is a reasonable probability that the outcome of Rice's trial would have been different. **See** Appellant's Brief, at 33. Rice asserts that this argument was waived when PCRA counsel failed to preserve it by not including it in his counseled PRCRA petition, aside from an attempt to incorporate the argument by reference. **Id.**

It is well-settled that counsel may not simply incorporate *pro se* claims by reference and without additional explanation or elaboration upon the validity of such claims. **See Commonwealth v. Johnson**, 179 A.3d 1153, 1157 (Pa. Super. 2018). Moreover, attempting to incorporate by reference a *pro se* issue amounts to hybrid representation, which is not permitted. **See id.**; **see also Jette, supra** at n.1.

Our Supreme Court's decision in **Bradley** guides us here:

In some instances, the record before the appellate court will be sufficient to allow for disposition of any newly-raised ineffectiveness claims. [**Commonwealth v.**] **Holmes**, 79 A.3d [562,] 577 [(Pa. 2013)]. However, in other cases, the appellate court may need to remand to the PCRA court for further development of the record and for the PCRA court to consider such claims as an initial matter. Consistent with our prior case law, to advance a request for remand, a petition would be required to provide more than mere "boilerplate assertions of PCRA counsel's ineffectiveness," [**Commonwealth v.**] **Hall**, 872 A.2d [1177,] 1182 [(Pa. 2005)]; however, where there are "material facts at issue concerning [claims challenging counsel's stewardship] and relief is not plainly unavailable as a matter of law, the remand should be afforded[.]" [**Commonwealth v.**] **Grant**, 813 A.2d [726,] 740 n.2 (Pa. 2002) (Saylor, J., concurring).

261 A.3d at 402.

Rice provides little information as to what trial counsel's pretrial investigation and interview of complaining witnesses may have revealed. However, if trial counsel were ineffective on this front and PCRA counsel were similarly ineffective, there was no prior opportunity to develop the record with respect to this issue. Because we are not tasked with developing the record, nor are we a fact-finding court, we remand to the PCRA court for the development of a record on this issue. ***See Bradley***, 261 A.3d at 402-03.

In sum, Rice raised four challenges to the PCRA court's denial of relief. We affirm the denial of PCRA relief with respect to Rice's claims of: (1) after-discovered evidence and ineffectiveness regarding trial counsel's failure to file a motion for reconsideration of sentence; and (2) that trial and appellate counsel were ineffective for failing to preserve and pursue a claim that Rice's three PIC convictions merged. However, we vacate and remand to the PCRA court for further development and a hearing on Rice's claim as to trial counsel's pretrial investigation of evidence and witnesses prior to trial.

Order affirmed in part and reversed in part. Case remanded for further proceedings consistent with the dictates of this memorandum. Jurisdiction relinquished.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/18/2024