NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RICHARD JARMON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3275 EDA 2012

Appeal from the PCRA Order November 30, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0703901-2006;
CP-51-CR-0703911-2006

BEFORE: GANTMAN, J., OLSON, J., and WECHT, J.

MEMORANDUM BY GANTMAN, J.: **FILED FEBRUARY 05, 2014**

Appellant, Richard Jarmon, appeals from the order entered in the Philadelphia County Court of Common Pleas, which denied and dismissed his first petition filed pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

In its opinion, the PCRA court fully and correctly set forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.[2]

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[1] 42 Pa.C.S.A. §§ 9541-9546.

[2] Appellant timely filed a notice of appeal on December 4, 2012. On December 6, 2012, the court ordered Appellant to file a concise statement of
(Footnote Continued Next Page)

Appellant raises the following issues for our review:

> DID THE PCRA COURT ERR WHEN IT DENIED APPELLANT POST-CONVICTION RELIEF IN THE ABSENCE OF AN EVIDENTIARY HEARING?
>
> IS APPELLANT ENTITLED TO POST-CONVICTION RELIEF SINCE APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO PROPERLY LITIGATE THE CLAIM OF INSUFFICIENCY OF [THE] EVIDENCE OR RAISE A CLAIM THAT THE VERDICTS OF GUILT ARE AGAINST THE WEIGHT OF THE EVIDENCE SINCE THE TRIAL TESTIMONY OF ERIC RICHARDSON AND DOMINIQUE SUTTON FAILED TO ESTABLISH APPELLANT'S GUILT BEYOND A REASONABLE DOUBT AND THEREFORE APPELLANT'S CONVICTION HAS BEEN OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW?
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> IS APPELLANT ENTITLED TO POST-CONVICTION RELIEF SINCE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN AGREEING TO CONSOLIDATE THE OFFENSES CHARGED AND/OR BY FAILING TO SEEK SEVERANCE OF THE OFFENSES CHARGED DUE TO THE PREJUDICIAL IMPACT OF HAVING THE OFFENSES TRIED TOGETHER?
>
> IS APPELLANT ENTITLED TO POST-CONVICTION RELIEF SINCE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO THE TRIAL COURT'S REFERENCE TO APPELLANT'S PRIOR RECORD AND INQUIRING AS TO WHETHER THE KNOWLEDGE OF APPELLANT'S PRIOR RECORD [A]FFECTED THE TRIAL COURT'S ABILITY TO PRESIDE IMPARTIALLY?
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> IS APPELLANT ENTITLED TO POST-CONVICTION RELIEF SINCE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO SEEK SUPPRESSION AND/OR THE STRIKING OF THE TESTIMONY OF ERIC RICHARDSON

(Footnote Continued) ———————————

errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), which Appellant timely filed on December 18, 2012.

> AND DOMINQUE SUTTON GIVEN THE TESTIMONY OF THOSE WITNESSES WAS IN DIRECT CONFLICT WITH THE PHYSICAL FACTS OF THE CASE?
>
> IS APPELLANT ENTITLED TO POST-CONVICTION RELIEF SINCE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO UTILIZE THE TESTIMONY AND FINDINGS OF PRIVATE INVESTIGATOR SHARON WILLIAMS TO DISCREDIT THE TESTIMONY OF DOMINIQUE SUTTON?
>
> IS APPELLANT ENTITLED TO POST-CONVICTION RELIEF SINCE APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO AMEND APPELLANT'S APPEAL TO INCLUDE A ***MELENDEZ-DIAZ***[3] ARGUMENT?
>
> IS APPELLANT ENTITLED TO POST-CONVICTION RELIEF SINCE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO THE TESTIMONY CONCERNING ANGELA NELSON'S ILLEGAL PURCHASE OF A GUN AND THE SUBSEQUENT THEFT OF THE GUN FROM A CAR THAT [APPELLANT] HAD ACCESS TO SINCE IT HAD NO RELEVANCE AND WAS PREJUDICIAL?

(Appellant's Brief at 4-5).

Our standard of review of the denial of a PCRA petition is limited to examining whether the record evidence supports the court's determination and whether the court's decision is free of legal error. ***Commonwealth v. Ford***, 947 A.2d 1251, 1252 (Pa.Super. 2008), *appeal denied*, 598 Pa. 779, 959 A.2d 319 (2008). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513, 515 (Pa.Super. 2007), *appeal*

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[3] ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

denied, 593 Pa. 754, 932 A.2d 74 (2007). A petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact, the petitioner is not entitled to PCRA relief, and no purpose would be served by any further proceedings. ***Commonwealth v. Hardcastle***, 549 Pa. 450, 454, 701 A.2d 541, 542 (1997).

After a thorough review of the record, the briefs of the parties, the applicable law, and the comprehensive opinion of the Honorable Shelley Robins New, we conclude Appellant's issues merit no relief. The PCRA court opinion discusses and properly disposes of the questions presented. (***See*** PCRA Court Opinion, filed May 2, 2013, at 3-9) (finding: **(1)** evidentiary hearing was unnecessary where Appellant's ineffectiveness claims lacked arguable merit; **(2)** Appellant's complaint regarding appellate counsel's alleged failure to raise challenge to sufficiency of evidence on direct appeal is actually challenge to weight of evidence; appellate counsel raised challenges to sufficiency and weight of evidence on direct appeal; Appellant now attempts to re-litigate sufficiency claim under new theory, which does not warrant additional review; moreover, court credited testimony of Eric Richardson that Appellant stood over first murder victim and shot him in head; court credited testimony of Mr. Richardson's wife, which corroborated Mr. Richardson's testimony; court credited testimony of Domanique Sutton, who observed Appellant shoot second murder victim at close range; physical

evidence corroborated eyewitnesses' testimony; trial counsel vigorously cross-examined eyewitnesses, raising all avenues of impeachment; thus, Commonwealth presented sufficient evidence to sustain Appellant's convictions and convictions were not against weight of evidence; **(3)** fact that court tried cases involving separate murder victims together raised no inference of guilt against Appellant in either case and no prejudice occurred, where Appellant was subject to bench trial, not jury trial; evidence demonstrated that second murder occurred because Appellant and his cohort feared second murder victim was witness to first murder, which occurred six days earlier; Ms. Sutton heard Appellant state: "I don't have to worry about you snitching. I am going to get you out of the way. I am just going to end this now"; court properly tried cases together where circumstances of first murder provided motive for second murder; **(4)** Appellant misinterprets and takes out of context court's comment referring to standard police form; court merely referred to fact that when police arrested Appellant for instant crimes, police might have asked him some background questions contained in standard police form; court's comment did not refer to Appellant possessing criminal record; **(5)** testimony of Mr. Richardson and Ms. Sutton was not inconsistent with physical evidence; moreover, Appellant's claim that eyewitnesses' testimony was inconsistent with physical evidence is not basis for suppression motion; **(6)** Appellant provided no affidavit from private investigator explaining what her proffered testimony would have

been if called as defense witness; moreover, Appellant's claim that private investigator would have discredited Ms. Sutton's testimony misstates trial testimony; Ms. Sutton testified she witnessed second murder while she was peeking around building, not sitting on steps behind building; **(7)** Dr. Ian Hood performed autopsy on first murder victim; Dr. Hood did not perform autopsy on second murder victim, but testified that he reviewed autopsy report, autopsy photographs and autopsy file, and independently reached his own conclusion regarding cause and manner of second murder victim's death; Dr. Hood was subject to cross-examination as to cause and manner of both deaths; Appellant's ***Melendez-Diaz*** argument fails;[4] **(8)** court properly admitted testimony of Angela Nelson, Appellant's cousin, to show

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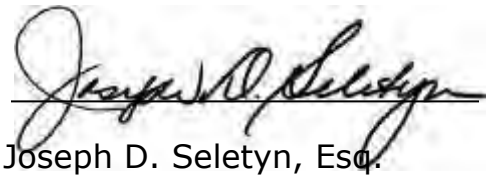
[4] Appellant's ***Melendez-Diaz*** argument as presented on appeal is unclear and conclusory. Nevertheless, we observe: (1) Appellant did not object at trial to admission of the autopsy report concerning the second murder victim, Mr. Poles; (2) Appellant did not object at trial to the admission of Dr. Hood's testimony discussing the autopsy report concerning Mr. Poles; (3) Dr. Hood testified at trial that he independently reached his own conclusion regarding the cause and manner of Mr. Poles' death; (4) Dr. Hood testified at trial that he could have rendered his conclusion regarding the cause and manner of Mr. Poles' death in the absence of an autopsy report; and (5) Appellant cross-examined Dr. Hood concerning the second autopsy report. Further, we note that ***Melendez-Diaz*** requires an objection based on Confrontation Clause grounds at trial. ***See Melendez-Diaz, supra*** at 309, 129 S.Ct. at 2531. Because trial counsel was also appellate counsel, trial counsel could not have raised on appeal his own ineffectiveness for failing to object at trial. Moreover, Appellant has failed to articulate in the instant appeal how the admission of the autopsy report concerning Mr. Poles calls into question the integrity of the court's verdict in light of the physical and testimonial evidence of Appellant's guilt in this case.

that Appellant and his cohort had access to type of gun used in crimes). Accordingly, we affirm on the basis of the PCRA court's opinion.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/5/2014

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0703901-2006** ✓ **CP-51-CR-0703911-2006**
v.	:	
RICHARD JARMON, Appellant	:	**Superior Court Docket No: 3275 EDA 2012**

OPINION

Appellant, Richard Jarmon appeals from this Court's denial of relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A.§9541, *et. seq.* From September 17, 2007 through September 25, 2007, Appellant was tried before this Court in a bench trial. The charges involved two killings: the May 23, 2005 fatal shooting of Joseph El and wounding of Eric Richardson and the May 29, 2005 fatal shooting of Bruce Poles. Both murders occurred in Philadelphia. Following the arguments of counsel, this Court found Appellant guilty of First Degree Murder, Conspiracy, Aggravated Assault, Attempted Murder, Possessing an Instrument of Crime and a Violation of the Uniform Firearms Act (18 Pa.C.S.A. §6106) concerning the May 25, 2005 incident. The Court also found Appellant guilty of First Degree Murder, Possessing an Instrument of Crime and a Violation of the Uniform Firearms Act (18 Pa.C.S.A. §6106) concerning the May 29, 2005 incident. Upon the request of defense counsel, sentencing occurred on September 25, 2007[1]. Appellant was sentenced to consecutive life sentences and

[1] This case initially was called as a death qualified jury trial. At sentencing counsel provided the Court with psychological and social background reports prepared in preparation for trial. The parties and the Court believed that the Court had sufficient information upon which to fashion appropriate sentences.

various concurrent sentences for the lesser crimes[2]. Timely post sentence motions were filed and denied. The judgments of sentence were affirmed by the Superior Court, docketed at No. 701 EDA 2008. Allocatur was denied by the Supreme Court docketed at No 289 EAL 2008.

The facts as found by this Court were as follows: On May 23, 2005 at approximately 12:45 a.m. Eric Richardson was home in bed in his rented third floor room in a rooming house located at 27 E. Meehan Street in Philadelphia. His girlfriend, now wife, Antoinette Haynes was with him. Richardson allowed his friend Joseph El to stay in what was Richardson's father's rented room, as his father was not going to be home that night. At about 12:45 a.m. there was a knock at Richardson's door. Richardson partially opened the door and saw an individual he knew as Buck who was later identified as co-conspirator, David Mathias. Richardson dressed, went outside his door to the landing and spoke with Buck. Richardson testified that Buck asked him change of a $5 bill. As they were talking, Richardson was able to see into his father's room. The television was on, and there was a male sitting on a plastic chair. El appeared to be lying on the floor. Richardson further testified that he went to his room to get 5 one dollar bills. When he went back into the hallway, Buck said, "Is you ready to go?" At that time, Richardson saw the man in the other room stand up. He recognized the man to be Appellant, whom he knew as Boz who was a friend of Buck. Things happened quickly after that. The Court found as fact that Buck reached under his shirt, pulled out a gun and began firing at Richardson. They struggled and eventually Richardson, was able to flee down the stairs as he was being shot at and ran out of the building. Richardson also saw Appellant standing over El and fire straight down at him. Appellant also fired at Richardson. Richardson was struck five times and recovered from his injuries. El was not as lucky, he died at the scene.

[2] No sentence was imposed for Attempted Murder as the Court found that it merged into the sentence for Aggravated Assault.

On May 29, 2005, at about 4:40 a.m. Dominique Sutton was outside behind a building at 6415 Cliveden Street in Philadelphia. She had been doing drugs and drinking alcohol. She saw her best friend, Bruce Poles walking on Musgrave Street along side of the park. She then saw a silver Taurus drive up and approach Poles. Appellant was in the front passenger seat and Buck was in the back seat. Appellant and the driver got out. She heard an argument between Poles and Appellant and heard Poles say, "You don't have to do this." She then heard Appellant say, "I don't have to worry about you snitching. I'm going to get you out of the way." Appellant then repeatedly shot Boles, killing him. Appellant ran away as Buck and the driver fled in the car.

Appellant timely filed a *pro-se* PCRA Petition. Counsel was appointed who filed an amended petition. The Commonwealth responded with a motion to dismiss. Appellant subsequently filed a reply to the Commonwealth's motion. After a thorough review of the pleadings, the record and the law and after complying the procedural requirements contained in Pa.R.Crim. P. 907, this Court dismissed the petition without granting a hearing. The instant timely appeal followed.

"Ineffective assistance of counsel is a mixed question of law and fact that we review *de novo*." United States v. Blaylock, 20 F.3d 1458, 1464-5 (1994). The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 685 (1984), stated, "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment including the Counsel Clause." The Supreme Court also states, "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's

playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Id. Due to the reason above, the Supreme Court has acknowledged that the right to counsel is the right to effective counsel. Id. at 686. The law presumes that counsel was effective and, therefore Appellant has the burden to show that counsel was ineffective. Commonwealth v. Baker, 614 A.2d 663, 673 (Pa. 1993).

The Strickland Court set out a test where a defendant would have to show that (1) his attorney's performance was unreasonable under prevailing professional standards and (2) that there is a reasonable probability that but for counsel's unprofessional errors; the result would have been different. Strickland v. Washington. at 687-90. In reviewing the PCRA, the Pennsylvania Supreme Court, in Commonwealth v. Douglas, 645 A.2d 226, 230 (Pa. 1994), stated, "To prevail on such a claim, Appellant must demonstrate that (1) the underlying claim is of arguable merit; (2) counsel's course of conduct was without a reasonable basis designed to effectuate his interest; and (3) that he was prejudiced by counsel's ineffectiveness." To show prejudice defendant must establish that, but for counsel's errors, the outcome of the trial would have been different. Commonwealth v. Bond, 819 A.2d 33, (Pa. 2002). Appellant's failure to satisfy all the prongs of the test should result in the dismissal of the ineffective counsel claim. Commonwealth v. Fulton, 876 A.2d 342, (Pa. 2003).

To be entitled to an evidentiary hearing on a claim of ineffectiveness, a defendant must "set forth an offer to prove at an appropriate hearing sufficient facts upon which a reviewing court can conclude ... counsel may have, in fact, been ineffective." Commonwealth v. Priovolos, 715 A.2d 420, 422 (Pa. 1998) (quoting Commonwealth v. Pettus, 424 A.2d 1332, 1335 (Pa. 1981)). As the facts present no basis for ineffectiveness, no hearing was necessary.

Appellant's first claim was that his prior counsel was ineffective for failing to properly raise on appeal his claim that the evidence was insufficient to support convictions[3]. Specifically Appellant cited to what he perceived to be inconsistencies among the testimony of various witnesses and claimed therefore that the evidence was insufficient to support the verdicts. First, we agree with the Commonwealth's analysis that the instant claim is a challenge to the weight and not the sufficiency of the evidence. However under either theory, Appellant simply is seeking to relitigate a claim that was addressed and rejected in his direct appeal. The mere fact that Appellant now poses a different theory does not entitle him to additional review of this claim. See Commonwealth v. Wharton, 811 A.2d. 978, 984 (Pa. 2002) (PCRA petitioner cannot obtain additional review of previously litigated claims by presenting new theories of relief including allegations of ineffectiveness.) (collecting cases)

Moreover, as we addressed in our opinion in the direct appeal, the evidence was consistent and corroborated by other testimony. The Court credited the testimony of the eyewitness that Appellant stood over his first victim and shot him in the head, as his co-conspirator tried to kill the eyewitness. See N.T. 9/19/07, 59-136 (Testimony of Eric Richardson). Richardson's testimony was also corroborated in large part by the testimony of his wife. See N.T. 9/19/07, 272-29, (Testimony of Antoinette Haynes). The Court also credited the testimony of the eyewitness to the second murder that Appellant repeatedly shot into the body of his second victim at close range. See N.T. 9/24/07, 42-86 (Testimony of Domanique Sutton). The physical evidence recovered including the bullets and shell casings, placements of the bodies and autopsy results strongly corroborated the eyewitness testimony[4]. We also noted that counsel

[3] Challenges to both the sufficiency and weight of the evidence were raised and rejected on appeal.
[4] Appellant also claims that counsel was ineffective for failing to seek suppression of Eric Richardson's and Domanique Sutton's testimony because they were inconsistent with the physical evidence. Their testimony was

for Appellant vigorously cross examined each witness raising all avenues of impeachment available as to that witness. The mere fact that this Court, as the fact finder chose to find facts justifying each verdict in no way shocks one's sense of justice. Therefore, this previously litigated claim also is baseless.

Next, Appellant alleges that prior counsel was ineffective for failing to seek to sever the trials for the two killings. First, we must again note that the case was tried as a bench trial and not a jury trial. This Court as fact finder recognized that it was trying two cases in which the killings were separated by six days. The mere fact that the cases were being tried together raised no inference of guilt in either case and no prejudice occurred to Appellant. See Commonwealth v. Gribble, 863 A.2d. 455 (Pa. 2004.)

More importantly however, the evidence demonstrated that the second murder, occurred because Appellant and his co-defendant feared that the victim, Bruce Poles, was a witness to the first shooting six days earlier. As noted above, Domanique Sutton testified that immediately before executing Poles, "[Appellant] was talking to Bruce. He was saying I don't have to worry about you snitching. I am going to get you out of the way. I am just going to end this now." She further stated, "[Poles] said, we grew up together, it don't have to be like this. I didn't tell them sh*t." N.T. 9/24/07, 58. As the first killing provided the motive for the second killing, the cases properly were tried together. See Commonwealth v. Turner, 450 A, 2d. 9 (Pa. Superior 1982). Accordingly, this claim, too, is baseless.

Next, Appellant cites, out of context, a brief comment the Court made to him and claims that the prior Counsel was ineffective for not objecting to a reference to Appellant's prior record. First, the Court must state that prior to a bench trial it never reviews whether a defendant has a

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consistent with the physical evidence and even if it were not, it was not a basis for suppression. Therefore that claim, too is baseless.

prior criminal record. In this matter, during the testimony of the officer who arrested the co-defendant, counsel for the co-defendant stipulated to certain biographical information contained in a standard police form[5]. In explaining the stipulation to Appellant, the Court stated, "It is a biographical information sheet. So, basically, the officer who took that general information, it is standard in all arrests, as you probably experienced yourself." N.T. 9/20/07, 12. Contrary to current counsel's sinister interpretation of this comment, the Court simply referred to the fact that when arrested for the instant crimes, Appellant also probably was asked the biographical questions contained in the 75-229 form. Accordingly, this claim, too is baseless.

Next Appellant claims that prior counsel was ineffective for failing to call his investigator, Sharon Williams to discredit the testimony of Domanique Sutton. Specifically, Appellant claimed that Ms. Williams should have been called to testify that her investigation demonstrated the impossibility that Ms. Sutton could have witnessed the shooting from her stated position which Appellant claimed to have been seated on some steps behind the building. Even assuming that Appellant properly complied with required PCRA procedure[6], this claim misstates the testimony at trial. Ms Sutton testified that she peeking around the building, not sitting on steps behind the building when she witnessed the murder. N.T. 9/24/07, 124. Therefore this claim also fails.

Next, Appellant again misstates the record and claims that prior counsel was ineffective for failing to challenge on appeal the testimony of the medical examiner, by raising a challenge pursuant to Melenzez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009). In Melendez-Diaz, the United States Supreme Court held that the where the government chose not to produce the expert

[5] This is the form 75-229.
[6] Appellant provided no required affidavit from Ms. Williams.

who performed necessary scientific tests at trial for cross examination, but instead just utilized the reports, it violated a defendant's rights under the Confrontation Clause.

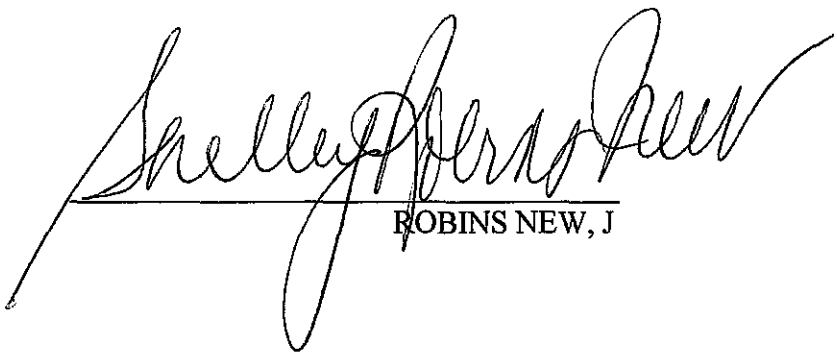
Instantly, the autopsies on the decedents in the two incidents were performed by different medical examiners. Appellant now claims that because the Commonwealth chose to produce only one medical examiner at trial and because Appellate counsel failed to raise this issue on appeal, he is entitled to a new trial. In so doing, he misstates both the evidence and the law.

Dr. Ian Hood performed the autopsy on Joseph El. Although he did not perform the autopsy on Bruce Poles, Dr. Hood testified that he reviewed the autopsy report, the autopsy photographs and the remainder of the autopsy file. Dr. Hood further testified that as a result of his review he independently reached his own conclusions about the cause and the manor of the death of Mr. Poles. Dr. Hood then testified, subject to cross examination as to the cause and manner of both deaths. Nothing in this procedure was, in any way, improper or, in any way, violated Appellant's rights under the Confrontation Clause. Accordingly, prior counsel was not ineffective for failing to raise this issue on appeal.

Finally, Appellant claims that prior counsel was ineffective for failing to object to the testimony of Appellant's cousin, Angela Nelson. Ms. Nelson was a police officer who, shortly after the El murder and before the Poles murder, took Appellant and his co-defendant to a suburban gun shop and purchased a .45 caliber handgun. She later falsely claimed that the gun was stolen and was fired from the police force for falsely claiming on the gun application that she was unemployed. As a .45 caliber weapon was used both in the El murder and the Poles murder, this evidence properly was admitted to show that both defendants had access to the type of gun used in the crimes. See Commonwealth v. Akers, 572 A.2d. 746 (Pa. Superior 1990). Accordingly, this claim, too is baseless.

For the reasons set forth above, the Order denying PCRA relief should be affirmed.

BY THE COURT:



ROBINS NEW, J