

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

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| <b>COMMONWEALTH OF PENNSYLVANIA</b> | : | <b>No. CR-1459-2011</b>  |
|                                     | : |                          |
| <b>v.</b>                           | : |                          |
|                                     | : |                          |
| <b>ROGER MITCHELL RIERA,</b>        | : | <b>CRIMINAL DIVISION</b> |
| <b>Petitioner</b>                   | : |                          |

**OPINION AND ORDER**

After a jury trial held from August 13, 2012 to August 17, 2012, Roger Mitchell Riera (Petitioner) was convicted of Murder of the Third Degree, a felony of the first degree;<sup>1</sup> Voluntary Manslaughter, a felony of the first degree;<sup>2</sup> and Aggravated Assault, a felony of the first degree.<sup>3</sup> On October 28, 2012, the Petitioner filed a Post-Verdict Motion for Arrest of Judgment, which this Court denied following a hearing held on October 22, 2012. On November 27, 2012, this Court sentenced the Petitioner to fifteen (15) to thirty (30) years in a State Correctional Institution with a consecutive five (5) years of probation with the Pennsylvania Board of Probation and Parole.

On December 3, 2012, the Petitioner filed a Post-Sentence Motion. On April 1, 2013, the Petitioner filed a Notice of Appeal to the Superior Court of Pennsylvania. On April 2, 2013, this Court denied the Petitioner's Post-Sentence Motion in an Opinion and Order, which also summarized the testimony presented at trial. The next day, the Petitioner filed a Praecipe to Discontinue the Notice of Appeal filed on April 1, 2013 and filed another timely Notice of Appeal after this Court's decision.

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<sup>1</sup> 18 Pa.C.S. § 2502(c).

<sup>2</sup> 18 Pa.C.S. § 2503(b).

<sup>3</sup> 18 Pa.C.S. § 2702(a) (1).

On August 25, 2014, the Superior Court denied the Petitioner's direct appeal. Subsequently, the Petitioner filed for Allowance of Appeal by the Supreme Court which was denied April 2, 2015. Therefore, Petitioner's sentence was final on July 1, 2015.

On March 7, 2016 Petitioner filed a pro se post conviction relief (PCRA) petition. The Court appointed Kyle W. Rude, Esquire on March 29, 2016 to represent Petitioner and set a June 30, 2016 conference date to discuss any filings. On May 31, 2016, the Court granted the Petitioner's request for a thirty (30) day extension of time and conference was then scheduled for August 8, 2016. PCRA Counsel filed an amended PCRA petition on July 6, 2016.

At the conference in August, PCRA Counsel notified the Court that appellate counsel had not yet provided him with the case file. Therefore on August 10, 2016, this Court generated an order requiring appellate counsel to provide the court file to PCRA Counsel as quickly as possible.

Once appellate counsel provided the file, a second amended petition was filed by PCRA Counsel on November 29, 2016 with a conference scheduled for January 19, 2017. After the conference held by the court, PCRA Counsel was given 45 days to collect certifications and the additional information as discussed during the conference.

By June, when the Court had heard nothing further from PCRA Counsel, this Court entered an order on June 7, 2017, setting a deadline for any amended petition to be filed on June 14, 2017. By the same order, a conference was scheduled for June 19, 2017. Due to PCRA Counsel's unavailability, that conference was rescheduled to July 24, 2017; the conference was held on that date and both parties made argument on the issues set forth in the Petitioner's Amended PCRA petition.

Petitioner alleges the following errors during trial for which he seeks relief: 1) trial counsel should have called a weapons expert to testify regarding the placement of the shot and accuracy of the weapon used by Petitioner; 2) trial counsel failed to call character or reputation witnesses regarding the petitioner's peacefulness and truthfulness which could have bolstered his self-defense justification claim; 3) trial counsel failed to introduce into evidence of Petitioner's prior tape recorded statement to support his defense as a prior consistent statement and show petitioner's state of mind after learning that the victim was pronounced dead; 4) trial counsel failed to introduce into evidence Petitioner's 911 call to demonstrate to the jury the Petitioner's state of mind after the shooting; 5) trial counsel did not discuss with Petitioner whether or not he should testify or wanted to testify at trial; 6) trial counsel failed to elicit testimony from Petitioner or a medical expert regarding his medical condition at the time of the shooting which would have been relevant to his state of mind at the time of the offense; 7) Petitioner challenges the propriety of the Court's ruling denying Petitioner's request for a self defense instruction based on the "Stand Your Ground" law at 18 Pa. C.S.A. Section 505(b)(2.3) as Petitioner believed that the victim possessed and used a lethal weapon even though none was seen by the Petitioner or found; and, 8) Petitioner challenges the propriety of the Court's ruling denying Petitioner's request for a self defense instruction based on the "Stand Your Ground" law at 18 Pa. C.S.A. Section 505(b)(2.3) as Petitioner believed that the victim could have inflicted serious bodily injury even without a weapon. The Court will address these issues *seriatim*.

Incarcerated Petitioners, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by a preponderance of the evidence the following four components:

- 1) Petitioner has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.
- 2) Conviction or sentence resulted from one or more of the following
  - i. Violation of the US or PA Constitution that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.
  - ii. Ineffective assistance of counsel – same undermining the truth determining process standard as above “undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place”.
  - iii. Plea of guilty induced where inducement caused Petitioner to plead guilty when he is innocent.
  - iv. Improper obstruction by government officials of petitioner’s appeal right where a meritorious appealable issue 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 had it been introduced.
  - vi. Imposition of sentence greater than the lawful maximum.
  - vii. Proceeding in a tribunal without jurisdiction.
- 3) Allegation of the error has not been previously litigated or waived; and
- 4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel<sup>4</sup>.

To make a claim for ineffective assistance of counsel, a Petitioner must show 1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. *Commonwealth v. Cooper*, 941 A.2d 655, 664 (2007). (See *Commonwealth v. Carpenter*, 725 A.2d 154, 161 (1999)). A failure to satisfy

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<sup>4</sup> 42 Pa.C.S. § 9543.

any prong of this test is fatal to the ineffectiveness claim. *Cooper*, at 664. (See *Commonwealth v. Sneed*, 899 A.2d 1067, 1076 (2006)).

***Trial counsel should have called a weapons expert to testify regarding the placement of the shot and accuracy of the weapon used by Petitioner***

Petitioner in the first allegation of his PCRA petition alleges that trial counsel should have called a firearms expert to testify about the capability of the gun to have shot the victim where it did. At the time of the conference in August, PCRA Counsel indicated to the court that based upon his review of the evidence presented at trial and his investigation that there was no merit to this issue.

In reviewing the testimony presented at trial, there was no indication that the gun misfired or malfunctioned in any way. This Court is hard pressed to determine what the issue would have been that the expert, if one was able to be found, would have clarified or addressed.

Since the Petitioner cannot show that the need for an expert was a claim of arguable merit, the Court agrees with PCRA Counsel and this issue will be dismissed.

***Trial counsel failed to call character or reputation witnesses regarding the Petitioner's peacefulness and truthfulness which could have bolstered his self-defense justification defense***

Petitioner's next claim is that trial counsel failed to locate and present witnesses at trial to establish Petitioner's reputation for peacefulness and

truthfulness which would have been relevant and admissible to support his case.

PCRA Counsel interviewed trial counsel in preparation for the conference on the petition. In her certification filed with the Court attached to the Amended PCRA petition, trial counsel notes that she had attempted to locate individuals who could testify as to the Petitioner's reputation for truthfulness and as a law abiding person. She was unable to find any (see Certification of Jeana Longo, Esq., filed 6/14/2017).

PCRA Counsel was also unable to locate any witnesses which could have been called to testify on the Petitioner's behalf. Although this issue may be one of arguable merit, since trial counsel had a reasonable basis for her omission and PCRA Counsel cannot show the existence of witnesses who should have been called at trial, this fails to establish the second prong of Petitioner's claim of ineffectiveness and the claim fails.

***Trial counsel failed to introduce into evidence Petitioner's prior tape recorded statement to support his defense as a prior consistent statement and show Petitioner's state of mind after learning that the victim was pronounced dead***

PCRA Counsel alleges that trial counsel was ineffective for her failure to present the statement the Petitioner made to Agent Dincher of the Williamsport Bureau of Police. Petitioner alleges that it should have been admitted at trial as a prior consistent statement and to show the Petitioner's state of mind after learning that the victim was dead.

On July 19, 2012 the Commonwealth filed a Motion in Limine arguing that the video should be precluded if the Commonwealth did not introduce it during its

case in chief. A hearing was held on the Motion in Limine on August 8, 2012 and at the conclusion, the Court ruled that if the Commonwealth did not use the video in its case, in order for the defense to use it at trial, they must argue an applicable hearsay exception to make it admissible.

Trial counsel never tried to introduce the video at trial and never argued any hearsay exception. This Court found at the hearing in August, that the statement was 801(c) hearsay thus requiring an exception to be demonstrated to allow it to be used at trial.

On its face it would appear that this issue could have arguable merit. Although the Court cannot tell if there would be a reasonable probability that had trial counsel attempted to argue an exception or that the Commonwealth “opened the door” to allow its admission and presented the testimony, the outcome of the trial would have been different. However, in reviewing the testimony of the Petitioner the Commonwealth did not appear to challenge his credibility by cross examining him on statements about which the previously precluded statement would have been relevant and admissible.

Therefore the Court finds a reasonable basis for trial counsel’s failure to argue for the admission of the Petitioner’s statement to Agent Dincher. Therefore, this issue has no merit.

***Trial Counsel failed to introduce into evidence the Petitioner’s 911 call to demonstrate to the jury his state of mind after the shooting***

Petitioner alleges that trial counsel was ineffective in failing to present evidence of the 911 call made by Petitioner after he shot the victim. Petitioner

believes that if the jury would have heard him on the call it would have helped establish his self defense claim. Furthermore, it would also have addressed the issue raised by the Commonwealth of both the Petitioner's state of mind and explain why he walked away from the scene as he did. After reviewing the trial transcript, the Court finds this issue to be without merit.

On the first day of trial, the parties stipulated to the authenticity of the 911 call provided by the County's 911 Center. See *Notes of Testimony, 8/13/13* at p.26. In fact, trial counsel had no objection to the admission of the recording and even noted in open court in the presence of the jury that it was the first 19 seconds and that it was in fact the Petitioner calling 911. *Id.* Therefore, the issue has no merit and will be dismissed.

***Trial counsel did not discuss with Petitioner whether or not he should testify or wanted to testify at trial***

Petitioner asserts that trial counsel did not discuss with Petitioner whether or not he wanted to testify or that he should testify at trial. Petitioner alleges that trial counsel surprised him by calling him to testify in front of the jury. As a result of the surprise he not only felt compelled to testify but he was not properly prepared.

It is clear from the transcript that shortly before lunch on Wednesday, August, 14, 2012, Counsel and the Court outside the presence of the jury but with Petitioner in the courtroom, discussed the nature of the possible testimony of the Petitioner in a specific area; whether he would be allowed to testify as to his belief about his medical condition. The Court made a preliminary ruling and



adjourned for lunch at 11:30 AM. The Court resumed the trial at 1:13 PM, with the jury present, to begin the afternoon session of Court. While this Court is not aware of the conversation between Petitioner and trial counsel over the luncheon recess, it is clear that the Petitioner knew that he would be testifying at some point during that day and had approximately two hours to discuss his concerns with his attorneys.

Once again, Petitioner fails to show how he was prejudiced during trial. However, in light of the contradiction between the Petitioner's assertions and trial counsel's memory and nothing in the record to rely upon, the Court believes that a hearing should be held to develop the issue.

***Trial counsel failed to elicit testimony from Petitioner or a medical expert regarding his medical condition at the time of the shooting which would have been relevant to his state of mind at the time of the offense***

Petitioner alleges that trial counsel was ineffective for failing to present medical testimony or failing to elicit testimony from Petitioner about his medical condition at the time of the incident.

Just before the Petitioner testified, both Counsel and the Court discussed at great length the fact Petitioner believed that he had a degenerative muscle condition and wanted to testify to that fact without presenting medical testimony. *Notes of Testimony, August 15, 2012*, at pp. 56-60. The Court did not preclude Petitioner's ability to testify about how he felt on the night of the incident and how his body felt at the time of trial. *Id.*

However, after the lengthy discussion at sidebar, once testimony

resumed, trial counsel did not ask Petitioner anything about how he was feeling on that evening or about any problems that his body was experiencing which may have affected his behavior that night. It is unclear from the questioning of the Petitioner why trial counsel abandoned that line of questioning.

To satisfy the “arguable merit” prong for a claim of ineffectiveness based upon trial counsel's **failure to call** an **expert** witness, the petitioner must prove that an expert witness was willing and available to testify on the subject of the testimony at trial, counsel knew or should have known about the witness and the Petitioner was prejudiced by the absence of the testimony. *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 1111, 1143 (2011); *Commonwealth v. Gibson*, 597 Pa. 402, 951 A.2d 1110, 1133 (2008). Prejudice in this respect requires the petitioner to “show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case.” *Commonwealth v. Sneed*, 616 Pa. 1, 45 A.3d 1096, 1109 (2012) (quoting *Gibson*, 951 A.2d at 1134). Therefore, the petitioner's burden is to show that testimony provided by the uncalled witnesses “would have been helpful to the defense.” *Id.* (quoting *Commonwealth v. Auken*, 545 Pa. 521, 681 A.2d 1305, 1319 (1996)).

PCRA Counsel has not offered the name of any expert witness who would have been available to testify on Petitioner's behalf regarding his medical condition. Therefore, PCRA Counsel has not met his burden on the issue of failing to call an expert to testify on the Petitioner's behalf. However, it does not answer the question of why trial counsel did not ask Petitioner directly about his medical concerns which may have been relevant to the events of the evening of the murder.

When assessing whether counsel had a reasonable basis for his act or omission, the question is not whether there were other courses of action that counsel could have taken, but whether counsel's decision had any basis reasonably designed to effectuate his client's interest. *Commonwealth v. Eichinger*, — Pa. —, 108 A.3d 821, 848 (2014)(citing *Commonwealth v. Williams*, 587 Pa. 304, 899 A.2d 1060, 1063–64 (2006)). As the Commonwealth accurately states, this cannot be a hindsight evaluation of counsel's performance, but requires an examination of “ whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered to advance and protect [the] Petitioner's interests.” *Commonwealth v. Dunbar*, 503 Pa. 590, 470 A.2d 74, 77 (1983). Our evaluation of counsel's performance is “highly deferential.” *Commonwealth v. Tharp*, 627 Pa. 673, 101 A.3d 736, 772 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

*Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052; see also *Commonwealth v. Johnson*, 600 Pa. 329, 966 A.2d 523, 535–36 (2009) (“The duty to investigate, of course, may include a duty to interview certain potential witnesses; and a

prejudicial **failure** to fulfill this duty, unless pursuant to a reasonable strategic decision, may lead to a finding of ineffective assistance.”)(emphasis added).

Since this Court cannot determine what trial counsel was thinking at the time of Petitioner’s testimony, a hearing on the issue will be necessary to determine what was the basis for trial counsel’s choice to abandon the questioning of Petitioner on his medical issues.

***Petitioner challenges the propriety of the Court’s ruling denying Petitioner’s request for a self defense instruction based on the “Stand your Ground” law at 18 Pa. C.S.A. Section 505(b)(2.3) as Petitioner believed that the victim possessed and used a lethal weapon even though none was seen by the Petitioner or found***

***Petitioner challenges the propriety of the Court’s ruling denying Petitioner’s request for a self defense instruction based on the “Stand your Ground” law at 18 Pa. C.S.A. Section 505(b)(2.3) as Petitioner believed that the victim could have inflicted serious bodily injury even without a weapon***

Petitioner has raised these additional issues as part of his PCRA petition. Issue seven (7) is the same issue raised on direct appeal; issue eight (8) is a new theory requesting similar relief.

The PCRA, however, procedurally bars claims of trial court error, by requiring a petitioner to show the allegation of error is not previously litigated or waived. 42 Pa.C.S.A. §§ 9543(a) (3), 9544. *Commonwealth v. Reyes-Rodriguez*, 111 A.3d 775, 780 (Pa.Super. 2015) “[A] PCRA petitioner cannot obtain additional review of previously litigated claims by presenting new theories of relief [.]” *Commonwealth v. Sneed*, 616 Pa. 1, 45 A.3d 1096, 1112 (2012) (citing *Commonwealth v. Wharton*, 571 Pa. 85, 811 A.2d 978, 984 (2002)). *Commonwealth v. Davido*, 630 Pa. 217, 245, 106 A.3d 611, 627 (Pa., 2014).

In the opinion filed August 25, 2014, the Superior Court relied upon this Court's rationale in ruling to deny the request for the "Stand your Ground" instruction, finding that this Court neither abused its discretion nor committed an error of law. Therefore, these issues shall be dismissed.

***Conclusion***

Based upon the foregoing, although the Court finds the majority of the issues to be without merit, on the two (2) issues listed above the Court will schedule an evidentiary hearing to determine whether a basis upon which to grant the Petitioner's PCRA petition may exist.

**ORDER**

AND NOW, this 4th day of April, 2018, it is ORDERED and DIRECTED that a hearing on Petitioner's PCRA Petition shall be GRANTED and held on a date and time to be scheduled by the Court Scheduling Technician.

The hearing is granted ONLY to the following issues:

1) was trial counsel ineffective for failing to question the Petitioner during trial about his medical concerns which would have been in existence during the time of the murder; and,

2) whether trial counsel was ineffective for failing to discuss the Petitioner's testimony with him before he was called to the stand during trial or have a conversation with Petitioner about whether in fact he should testify at trial.

One hour and one-half will be allotted for the hearing. PCRA Counsel is to let the Court know as soon as possible if the Petitioner would prefer to participate by video conference or if he will need to be transported to appear in person.

BY THE COURT,

Nancy L. Butts, President Judge

Cc: Kenneth A. Osokow, District Attorney  
Kyle Rude, Esq. Counsel for Petitioner.  
Sheriff  
Warden-LCP