IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-196-2011**
	:	**CP-41-CR-630-2011**
vs.	**:**	
	:	
	:	
BILAL SABUR,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's order entered on June 30, 2017. The relevant facts follow.

On January 28, 2011, Defendant and Ryan Smith got into a disagreement concerning Smith's girlfriend when they were at a local bar. Defendant, Smith, Dawine Jeffreys, and Bernard Daniels left the bar and went into a nearby alley. While these individuals were in the alley, Defendant pulled out a gun and fired several shots. As a result, Dawine Jeffreys sustained gunshot wounds to his leg.

On January 31, 2011, police charged Defendant with two counts of criminal attempt – homicide, one count of possession of an instrument of crime (weapon), four counts of aggravated assault, two counts of recklessly endangering another person, three counts of simple assault, one count of possession of a firearm without a license, and one count of persons not to possess a firearm. The Magisterial District Judge dismissed the one count of attempted homicide, two counts of aggravated assault, one count of recklessly endangering another person and one count of simple assault that named Ryan Smith as the alleged victim.

The remaining counts, which either listed Dawine Jeffreys as the victim or involved Defendant's possession of a firearm, were held for court. The charges were filed to Information CR-196-2011.

After Defendant was arrested and placed in the county prison, he made a phone call from the prison to his girlfriend asking her to call another individual to get rid of the gun. As a result of this phone call, Defendant was charged with conspiracy to tamper with physical evidence in CR-630-2011.

The cases were consolidated for trial, but the persons not to possess a firearm charge was severed because it required proof of Defendant's prior record, which generally would not be admissible in a trial on the other charges.

On January 23, 2012, a jury acquitted Defendant of attempted homicide, but convicted him of possession of an instrument of crime, aggravated assault – attempt to cause serious bodily injury, aggravated assault – cause bodily injury with a deadly weapon, recklessly endangering another person, simple assault – cause bodily injury, simple assault – by physical menace, possession of a firearm without a license and conspiracy to tamper with physical evidence. On that same date, Defendant waived his right to a jury trial on the severed charge of person not to possess a firearm. The court considered the evidence presented at trial, as well as additional evidence the Commonwealth introduced regarding Defendant's prior criminal record. On January 26, 2012, the court found Defendant guilty of person not to possess a firearm.

The court sentenced Defendant to an aggregate term of 18 to 38 years' incarceration in a state correctional institution. Defendant filed post sentence motions, which the court granted in part and denied in part. The court granted Defendant's post sentence

motion and vacated his sentence for recklessly endangering another person, because that offense merged with aggravated assault for purposes of sentencing. This reduced Defendant's aggregate sentence to 17 to 36 years' incarceration in a state correctional institution. The court denied the remainder of Defendant's post sentence motion.

Defendant appealed to the Pennsylvania Superior Court, which affirmed his judgment of sentence on June 3, 2014. Defendant sought allowance of appeal, which the Pennsylvania Supreme Court denied on December 26, 2014.

Defendant filed a pro se Post Conviction Relief Act (PCRA) petition which, following the appointment of counsel, was amended several times. Defendant asserted numerous issues of ineffective assistance of trial counsel. The court gave Defendant notice of its intent to dismiss many of his issues without holding an evidentiary hearing, but granted an evidentiary hearing on three issues. The court denied Defendant's PCRA petition in its Opinion and Order entered on June 30, 2017.

On July 17, 2017, Defendant filed a petition for appointment of new counsel or, in the alternative, to proceed pro se. On July 20, 2017, Defendant filed a timely pro se appeal. The court forwarded a copy of Defendant's notice of appeal to PCRA counsel. As it was unclear who would be representing Defendant or whether he would be proceeding pro se, the court deferred issuing its order directing Defendant to file a concise statement of matters complained of on appeal until after the hearing on Defendant's motion.

At a hearing held on August 15, 2017, Defendant waived his right to appellate counsel and elected to proceed pro se with newly appointed standby counsel.

On September 5, 2017, Defendant filed his concise statement in which he asserted 17 claims of ineffective assistance of PCRA counsel, none of which were previously

presented to the trial court.

It is well-settled that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." PA. R. APP. P. 302(a); see also ***Commonwealth v. Roney***, 79 A.3d 595, 611 (Pa. 2013); ***Commonwealth v. Jordan***, 65 A.3d 318, 335-36 (Pa. 2013); ***Commonwealth v. May***, 31 A.3d 668, 673 (Pa. 2011). Furthermore, the Pennsylvania appellate courts have repeatedly stated that claims of PCRA counsel's ineffectiveness may not be raised for the first time on appeal. ***Commonwealth v. Robinson***, 139 A.3d 178, 184 n.8 (Pa. 2016); ***Commonwealth v. Jette***, 23 A.3d 1032, 1044 n.14 (Pa. 2011); ***Commonwealth v. Colavita***, 993 A.2d 874, 893 n. 12 (Pa. 2010); ***Commonwealth v. Henkel***, 90 A.3d 16, 20 (Pa. Super. 2014)(en banc); ***Commonwealth v. Ford***, 44 A.2d 1190, 1200-01 (Pa. Super. 2012), appeal denied, 54 A.2d 347 (Pa. 2012). Therefore, the court believes that none of the issues asserted by Appellant are properly before the appellate court.

In the event the appellate court does not find waiver, the court will endeavor to address each of Appellant's claims to the extent that it can.

Appellant first asserts PCRA counsel was ineffective for failing to raise trial counsel's failure to raise a "Fabrication Defense" during trial. Unfortunately, the court has no idea what Appellant is referring to. Dawine Jeffreys was shot in the alley. The crime was not fabricated. Appellant admitted that he was in the alley but denied that he was the shooter. Credibility is solely within the province of the jury as the fact finder. ***Commonwealth v. Cash***, 137 A.3d 1262, 1270-71 (Pa. 2016); ***Commonwealth v. Gibson***, 720 A.2d 473, 480 (Pa. 1998)("Credibility determinations are strictly within the province of the finder of fact."). The jury was free to believe all, part or none of the evidence presented. ***Commonwealth v. Morales***, 91 A.3d 80, 89 (Pa. 2014)("It is well-settled that a jury or a trial

court can believe all or a part of or none of a defendant's statements, confessions or testimony or the testimony of any witness."). The jury accepted the Commonwealth's evidence and rejected Appellant's testimony.

Appellant next asserts PCRA counsel was ineffective for failing to raise trial counsel's failure to object to the prosecutor's "Staged Act" during the course of trial. Again, the court does not know to what Appellant is referring. The claim is too vague for the court to address it on the merits.

Appellant also contends PCRA counsel was ineffective for failing to object to the Commonwealth's witness testimony and submit material rebuttal evidence. This claim is too vague as well. The court does not know what witness's testimony Appellant believes was objectionable or the bases for any objection. The court also does not know what evidence Appellant contends trial counsel should have submitted as rebuttal evidence. To the extent this issue refers to testimony that the argument began because Ryan Smith's girlfriend made allegations that she had been raped by Appellant or trial counsel's failure to call Devon Darby as a witness at trial to testify that Bernard Daniels admitted to Darby that he (Daniels) was the shooter, the court addressed these issues in its Opinions and Orders entered on December 6, 2016 and June 30, 2017.

Appellant next contends PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to prepare and/or inform Appellant of the consequences of taking the stand in his own defense. Appellant did not assert this claim of trial counsel ineffectiveness in his pro se PCRA petition. This type of claim would not be apparent from the trial record. As far as the court is aware, the first time this issue was mentioned was during Appellant's testimony at the PCRA hearing.

Appellant also asserts PCRA counsel was ineffective by failing to raise trial counsel's ineffectiveness for failing to object to the prosecutor's closing argument. This claim is clearly without merit. PCRA counsel raised this issue and the court denied it without holding an evidentiary hearing. See Opinion and Order, December 6, 2016 at pp. 4-6.

Appellant alleges PCRA counsel was ineffective for failing to question, call, and subpoena "Alibi Witness Devon Darby" and/or subpoena trial counsel to show what her reasonable basis was for not calling Devon Darby to testify at trial. First and foremost, Devon Darby was not an alibi witness. He would not have testified that Appellant was at another location on the date and at the time of the shooting. In his trial testimony, Appellant admitted that he was present in the alley; he simply denied that he was the shooter. According to Appellant's PCRA petition, Darby would have testified that Bernard Daniels admitted that he was the shooter. The court questioned whether this testimony would have been admissible as substantive evidence at trial (see Opinion and Order, December 6, 2016, at p.8), but granted an evidentiary hearing to determine exactly what testimony Darby could offer, whether Darby was available and willing to testify at trial, whether defense counsel was aware of Darby's proposed testimony, and the reasons why counsel did not call him as a witness. There are any number of reasons why trial counsel or PCRA counsel may not have called Darby as a witness. Perhaps Darby could not be located. Perhaps Darby was not willing to testify in the manner Appellant believed he would.

Appellant next asserts PCRA counsel was ineffective for failing to question, call, and subpoena trial counsel as a witness at petitioner's evidentiary hearing to establish why she did not request a jury instruction on misidentification. The court does not believe that Appellant was prejudiced by the lack of such a jury instruction. The victim admitted in

his trial testimony that he did not see who shot him. N.T., 1 /18/2012, at 66, 81.

Moreover, it was Appellant's own statements and actions that resulted in his convictions. Appellant admitted in his trial testimony that he was in the alley that night. N.T., 1/23/2012, at 24, 37. As he left the alley, Appellant removed his scarf. N.T., 1/ 23/ 2012, at 45. Despite the fact that it was cold outside, Appellant went to a friend's apartment, took his jacket off, and left it there. N.T., 1/23/2012, at 46-47, 50. He also admitted using another inmate's pin number to make phone calls and have conversations during visits to hide his calls and what was being said. N.T., 1/23/2012, at 69. Appellant admitted that Ryan Smith was arguing with him about having relations with Smith's girlfriend. N.T., 1/23/2012, at 22, 35. However, he denied shooting at anyone; instead, he claimed that Ryan Smith and Bernard Daniels were shooting at each other even though Smith and Daniels did not have any altercation or words that evening. N.T., 1/23/2012, at 31-35.

Video recordings from surveillance cameras in the area showed Bernard Daniels walking away from the area of the shooting with nothing in his hands and Appellant running away from the area with his right hand concealed in his pocket.

Appellant's girlfriend, Nicole Kramer, testified against him at trial. She testified that Appellant told her that he shot someone that night. N.T., 1/18/2012, at 150, 165. She also testified that she and Appellant drove to Philadelphia to get rid of the gun by giving it to an individual named "Shad" or "Rashad." N.T., 1/18/2012 at 174-176. After they returned to Williamsport and Appellant was arrested, Appellant called her from the prison and asked her to call "Shad" and tell him to get rid of the gun. This phone conversation was played for the jury. N.T., 1/18/2012, at 184-185. Appellant made this phone call using another inmate's pin number.

Appellant also wrote a letter to Bernard Daniels (a.k.a. "Eazy") in which he basically asked "Eazy" to take the rap for him because he would get less time in jail. Appellant sent this letter to Ms. Kramer and asked her to get the letter to "Eazy." The letter was introduced at Appellant's trial and discussed during Ms. Kramer's trial testimony. N.T., 1/18/2012, at 189-193.

Since it was Appellant's statements and actions that showed he was the shooter, Appellant was not prejudiced by trial counsel's failure to request a misidentification jury instruction.

Appellant avers that PCRA counsel was ineffective for failing to question, call, and subpoena trial counsel to show or present any and all evidence to establish that trial counsel lacked a reasonable basis for failure to object, and/or that the petitioner was prejudiced as a result thereof to the line of questioning by the prosecutor. Appellant does not specify what trial counsel failed to object to or the basis for any objection. Based on the reference to the "line of questioning by the prosecutor," the court assumes that Appellant is referring to the prosecutor's questions that led to the introduction of evidence regarding Appellant's prior firearms convictions. Trial counsel objected to this line of questioning, but did not object on the basis of 42 Pa. C.S. §5918. If trial counsel had been successful on the objection that she made at trial, evidence regarding Appellant's firearm convictions would not have been admissible at trial at all. If trial counsel objected based on section 5918, the prosecutor may still have been able to introduce evidence of Appellant's firearm convictions in rebuttal.

Appellant next contends PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to raise a suggestive identification violation during

pre-trial stages. The court does not know what Appellant contends that the police did to constitute a "suggested identification violation." See ***Commonwealth v. Sanders***, 42 A.3d 325, 330 (Pa. Super. 2012)("where a defendant does no show that improper police conduct resulted in a suggestive identification, suppression is not warranted."). If Appellant is referring to the letter that the victim wrote to defense counsel in which he claimed he was bribed and threatened by the police and the District Attorney to identify Appellant as the shooter, the victim testified under oath at trial that the letter was not true. The victim testified that he was threatened by other inmates who knew Appellant. After he testified against Appellant at his preliminary hearing, these other inmates made rat noises all night and took portions of his food. They told him the only way to get them to stop was to write a letter to the public defender. N.T., 1/19/12, at 176-178. In light of this testimony, the court would not have granted a suppression motion based on the allegations contained in the victim's letter to defense counsel.

Appellant also asserts PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to raise an "Involuntary Confession violation" during the pre-trial stages. Based on Appellant's pre-trial motion in limine, the court assumes that Appellant is claiming that his confession was involuntary because he was intoxicated. The court rejected this claim prior to trial, not only because the motion was in actuality an untimely suppression motion, but also because a claim of intoxication alone does not preclude a valid waiver of one's ***Miranda*** rights or automatically render a statement involuntary. ***Commonwealth v. Culbertson***, 467 Pa. 424, 358 A.2d 416, 417 (1976)("intoxication is a factor to be considered, but it is not sufficient, in and of itself, to render the confession involuntary"); ***Commonwealth v. McFadden***, 384 Pa. Super. 444, 559

A.2d 58, 60 (1989)(evidence of alcohol consumption does not render a confession inadmissible, it only affects the weight to be accorded to the confession.").

Appellant claims PCRA counsel was ineffective by failing to raise trial counsel's ineffectiveness for failing to raise a discovery violation during the pre-trial stages. Appellant does not specify the alleged discovery violation in his concise statement. The only purported discovery issue that the court was aware of related to the disclosure of prison recordings. Thirty-eight recordings were provided to counsel prior to trial and counsel filed a motion in limine to preclude their admission. (Defense motion in limine filed on January 17, 2012 at para. 14-16). According to the motion, trial counsel received these recordings on January 11, 2012, which was one week before the trial began on January 18, 2012. Therefore, counsel did not receive those recordings five or six hours before the start of trial. Rather, at the start of trial, counsel indicated that there were five or six hours of recordings that she had not yet listened to. N.T., 1/18/2012, at 21.

There were a handful of recordings of calls or visits that occurred from January 6 through January 17, 2012, which the Commonwealth did not provide to counsel until during trial. See N.T., 1/20/2012, at 89-110. The Commonwealth, however, did not possess those recordings before the start of trial. N.T., 1/20/2012, at 108. The Commonwealth was not aware of the January 2012 recordings, because Appellant used another inmate's number to access the prison phone and visitation system. N.T., 1/23/2012, at 3-8. At the beginning of the trial, issues arose whether a visitor brought clothes to the prison for Appellant to wear during trial but was turned away. N.T., 1/18/2012 at 27-33. When the Deputy Warden investigated that claim, he discovered that Appellant had used another inmate's number. Prison staff then investigated whether Appellant had used the

other inmate's number on other occasions and he had. It was the recordings of the telephone calls and visits where Appellant used another inmate's pin number that the Commonwealth provided during trial. At the latest, these recordings were provided on Friday, January 20, 2012. The Commonwealth did not introduce these recordings as evidence and play them for the jury until Monday, January 23, 2012. N.T., 1/23/2012, at 11-15.

To the extent Appellant asserts trial counsel was ineffective for failing to object to the prison recordings, any such claim lacks merit and is belied by the record in this case. In fact, the admission of the prison recordings was an issue that was litigated at the time of trial and during Appellant's direct appeal. Since Appellant cannot prevail on his claim of trial counsel ineffectiveness, his derivative claim of PCRA counsel ineffectiveness also must fail.

Appellant avers PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to raise a Batson violation during the pre-trial stages. Batson challenges typically are made during jury selection, not "the pre-trial stages." Furthermore, Appellant has not provided any specific allegations to support a Batson challenge.

Appellant claims PCRA counsel was ineffective for failing "to specify in term (sic) on trial counsel's ineffectiveness at trial by failing to request and call an expert witness. "Where a claim is made of counsel's ineffectiveness for failing to call witnesses, it is the appellant's burden to show that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the appellant." ***Commonwealth v. Chmiel***, 612 Pa. 333, 30 A.3d 1111, 1143 (2011).

Appellant alleged that counsel should have requested an expert to examine the ballistics data; he did not, and still does not allege what such an examination could or would reveal. Counsel is not ineffective merely because he does not call a medical, forensic, or scientific expert to critically evaluate expert testimony or evidence. ***Commonwealth v. Marinelli***, 810 A.2d 1257, 1269 (Pa. 2002); ***Commonwealth v. Smith***, 675 A.2d 1221, 1230 (Pa. 1996). Furthermore, the only evidence from a ballistics expert in this case was a stipulation that if called as a witness Corporal Joseph Gober would testify that the discharged and mutilated bullets were of the .44 and .45 caliber class; these bullets had been discharged from an unknown firearm having six lands and six grooves with a left twist; and the casings were discharged from the same unknown firearm. N.T, 1/20/12, at 120. No firearms were recovered to compare to the bullets and casings or the markings thereon. Moreover, the real issue in this case was not whether the shots were all fired from a single weapon, but rather who was the shooter.

Appellant next contends PCRA counsel was ineffective for failing to "specify in term (sic) on trial counsel's ineffectiveness by stipulating in part to a ballistic report." Although the court noted that Appellant failed to specify what the issues with the report were, or how or why counsel was ineffective for stipulating in part to the ballistics report, the court also found that Appellant's claim of trial counsel's ineffectiveness failed because the record showed that counsel had a reasonable basis for the stipulation. The court noted that trial counsel had a reasonable basis for stipulating because she did not want to cross-examine Corporal Gober and have him take it as a personal attack or an affront on his ego, the issue was really one of semantics between the casings being discharged from the same firearm as opposed to being consistent with having come from the same firearm, and it may not have

really been an issue in this case where Appellant was asserting that he did not have a firearm and did not fire any shots. N.T., 1/18/12, at 17-21. Since Appellant cannot prove the underlying claim of trial counsel ineffectiveness, his claim of PCRA counsel ineffectiveness fails. See ***Commonwealth v. Busanet***, 618 Pa. 1, 54 A.3d 35, 46 (2012)(If the petitioner cannot prove the underlying claim of trial counsel ineffectiveness, petitioner's derivative claim of ineffectiveness fails).

Appellant also asserts PCRA counsel was ineffective for failing to "specify in term (sic) on trial counsel's ineffectiveness for failing to investigate and/or interview Dawine Jeffreys." Witnesses are not required to speak to counsel prior to trial. See ***Commonwealth v. Fletcher***, 750 A.2d 261, 272 (Pa. 2000).

Furthermore, although Appellant never alleged that Jeffreys was willing to be interviewed by defense counsel or to testify on Appellant's behalf, the court also found that Appellant's claim failed because Appellant was not prejudiced by counsel's alleged failure to investigate or interview Dawine Jeffreys. Trial counsel, through her questions on cross-examination, made the jury aware that Jeffreys did not see anyone with a gun and he did not see who shot him. N.T., 1/18/12, at 81. She also cross-examined Jeffreys with Defendants' Exhibit 1, a letter that Jeffreys wrote to her in which Jeffreys said he was bribed and threatened by the police and the District Attorney to identify Appellant as the individual who shot him.[1] *Id*. at 83. Trial counsel also elicited testimony from Jeffreys on re-cross examination that the police told him if he identified Sabur as the shooter he could go home and that is why he made the identification. *Id*. at 87-88. Although Jeffreys recanted the contents of the letter in later testimony (N.T., 1/19/12, at 176-178), the letter was still helpful

for credibility purposes because it tended to show that Jeffreys would lie if it suited his wants or needs.

Appellant's final issue on appeal is that PCRA counsel was ineffective for failing to specify the terms of appellate counsel's ineffectiveness for failing to amend his 1925(b) statement. Appellant wanted appellate counsel to assert claims of trial counsel ineffectiveness on direct appeal, which he could not do in this case. ***Commonwealth v. Holmes***, 79 A.3d 562, 563-564 (Pa. 2013)(claims of ineffective assistance of counsel must be deferred to collateral review unless the claim is apparent from the record and clearly meritorious or there is good cause shown and the defendant expressly waives his right to seek PCRA review of his conviction and sentence). Furthermore, Appellant misapprehends appellate advocacy. "[A]ppellate counsel… need not, and should not, raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." ***Smith v. Robbins***, 528 U.S. 259, 288, 120 S.Ct. 746, 765 (2000). "Generally, only where ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome." ***Id.*** (quoting ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986)). Appellant has not offered any issue that he wanted appellate counsel to include in the 1925(b) statement that was stronger than the issues appellate counsel actually asserted on direct appeal.

[1] The letter was also admitted into evidence. N.T., 1/23/12, at 92.

DATE: _____ By The Court,

_____
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