NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ABDUL HOLMES	:	
Appellant	:	No. 911 EDA 2024

Appeal from the PCRA Order Entered March 8, 2024
In the Court of Common Pleas of Philadelphia County
Criminal Division at No: CP-51-CR-0009947-2017

BEFORE: STABILE, J., NICHOLS, J., and BENDER, P.J.E.

MEMORANDUM BY STABILE, J.: **FILED APRIL 29, 2025**

Appellant, Abdul Holmes, who is serving a sentence of imprisonment for aggravated assault under 18 Pa.C.S.A. § 2702(a)(1) and related offenses, appeals from an order denying his petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Upon review, we affirm.

The PCRA court summarized the case as follows:

> On the evening of September 29, 2017, [Appellant] fired multiple shots at a family standing outside their home near 24th and Norris Streets in Philadelphia. At the sound of the shooting, the father hurried his three young sons inside, but not before one of [Appellant]'s bullets struck six-year-old J.A. in the shoulder. J.A.'s father ran back outside, hoping to spot the shooter, but all he saw was a man running from the scene. Inside, J.A. lay crying and bleeding on the floor. When police arrived, J.A.'s condition was so severe that they took him to Temple University Hospital in their patrol car rather than waiting for an ambulance. J.A. was later transferred to St. Christopher's Hospital for Children, where he underwent surgery to extract the bullet.
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> At the crime scene, detectives looked for witnesses to the shooting. Multiple neighbors told police that they had heard the

gunshots, but none had seen the shooter. One neighbor, however, said that her son, Jasun Lark, had been outside at the time of the shooting. The following day, Philadelphia Police Detective Michael Rocks conducted a videotaped interview of Mr. Lark. After identifying [Appellant] in a photograph, Mr. Lark stated that he knew him from the neighborhood, had seen him walking with another man in the area of 24th and Norris Streets on the night of the shooting, and had witnessed [Appellant] pull a gun from his left hip, fire twice at J.A. and his family, and flee the scene.

Police arrested [Appellant] on October 1, 2017, and charged him with aggravated assault and related offenses. On November 7, 2017, Mr. Lark testified before a grand jury that [Appellant] shot J.A. On the day of [Appellant]'s trial, however, Mr. Lark failed to appear. Police were unable to locate him until October 29, 2018. On October 31, 2018, police escorted Mr. Lark to the courthouse after he told them that he was afraid to testify against [Appellant]. The Court issued Mr. Lark a subpoena for [Appellant]'s rescheduled trial. On December 4, 2018, the date of trial, Mr. Lark again failed to appear. Unable to locate their witness, the Commonwealth moved for a *nolle prosequi* of the charges against [Appellant].

Soon after, police found Mr. Lark, and the Court held him in contempt and sentenced him to a period of incarceration. On January 28, 2019, the Commonwealth moved to vacate the *nolle prosequi*. That same day, [Appellant]'s trial counsel, Todd Henry, Esquire, filed a motion to withdraw his representation. In his motion, Attorney Henry stated that he had been unable to reach [Appellant] since the *nolle prosequi* on December 4, 2018. The Court granted Attorney Henry's motion and appointed new counsel, Donald Bermudez, Esquire.[1] The Court also granted the Commonwealth's motion to vacate the *nolle prosequi*, and trial was listed for April 1, 2019.

On April 1, the day before jury selection was scheduled to begin, [Appellant] requested a continuance to rehire Attorney Henry. The Court denied the request, noting its timing and Attorney Henry's own motion to withdraw his representation. [Appellant] appeared for jury selection the following day, but shortly after he

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[1] We refer to Mr. Bermudez below as "trial counsel".

> arrived, he left the courtroom and did not return, nor did he return to the residence where he was registered under house arrest. The Court issued a bench warrant for [Appellant]'s arrest, and the jury trial proceeded *in absentia*.
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> On April 10, 2019, the jury convicted [Appellant] of aggravated assault, possessing an instrument of crime, recklessly endangering another person, [carrying a firearm without a license, and carrying a firearm on a public street]. The Court sentenced [Appellant], *in absentia*, on May 10, 2019, to nineteen and one-half to thirty-nine years of incarceration.

PCRA Court Opinion, 5/16/24, at 1-3.

Appellant was arrested shortly after sentencing, and he timely appealed to this Court. On October 19, 2020, this Court affirmed Appellant's judgment of sentence. Appellant did not appeal to our Supreme Court. On October 8, 2021, Appellant filed a timely PCRA petition *pro se*. He subsequently filed an amended petition through counsel alleging ineffectiveness of trial counsel.

The PCRA court granted an evidentiary hearing limited to Appellant's claim that counsel was ineffective for not objecting to the court's instruction on aggravated assault by causing serious bodily injury. The evidentiary hearing took place on September 18, 2023. Trial counsel testified that he "really didn't think there was a meritorious argument" in favor of such an objection. N.T. 9/18/23, at 24. He explained that the evidence was sufficient to support the charge as a "young man who was about five or six at the time was shot, was shot in his shoulder area. It was a very dramatic scene and he had lack of mobility and substantial pain for some period of time." ***Id.*** at 25.

Following the evidentiary hearing, the court filed a Rule 907 notice of intent to dismiss, to which Appellant did not respond. On March 8, 2024, the PCRA court dismissed Appellant's petition. This timely appeal followed. Both Appellant and the PCRA court complied with Pa.R.A.P. 1925.

Appellant's brief raises one issue in his Statement of Questions Presented, "Did the lower court err in dismissing Appellant's PCRA petition after holding a limited evidentiary hearing as to only the first claim of ineffectiveness alleged in his amended petition?" The argument section of his brief includes four distinct claims of ineffective assistance. Although Appellant should have expressly raised each claim in his Statement of Questions Presented, ***see*** Pa.R.A.P. 2116(a), this defect does not impede our review of this appeal, and we will examine each issue *seriatim.*

On appeal from an order in a post-conviction matter, "our standard of review requires us to consider whether the PCRA court's factual findings are supported by the record and free of legal error." ***Commonwealth v. Thomas***, 323 A.3d 611, 620 (Pa. 2024). "A PCRA court's credibility determinations, when supported by the record, are binding on an appellate court but its legal conclusions are reviewed *de novo*." ***Id.***

A PCRA petitioner has the burden to "plead and prove" ineffective assistance of counsel "by a preponderance of the evidence." 42 Pa.C.S.A. § 9543(a). "Counsel is presumed to be effective and it is a petitioner's burden to overcome this presumption by a preponderance of the evidence." ***Thomas***,

323 A.3d at 620. "To succeed on a claim of ineffective assistance of counsel, a petitioner must establish three criteria: (1) that the underlying claim is of arguable merit; (2) that counsel had no reasonable basis for his or her action or inaction; and (3) that petitioner was prejudiced as a result of the complained-of action or inaction." ***Id.*** at 620-21. "The failure to satisfy any one of these criteria is fatal to the claim." ***Id.*** at 621.

> A claim has arguable merit
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> where the factual averments, if accurate, could establish cause for relief. ***See Commonwealth v. Jones*****,** 876 A.2d 380, 385 (Pa. 2005) ("if a petitioner raises allegations, which, even if accepted as true, do not establish the underlying claim . . . , he or she will have failed to establish the arguable merit prong related to the claim"). Whether the facts rise to the level of arguable merit is a legal determination.

Commonwealth v. Stewart, 84 A.3d 701, 707 (Pa. Super. 2013).

Counsel has a reasonable basis for his or her action or inaction if he or she chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. ***Commonwealth v. Spotz***, 84 A. 3d 294, 311 (Pa. 2014). Where matters of strategy and tactics are concerned, "[a] finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." ***Id.*** at 312 (citing ***Commonwealth v. Colavita,*** 993 A.2d 874, 887 (Pa. 2010)).

"To establish prejudice in the context of this standard, a petitioner must establish that there is a reasonable probability that the result of the proceeding would have been different but for the complained-of conduct." ***Thomas***, 323 A.3d at 621.

Appellant first contends that trial counsel was ineffective for failing to object to the court's instruction on aggravated assault. This argument fails due to lack of arguable merit.

18 Pa.C.S.A. § 2702(a)(1) provides, "A person is guilty of aggravated assault if he . . . attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life."[2] ***Id.*** Under this provision, the Commonwealth can prevail either by proving that the defendant "attempt[ed] to cause serious bodily injury to another" **or** "caus[ed] [serious bodily] injury intentionally, knowingly or recklessly [to another] under circumstances manifesting extreme indifference to the value of human life." ***See In Re Paulmier***, 937 A.2d 364, 373 (Pa. 2007) ("'or' is disjunctive. It means one or the other of two alternatives"). "Serious bodily injury" is "bodily injury **which creates a substantial risk of death** or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. § 2301 (emphasis added). There

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[2] The criminal information against Appellant accurately recited these elements.

is no requirement that the Commonwealth must prove serious bodily injury through medical records. ***Commonwealth v. McCullough***, 324 A.3d 582, 586 (Pa. Super. 2024) (affirming conviction for aggravated assault).

During closing statements, trial counsel argued that Appellant was not guilty under Section 2702(a)(1) because he did not have any intent to harm J.A. and thus did not attempt to cause serious bodily injury to another. Following closing statements, the court stated that (1) it would charge the jury on attempt to cause serious bodily injury, and (2) it would not charge the jury on causing serious bodily injury intentionally, knowingly, or recklessly, because J.A. did not suffer serious bodily injury. N.T., 4/8/19, at 233-34. The next morning, however, the court informed counsel that it decided to charge on causing serious bodily injury, because the jury could find that Appellant "cause[d] a substantial risk of death to whomever might have been in the path of that bullet." N.T., 4/9/19, at 16-17. Trial counsel did not raise any objection. The court then charged the jury on causing serious bodily injury but not on attempting to cause serious bodily injury. The court instructed, *inter alia*, that "serious bodily injury to the victim . . . is bodily injury that creates a substantial risk of death . . ." N.T. 4/9/19, at 35. Once again, trial counsel did not voice any objection.

Appellant contends that trial counsel was ineffective for failing to object to the "causing" instruction. Appellant maintains that J.A. did not suffer serious bodily injury, and therefore trial counsel should have requested an

instruction on "attempt[ing] to cause serious bodily injury to another" instead of "causing" such injury. Appellant claims that counsel's failure to object to the "causing" instruction prejudiced him, because the "causing" instruction merely required proof of recklessness, while an "attempting" instruction would have required proof of intent, a stricter *mens rea*.

A jury instruction is proper if there is an evidentiary basis upon which the jury could find the element, offense or defense that is the subject of the instruction. ***Commonwealth v. Hall***, 199 A.3d 954, 963 (Pa. 2018). Jury instructions regarding particular crimes or defenses are not warranted where the facts of the case do not support those instructions. ***Id.*** Trial counsel will not be held ineffective for failing to object to a valid jury instruction. ***Commonwealth v. Howard***, 749 A.2d 951, 957 (Pa. Super. 2000).

There was an evidentiary basis for the jury to find that Appellant caused serious bodily injury to J.A. by creating a "substantial risk of death." 18 Pa.C.S.A. § 2301. One of the bullets fired by Appellant struck J.A. in his shoulder and lodged in his chest. A police officer who responded to the scene testified that J.A. suffered such "profuse" blood loss that police officers rushed J.A. to the hospital themselves instead of waiting for ambulances to arrive. N.T., 4/3/19, at 67, 70 (Officer Daly). The officers' swift action probably saved J.A.'s life; he might have bled to death without immediate transportation to the hospital and surgical intervention. Following surgery, J.A. remained hospitalized for the weekend. This evidence entitled the jury to find that J.A.'s

injury posed a substantial risk of death and constituted serious bodily injury. ***Cf. Commonwealth v. Caterino***, 678 A.2d 389, 392 (Pa. Super. 1996) (in aggravated assault case, victim's broken nose and severed artery, which required over three hours of emergency medical attention, was serious bodily injury for purpose of determining defendant's sentencing offense score); ***Commonwealth v. Phillips***, 410 A.2d 832, 834 (Pa. Super. 1979) (victim suffered serious bodily injury where defendant was shot in the leg and had to spend two weeks in the hospital). Since the jury instruction on causing serious bodily injury was correct, Appellant's claim that trial counsel was ineffective for failing to object to this instruction lacks arguable merit.[3]

Next, Appellant contends that trial counsel was ineffective for failing to object when the jury requested and received a transcript of Lark's videotaped interview during jury deliberations. Lark testified at trial as a Commonwealth witness. He stated during his direct testimony that he did not see who fired the shots. N.T., 4/4/19, at 168-69. The Commonwealth then played a videotape of Lark's interview with the police that took place one day after the

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[3] The PCRA court determined that this argument failed for different reasons than lack of arguable merit. ***See*** PCRA Court Opinion, 5/16/24, at 5-7 (holding that Appellant failed to satisfy reasonable basis and prejudice prongs of the ineffectiveness test). We have the authority, however, to affirm for a different reason than the reasons given by the PCRA court, and we choose to exercise that authority in this case. ***Commonwealth v. Lehman***, 275 A.3d 513, 520 n.5 (Pa. Super. 2022) (where result is correct, appellate court may affirm lower court's decision on any ground without regard to ground relied upon by lower court).

shooting. Exhibit C-10A, N.T., 4/4/19, at 184-87. The jury reviewed the transcript of the interview while the videotape played. ***Id.***; ***see also*** N.T., 4/9/19, at 54 (identifying transcript as Exhibit C-10B). Lark stated during the interview that he saw Appellant fire two shots towards the victim. Exhibit C-10B at 6-8 (interview transcript). The court later admitted both the videotape of Lark's interview and the interview transcript into evidence. N.T., 4/4/19, at 140-41 (moving Exhibits C-10A and B into evidence without objection). During jury deliberations, the jury asked to review the interview transcript. The court agreed to this request, and defense counsel did not object. N.T., 4/9/19, at 53-54. This was the only exhibit that the jury asked to see during deliberations.

Appellant argues that providing the transcript was improper under Pennsylvania Rule of Criminal Procedure 646(C)(1), and allowing the jury to view the transcript prejudiced him because it put undue emphasis on Lark's identification of him as the shooter. The PCRA court correctly determined that this claim lacks arguable merit. We also conclude that this claim fails because Appellant failed to demonstrate prejudice.

Pennsylvania Rule of Criminal Procedure 646 expressly forbids juries from having certain enumerated categories of exhibits during deliberations. Rule 646 provides in relevant part:

> **Material Permitted in Possession of the Jury**
>
> (A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (C).

* * *

(C) During deliberations, the jury shall not be permitted to have:

(1) a transcript of any trial testimony . . .

(2) a copy of any written or otherwise recorded confession by the defendant;

(3) a copy of the information or indictment; and

(4) except as provided in paragraph (B), written jury instructions.

Id.

Appellant claims that Lark's interview transcript constitutes "a transcript of trial testimony" that the jury could not have during deliberations under Rule 646(C)(1). We disagree. In ***Commonwealth v. Miller***, 172 A.3d 632 (Pa. Super. 2017), the court admitted a recording of the defendant's prison telephone communications into evidence during the defendant's trial. The jury reviewed a transcript of the recordings without objection while the Commonwealth played the recordings for the jury. The court permitted the jury to take the transcript to the jury room during deliberations. The defendant argued that the trial court erred by permitting the jury to take a transcript of his recorded prison telephone conversations to the jury room during deliberations. We held that the transcripts "were not prohibited under Rule 646(C)." ***Id.*** at 648.

Appellant makes the same argument as the defendant in ***Miller***: the court violated Rule 646 by sending Lark's interview transcript to the jury. Our precedential opinion in ***Miller***, however, requires us to conclude that Rule

646(C) did not prohibit the jury from obtaining Lark's interview transcript during deliberations.

This, however, does not end our discussion. When an exhibit is not prohibited from going to the jury under Rule 646(C), we must still examine whether the decision to furnish the exhibit was a proper exercise of the court's discretion under Rule 646(A). ***See id.*** ("[u]pon retiring, the jury may take with it such exhibits as the trial judge deems proper"); ***Miller***, 172 A.3d at 648 ("[o]rdinarily, [w]hether an exhibit should be allowed to go out with the jury during its deliberation is within the sound discretion of the trial judge"). In reaching this decision, the court should consider the relevance of the exhibit and whether prejudice will result from sending it out with the jury. ***See Commonwealth v. Woodard***, 129 A.3d 480, 496-97 (Pa. 2015). Prejudice can arise when there is a likelihood that the jury will place undue emphasis on the material and de-emphasize other evidence not in the room. ***Id.***

In ***Commonwealth v. Bango***, 685 A.2d 564 (Pa. Super. 1996), during trial, the Commonwealth played multiple audio tape recordings of intercepted phone calls between the defendant and other individuals. The Commonwealth distributed transcripts of the recorded conversations to aid the court and the jury in following the tapes. The tape recordings were admitted into evidence; the transcripts were not. During jury deliberations, the court permitted the jury to review the transcripts. The defendant argued that the court abused its discretion by allowing the jury to review the transcripts during

deliberations. This Court disagreed. We noted that Pennsylvania had not yet had occasion to consider whether Pennsylvania Rule of Criminal Procedure 1114, the predecessor to Rule 646, included transcripts of tapes where the tapes have been marked as exhibits and entered into evidence, but the transcripts have not. ***Id.*** at 565. We observed federal courts that have analyzed this issue have permitted jurors to review transcripts of tapes during their deliberations if certain safeguards are present, such as

> the use of limiting instructions to the effect that the transcripts of the tapes are not evidence and therefore should not be considered part of the evidence; that the defense be given an opportunity to submit its version of the transcripts where inconsistencies exist between the transcripts and the audio tapes; and that the defense should be given the opportunity to challenge the identity of speakers through cross examination of persons monitoring the taped telephone calls.

Id. at 566 (collecting federal cases). We determined that

> [t]he instant case is replete with safeguards. The jurors were instructed a number of times on the use of the transcripts: when the jurors were handed the transcripts during trial, when the judge charged the jury, and when the judge permitted the transcripts to go to the jury room during deliberations. The judge emphasized that the audio tapes and not the transcripts were the evidence, and that any discrepancy between the two must be resolved in favor of the audio tapes themselves. Moreover, appellant had an opportunity to cross-examine the Pennsylvania State Trooper, who monitored the recorded telephone calls and identified the parties.

Id.

In ***Miller***, ***supra***, we held that the trial court properly exercised its discretion in permitting the jury to receive the defendant's recorded prison telephone conversations to the jury room during deliberations:

> Where a recording has been admitted as evidence at trial, but the transcripts of that recording have not, this Court has previously held that trial courts may permit the jury to use the transcripts during deliberations 'as an aid in its assessment of the [recordings].' ***Bango***, [685 A.2d] at 566. We reasoned that 'where materials inform a jury and aid it in the difficult task of determining facts, the jury should be permitted to study those materials during its deliberations.' ***Id.***
>
> Appellant has failed to establish that the trial court abused its discretion in permitting the jury to have these transcripts during deliberations. The transcripts were not forbidden under Pa.R.Crim.P. 646(C), so our Rules of Evidence permitted the trial court to exercise its sound discretion in determining whether to permit the jury to have these transcripts during deliberations. The trial court sent these transcripts to the jury in response to their request during deliberations. This occurred after the trial court had admitted the recordings at trial, and after the jury had reviewed the transcripts without objection while the Commonwealth played the recordings for the jury. Pursuant to ***Bango***, ***supra***, the trial court did not abuse its discretion in allowing the jury to review the transcripts during deliberations.

Miller, 172 A.3d at 648-49.

Presently, as in ***Bango*** and ***Miller,*** the trial court's decision to give Lark's transcript to the jury was a proper exercise of discretion. As in ***Miller***, the transcript of Lark's interview was both relevant and admitted into evidence, and the jury reviewed the transcript without objection while the Commonwealth played the videotape of his interview for the jury. The transcript served as an aid for the jury to assess the videotape recording. Thus, as in ***Miller***, the court correctly permitted the jury to view the transcript during deliberations.

We note that when the court permitted the jury to review the transcript during deliberations, it did not employ any of the safeguards referenced as

examples in ***Bango***. None of these suggested safeguards applied to this case. A limiting instruction that transcripts "are not evidence," ***id.***, 685 A.2d at 566, was inapplicable because Lark's transcript was admitted into evidence as Exhibit C-10B. Allowing the defense to submit its version of the transcript where inconsistencies exist between the transcript and the videotape and to challenge the identity of speakers through cross-examination—were inapplicable because Appellant did not identify any inconsistency between Lark's transcript and the videotape[4] or raise any question about who was speaking. For these additional reasons, we agree with the PCRA court that Appellant's claim lacks arguable merit.

Appellant contends that it was prejudicial to allow the jury to review the transcript during deliberations, because it caused the jury to place undue emphasis on the transcript. Although the PCRA court did not address prejudice, we hold that Appellant failed to demonstrate any prejudice from the court's decision. ***See Commonwealth v. Lehman***, 275 A.3d 513, 520 n.5 (Pa. Super. 2022) (where result is correct, appellate court can affirm lower court's decision on any ground without regard to ground relied upon by lower court itself).

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[4] When the court granted the jury's request during deliberations to see the transcript, the court asked defense counsel whether he wanted to look at the transcript. Counsel responded, "No. I read it." N.T., 4/9/19, at 54. Thus, it appears that counsel had no concerns about the accuracy of the transcript.

In this regard, we find instructive our Supreme Court's analysis in ***Commonwealth v. Strong***, 836 A.2d 884 (Pa. 2003). There, during deliberations in a murder case, the court allowed the jury to see a diagram of the area of the shooting that was not admitted into evidence. The Supreme Court held that the defendant failed to demonstrate prejudice, reasoning that "[t]he jury viewed the diagram throughout the trial; it was not a surprise or mysterious depiction, but something used by all to aid their comprehension of the testimony." ***Id.*** at 888-89. Similarly, in the present case, the jury read the transcript of Lark's interview during trial while viewing a videotape of the interview. Thus, the transcript was not a surprise exhibit but a document that the jury used to aid its comprehension of the videotape during trial. Under these circumstances, we are not persuaded that the jury skewed the importance of this exhibit by reviewing it during deliberations.

Appellant also suggests that he suffered prejudice for the following reason:

> A large portion of the information contained in the interview comes from Detective Rocks, whereas Mr. Lark's answers are often short and curt responses to the detective's leading questions. Providing this interview transcript, introduced as substantive evidence during trial, to jury during deliberations was akin to providing the jury a trial transcript from not only Mr. Lark but also Detective Rocks.

Appellant's Brief at 19. Appellant fails, however, to point to specific instances where the detective gave leading questions or how such questions influenced Lark's answers. Accordingly, this argument does not warrant relief.

For all of these reasons, the jury's receipt of Lark's interview transcript during deliberations does not warrant PCRA relief.

Next, Appellant argues that counsel on direct appeal was ineffective for failing to contend that the trial court erroneously denied Appellant's pretrial motion to dismiss under Pa.R.Crim.P. 600. The PCRA court and the Commonwealth assert, and we agree, that Appellant has waived this issue by failing to identify any time period in which the Commonwealth failed to act with due diligence.

Rule 600 provides that "[t]rial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed." Pa.R.Crim.P. 600(A)(2)(a). For purposes of the rule, trial is deemed to commence on the date the trial judge calls the case to trial, or a defendant tenders of plea of guilty or nolo contendere. Pa.R.Crim.P. 600(A)(1). Rule 600(C) provides:

> (1) For purposes of paragraph (A), periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in the computation of the time within which trial must commence. Any other periods of delay shall be excluded from the computation.

Id.

In this PCRA proceeding, Appellant had the burden to plead and prove by a preponderance of the evidence that appellate counsel was ineffective for failing to challenge the denial of Appellant's Rule 600 motion on direct appeal.

42 Pa.C.S.A. § 9543(a). Appellant alleged the following in his amended PCRA petition relating to the Rule 600 issue:

> 40. On direct appeal, Petitioner's appellate counsel failed to raise the issue that Petitioner's motion to dismiss pursuant to Rule 600 was denied in error.
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> 41. In ***Commonwealth v. Harth***, 252 A.3d 600 (Pa. 2021), the Pennsylvania Supreme Court expanded and elaborated upon its previous decision in ***Commonwealth v. Mills***, 162 A3d 323 (Pa. 2017). Specifically, the Pennsylvania Supreme Court has held that the Commonwealth must demonstrate that it acted with due diligence throughout the life of the case, and only after it meets its burden of proving due diligence, may the trial court then rely on its own congested calendar or scheduling as justification for denying a defendant's motion to dismiss pursuant to 600(A).
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> 42. According to the record of this case, the Commonwealth did not demonstrate or provide any evidence that it acted with due diligence throughout the proceedings.
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> 43. Despite this, appellate counsel for Petitioner failed to raise this issue on direct appeal, despite a total of 549 days elapsing from the date of arrest, on October 1, 2017, to the date of trial, on April 2, 2019.

Amended PCRA Petition, 8/25/22, at ¶¶ 40-43.

In this Court, following a citation to ***Harth***, Appellant provides only two paragraphs of argument on the Rule 600 issue:

> According to the record of this case, the Commonwealth did not demonstrate or provide any evidence that it acted with due diligence throughout the proceedings. Despite this, appellate counsel for [Appellant] failed to raise this issue on direct appeal, despite a total of 549 days elapsing from the date of arrest, on October 1, 2017, to the date of trial, on April 2, 2019.
>
> Furthermore, the trial court failed to require that the Commonwealth to put forth competent evidence that it acted with due diligence at the hearing. The record of the March 1, 2019 hearing demonstrates that only brief argument was placed on the

> record prior to the trial court denying Appellant's motion to dismiss.

Appellant's Brief at 20.

In ***Commonwealth v. Martz***, 232 A.3d 801 (Pa. Super. 2020), the petitioner claimed that the trial court erred in denying his Rule 600 motion. We held that the petitioner waived this argument under Pa.R.A.P. 2119 by failing to "develop a meaningful argument with citation to relevant, legal authority on this claim in his appellate brief." ***Id.*** at 811 (citing Rule 2119(a)'s requirement that each point in brief be supported by discussion and analysis of pertinent authority). We explained:

> Appellant's Rule 600 argument provides neither an accounting of the time delays at issue nor any developed argument or citation to authority to support his bare assertion that the court erroneously calculated excusable and excludable time to the demise of his Rule 600 motion. Instead, his argument consists of nothing more than a reference to the nearly four-year time period between the January 2014 filing of charges and the October 2017 commencement of trial, and a general accusation that the record as it had developed leading up to the motion *in limine* hearing on the eve of trial provided insufficient evidence to support the court's order denying his motion.

Id.

Appellant's brief herein suffers from the same defect. He merely refers to the 549-day period between his arrest and the date of trial and claims that the Commonwealth failed to prove due diligence during the pretrial Rule 600 hearing. He fails to include an accounting of the time delays at issue, identify the periods in which the Commonwealth failed to exercise due diligence, or submit any evidence demonstrating lack of due diligence. Thus, as in ***Martz***,

we hold that Appellant has waived this argument under Rule 2119. We also note that Appellant's PCRA petition is equally devoid of specific detail and thus fails to state a claim for relief on this claim of ineffectiveness. ***See*** 42 Pa.C.S.A. § 9543(a) (PCRA petitioner "must plead" claim for relief); ***Commonwealth v. Rush***, 838 A.2d 651, 660 (Pa. 2003) (appellant waived claim of ineffective assistance by, *inter alia*, failing to plead claim in his PCRA petition).

In his final claim, Appellant contends that trial counsel was ineffective for failing to make a timely continuance request so that Appellant could rehire his original trial attorney, Todd Henry, Esquire. This claim does not warrant relief.

In December 2018, four months before trial, the court granted attorney Henry's motion to withdraw from representation. Appellant claimed in his PCRA petition that (1) he made repeated unsuccessful attempts to contact Henry between January 2019 and his trial in April 2019, and (2) he asked trial counsel to request a continuance so that he could rehire Henry, but trial counsel failed to make a continuance request until one day before trial. The court denied the continuance request, and this Court held on direct appeal that the court's decision was a proper exercise of discretion. ***Commonwealth v. Holmes***, 1651 EDA 2019, at 13-20 (Pa. Super., Oct. 19, 2020). Appellant contended in his PCRA petition that trial counsel should have made a continuance request earlier than one day before trial.

The PCRA court properly rejected this claim for several reasons. First, as the court observed, Appellant failed to plead "any specifics" to support his claim in his PCRA petition, such as the dates he attempted to contact Henry, how he made these attempts (by telephone, email, etc.), or when he asked trial counsel to request a continuance. PCRA Court Opinion at 12. Furthermore, one day before trial, Appellant claimed on the record that he had attempted without success to contact Henry. N.T., 4/1/19, at 11. The court rejected his claim as incredible, noting that Henry has a "thriving practice" and is "easy to contact." ***Id.*** Thus, the court found, as fact, that Appellant *did not* attempt to contact Henry. Appellant fails to present any reason how this Court has the authority to disregard this finding, or why we should do so even if we had such authority. Next, as both the PCRA court and the Commonwealth observed, Appellant failed to demonstrate that Henry was willing to re-enter his appearance and represent Appellant at trial. PCRA Court Opinion at 12; Commonwealth's Brief at 23. As the PCRA court observed, in the absence of such evidence, it would not have granted a continuance regardless of whether trial counsel had raised it earlier. PCRA Court Opinion at 12. Finally, even if the court had granted a continuance and Henry had agreed to represent Appellant, Appellant fails to explain why that would have led to a different verdict. Therefore, he could not show prejudice.

For these reasons, we affirm the order denying Appellant's PCRA petition.

Order affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 4/29/2025