

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

<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
	:	
<b>v.</b>	:	<b>No. 2025-2005</b>
	:	<b>CRIMINAL DIVISION</b>
<b>JONATHAN MITCHELL,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

Following a Court Conference with both parties on the Defendant's Post Conviction Relief Act (PCRA) Petition, the Court conducted a review of the Petition and this Opinion addresses the issues raised in that Petition.

***Factual Background***

In its Opinion of November 9, 2009, from the direct appeal of the Defendant's conviction, the Superior Court stated the basic facts of this case as follows. This case arose from the shooting death of Idreise Jones (Jones). Jones was one of several men who kidnapped and beat the Defendant in January of 2000 in Philadelphia. Shortly after midnight on May 24, 2005, Jones was driving down High Street in Williamsport and the Defendant was a passenger. In revenge for Jones' participation in the January 2000 incident, the Defendant shot Jones three times in the face at close range, killing him. The Defendant was then arrested and charged with first degree murder, robbery and weapon offenses. Following an eight day jury trial before the Honorable William S. Kieser in April of 2007, a jury convicted the Defendant of criminal homicide, robbery, and possessing an instrument of crime. As part of the Commonwealth's case against the Defendant, the Commonwealth presented the testimony of Renata McKee, Ronald Gibbs (Gibbs), and Davonna Stevens, all of whom testified that on May 23 and 24, 2005, they

were present at the home of Gibbs when the Defendant showed up at the residence covered in blood, changed into different clothing, and made statements indicating that he had shot someone. N.T., 4/20/07, p. 123, 130 and N.T., 4/23/07, p. 11-13, 47-48. Gregory Logan (Logan) was also supposedly present at Gibbs home at the time the Defendant arrived; however, the Commonwealth was unable to secure Gibbs as a witness, as it appears Gibbs failed to appear in Court even after a bench warrant was issued for him. N.T., 4/23/07, p. 174. On May 1, 2007, Judge Kieser sentenced the Defendant to state incarceration for the “rest of his natural life,” with credit for time served from December 19, 2005, and any other credit due by law.<sup>1</sup>

### ***Procedural Background***

The Defendant filed an appeal from the judgment of sentence entered against him, which the Superior Court affirmed via their November 9, 2009 Opinion. On April 27, 2010, the Supreme Court denied the Defendant’s Petition for allowance of appeal. On March 3, 2011, the Defendant filed a pro-se Post Conviction Relief Act (PCRA) Petition, and current Counsel Lori A. Rexroth, Esquire, entered her appearance on April 26, 2011. Attorney Rexroth filed an Amended PCRA Petition on June 27, 2011 and a Supplement to the Amended Petition on July 21, 2011. In the Amended Petition, the Defendant, through his attorney, raises several allegations: 1) the trial judge abused his discretion when he declined to charge the jury with a Missing Witness instruction as it relates to witness Gregory G. Logan; 2) the trial judge abused his discretion by not excusing the juror who violated the instruction given by the Court regarding exposure to the media; 3) trial counsel was ineffective by failing to properly preserve and argue

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<sup>1</sup> As the Defendant is currently serving a sentence of imprisonment, probation or parole for the crime, the Court finds it has jurisdiction to hear this case pursuant to 42 Pa.C.S. §9544(a)(1)(i). See Commonwealth v. Ahlborn, 683 A.2d (Pa. Super. 1996) where the Superior Court determined that the “currently serving” requirement of Pa.C.S. §9544(a)(1)(i) is determined at the time the petition is filed, and that even where a petition is filed prior to the petitioner’s release from custody, the petition is rendered moot by the defendant’s subsequent unconditional release.

the trial judge's error in not giving the jury the Missing Witness instruction; 4) trial counsel was ineffective by failing to present a viable defense at trial; 5) trial counsel provided ineffective assistance of counsel by failing to properly investigate the information provided by the Defendant and the statements of other witnesses; 6) the trial judge erred in precluding the testimony, evidence, and argument regarding an alternative murderer; and 7) trial counsel provided ineffective assistance of counsel by failing to properly advise the Defendant of all the consequences of the plea offer made by the Commonwealth for 15 to 40 years and how the plea would relate to the other outstanding cases the Defendant was facing.

***Failure to charge the jury with a Missing Witness instruction as it relates to witness Gregory G. Logan***

The Defendant contends that the trial judge abused his discretion when he declined to charge the jury with a Missing Witness instruction as it relates to witness Logan. The Defendant asserts that Logan would have provided testimony inconsistent with witnesses Davonna Stevens, Gibbs and Renata McKee, all of whom indicated that the Defendant showed up at Gibbs home wearing bloody clothing and made statements related to the murder. The Defendant believes that Logan would have provided testimony that the Defendant did come to the home of Gibbs, but that he did not have on bloody clothing, he did not change his clothes, and he did not make statements about the murder.

To be eligible for relief under the PCRA, a defendant must demonstrate that the claims raised have not been waived. See Commonwealth v. Bracey, 795 A.2d 935 (Pa. 2001). An allegation is considered waived if the defendant "[c]ould have raised it but failed to do so before

trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” 42 Pa.C.S. §9544(b).

The Court believes that the Defendant waived the right to now allege that the trial judge abused his discretion, as the Defendant failed to raise this issue on appeal. However, as the Defendant also avers that trial counsel was ineffective in failing to properly preserve and argue the issue of the trial judge’s abuse of discretion in failing to give the instruction, the Court will address the merit of both contentions jointly.

The “Missing Witness” adverse inference rule is as follows:

When a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue and this person’s testimony would not merely be cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference that it would have been unfavorable

Commonwealth v. Evans, 664 A.2d 570 (Pa. Super. 1995) (quoting Commonwealth v. Manigault, 462 A.2d 239, 241 (Pa. 1983)). However, the Court finds that a Missing Witness instruction was not appropriate in this case, as the Commonwealth pointed out during trial:

MS. SPRING: [A]nd I guess, the issue comes down at this point to Mr. Logan and we’d be requesting a missing witness instruction.

....

MR. OSOKOW: The reason you can’t – the reason you can’t give it Judge, and it’s not a question about telling the Jury. If the Court recalls he was hand served with a subpoena and he failed to appear at trial and we’ve issued a bench warrant in the case. Neither party’s entitled to a missing witness instruction on that person. They could have called him too, but that’s besides the point. And it’s not a question of an explanation for not calling him. It’s you don’t get it when the witness fails to appear.

N.T., 4/26/07-4/27/07, p. 58. The trial judge agreed with the Commonwealth that efforts were made to procure the witness, and the trial court determined that it would have been inappropriate to tell the Jury they could infer the witness’s testimony would have been unfavorable to the

Commonwealth. N.T., 4/26/07-4/27/07, p. 59. Furthermore, a review of the record confirms for this Court that efforts were unsuccessfully made to secure Logan as a witness. N.T., 4/23/07, p. 174. As it appears that the Defendant was not entitled to a Missing Witness instruction, the Court can find no abuse of discretion on the part of the trial judge in his refusal to charge the jury with such an instruction.

As to the Defendant's claim of ineffective assistance of counsel in relation to the trial court's failure to give the instruction, the Court notes that in order to make a claim for ineffective assistance of counsel, a defendant 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 (Pa. 2007) (See Commonwealth v. Carpenter, 725 A.2d 154, 161 (Pa. 1999)). As this Court finds that the trial court's failure to give the Missing Witness instruction was not in error and was not an abuse of discretion, the Court finds that the Defendant's allegation of ineffective assistance of counsel in relation to said claim fails at least the first prong needed to establish ineffective assistance of counsel.

***The trial judge abused his discretion by not excusing the juror who violated the instruction given by the Court regarding exposure to the media***

The Defendant contends that the trial judge abused his discretion by not excusing the juror who violated the instruction given by the Court regarding exposure to the media. The Court finds that this claim is not in compliance with Pa.R.Crim.P. 902, which provides that petitions for Post-Conviction Collateral Relief shall include, among other things:

- (11) the grounds for the relief requested;
- (12) the facts supporting each such ground that:
  - (a) appear in the record, and the place in the record where they appear; and
  - (b) do not appear in the record, and an identification of any affidavits, documents, and other evidence showing such facts....

Pa.R.Crim.P. 902(D) provides that the defendant “shall attach to the petition any affidavits, records, documents, or other evidence which show the facts stated in support of the grounds for relief, or the petition shall state why they are not attached.”

As the Defendant has failed to comply with the rules, in that he has failed to provide the Court with the required facts supporting his claim, or any documents in support of the facts, the Court is unable to make a determination as to the merit of this claim. See Commonwealth v. Hall, 867 A.2d 619 (Pa. Super. 2005) where the Superior Court found that a petitioner’s PCRA petition was properly dismissed where the petition failed to include information pursuant to Pa.R.Crim.P. 902 (A) and (D), and therefore the petitioner’s claim of ineffectiveness had no ‘arguable merit.’ Furthermore, the Court believes that this claim could have been raised on direct appeal, and the Defendant has failed to demonstrate how this assertion qualifies as a meritorious claim under the PCRA pursuant to 42 Pa.C.S. §9543(a)(2)(i-viii) and is not waived under 42 Pa.C.S. §9544(b). As such, the Court finds that the Defendant is not entitled to relief under the PCRA on this issue.

***Trial counsel was ineffective by failing to present a viable defense at trial***

The Defendant claims that trial counsel was ineffective by failing to present a viable defense at trial.

The Court finds that this claim is too vague to establish of the elements needed to prove ineffective assistance of counsel, which are enumerated above. Such an imprecise argument,

which fails to demonstrate the defendant's entitlement to relief, is considered to be waived. See Bracey at 940. n.4. Exactly what defense the Defendant would have liked his counsel to present at trial, the Court is unsure, as the Defendant has again failed to comply with Pa.R.Crim.P. 902, in that the Defendant failed to provide the Court with any facts in support of his claim, or to attach any documents in support of the facts. See Hall at 629-630. Accordingly, the Court finds the Defendant is not entitled to relief under the PCRA on this issue.

***Trial counsel provided ineffective assistance of counsel by failing to properly investigate the information provided by the Defendant and the statements of other witnesses***

The Defendant claims that trial counsel was ineffective by failing to properly investigate the information provided by the Defendant and the statements of other witnesses.

The Petition provides the Court with no information as to what knowledge the Defendant imparted to his counsel that counsel failed to investigate. The Petition also fails to even provide the Court with the names of witnesses whose statements counsel failed to investigate, much less the content of any such statements. As such, the Court again finds that the Defendant's claim does not comply with Pa.R.Crim.P. 902, as the Defendant failed to provide the Court with any facts in support of his claim, or attach any documents in support of thereof. See Hall at 629-630. The Court finds this claim is also too vague to establish ineffective assistance of counsel. See Bracey at 940. n.4. Therefore, the Court finds that the Defendant is not entitled to relief under the PCRA on this issue.

***Testimony, evidence, and argument regarding an alternative murderer***

The Defendant claims that trial counsel was ineffective by failing to adequately present evidence of an alternative theory of the murder, and that the trial judge erred in precluding the testimony, evidence, and argument regarding an alternative murderer.

As to the claim of trial judge error, the Court finds that the Defendant has failed to demonstrate why this assertion qualifies as a meritorious claim under the PCRA pursuant to 42 Pa.C.S. §9543(a)(2)(i-viii) and is not waived under 42 Pa.C.S. §9544(b). Even if the Defendant were to demonstrate how this claim is now a viable PCRA claim, the Court again finds that the Defendant's claims as to both trial counsel's ineffectiveness and trial judge error fail to comply with Pa.R.Crim.P. 902, as the Defendant failed to provide the Court with any facts in support of his claim, or attach any documents in support of thereof. See Hall at 629-630. Furthermore, these claims are too vague for this Court to address, as the Defendant has provided no indication as to what theory of an alternative murderer he would have liked his counsel to assert, or the existence of any evidence in the record which would lead the Court to believe this theory is anything more than just speculative. See Bracey at 940. n.4. Accordingly, the Court finds that the Defendant is not entitled to relief on this issue.

***Trial counsel provided ineffective assistance of counsel by failing to properly advise the Defendant of all the consequences of the plea offer made by the Commonwealth for 15 to 40 years and the plea related to the other outstanding cases the Defendant was facing***

The Defendant claims that trial counsel was ineffective by failing to properly advise the Defendant of all the consequences of the plea offer made by the Commonwealth for 15 to 40 years and how the plea related to the other outstanding cases the Defendant was facing. The



Defendant contends that he did not understand how the plea offer would interact with the remaining cases he had pending against him.

Not only does said allegation fail to comply with Pa.R.Crim.P. 902, in that the Defendant fails to provide the Court with any facts to support his claim or attach any documents in support thereof, the Defendant fails to present any evidence that the plea offered to him would have interacted with his other cases in such a way that he would have accepted the plea. See Hall at 629-630. Furthermore, if the Defendant believes that the plea would have run concurrently to any cases he was facing, the Court would have had the authority to sentence the Defendant concurrently to these cases only if a sentence had already been imposed on those other offenses, or if the Defendant had entered a plea of guilty to those other offenses and sentence was going to be imposed at the same time as the sentencing in this case. See Pa.R.Crim.P. 701; Pa.R.Crim.P. 705(B). Although the Defendant did file a Supplement to his Amended Petition, which includes a brief description as to the substance of several intended witness' testimony if the Court should in fact grant an evidentiary hearing on this matter, said descriptions are not signed by the witnesses themselves, which the Court believes is required to validate an intended witness's testimony. See Hall at 632. Furthermore, the description of such intended testimony as it relates to the plea agreement does not indicate that the plea agreement would in fact have been such that the Defendant would have accepted the plea. As the Defendant has failed to present sufficient facts to establish a claim of arguable merit, the Court finds he is not entitled to relief on this issue.

**ORDER**

**AND NOW**, this \_\_\_\_ day of December, 2011, the Defendant and his attorney are notified that it is the intention of the Court to dismiss the Defendant's PCRA petition unless he files an objection to that dismissal within twenty days (20) of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.  
Lori Rexroth, Esq.