

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

**COMMONWEALTH OF PENNSYLVANIA** :  
 :  
 **v.** : **No. 1707-2005**  
 : **CRIMINAL DIVISION**  
 **TYRONE WILLIAMS,** :  
 **Defendant** : **PCRA**

**OPINION AND ORDER**

On November 3, 2010, current Court Appointed Counsel for the Defendant filed a Motion to Withdraw in accordance with Commonwealth v. Turner, 544 A.2d 927 (1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa.Super.1988). After an independent review of the entire record, the Court agrees with PCRA Counsel and finds that the Defendant fails to raise any meritorious issues in his PCRA Petition.

***Background***

Following a non-jury trial held before the Honorable William S. Kieser on September 25, 2006 and September 26, 2006, the Defendant was found guilty of the following: two (2) counts of Aggravated Assault; two (2) counts of on October 17, 2006, to an aggregate period of incarceration of six (6) to fifteen (15) years with a seven (7) year period of consecutive probation. The Defendant filed an appeal; the appeal was denied by the Superior Court of Pennsylvania on July, 18, 2008. The Defendant filed a Post Conviction Relief Act (PCRA) Petition on July 23, 2009. Initially, Ryan Gardner, Esq., was appointed to represent the Defendant. However, on September 17, 2010, due to Mr. Gardner's resignation as Conflicts Counsel, the Defendant's case was reassigned to Donald F. Martino, Esq. A Motion to Withdraw as Counsel was filed with the Court on November 3, 2010 by Mr. Martino in compliance with the requirements of Turner, supra and Finley, supra. A copy of Mr. Martino's

exceptionally thorough and detailed Turner-Finley letter accompanied his Motion to Withdraw as Counsel.

### ***Discussion***

Defense Counsel's Turner-Finley letter to the Defendant sets forth with specificity the issues raised in the Defendant's PCRA Petition: 1) trial counsel was ineffective in failing to file a Motion to Suppress the Defendant's video taped interview and the photo array used in the case; 2) trial counsel was ineffective for failing to object to the admission of the photo array and testimony related to the photo array; 3) trial counsel was ineffective for failing to object to Agent Sorage's testimony regarding the victim's identification of the Defendant and one other person in the photo array as potential perpetrators, and for failing to object to the victim's in-court identification of the Defendant at trial; 4) trial counsel was ineffective in failing to call Eric Smith who would have testified that the victim was intoxicated; 5) trial counsel was unprepared for trial; 6) the Defendant's Prior Record Score was incorrectly calculated; and 7) trial counsel was ineffective for failing to present a toxicology report of the victim's blood alcohol content at the time he received treatment.

### ***Trial counsel was ineffective in failing to file a Motion to Suppress the Defendant's video taped interview and the photo array used in the case***

The Defendant contends that his trial counsel was ineffective in failing to file a Motion to Suppress his video taped interview and the photo array used in the case. 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 (2007). (See

Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). Therefore, in order for these issues to have merit, the Defendant must show that the Motion to Suppress would have been granted.

As to the Defendant's video taped interview, the Motion to Suppress would have been granted if the Defendant's Miranda rights had been violated during the interview. Miranda rights exist to protect against the Fifth Amendment privilege against self incrimination during custodial interrogation. However, the Defendant has presented no evidence showing that his Miranda rights were violated. Furthermore, evidence presented at trial establishes that the Defendant's Miranda rights were not violated. N.T. 9/25/2006, 132, 156-159. As such, the Court finds this issue to be without merit.

As to the photo array, as current Counsel correctly points out in his Turner-Finley letter, the use of a photo array by the police is subject to considerable scrutiny by the court. "Generally, a pre-trial identification may be inadmissible at trial if it was obtained by a procedure so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the accused due process." Commonwealth v. Messina, Pa. Dist. & Cnty. Dec. LEXIS. 301 (Pa. Dist. & Cnty. 2008)(See Commonwealth v. Voss, 482 A.2d 593 (Pa. Super. 1984)). "A photographic identification is unduly suggestive if, under the totality of the circumstances, the identification procedure creates a substantial likelihood of misidentification." Id. at 7. (Citing Commonwealth v. Harris, 888 A.2d 862, 866 (Pa. Super. 2005)). "Photographs utilized in lineups will not be deemed unduly suggestive if the suspect's picture does not stand out more than those of the other individuals included in the array and the people depicted in it all exhibit similar facial characteristics." Id. (citing Commonwealth v. Fisher, 769 A.2d 1116, 1127 (Pa. 2001)).

In this case, the photo array was generated using a computer system. N.T., 9/25/2006, 129-132, 137. The computer system generated images of individuals similar to the image of the Defendant. Seven images of those generated by the computer were then chosen by the police to

be included in the photo array. N.T., 9/25/2006, 138. Furthermore, after viewing the photo array, the victim in this case narrowed the potential perpetrator down to two (2) individuals. N.T., 9/25/2006, 37. This fact supports the conclusion that the photo array in this case was not unduly suggestive of the Defendant. The Court has also reviewed the photo array and can find no evidence that it was unduly suggestive; therefore, this issue is without merit.

***Trial counsel was ineffective for failing to object to the admission of the photo array and testimony related to the photo array***

The Defendant contends that trial counsel was ineffective for failing to object to the admission of the photo array and testimony related to the photo array. For the reasons stated in the above section, the Court finds that the admission of the photo array was not in error. Therefore, the Court finds that the trial counsel was not ineffective in failing to object to the admission of the photo array or the testimony related to the photo array.

***Trial counsel was ineffective for failing to object to Agent Sorage's testimony regarding the victim's identification of the Defendant and one other person in the photo array as potential perpetrators, and for failing to object to the victim's in-court identification of the Defendant at trial***

The Defendant alleges that trial counsel was ineffective for failing to object to Agent Sorage's testimony regarding the victim's identification of the Defendant and one other person in the photo array as potential perpetrators. As stated above, the photo array was not created or admitted in error. Therefore, this issue has no merit.

The Defendant also alleges that counsel was ineffective for failing to object to the victim's in-court identification of the Defendant at trial. As the Court finds that the photo array was not unduly suggestive, the Court also finds that the array did not taint the victim's later in-court identification of the Defendant at trial. See Commonwealth v. Crork, 966 A.2d 585, 590

(Pa.Super. 2009). The fact that the victim was unable to identify with certainty the Defendant as the perpetrator during the photo array does not affect the admissibility of the in-court identification. This fact only affects the weight and credibility of the Defendant's in-court identification. See Commonwealth v. Washington, 927 A.2d 586, 601-602 (Pa.2007). Furthermore, the Defendant has not alleged any evidence, nor does any appear to exist, to imply that any suggestive behavior by the police or the District Attorney was used to taint the victim's in-court identification. See Washington at 602. Moreover, trial counsel examined the victim at length during trial as to his identification of the Defendant. N.T., 9/25/2006, 24-43. Therefore, the Court finds this issue to also be without merit.

***Trial counsel was ineffective in failing to call Eric Smith who would have testified that the victim was intoxicated***

The Defendant contends that trial counsel was ineffective in failing to call Eric Smith who would have testified that the victim was intoxicated. The Court finds this issue to be without merit. The Court was aware of this information as it was presented through the testimony of witnesses at trial. N.T., 9/25/2006, 54, 82, 88. Evidence that the victim had been drinking on the night in question was also established at trial by the victim himself. N.T., 9/25/2006, 5, 21. Furthermore, trial counsel had the opportunity to, and did cross-examine the victim on the subject of his drinking on the night in question. N.T., 9/25/2006, 24-32. Additionally, one of the treating physicians of the victim following the shooting, Dr. Maher Alhashimi, testified that the victim smelled strongly of alcohol when he arrived at the hospital. N.T., 9/25/2006, 150-151.

***Trial counsel was unprepared for trial***

The Defendant argues that trial counsel was unprepared for trial. In order to prevail on this issue, the Defendant must establish that “[c]ounsel inexcusably failed to raise issues which, had they been raised, would have afforded Appellant relief.” Commonwealth v. Porter, 728 A.2d 890 (Pa.1999). As the Defendant has failed to allege any meritorious issues which, had they been raised, would have afforded him relief, the Defendant has failed to meet his burden on this issue. Therefore, this issue is also without merit.

***The Defendant’s Prior Record Score was incorrectly calculated***

The Defendant alleges that his Prior Record Score was incorrectly calculated, affecting the sentencing guideline calculation used by the sentencing judge to determine his sentence. Transcripts of the Sentencing Hearing held before the Honorable William S. Kieser on October 17, 2006, reveal that the Defendant’s Prior Record Score was calculated to be a zero at the time of his sentencing. N.T., 10/17/2006, 3. Therefore, his prior record score could not have been miscalculated in a way to negatively impact the Defendant’s sentence. As a result, the Court finds this issue to be without merit.

***Trial counsel was ineffective for failing to present a toxicology report of the victim’s blood alcohol content at the time he received treatment***

Lastly, the Defendant contends that trial counsel was ineffective for failing to present a toxicology report of the victim’s blood alcohol content at the time he received treatment, which was shortly after the alleged accident. As explained above, the fact that the Defendant had been drinking on the night in question was established by multiple witnesses, including the victim himself. Therefore, even if a toxicology report was prepared, and the Court can find no evidence

that is was, the Court can find no ineffectiveness of trial counsel for failing to present such a report.

***Conclusion***

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907 (1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the Petition.

**ORDER**

**AND NOW**, this 13<sup>th</sup> day of April, 2011, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907 (1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for leave to withdraw appearance filed November 3, 2010, is hereby GRANTED and Donald F. Martino, Esq. may withdraw his appearance in the above captioned matter.

By The Court,

Nancy L. Butts, President Judge

xc: DA  
Donald F. Martino, Esq.