NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAMES ERIC O'BRIEN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1511 WDA 2012

Appeal from the PCRA Order September 4, 2012
In the Court of Common Pleas of Venango County
Criminal Division at No(s): CP-61-CR-0000838-2004

BEFORE: BOWES, MUNDY, and COLVILLE,* JJ.

MEMORANDUM BY BOWES, J.: **FILED NOVEMBER 19, 2013**

James Eric O'Brien appeals from the September 4, 2012 order denying him PCRA relief. We affirm.

On October 26, 2005, a jury convicted Appellant of second-degree murder, third-degree murder, involuntary deviate sexual intercourse, kidnapping, and conspiracy. Appellant's convictions were based upon his participation in the October 27, 1992 kidnapping, sexual assault, and murder of eleven-year-old Shauna Howe. The other two participants in the crime were Timothy O'Brien, who was Appellant's brother, and Eldred Ted Walker. Walker pled guilty and testified against Appellant at trial.

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* Retired Senior Judge assigned to the Superior Court.

In October 1992, the three men decided to kidnap a child. To that end, Walker grabbed Shauna as she was walking home along West First Street, Oil City, Pennsylvania. He then gave her to Timothy O'Brien, who was waiting with Appellant around the corner. Timothy placed the child in a car, and Appellant drove away while Timothy held her in the back seat. Appellant and Timothy took Shauna to Walker's home and placed her in a bedroom. Walker overheard the victim screaming to Appellant and Timothy to let her go and to get off of her. Appellant and his brother then took Shauna to a remote area where she was thrown from a railroad trestle and killed. A body suit that the child was wearing was discovered on October 29, 1992, the day before her body was found. Appellant's seminal fluid was found on that article of clothing. In addition, Appellant's DNA was discovered in Shauna's mouth. The autopsy revealed evidence of a sexual assault.

After trial, the court imposed a judgment of sentence of life imprisonment plus fifteen to thirty years, and, on appeal, we affirmed. ***Commonwealth v. O'Brien***, 981 A.2d 930 (Pa.Super. 2009) (unpublished memorandum). On March 10, 2010, our Supreme Court denied further review. ***Commonwealth v. O'Brien***, 990 A.2d 729 (Pa. 2010). On September 1, 2010, Appellant filed a timely petition for post-conviction relief. Counsel was appointed, and the matter proceeded to a two-day hearing, which was conducted June 14 and 15, 2012. On September 4,

2012, the PCRA court issued an order, with a supporting opinion, denying PCRA relief. This timely appeal followed. Appellant presents these issues for our review:

> 1. Whether the PCRA Court erred as a matter of law or abused its discretion when it determining that Trial Counsel was not ineffective for failing to file a suppression motion to exclude the DNA taken by threat of force while the petitioner was at SCI Mercer.
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> 2. Whether the PCRA Court erred as a matter of law or abused its discretion when determining that Trial Counsel was not ineffective for failing to exclude a juror from being a member on his jury panel when there were discussions during jury selection of the petitioner's guilt, the crime, and the jurors drawing the conclusion that the petitioner was already guil[ty].
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> 3. Whether the PCRA Court erred as a matter of law or abused its discretion when determining that Trial Counsel was not ineffective when failing to prepare an alibi defense when trial counsels [sic] failed to file a notice of alibi, use a DNA expert, speak to witnesses to verify the alibi defense, use the deposition of a witness Clair Sible whose testimony would shorten the time period in which the victim had died and told the petitioner to lie on the stand about the woman he was with the weekend of the victim's kidnapping, rape and murder because trial counsels [sic] failed to interview that woman.
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> 4. Whether the PCRA Court erred as a matter of law or abused its discretion when determining that Trial Counsel was not ineffective for failing to file a post sentence motion for an illegal sentence and for failing delivering the appellate brief before filing.

Appellant's brief, at 5-6.

Initially, we note, "On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error."

Commonwealth v. Edmiston, 65 A.3d 339, 345 (Pa. 2013). Appellant's averments relate to the effectiveness of his trial counsel. As we noted in ***Commonwealth v. Michaud***, 70 A.3d 862 (Pa.Super. 2013), we presume that counsel was effective, and the defendant bears the burden of proving the contrary by a preponderance of the evidence. To present a successful ineffectiveness claim, the PCRA petitioner must "demonstrate that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) counsel's ineffectiveness prejudiced him." ***Id***. Additionally, to prove that counsel was ineffective for failing to procure a witness, a defendant must establish: "(1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial." ***Commonwealth v. Sneed***, 45 A.3d 1096, 1109 (Pa. 2012).

Appellant first avers that the PCRA court erred in concluding that trial counsel were not ineffective for failing to file a motion to suppress the DNA evidence seized from his person. He acknowledges that, on the two occasions that his DNA was collected, he executed documents consenting to the procedure. He maintains that his signature was the product of duress in that the second time a DNA sample was procured, the police officer

threatened to use force to collect it if Appellant did not agree to permit him to do so.

Appellant had two trial attorneys, William Cisek and Wayne Hundertmark. Mr. Cisek related that he did not recall Appellant informing him that the second DNA sample was secured by threat of force and that if Appellant "would have raised that issue[,] we would have followed up with that." N.T. PCRA Hearing, 6/14/12, at 33. Mr. Hundertmark's testimony at the hearing was consistent.

The PCRA court credited the lawyers' testimony and concluded that counsel were not ineffective when they failed to challenge the voluntariness of the DNA collection since Appellant had executed a form consenting to the procedure and since counsel never were informed that the signature was the product of force or duress. As our Supreme Court observed in ***Commonwealth v. Dennis***, 17 A.3d 297, 305 (Pa. 2011):

> "A PCRA court's credibility findings are to be accorded great deference. ***Commonwealth v. Johnson***, 600 Pa. 329, 356, 966 A.2d 523, 539 (2009) ("A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts."). Indeed, where the record supports the PCRA court's credibility determinations, such determinations are binding on a reviewing court. ***Commonwealth v. Abu–Jamal***, 553 Pa. 485, 527, 720 A.2d 79, 99 (1998).

As the record supports the determination that Appellant did not tell his lawyers about the coercive statements purportedly made by police, they could not have been ineffective for failing to present a suppression motion

on that ground. Thus, the PCRA court did not abuse its discretion in failing to grant PCRA relief on this claim.

After a review of the facts and pertinent law, we reject Appellant's second and third allegations based upon the comprehensive and compelling analysis of those claims at pages five through twelve of the PCRA court's September 4, 2012 opinion. Therein, the court delineated that: 1) all of the veniremen who were privy to the conversation about Appellant's guilt were stricken for cause; 2) counsel secured the services of a DNA expert witness and that expert informed counsel that he could provide no evidence useful to Appellant's defense; 3) counsel diligently attempted to secure alibi witnesses on behalf of Appellant; 4) despite Appellant's failure to provide notice of intent to present an alibi, Appellant's alibi for part of the period wherein the crimes were committed was presented to the jury by means of his brother's witnesses on the subject; 5) the proof that was to be secured by the use of the deposition of Clair Sibble was revealed to the jury through the testimony of another witness; and 6) the testimony of trial counsel, who always met with Appellant jointly, belied Appellant's averment that they told him to perjure himself before the jury.

Appellant's final position is undeveloped by citation to pertinent authority. Appellant's brief at 22. Moreover, he implicitly concedes the validity of the PCRA court's resolution of those claims. Specifically, Appellant acknowledges that his legality-of-sentence claim actually related to the

consecutive nature of his sentences, which he acknowledges pertains to the discretionary aspects of his sentence. ***See Commonwealth v. Austin***, 66 A.3d 798, 808-09 (Pa.Super. 2013) ("Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed."). He also indicates that appellate counsel met with him on several occasions prior to filing the appellate brief on direct appeal. Hence, we decline to consider his allegations in that section of his brief further. ***Commonwealth v. McDermitt***, 66 A.3d 810, 814 (Pa.Super. 2013) (holding that, under well-settled authority, undeveloped allegations of ineffectiveness were waived).

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/19/2013

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY,
PENNSYLVANIA

COMMONWEALTH OF PA.,
Plaintiff,

v.

JAMES E. O'BRIEN,
Defendant.

: CR. No. 838-2004

OPINION AND ORDER OF COURT

AND NOW, this 4th day of September, 2012, the Court has for consideration the Petition for Post Conviction Collateral Relief filed by the Petitioner in the above-captioned case. A hearing was held thereon at which time the Petitioner was present and represented by Matthew Parson, Esquire. The Commonwealth was represented by District Attorney Marie Veon. Based upon the testimony and evidence presented at the hearing and the record, the Court enters the following Opinion and Order of Court.

The Petitioner, James Eric O'Brien, after a 15 day jury trial, was found guilty of Second Degree Murder, in violation of 18 Pa. C.S.A. §2502(b); Third Degree Murder, in violation of 18 Pa.C.S.A. §2502(c); Involuntary Deviate Sexual Intercourse, in violation of 18 Pa. C.S.A. §3123(1)&(2); Conspiracy to Commit Kidnapping, in violation of 18 Pa. C.S.A. §903 to commit 18 Pa.C.S.A. §2901(a)(2)&(3); and Kidnapping, in violation of 18 Pa.C.S.A. §2901(a)(2). A Megan's Law hearing was held whereby the Court found the Petitioner to be a sexually violent predator. Thereafter, the Petitioner was sentenced to a life term for second degree murder, a consecutive ten to 20 years for Involuntary Deviate Sexual Intercourse and a consecutive five to ten years for Conspiracy to Commit Kidnapping. The remaining two charges merged for sentencing purposes. The Defendant filed an appeal to the Superior Court who affirmed this

Appendix A

Court's rulings on July 15, 2009. Currently before the Court is the Petitioner's Petition for Post Conviction Collateral Relief.

In his PCRA, Petitioner is claiming ineffective assistance of counsel regarding both of his trial attorneys, William Cisek, Esquire and Wayne Hundertmark, Esquire and his appellate counsel, William Cisek, Esq. Petitioner raises multiple reasons in support of these assertions, which include: counsel was ineffective by failing to file a suppression motion on the DNA evidence and for failing to use an independent DNA expert; counsel was ineffective for instructing him to lie to the Court and the jury; counsel was ineffective for failing to file notice of alibi and for failing to call certain witnesses regarding an alibi; counsel was ineffective for failing to file a post-sentence motion regarding his sentence and for failing to provide Petitioner a copy of the appellate brief before it was filed; counsel was ineffective for permitting a juror on the case when there was a discussion during jury selection of the Petitioner's guilt and the crime from which the other jurors drew the conclusion that the petitioner was already guilty; and finally, counsel was ineffective for failing to produce to the jury the deposition of Clair Sibble.

To be eligible for post-conviction relief, the Petitioner must satisfy four (4) requirements under the statute. First, the Petitioner must prove that he has been convicted of a crime and is currently serving a sentence of imprisonment for that crime. 42 Pa.C.S.A. §9543(a). In this case, Petitioner was found guilty of Second Degree Murder, Third Degree Murder, Involuntary Deviate Sexual Intercourse, Conspiracy to Commit Kidnapping and Kidnapping. As previously stated, he is currently serving a life term for second degree murder, a consecutive ten to 20 years for Involuntary Deviate Sexual Intercourse and a consecutive five to ten years for Conspiracy to Commit Kidnapping. Therefore, Petitioner satisfies the first requirement under the statute.

Secondly, the Petitioner must prove that the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) 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.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's rights of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vi) The imposition of a sentence greater than the lawful maximum.

(vii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S.A. §9543(2).

Third, the Petitioner must prove that the allegation of error has not been previously litigated or waived. 42 Pa.C.S.A. §9543(3). Finally, the Petitioner must prove "that the failure to litigate the issue prior to trial...or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." 42 Pa.C.S.A. §9543(4).

In order "[t]o obtain relief on a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient, and that such deficiency prejudiced the defendant." *Commonwealth v. Tedford*, 960 A.2d 1, 12 (Pa. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Petitioner must prove (1) that there is merit to the underlying claim; (2) that counsel had no reasonable basis for his or her course of conduct; and (3) that there is a reasonable probability that, but for the act or omission challenged, the outcome

of the proceeding would have been different. *Commonwealth v. Rivers*, 786 A.2d 923, 927 (Pa. 2001) (citing *Commonwealth v. Jones*, 683 A.2d 1181, 1188 (Pa. 1996)). Counsel is presumed to be effective and the Defendant must prove otherwise. *Commonwealth v. Rivers*, 786 A.2d 923, 927 (Pa. 2001). A failure to satisfy any prong of the test for ineffectiveness will end the inquiry and result in dismissal of a petitioner's claim. *Commonwealth v. Rega*, 933 A.2d 997, 1018 (Pa. 2007). In order for a Defendant to show that he suffered actual prejudice, he must show "that counsel's ineffectiveness was of such magnitude that it 'could have reasonably had an adverse effect on the outcome of the proceedings.'" *Commonwealth v. Howard*, 645 A.2d 1300, 1307 (Pa. 1994) citing *Commonwealth v. Pierce,* 529 A.2d 973 (Pa. 1987).

The Court will begin by addressing Defendant's claims as they relate to DNA. Defendant argues that, while incarcerated at SCI Mercer, a state trooper collected his DNA for identification purposes. He argues that, while the trooper did so with his consent, the consent was given under duress as he alleges that he was threatened by the trooper that if consent was not given the DNA would be collected by force. Defendant argues this was a violation of his Fourth Amendment rights under the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution and that his trial counsel should have sought suppression of this evidence on these grounds.

Attorney Cisek explained that counsel was aware that state troopers had taken samples of Petitioner's DNA at SCI Mercer as two Waived Rights Warning and Waiver documents which the Defendant had signed on two separate occasions permitting his DNA to be taken via a mouth swab were provided to defense counsel in discovery from the District Attorney's office. The first occasion was March 1, 2002 and this DNA was taken by Trooper O'Toole. The second occasion, the one complained of in this matter, was on January 4, 2002, and was taken by

Trooper McClane. Attorney Cisek had no recollection of the Petitioner complaining that the DNA samples were taken under threat or duress or that the Petitioner had ever requested that counsel file a Motion to Suppress despite the frequent correspondence between Petitioner and his counsel and the three occasions in which they communicated in person prior to trial. Both Attorney Hundertmark and Attorney Cisek explained that had the Petitioner conveyed to either of them that the DNA was taken under duress, they would have followed up with that information and been obligated to file a Motion to Suppress no matter how frivolous they believed it to be. This Court finds that no such issue was raised by the Defendant to his attorneys. Therefore, this claim is without merit.

Petitioner also asserts that counsel was ineffective for failing to use an independent DNA expert. The Court finds this contention to be without merit. During the PCRA hearing, the Commonwealth provided a copy of an Order of Court dated August 11, 2005 which is in response to Defendant's Motion to Hire Experts. The Order granted Defendant's request to hire Harry Kamerow, M.D., a pathologist, Dr. Lawrence A. Presley of National Medical Services for DNA analysis and Dr. Vangura, Jr., of Robinson Forensics, Inc., a Biomechanical Engineer. Based on this Order, Attorney Cisek explained that trial counsel had hired a separate DNA expert prior to the beginning of trial, that counsel had provided the expert with all of the forensic evidence that was provided to them by the Commonwealth in discovery and that Dr. Presley had communicated to Attorney Cisek that it was determined that he could not provide any beneficial testimony in relation to the procedures used to collect the DNA or as it related to the defense theory being presented by the Petitioner. Based on that conversation, an expert report was not prepared and therefore could not have been provided to the Petitioner for review. Furthermore, Attorney Cisek explained that, as Dr. Presley did not have any useful information that could be

used to cross-examine the Commonwealth's DNA expert and nothing beneficial to add himself, that counsel decided that it was not a good defense strategy to "ring the bell twice" against the Petitioner in front of the jury. Therefore, Petitioner's claim as asserted is without merit as a separate DNA expert was hired by defense counsel and there was a reasonably objective basis for counsel's actions in not calling him as a separate expert at trial.

The Court will next address Petitioner's allegation that counsel was ineffective for failing to file notice of alibi and for failing to call certain witnesses regarding an alibi and for instructing him to lie to the Court and the jury. Petitioner argues that part of his defense was to narrow the range of time regarding the time of death so as to be able to assert an alibi defense for the relevant time period. He argues that despite this strategy, trial counsel failed to file any notice of alibi in the case. He also asserts that trial counsel not only failed to file notice of alibi but also failed to interview Petitioner's witnesses, interview their own DNA expert to establish time of death and use Clair Sibble's deposition, that all of these factors would have narrowed the timeframe for time of death of the victim, which would have enabled them to establish where the Petitioner was at the time the victim died and then file the alibi defense.

Attorney Cisek denied that either he or Attorney Hundertmark ever instructed the Petitioner to lie to the Court or the jury and in fact explained that he and Attorney Hundertmark always met with the Petitioner together so that there would be a witness to every conversation so that an allegation such as this could be shown to be untrue. Attorney Hundertmark explained that it was actually the Petitioner who had kept changing the name of the woman that he allegedly had sex with the night of the crime. As a result of being provided numerous different names by Petitioner, counsel attempted to track down those women so that they could be interviewed as possible alibi witnesses. When Attorney Cisek attempted to track down the first

woman, he discovered that she was dead. This obviously negated her being called as a witness for the Petitioner. Attorney Cisek interviewed Kelly Cosper as a possible alibi witness as well as she was, at that time, engaged to the Petitioner. Eventually, Petitioner gave the name of Heather, but did not know her last name. This was the name of the woman he testified to at trial and even during trial, her last name was still unknown. As such, Attorney Cisek was not able to track her down in an attempt to interview her as a possible alibi witness. In fact, it was not until the day of the PCRA hearing that Petitioner's trial counsel learned that Heather's last name was Wise.

Attorney Cisek further explained that he had tracked down and interviewed all of the names of individuals that the Petitioner had given as possible witnesses in his defense and had kept a record of all of the interviews in individual folders. Mr. Cisek brought to the PCRA Hearing a multitude of these folders for reference. He stated that he spoke with Kelly Cosper on September 13, 2005 and that she was not helpful as an alibi witness. Petitioner had claimed that, at some allegedly relevant time, he had assisted her father in pouring concrete around the garage and the flag pole and that his initials and the date were memorialized in the cement. Attorney Cisek explained that not only did he go to her father's house and look for these marks in the cement, which did not exist, but that he had also spoken to Ms. Cosper's father, who had no memory of the Petitioner participating in the pouring of the concrete. Attorney Cisek tracked down Helen Allenbaugh in Tucson, Arizona, whom Petitioner claimed had rented a garage to the Petitioner where he was working on a car. She too was not able to provide any beneficial information as to an alibi. Attorney Cisek spoke to the manager of Butler Candies and an individual from Meals-on-Wheels as possible alibi witnesses. Again none of those individuals were able to provide any useful information as to make an alibi defense for Petitioner a viable

option. Attorney Cisek explained that if any of the witnesses he had interviewed had any potential value to Petitioner's defense they were called as witnesses during trial.

Petitioner also asserts in his alibi contention that counsel failed to file notice of an alibi defense based on the fact that both he and his brother, Timothy O'Brien were at a baptism during a portion of the three days at issue during the case. However, this defense was not presented to counsel until jury selection and, as such, a notice of alibi defense could not have been properly filed at that time. However, the Petitioner was not prejudiced by their failure to file a notice of alibi on this topic as the Court ruled that they were permitted to present the same witnesses. On the tenth day of trial, after substantial argument from all counsel, the Court stated:

> I think it is clear to everybody, maybe not to everybody, but it is clear to me that in response to Eldred Ted Walker's testimony that the O'Briens were at his house for a particular time period on October 28th, that the defense is entitled to present evidence to contradict and impeach Walker. And as I have heard, that is in the form of James O'Brien testifying as to his whereabouts, a photograph, a baptismal certificate, and the testimony of William Martin and the O'Brien brothers' sister, and I find that that is appropriate. That probably constitutes some sort of an alibi.
> ...the sanction that the Court would impose at this time would be that the Court would give the Commonwealth all the time that it needs to develop leads and perhaps rebut a witness. The Court would also allow the Commonwealth to recall any of the defense witnesses who testify today or tomorrow on that subject for additional cross examination based upon additional information that the Commonwealth would have, and that would include either defendant, if they testify.

(*Jury Trial Transcript*, Day 10 of 15, page 35, line 1 to page 36, line 7).

After the Court's ruling and further discussion on a collateral issue, the Commonwealth had the opportunity to interview Reverend Rhome, Bill Martin and Nancy Deeter during a recess. (*Jury Trial Transcript*, Day 10 of 15, page 89, line 11-21). Following the interviews, the Court reconvened in chambers to have further discussion regarding the proffered testimony of those witnesses. Following those discussions, the Court confirmed it's previous ruling

permitting certain evidence, which included "Reverend Rhome's testimony, the baptismal certificates, two photographs, and Martin's testimony, and Nancy Deeter's testimony" (*Jury Trial Transcript*, Day 10 of 15, page 90, line 7-10).

Therefore, Petitioner's claim is without merit as the Court finds that counsel never instructed him to lie to the Court and the jury and that in fact it was Petitioner who kept changing the name of the female alibi witness. Petitioner's claim is without merit based on the fact that counsel *had* pursued and interviewed the witnesses that Petitioner provided as possible alibi witnesses. Lastly, the Court concludes that Petitioner fails to satisfy the third prong of the ineffectiveness test as he did not suffer any actual prejudice due to trial counsel's failure to provide notice of an alibi as it relates to the baptism as the Court ruled that the testimony of those witnesses was permitted. The Defendant was permitted to introduce the evidence in question.

The Court will next address Petitioner's claim that trial counsel was ineffective for failing to produce to the jury the deposition testimony of Clair Sibble. Clair Sibble was the uncle of the victim in this case, Shauna Howe. During the hearing, Defense presented a document created by Constable Craig Westover of an interview he conducted prior to trial on October 13, 2005 with Mr. Sibble as to his participation in the search for Shauna Howe's body. In the interview, Mr. Sibble indicated that he was searching the area of Coulter's Hole with a father and son. He stated that at one point, he and an officer walked across the bridge two times where Shauna Howe's body would later be located and that he did not see her body at that time. He stated that he and the officer had looked carefully the day before and that the body was definitely not at the location where it was found the next day. Based on this interview, defense counsel had planned on calling Mr. Sibble as a witness at trial, however, Mr. Sibble was to be getting married and would be away on his honeymoon during the time of the trial. In an effort to preserve his

testimony to be used later at trial, the Commonwealth permitted deposition testimony to be taken on October 14, 2005; the fifth day of trial. As explained in the transcripts, Attorney Hundertmark had the intention of using the testimony provided by Mr. Sibble at trial. (*Jury Trial Transcript*, Day 5 of 15, page 132-133). However, during the deposition, Mr. Sibble's testimony changed from that of the interview in that he now stated that he never looked over the side of the trestle. Based on the altered testimony of Mr. Sibble, counsel for Petitioner determined that it was a better defense strategy not to introduce his deposition testimony. This was partially based upon the reasoning that counsel for the Petitioner would be able to present the same testimony from Sergeant John Beggs. Sergeant Beggs testified to the jury that he was also searching the area of Coulter's Hole the same day as Clair Sibble and that he had not only walked across the trestle but did look over both the right side and the left side and did not see Shauna Howe's body where it was found a day later in that exact spot. (*Jury Trial Transcript*, Day 9 of 15, page 173-174, 180). Based on Sergeant Beggs' testimony, defense counsel did not need to introduce the deposition testimony of Mr. Sibble. Therefore, the Court finds Petitioner's claim as asserted without merit as defense counsel had a reasonably objective basis for not introducing the deposition testimony of Clair Sibble during trial and Petitioner has failed to prove that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different.

Next, the Court will address Petitioner's claim that trial counsel was ineffective for failing to strike jurors that were to sit on his trial that had allegedly been part of a conversation with a prospective juror who talked about the murder and declared a fixed opinion as to the Petitioner's guilt. Jury selection in this case was held in Indiana County, Pennsylvania to help ensure that the jury panel would be fair and impartial. On October 6, 2005, the fourth day of jury

selection, the Court was notified by a tipstaff that "one of the prospective jurors on this panel, name is Trudy Williams, No. 168, was sitting not in [the] room immediately outside Judge's chambers but the other room with the other prospective jurors and was overheard...saying that her cousin lives in Oil City and knows all about this case, and [they] were not sure what she said." *Jury Selection Transcript*, Day 4 of 4, page 74, line 2-8. Petitioner asserts that one of the eight other jurors that were in the same room when the discussion occurred stayed on his jury panel despite being present during the conversation. After being notified of the situation, the Court convened in chambers with all counsel, Brad Foulk, District Attorney for Erie County, Marie Veon, District Attorney for Venango County, James Goodwin, Esquire, counsel for co-defendant Timothy O'Brien, Virginia Garris Sharp, Esquire, co-counsel for Timothy O'Brien, Wayne Hundertmark, Esquire and William Cisek, Esquire, to discuss the situation. It was decided between the Court and all counsel that they would excuse Juror 168, Ms. Williams, for cause at that point, however, before doing so that they would talk to her regarding her conduct to further evaluate the situation. (*Jury Selection Transcript*, Day 4 of 4, page 74-77). The Court brought Ms. Williams into chambers to discuss what was said to or in front of the other prospective jurors. (*Jury Selection Transcript*, Day 4 of 4, page 77-86). At the completion of her questioning, it was discussed whether the other jurors in the same room had been tainted by her comments. It was then decided that they would bring those jurors in, one by one, and inquire as to what they heard and whether they had a fixed opinion as to the guilt or innocence of the Petitioner and/or his co-defendant. (*Jury Selection Transcript*, Day 4 of 4, page 90).

The Court proceeded to individually question every one of the jurors that were in the same room as Ms. Williams. Throughout the process, four of the nine were excused for cause based on multiple different reasons ranging from medical surgeries to preconceived notions as

the Petitioner's guilt. (*Jury Selection Transcript*, Day 4 of 4, page 90-130). One of the jurors, Juror 56, Faye Haupt, was questioned during this voir dire process where the following exchange took place:

> LAW CLERK: Fay (sic) Haupt, No. 56.
> THE COURT: Good morning. Just come right around here. The attorneys will have – you are Faye Haupt?
> JUROR NO. 56: It's Haupt. We get everything.
> THE COURT: Haupt (corrects pronunciation.) Juror No. 56?
> ...
> MR. FOULK: My name is Brad Foulk. I am the District Attorney in Erie, Pennsylvania. This is Marie Veon. She is the District Attorney in Venango County. The county seat is Franklin. We are the prosecutors in this case.
>
> We wanted to ask you a couple questions because something came to our attention, actually the Judge's attention. and I am kind of speaking for the group a little bit here. You were waiting in the law library to come for jury selection, correct?
> JUROR NO. 56: Uh huh.
> MR. FOULK: And probably 45 minutes ago or so, maybe an hour ago, do you recalling (sic) anyone or hearing anyone saying they had formed an opinion or they had knowledge about this case?
> JUROR NO. 56: No. Huh uh.
> MR. FOULK: Do you recall anyone saying they didn't want to be on this jury?
> JUROR NO. 56: I have heard different people say that.
> MR. FOULK: Did anyone say they didn't want to be on the jury because they had already come up with an opinion as to whether or not they were guilty or not guilty?
> JUROR NO. 56: Huh uh.
> MR. FOULK: You didn't hear anything about that?
> JUROR NO. 56: No.
> MR. FOULK: Have you formed any opinion as to whether or not these people are guilty or not guilty?
> JUROR NO. 56: I haven't because I don't know the situation yet, so I don't know.
> MR. FOULK: Did anyone tell you or did you overhear any talk about where this trial is going to be held?
> JUROR NO. 56: No.
> MR. HUNDERTMARK: No questions.
> THE COURT: Mr. Goodwin.
> MR. GOODWIN: No questions, Your Honor.
> THE COURT: We thank you very much. Once again, you still have to stick around for awhile.

JUROR NO. 56: Oh, I do.
THE COURT: Don't have any conversation with the other jurors about this case. Don't speculate. It sounds like you haven't heard any facts or evidence. This wouldn't be the time to start discussing the case. Thank you.

(*Jury Selection Transcript*, Day 4 of 4, page 115-118). Ms. Haupt was eventually selected to serve as an alternate on the case. However, as evidenced hereinbefore, at no time did Ms. Haupt give the Court or counsel any impression that she was privy to the conversation that Ms. Williams had nor did she have a preconceived notion as to the Petitioner's guilt or innocence. After the Court and counsel had questioned every one of the jurors that were in the law library with Ms. Williams, the Court inquired as to whether all counsel was satisfied with the special voir dire conducted of the jurors and to whether there was any reason any of those remaining should be removed for cause. All counsel agreed that those remaining in the panel had not been tainted. (*Jury Selection Transcript*, Day 4 of 4, page 130, line 6-18).

As evidenced by a review of the transcripts and based on both what Attorney Cisek and Attorney Hundertmark explained, if any of the jurors on the panel expressed that there was any doubt as to whether they had already formed a fixed opinion as to the guilt or innocence of the Petitioner and/or his co-defendant, they would then challenge for cause. Also, as explained by Attorney Cisek during the PCRA hearing, throughout jury selection, the Judge was liberally granting challenges for cause, therefore, if any one of the jurors on the panel had shown any indication of having a preconceived notion, they would have been excused from the panel and not been permitted to serve for the trial. Attorney Hundertmark went further to explain that most of the jurors brought into chambers for the individual voir dire seemed irritated by the situation of Ms. Williams talking about the case when she knew she was not supposed to and that he did not feel at all uncomfortable about the situation following the individual voir dire discussions.

Therefore, the Court finds Petitioner's contention to be without merit. Despite the fact that one of the prospective jurors in the library with Ms. Williams did serve as an alternate on the case, Petitioner has failed to prove that counsel had no reasonable basis for permitting Ms. Haupt to remain on the jury panel or that he was prejudiced in any way. The Court further finds Petitioner's contention to be without merit as he has failed to prove a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different.

The Court will next address Petitioner's contention that counsel was ineffective for failing to file a post-sentence motion regarding his sentence. At the PCRA hearing, Petitioner testified that he wanted a post-sentence motion filed addressing the issue of District Attorney Foulk allegedly having lunch with the Judge prior to sentencing regarding Senate Resolution 149. Petitioner alleges that this Senate Resolution addressed the issue of paroling individuals who were serving life sentences and that due to this information, the Judge sentenced Petitioner to consecutive sentences instead of concurrent ones. When pressed further about how he obtained the knowledge of this alleged meeting, he admitted that it was based only on an educated guess and that he was not able to prove anything was ever given to the sentencing Judge. The Court has reviewed the transcript of the sentencing and nothing is stated regarding Senate Resolution 149. Attorney Cisek explained that he has no knowledge of a "secret meeting" between District Attorney Foulk and the Judge. Attorney Hundertmark explained that he did remember that he had seen District Attorney Foulk on the PCN Network discussing the Senate Resolution but that it had nothing to with the sentencing Judge and in fact, the Resolution was never passed. Lastly, Petitioner never testified that he ever requested counsel file a post-sentence motion on his behalf regarding his sentence.

It is noted at the outset that "sentencing is a matter vested in the sound discretion of the sentencing judge, whose judgment will not be disturbed absent an abuse of discretion." *Commonwealth v. Perry*, 883 A.2d 599, 602 (Pa.Super.2005). "Generally, Pennsylvania law 'affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed.'" *Commonwealth v. Prisk*, 13 A.3d 526, 533 (Pa.Super. 2011) citing *Commonwealth v. Pass*, 914 A.2d 442, 446-447 (Pa.Super.2006). The Court was acting within its full discretion in sentencing Petitioner to consecutive terms instead of concurrent. Furthermore, the Court explained its reasoning for running the sentences consecutively in the Sentence Order dated April 6, 2006, which states as follows:

> We find that the conduct of the Defendants far exceeded the means necessary to commit these two crimes. The victim did not have to be killed and this was done in an attempt to cover up the terrible things that had been done to her and to prevent her from identifying her abductors/captors and the perpetrators of these crimes. The throwing of this young victim from a railroad trestle inflicted upon this young child a terror and a horror that went far beyond a typical violation of Involuntary Deviate Sexual Intercourse and Criminal Conspiracy to Commit Kidnapping. What extreme cruelty it was to throw a child who was alive off of the trestle onto the rocks below. What a horrific way for anyone to die, especially a young child. The Commonwealth's evidence in the form of photographic autopsy evidence demonstrates the ripping of the victim's genitalia that clearly shows a cruelty that is not necessarily a typical part of these crimes.
>
> These crimes had a devastating effect upon the victim's family, the citizens of the city of Oil City, Venango County, and all the members of our surrounding communities. Following Shawna's (sic) abduction and the finding of her battered and broken body fear gripped our community. Citizens changed the way they went about their day-to-day activities, youth activities were restricted and even eliminated, and this effect continued for more than a decade, especially in Oil City.
>
> We find that both Defendants have demonstrated absolutely no remorse for their despicable conduct. We find that both

> Defendants are extremely dangerous predators and we need to protect society from both of them as long as possible.
>
> Therefore, we have imposed consecutive sentences in this case in the event there would be some change in the law which would make them eligible for parole on the charge of Second Degree Murder. We certainly believe that any lesser sentence would depreciate the seriousness of these crimes and their disastrous effects.

(*Sentence Order* dated April 6, 2006).

Therefore, the Court finds Petitioner's contention to be without merit as Petitioner admitted that the allegation of a "secret meeting" was based solely on an educated guess. The Court further finds Petitioner's contention to be without merit as the reasoning behind Petitioner's sentences running consecutively instead of concurrently clearly had no relation to Senate Resolution 149. This Sentencing Judge had never heard of Senate Resolution 149 prior to sentencing this Petitioner or that District Attorney Faulk was part of a committee or discussion on the issue. In fact, the first time this Judge ever heard of Senate Resolution 149 was in the course of the Petitioner's PCRA. This Sentencing Judge had no secret meeting with District Attorney Faulk. This Court's reasoning for consecutive sentences is exactly as announced in open Court at sentencing. This Court was concerned that this Petitioner is so dangerous the Court was attempting to assure that this Petitioner would not be released in the event of some future change in the life without parole law. The fact that there may have been hearings being conducted in the legislative process on this issue that the sentencing Court was unaware of obviously played no role in the Court's decision regarding consecutive sentences but would indicate that this Court's intuitions were grounded in distinct possibility. Petitioner has further failed to prove that but for the act or omission challenged, the outcome of the proceeding would have been different.

Lastly, the Court will address Petitioner's contention that counsel was ineffective for failing to provide Defendant a copy of the appellate brief before it was filed. As stated hereinbefore, Attorney Cisek was appointed as appellate counsel for Petitioner following the trial. Petitioner admits that he and Attorney Cisek corresponded numerous different times via letter regarding certain issues that could be raised on appeal. He also admits that Attorney Cisek traveled to SCI Coal Township to discuss the issues in person. Petitioner alleges that, despite these conversations, there were other issues that he preferred to be included in the concise statements taken on appeal but that Attorney Cisek did not include them nor did Attorney Cisek provide a copy of the appellate brief to Petitioner before it was submitted to the Superior Court. Attorney Cisek confirmed that he had communicated with Petitioner numerous times regarding this issue in written form and that he had visited Petitioner at SCI Coal Township on March 14, 2008, at which time they had spent hours discussing the possibility of issues that were to be included in the appeal. Attorney Cisek explained that at any time during the trial where an issue arose that could be included in an appeal for the Petitioner, he would keep a log of them so that when the time came, he would be better prepared. This list detailed eleven issues considered in the beginning. Five were eliminated for being frivolous issues and the six remaining were combined into four concise statements that were ultimately brought on appeal after discussions with the Petitioner. Attorney Cisek explained that, after his meeting in person with the Petitioner, they were in agreement as to the issues to be raised. Furthermore, Attorney Cisek explained that he spent time discussing the issues with Attorney Hundertmark and Attorney Sharp, counsel for Petitioner's co-defendant to ensure that their issues were similarly framed. Lastly, Attorney Cisek did send the Petitioner a copy of the appellate brief after it was completed.

Therefore, the Court finds Petitioner's contention to be without merit as Attorney Cisek did perfect an appeal to the Superior Court after fully discussing with the Petitioner all issues to be raised and that Petitioner cannot prove that counsel had no reasonable basis for his action or that counsel's failure to provide a copy of the appellate brief before being submitted would have changed the outcome of the proceeding.

Based upon the above conclusions, it is ORDERED and DECREED that the Petitioner's Petition for Post Conviction Collateral Relief is hereby DENIED. The Petitioner is also hereby notified of his right to appeal this decision within 30 days of the date of this order.

BY THE COURT,

OLIVER J. LOBAUGH, President Judge

cc: DA
Matthew Parson, Esquire