

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

**COMMONWEALTH** : **No. CR-1467-2013**  
 :  
**vs.** : **CRIMINAL DIVISION**  
 :  
 : **Opinion and Order Granting Hearing**  
**TYRELL BOYD,** : **On Three PCRA Claims and Notice Intent**  
**Defendant** : **To Dismiss Remaining Claims**  
**OPINION AND ORDER**

This matter came before the court on the Post Conviction Relief Act (PCRA) petition filed by Tyrell Boyd (hereinafter “Petitioner”). The relevant facts follow.

On July 20, 2013, Petitioner shot Ansari Wilson inside a residence at 1510 Scott Street in Williamsport, Pennsylvania. In the day or hours prior to the shooting, Petitioner and Mr. Wilson had disagreements over money, and Petitioner told Reginald Morton that he might have to “down Mook” (shoot Mr. Wilson). Just prior to the shooting, witnesses saw Petitioner walking towards 1510 Scott Street together with another young African American male who was riding a bike. Petitioner had a black handgun tucked inside the waist of his pants and he was talking on a cellular phone. These witnesses heard Petitioner tell the person on the other end of the conversation that he was on the block, and then Petitioner angrily said “now what” and “I don’t play” several times. Petitioner hung up the phone and entered the residence at 1510 Scott Street. Shortly thereafter, the witnesses heard gunshots and Petitioner yelling “I don’t play” and/or “I told you I don’t play.” Petitioner quickly came out of the residence, took the bike from the other individual, got on the bike, and left.

Petitioner fled to Reginald Morton’s residence where he changed his shirt before ultimately fleeing to Philadelphia.

A witness who heard the shots called 911. Police and emergency medical personnel responded to 1510 Scott Street. The police kicked in the door and found Mr. Wilson near the door lying on his back, covered in blood and gasping for air. Shortly thereafter, Mr. Wilson died from a gunshot wound to the torso.

The police apprehended Petitioner in Philadelphia.

Petitioner was charged with an open count of homicide, aggravated assault, firearms not to be carried without a license, person not to possess a firearm, and flight to avoid apprehension, trial or punishment.

A trial was held from November 3-7, 2014. Petitioner was convicted of all the charges, including first degree murder.

On December 18, 2014, the court sentenced Petitioner to life without parole for first degree murder.<sup>1</sup>

On December 29, 2014, Petitioner filed a post-sentence motion, in which he challenged the sufficiency and weight of the evidence for his first degree murder conviction. The court denied this motion in an opinion and order entered on March 5, 2015.

Petitioner filed an appeal in which he asserted that the trial court erred by: (1) permitting the Commonwealth to enter into evidence a timeline of events; (2) refusing his requested jury instructions; and (3) determining which exhibits would be given to the jury during deliberations. In a memorandum decision filed July 6, 2016 (see 441 MDA 2015), the Superior Court rejected Petitioner's claims and affirmed his judgment of sentence. Petitioner filed a petition for allowance of appeal, which was denied by the Pennsylvania Supreme

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<sup>1</sup>The court also sentenced Petitioner to 3 ½ to 7 years for carrying a firearm without a license, 5 to 10 years for person not to possess a firearm, and 1 ½ to 7 years for flight to avoid apprehension. These sentences were

Court on December 21, 2016.

Petitioner filed his pro se PCRA petition on December 19, 2017. The court appointed counsel and gave counsel opportunities to amend the petition and provide witness certifications in support of the petition. By the end of 2018, PCRA counsel had filed a Second Amended PCRA petition, witness certifications, and a brief in support of the petition, and the Commonwealth had filed a brief in opposition.

In his petition, Petitioner asserts numerous claims of ineffective assistance of counsel. Counsel is presumed to be effective and the burden is on a petitioner to show otherwise. *Commonwealth v. Brown*, 196 A.3d 130, 150 (Pa. 2018). In order to establish ineffective assistance of counsel, a petitioner must plead and prove the following three elements: (1) the claim has arguable merit; (2) there was no rational or strategic reason for counsel's act or omission; and (3) prejudice, i.e. but for counsel's act or omission there is a reasonable probability that the outcome of the proceedings would have been different. *Id.* at 150-151.

Petitioner first asserts that counsel was ineffective for failing to object to Cindy Kurtz's testimony identifying Petitioner as the individual saying "I told you I don't play" as well as describing the voice as angry. Petitioner contends this testimony was inadmissible because there was no foundation, the witness lacked the personal knowledge required by Pa. R. Evid. 602, and the witness rendered an opinion in violation of Pa. R. Evid. 701. The court cannot agree.

The identity of a speaker is not to be distinguished from any other fact that

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consecutive to each other, but concurrent to the sentence of life without parole for first degree murder.

may be proved by competent direct or circumstantial evidence. *Commonwealth v. Gold*, 186 A. 208, 211 (Pa. Super. 1936). Furthermore, the Pennsylvania Rules of Evidence state that a speaker may be identified “by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.” Pa. R. E. 901(b)(5).

Petitioner seems to argue that for a witness to have personal knowledge, he or she must have been familiar with the speaker’s voice prior to the incident in question. While such is certainly one basis for identifying a speaker’s voice, it is not the only basis. The term “personal knowledge” does not mean prior knowledge or experience but rather it is a requirement that the witness’s testimony be based on his or her sensory perceptions. See *Lewis v. Mellor*, 393 A.2d 941, 946 (Pa. Super. 1978)(the lay witness must speak from personal knowledge, i.e. the witness must describe what he or she saw, heard, felt, tasted or smelled).

Ms. Kurtz’ testimony was based on personal knowledge. She testified that she was on her porch when she saw and heard Petitioner speaking on his phone as he walked toward the residence at 1510 Scott Street. He was yelling “I’m on the block—now what, now what.” Then Ms. Kurtz saw Petitioner enter the residence, she heard three shots – pow, pow, pow- and in between the shots she heard him say “I told you I don’t play.” She testified that she recognized the voice as it was the same voice when he was talking on the cell phone and saying “I’m on the block—now what, now what.” N.T., 11/3/2014, at 61-68.

Petitioner also complains that Ms. Kurtz should not have been permitted to describe the tone of the voice as angry. Again, the court cannot agree. A lay witness is permitted to describe the demeanor of another person. See *Commonwealth v. Boczkowski*,

577 Pa. 421, 846 A.2d 75, 97 (2004)(fellow prisoner was permitted to testify to his personal observation that the defendant appeared “serious” when he admitted that it was stupid to kill both his wives in the same manner).

Petitioner also did not suffer prejudice. If counsel had objected to this evidence, the court would have overruled the objection.

Petitioner next asserts that trial counsel was ineffective in cross-examining Kurtz and identifying Petitioner as the shooter. Petitioner contends the witness had not identified Petitioner as the shooter and had no personal knowledge as to the shooter in violation of Pa. R. Evid. 602. Again, the court cannot agree.

This assertion lacks arguable merit. The witness could infer that Petitioner was the shooter based on what she saw and heard. Furthermore, not only could the witness infer that Petitioner was the shooter based on her personal knowledge, Petitioner admitted he was the shooter and he defended the case on a theory of self-defense.

Finally, Petitioner was not prejudiced. Petitioner made statements to the police that he was the shooter and these statements were admitted into evidence at trial. Petitioner also testified at trial that he was the shooter.

Petitioner makes similar claims of ineffective assistance of counsel with respect to witness Sean Walker. The court rejects these claims for the same reasons that it rejected the claims related to Cindy Kurtz.

Petitioner also asserts that counsel was ineffective for failing to file a motion in limine and/or object to Officer Justin Snyder testifying that he was assigned to a special operations unit targeting street level crimes, naming narcotics and firearms trafficking.

Petitioner asserts that this testimony was irrelevant as there was no evidence that the crime was drug related or involved firearm trafficking and that it was prejudicial in that it painted Petitioner in a bad light with the jury. The court cannot agree.

The officer testified that he heard a triple tone call over the radio which meant there was an incident that needed police attention immediately. The incident came across as shots fired in the 1500 block of Scott Street and the dispatch provided a description of the shooter. He and his partner immediately responded to the area and tried to look for the person that may have been responsible for the shooting. Then he got called to the emergency room to make contact with the victim. He immediately recognized the victim as Ansari Wilson, who was also known as "Mook" on the street. The officer retrieved from the victim's pockets a distribution bag containing 10 baggies of crack cocaine, a flip cellular telephone, about \$760 in currency, and a Bic lighter. N.T., 11/3/2014, at 83-87.

The court does not believe the statement was prejudicial to Petitioner in that it simply defined the officer's duties on that date prior to this incident. Officer Snyder was called away from those duties by the triple tone dispatch about shots fired on Scott Street. If anything, the officer's testimony was prejudicial to the victim, as controlled substances and a large amount of cash were found in the victim's pockets. Officer Snyder did not provide any testimony about Petitioner being found in possession of controlled substances.

Furthermore, contrary to Petitioner's assertions, there was evidence that the crime was drug related. The Commonwealth presented evidence that Petitioner's and the victim's involvement in drug dealing was the motive for the killing. Petitioner also testified about selling drugs with the victim and possessing guns. Petitioner's trial counsel even

mentioned drug dealing and guns in his opening statement, because he wanted the jury to put themselves in Petitioner's shoes when they were evaluating Petitioner's self-defense claim.

Petitioner next contends trial counsel was ineffective for raising the issue of Petitioner allegedly dealing drugs out of the house and having weapons in the house. Petitioner contends that raising this issue was prejudicial to Petitioner, had no reasonable basis, and cannot be the result of any trial strategy. Again, the court cannot agree. The issue of dealing drugs out of the house and having weapons in the house was part and parcel of Petitioner's self-defense claim. N.T., 11/6/2014, at 129-138.

Petitioner also contends trial counsel was ineffective for failing to file a motion in limine and/or object to a witness testifying that Petitioner was selling drugs for the victim (see N.T., 11/4/2014, at 19-20). Petitioner asserts this evidence was in violation of Rules 401, 402, 403 and 404(b) of the Pennsylvania Rules of Evidence.

This issue lacks merit. The argument between Petitioner and the victim, which led to Petitioner shooting the victim, arose out of their drug dealing and possession of weapons. This evidence was relevant and highly probative.

Furthermore, Petitioner was not prejudiced by this testimony. Petitioner admitted in his statements to the police and in his trial testimony that he and the victim were dealing drugs and had possessed weapons. In fact, drug dealing and the possession of weapons was integral to Petitioner's self-defense claim. Petitioner admitted that he and the victim were dealing drugs. Petitioner asserted that the victim was too concerned with his many girlfriends and as a result the victim was spending more money than they were making. According to Petitioner, they agreed to go their separate ways, but the victim wanted a

firearm back that he had given Petitioner. Initially, Petitioner told the victim he could not have the firearm back, but then Petitioner agreed to return the firearm but he could not do so until he returned to his residence. Petitioner expressly told the victim not to go to his residence when he was not there. When Petitioner arrived at the residence, however, the victim was there allegedly retrieving the firearm from under the couch. The victim allegedly raised the firearm as if he were going to shoot Petitioner.

The Commonwealth introduced the testimony of Kisha DePitte, Petitioner's girlfriend, to show that there were no firearms in or under the couch in the residence. N.T., 11/3/2014 at 159. On cross-examination, defense counsel elicited testimony from Ms. DePitte to show that, because she was on Drug Court and subject to supervision by a probation officer, she either would have gotten into trouble or feared such if Petitioner was living her residence, she knew that guns were in her house, or she knew that Petitioner was dealing drugs out of her residence. N.T., 11/3/2014 (Volume 2), at 16-18.

There is no need for an evidentiary hearing to determine trial counsel's basis for asking these questions because such is already apparent in the record. The Commonwealth objected to the relevance of this line of questioning and trial counsel stated that the questions went to the witness's credibility and motive to fabricate her statements in July of 2013 and her trial testimony. N.T., 11/3/2014 (Volume 2), at 17. As trial counsel had a rational or strategic basis for these questions, i.e., discrediting Ms. DePitte's testimony which undercut Petitioner's self-defense claim, Petitioner cannot prove all of the elements of an ineffective assistance of counsel claim.

Petitioner next contends trial counsel should have objected to the



Commonwealth questioning Reginald Morton about Petitioner's drug dealing and/or possession of firearms. Again, Petitioner contends this evidence was irrelevant and prejudicial. As previously noted in this Opinion, the drug dealing and possession of firearms were relevant and probative in this case. From the Commonwealth's perspective, this evidence established the motive for the killing. From the defense perspective, this evidence—particularly the firearm evidence—was integral to Petitioner's self-defense claim.

Petitioner also asserts that counsel was ineffective for failing to object to references of Petitioner being at the state parole office in Philadelphia and/or any references to him being on parole with a detainer. Petitioner contends this evidence was not relevant and it was highly prejudicial.

The Commonwealth contends this evidence was admissible as part of the history of the natural development of the facts and the history of the case. It explained how the police were able to locate Petitioner after he left Williamsport. The Commonwealth also argued that the references were made in passing and were not exploited by the Commonwealth, and Petitioner was not prejudiced as there was no reasonable probability that the outcome of the trial would have been different had the jury not been aware that Petitioner was on parole.

In light of the decision in *Commonwealth v. Crispell*, 193 A.3d 919, 936-938 (Pa. 2018), the court will grant an evidentiary hearing on this claim. In that case, Crispell asserted a claim that counsel was ineffective for failing to file a motion to exclude evidence that Crispell was apprehended in Arizona after attempting to steal a purse in Tuscon. The PCRA court found that the evidence was admissible under the *res gestae* exception which

permits the admission of the complete story or natural development of event forming the history of the case. The Pennsylvania Supreme Court found that this claim had arguable merit. In rejecting the PCRA court's holding, the Court stated "the purse snatching in Arizona had nothing to with Brown's murder and, therefore, was not part of the complete story or natural development of events forming the history of the case. At the time of the attempted purse snatching, Brown's murder was complete, having occurred days earlier and over two thousand miles away." *Id.* at 937. While the Court did not ultimately grant relief on this claim, it was only because Crispell's statements and trial testimony regarding the attempted purse snatching aided his defense at trial which was to minimize his role in Brown's murder and to portray his co-defendant as the decision-maker and leader in the events that led to Brown's murder. Therefore, Crispell was not prejudiced.

Unlike *Crispell*, evidence that Petitioner was on parole was not utilized to aid or further his defense. While trial counsel's certification contends that there was no way to keep this information from the jury and that the fact he was on state parole had no bearing on the defense theory of the case, Petitioner contests these assertions. Petitioner argues that this information could have been kept from the jury if trial counsel had objected or filed a motion to preclude this evidence and the failure to do so prejudiced Petitioner in the eyes of the jury.

Petitioner next contends that counsel was ineffective for failing to object to Agent Stiles looking into the cellphone without a warrant. The court cannot agree.

Objecting at trial would be too late. If the basis of the objection is a lack of a search warrant, then to properly preserve the issue counsel would have had to file a motion to suppress evidence within 30 days of arraignment. Pa. R. Crim. P. 581(B); Pa. R. Crim. P.

579(A). The failure to file a timely suppression motion results in waiver of the issue. Pa. R. Crim. P. 581(B). Petitioner has not alleged that counsel was ineffective for failing to file a suppression motion.

Even if Petitioner had raised the issue as a claim that trial counsel was ineffective for failing to file a suppression motion, Petitioner would not be entitled to relief. The record clearly shows that Agent Stiles obtained custody of and looked into the victim's cellular telephone. N.T., 11/5/2014, at 67-69. Petitioner would not be entitled to the remedy of suppression because he did not have a legitimate expectation of privacy in the victim's cell phone. *Commonwealth v. Kane*, 210 A.3d 324, 330 (Pa. Super. 2019) (“To prevail on a suppression motion a defendant must demonstrate a legitimate expectation of privacy in the area searched or the effects seized....”).

Petitioner avers counsel was ineffective for failing to adequately prepare and meet with him prior to his testimony in his own defense. Petitioner contends that he met with counsel 15 minutes before he was placed on the witness stand with no other preparation. According to Petitioner, the only advice he was given was to watch his temper, to try not to argue with the prosecutor and to answer every question honestly. He was never prepared to testify and no questions or potential questions were asked of him prior to him taking the witness stand. Counsel's witness certification disputes both the amount and extent of preparation. The court will grant an evidentiary hearing on this claim.

Petitioner's final assertion is that counsel was ineffective for failing to advise Petitioner of a proposed plea agreement prior to jury selection. Petitioner's witness certification indicates that there was a potential plea to third degree murder had he accepted

it prior to jury selection, but he was not advised of that possibility until after jury selection. Trial counsel's certification indicates that the only plea agreement offered was to plead guilty to an open count of homicide, which Petitioner indicated was not an acceptable offer. Counsel's certification also indicates that Petitioner agreed to accept a plea to third degree murder but such an offer was never made by the District Attorney. The court will grant an evidentiary hearing on this claim.

**ORDER**

AND NOW, this \_\_\_ day of October 2019, the court will grant Petitioner an evidentiary hearing on his claims of ineffectiveness related to counsel's alleged failure to: (1) object to references of Petitioner being at the state parole office or being on parole; (2) adequately prepare and meet with Petitioner prior to his testimony in his own defense; and (3) advise Petitioner of a proposed plea agreement prior to jury selection. The evidentiary hearing is scheduled for **December 18, 2019 at 1:30 p.m. in courtroom #4 of the Lycoming County Courthouse.**

With respect to all other issues, the court gives Petitioner notice of its intent to dismiss those claims without holding an evidentiary hearing for the reasons stated in this Opinion. Petitioner may respond to this proposed dismissal within twenty (20) days. If Petitioner fails to respond, the court will issue an order dismissing these claims when it issues a decision on the three claims for which the court granted an evidentiary hearing.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)

Robert Hoffa, Esquire  
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