IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-1662-2012**
	:	**CP-41-CR-1990-2013**
vs.	:	
	:	
	:	**Opinion and Order granting hearing in**
KENNETH MARTIN,	:	**part and giving notice of intent to dismiss**
	:	**PCRA in part**

OPINION

Before the court is a Petition for Post-Conviction Relief pursuant to Pennsylvania's Post-Conviction Relief Act (PCRA). By way of background, Petitioner (hereinafter "Martin"), following a jury trial on January 28, 2016 and January 29, 2016, was convicted of burglary, robbery, aggravated assault and related charges.

He was subsequently sentenced on July 7, 2016 to an aggregate period of state incarceration, the minimum of which was 7 ½ years and the maximum of which was 20 years. He proceeded through the direct appeal process with the Superior Court affirming his conviction and sentence on June 26, 2018, and the Pennsylvania Supreme Court denying his petition for allowance of appeal on December 26, 2018.

He filed his first uncounseled PCRA Petition on February 25, 2019. He retained private counsel who subsequently filed amended petitions on his behalf with the controlling petition being a second amended supplemental PCRA petition filed on September 24, 2019. Petitioner's counsel also filed amended or additional witness certifications on November 12, 2019.

On March 2, 2020, the court held a conference and argument with counsel on

whether the court should conduct an evidentiary hearing on some, all, or none of the issues asserted in Martin's PCRA petition. Martin participated via videoconferencing. At the argument, Martin's counsel requested additional time to submit a signed witness certification from Jermaine Mullen. The court granted this request. Martin's counsel submitted such a certification to the court and the prosecutor via email on May 5, 2020; it was filed of record on June 12, 2020.[1]

Preliminarily, the court notes that the parties agreed that Martin's PCRA petition is timely and after review of the record, the court agrees and will assume jurisdiction to address the merits.

The factual background of the case is concisely set forth by the Superior Court in its Opinion filed on June 26, 2018:

> [Martin] and Noor Ford were acquaintances. Mr. Ford had been selling heroin for [Martin] and owed him approximately $1,000.00. On June 19, 2012, Mr. Ford was staying in Room 214 at the Econo Lodge in Williamsport, Pennsylvania. Around 11:00 a.m., Martin and two other men entered Mr. Ford's room without permission. [Martin] aimed a semi-automatic pistol at Mr. Ford and threatened to shoot him unless Mr. Ford produced the money owed.
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> When Mr. Ford replied that he did not have any money, [Martin] pistol whipped Mr. Ford and knocked him over. [Martin's] companions began to punch and kick Mr. Ford, eventually knocking him unconscious. The three men ransacked Mr. Ford's room, stealing money, heroin, an X-box video game console, backpack, duffel bag and Mr. Ford's phone. Video surveillance from the Econo Lodge showed [Martin] and two other men leaving with the duffel bag and a backpack.

[1] In light of the challenges presented by the COVID-19 pandemic and the fact that that the court and the prosecutor received the witness certification via email on May 5, the court considers the certification timely filed regardless of the deadline set forth in the court's order.

One of the assailants took photographs of [Martin] punching Mr. Ford in the head during the assault and of Mr. Ford's swollen and bloody face after the incident. The images were then posted to social media accounts with suggestions that Mr. Ford had been beaten due to a drug debt.

Mr. Ford called a friend, who assisted him in reaching a hospital. Hospital personnel treated his injuries and contacted the police. Trooper Tyson Havens had known Mr. Ford for a few years prior to this June 2012 incident. Prior to going to the hospital, Trooper Havens went to the Econo Lodge to view the room where Mr. Ford was assaulted and saw the blood splatter and layout of the room. Trooper Havens also viewed the surveillance footage from the Econo Lodge, which enabled him to identify two of the assailants as Terrence Forsythe also known as "Tee Pain", and Michael Wills.

Next, Trooper Havens visited Mr. Ford in the hospital. Mr. Ford told Trooper Havens that he was "struck with a pistol, punched and kicked by an individual named Snoop, by an individual named Dark, and by a third individual whose name he did not know." Mr. Ford also gave Trooper Havens the number for his stolen iPhone. This number was used to post photographs of the assault on Instagram.

During a second interview with police, Mr. Ford described the assailant he knew as "Snoop", to be a man with the number "13" tattooed between his eyes. Based on the description of the tattoo, Trooper Havens was able to identify "Snoop" as [Martin.] During a third interview, Mr. Ford signed a statement typed by Trooper Havens after making several redactions out of fear for his safety because of threats from [Martin.]

During the course of the investigation, Helena Yancey, the mother of one of Mr. Ford's children, informed Mr. Ford that photographs of the assault had been posted on Instagram. Mr. Ford informed Trooper Havens, who requested Ms. Yancey forward screenshots of the photographs to him. Upon further investigation, Trooper Havens determined that numerous Instagram accounts had posted or commented on the photographs. Using this

> information, Trooper Havens secured a court order to obtain from Instagram the images and comments posted, as well as all relevant account information. Instagram complied with the court order, providing a zip drive containing the photographs and account information along with the certificate of authenticity.

At a hearing held in March of 2014 to address an omnibus motion filed by Martin, Mr. Ford testified that he could not remember the assault or any statements made to Trooper Havens. Following the hearing, the court found that there had been forfeiture by wrongdoing and the statements of Mr. Ford were deemed admissible.

In June 2015, trial commenced before the Honorable Dudley N. Anderson. However, there were several disruptive incidents involving supporters of Martin that made jurors sufficiently uncomfortable so that a mistrial was declared.

A new trial was scheduled before the Honorable Michael J. Williamson but on the day before it was to begin, the case was reassigned from Judge Williamson to the undersigned. As a result of the sudden reassignment prior to trial, Martin presented an oral motion to dismiss, alleging improper ex parte communication between the District Attorney and President Judge Nancy L. Butts. According to Martin, he was prejudiced by the removal of Judge Williamson. Martin suggested that Judge Williamson may have ruled favorably on his pretrial motions.

On the day of trial, the court conducted a hearing on the motion and permitted Martin to call District Attorney Eric Linhardt to testify. Following the hearing, the court denied the motion, concluding that Martin's assertions of prejudice were merely speculative.

The Commonwealth then proceeded on its motion to have Mr. Ford again

declared unavailable as a result of Martin's wrongdoing. The parties agreed that Mr. Ford could testify in the presence of the jury. Mr. Ford stated that he could not remember the assault. Thus, the court again found that Mr. Ford was unavailable. The court further found that Martin had forfeited his right to cross-examine Mr. Ford because of his own wrongdoing. The court then permitted the Commonwealth to introduce Mr. Ford's prior oral and written statements.

Martin's second amended supplemental PCRA petition filed on September 24, 2019 asserts numerous grounds for relief under the PCRA.

I. Pennsylvania's Post Conviction Relief Act

Pennsylvania's Post-Conviction Relief Act (PCRA) is a defendant's sole means of obtaining collateral relief following a conviction and sentence. 42 Pa. C.S. § 9542. The PCRA permits defendants in custody, both at the time the petition is filed and when relief is granted, to seek relief when the petitioner's sentence resulted from one or more of the Act's enumerated errors, and the claimed error has not been previously litigated or waived. 42 Pa. C.S. § 9543 (a)(2), (3); *Commonwealth v. Housman,* 226 A.3d 1249, 1260 (Pa. 2020).

The errors include a violation of the Pennsylvania or U.S. Constitutions, or instances of ineffectiveness of counsel that so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa. C.S. § 9543 (a)(2)(i), (ii); *Housman, id.; Commonwealth v. Crispell,* 193 A.3d 919, 927 (Pa. 2018). An issue is previously litigated or waived if the highest appellate court in which the petitioner could have reviewed it as a matter of right, has ruled on the merits of the issue. 42 Pa. C.S. §

9544 (a)(2); *Housman, id.*

A petitioner must also be serving a sentence of imprisonment, probation or parole for the crime. *Commonwealth v. Turner,* 80 A.3d 754, 761-762 (Pa. 2013).

With respect to a claim of ineffective counsel, counsel is presumed effective. *Commonwealth v. Harper,* 2020 PA Super 77, 2020 WL 1516934, *3 (Pa. Super. March 30, 2020); *Commonwealth v. Becker,* 192 A.3d 106, 112 (Pa. Super. 2018), *appeal denied*, 200 A.3d 11 (Pa. 2019); *Commonwealth v. Sepulveda,* 55 A.3d 1108, 1117 (Pa. 2012).

In order to prevail on a claim of ineffectiveness, a petitioner must plead and prove by a preponderance of the evidence that: (1) the claim has arguable merit; (2) counsel lacked any reasonable basis for the action or inaction; and (3) the petitioner suffered prejudice as a result. *Commonwealth v. Diaz,* 226 A.3d 995, 1007 (Pa. 2020); *Housman, id; Commonwealth v. Hopkins,* 2020 Pa. Super. 88, 2020 WL 1671579 (April 6, 2020).

A failure to establish any one of the prongs warrants a denial of the ineffectiveness claim. *Harper,* 2020 WL 1516934, *3, citing *Becker,* 192 A.3d at 113; *Commonwealth v. Treiber*, 121 A.3d 435, 476 (Pa. 2015). The court need not analyze the elements of an ineffectiveness claim in any particular order; if a claim fails under any prong of the ineffectiveness test, the court may proceed to that element first. *Sepulveda,* 55 A.3d at 1117-18. Counsel's assistance is deemed constitutionally effective once the court determines that the petitioner has not established any one of the prongs of the ineffectiveness test. *Commonwealth v. Rolan,* 964 A.2d 398, 406 (Pa. Super. 2008), citing *Commonwealth v. Harvey*, 812 A.2d 1190, 1196 (Pa. 2002).

A claim has arguable merit where the factual averments, if true, could

establish cause for relief. *Commonwealth v. Stewart,* 84 A.3d 701, 707 (Pa. Super. 2013) (en banc). "Whether the facts rise to the level of arguable merit is a legal determination." *Id.* (internal quotation marks omitted), citing *Commonwealth v. Saranchak,* 866 A.2d 292, 304 n.14 (Pa. 2005).

The test for deciding whether counsel had a reasonable basis for his or her action or inaction is whether no competent counsel would have chosen that action or inaction, or the alternative not chosen offered a significantly greater potential chance of success. *Hopkins,* 2020 WL 1671579, *15; *Stewart,* 84 A.3d at 707, citing *Commonwealth v. Colavita,* 993 A.2d 874 (Pa. 2010). "Counsel's decisions will be considered reasonable if they effectuated their client's interests." *Stewart, id.,* citing *Commonwealth v. Miller,* 987 A.2d 638 (Pa. 2009). The courts do not employ a hindsight analysis in comparing trial counsel's actions with other efforts counsel may have taken. *Stewart*, *id.,* citing *Miller, id.* at 653.

The court will not question whether there were other more logical courses of action which counsel could have pursued; rather, the court must examine whether counsel's decision had any reasonable basis. *Commonwealth v. Mason,* 130 A.3d 601, 618 (Pa. 2015). "Counsel's decision to refrain from a particular action does not constitute ineffectiveness if it arises from a reasonable conclusion that there will be no benefit and is not the result of sloth or ignorance of other alternatives." *Hopkins,* 2020 WL 1671579, *15 (internal quotation marks omitted), citing *Commonwealth v. Collins,* 545 A.2d 882, 886 (Pa. 1988).

As to prejudice, it is measured by whether there is a reasonable probability that the result of the proceeding would have been different. *Housman,* 2020 WL 147362, *6,

citing *Commonwealth v. Pierce,* 786 A.2d 203, 213 (Pa. 2001). "A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceedings." *Commonwealth v. Spotz,* 84 A.3d 294, 312 (Pa. 2014)(internal quotation marks omitted).

The United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984) cautioned, however, that this standard is not intended to be viewed as mechanical. "Although those principles should guide the process of the decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding which is being challenged. In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696; *Diaz,* 226 A.3d at 1008. It has been posited that the petitioner must establish only that the challenged conduct resulted in "some effect…on the reliability of the trial process" in order for the constitutional guarantee of effective assistance to be implicated. *Diaz, id.,* citing *Strickland, Id.* at 686.

Indeed, there are certain limited circumstances where prejudice is so likely that it is presumed. Such examples include, but are not limited to, the actual or constructive denial of counsel at a critical stage of trial; when counsel fails entirely to provide meaningful adversarial testing of the prosecution's case; circumstances wherein no lawyer, regardless of general competency, could have provided effective assistance of counsel; and the failure to secure an interpreter where the petitioner was not a native English speaker and could not fully understand the proceedings. *U.S. v. Chronic,* 466 U.S. 648 (1984); *Diaz*, 226 A.3d 395 (Pa. 2020).

Finally, and with respect to holding an evidentiary hearing in connection with a PCRA petition, such a decision is within the sound discretion of the court. There is no absolute right to an evidentiary hearing. *Commonwealth v. Jones,* 942 A.2d 903, 906 (Pa. Super. 2008); *Commonwealth v. Maddrey,* 205 A.3d 323, 327 (Pa. Super. 2019). If a court can determine from the record that no genuine issue of material fact exists, a hearing is not necessary. *Maddrey, id.,* citing *Jones, id.* To be entitled to a hearing, the petitioner must demonstrate that he has raised a genuine issue of fact, which if resolved in his favor, would have entitled him to relief. *Maddrey*, *id*., citing *Commonwealth v. Hanible,* 30 A.3d 426, 452 (Pa. 2011). Furthermore, the court may deny a hearing and dismiss the petition if it is patently frivolous and without a trace of support in either the record or from other evidence. *Commonwealth v. Jordan,* 772 A.2d 1011, 1014 (Pa. Super. 2001).

II. Alleged Ineffectiveness for Failing to Object to Noor Ford Ruling on Compulsory Process/Due Process Grounds

During the trial, on January 28, 2016, the Commonwealth called Noor Ford as a witness. (Transcript, 01/28/2016, at 97). He testified that he could not recall even being at the Econo Lodge on June 19, 2012 let alone what happened. (Transcript, at 97-99). The Commonwealth made a motion to have Mr. Ford declared unavailable pursuant to Pennsylvania Rule of Evidence 804 (a)(3). (Transcript, at 99). Over Martin's objection, which included a Sixth Amendment confrontation claim, the court granted the Commonwealth's motion. (Transcript, at 99, 105).

Subsequently, following the limited direct exam of Mr. Ford, the Commonwealth objected to Martin cross-examining Mr. Ford. (Transcript, at 99-100). The

Commonwealth specifically argued that Martin forfeited his confrontation rights. (Transcript, at 108). Martin also raised the issue as to whether he could call Mr. Ford in his case in chief. (Transcript, at 111).

Martin specifically argued that by denying him the right to call Mr. Ford, the court "denied my right to confrontation." (Transcript, at 112). Martin argued that the court's ruling didn't strip away his right to confrontation. (Transcript, at 117). Martin argued further if the court found Ford unavailable, Martin was entitled to cross-examine Ford but if not, to call him on direct. (Transcript, at 122-123).

Martin argues in his PCRA that the forfeiture by wrongdoing decision did not affect his constitutional right to call Ford as a witness during his case in chief; therefore, Ford's testimony would have been admissible. (PCRA Second Amended Supplemental Petition, paragraph 55). Martin argues further that the forfeiture by wrongdoing doctrine only extinguishes a defendant's confrontation rights and has no effect on a defendant's rights to call witnesses on his behalf or to present a defense. (PCRA Second Amended Supplemental Petition, paragraph 59). Martin argues that his rights pursuant to the Sixth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution were violated when he was precluded from calling Ford as a witness in his case in chief. (PCRA Second Amended Supplemental Petition, paragraph 63). Further, Martin argues that he was prejudiced by this error because there was a reasonable probability that but for the error, Ford would have been permitted to testify during Martin's case in chief and would have provided relevant testimony in support of Martin's defense. (PCRA Second Amended Supplemental Petition, paragraph 70).

In sum, Martin argues that counsel was ineffective for failing to object, or to pursue on appeal, that despite the court's ruling that Martin forfeited his right to confront Mr. Ford, the court should have permitted Martin to call Mr. Ford as a witness in his case in chief pursuant to his constitutional rights to both due process and compulsory process.

Martin's claim, however, is without merit. First, Martin waived this claim because Martin never called nor attempted to call Noor Ford during his case in chief. Indeed, while the issue was being discussed, defense counsel indicated to the court that he had not determined if he would call Mr. Ford as a witness. "To be candid, I don't know if I am going to call him as a witness." (Transcript, at 123).

In conjunction with this, calling Mr. Ford as a witness might have been nothing more than mere subterfuge to get evidence before the jury that would not otherwise have been admissible. To allow Martin to call Mr. Ford, who had already testified that he did not remember anything, would have essentially been a ruse. Martin's compulsory process rights could not have been violated since defense counsel had not interviewed Mr. Ford, did not know anything about what Mr. Ford would say, and Mr. Ford's proposed testimony would not have produced any admissible evidence. See *Commonwealth v. Williams,* 537 Pa. 119, 640 A.2d 1251, 1259-1260 (Pa. 1994).

Next, as argued by Martin, both the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution, grant criminal defendants specified rights in connection with criminal proceedings. The confrontation clause grants defendants the right to confront and cross-examine witnesses. The compulsory process clause grants defendants the right to call witnesses in their defense.

These rights, however, are not absolute, and must occasionally give way to considerations of public policy, such as testimonial privileges, and the necessities of the case. *Commonwealth v. Campion,* 672 A.2d 1328, 1331 (Pa. Super. 1996); *Commonwealth v. Gibbs,* 642 A.2d 1132, 1135 (Pa. Super. 1994); *Commonwealth v. Allen,* 462 A.2d 624, 627 (Pa. Super. 1983).

The right to compulsory process does not guarantee the defendant the right to secure the attendance and testimony of any and all witnesses. *Williams,* 640 A.2d at 1260. In fact, case law supports the conclusion that a party waives, forfeits, or abandons that right when the party is responsible for the witness's practical or legal unavailability. *Commonwealth v. Holloman,* 621 A.2d 1046 (Pa. Super. 1998) (prosecutor's comments did not cause witness not to testify so no compulsory process violation); *Commonwealth v. Ryan,* 446 A.2d 277, 281 (Pa. Super. 1982) (defendant knew witness well and did not attempt to subpoena him) ; *Commonwealth ex rel Jennings v. Moroney,* 118 A.2d 287 (Pa. Super. 1955) (defendant did not request compulsory process until day before trial).

Martin's conduct in causing Ford to be unavailable resulted in his forfeiting not only his right to confront to Mr. Ford but also his right to compel Mr. Ford to testify on his behalf.

While the Pennsylvania courts are emphatic about the importance of constitutional rights, no right is absolute. *Commonwealth v. Ludwig,* 527 Pa. 472, 479, 594 A.2d 281, 284 (1991). The right asserted by the defendant to offer testimony of witnesses, is in plain terms the right to present a defense. *Washington v. Texas,* 388 U.S. 14, 23 (1967). This right is a fundamental element of due process of law. *Id.*

The forfeiture by wrongdoing principle has been described by the Pennsylvania courts as a "waiver by misconduct rule." *See Commonwealth v. Laisch*, 777 A.2d 1057, 1068 (Pa. 2001)(Castille, J., dissenting). One who wrongfully procures the absence of a witness is in a weak position to complain about losing the chance to confront that witness. *U.S. v. White*, 116 F.3d 903 (D.C. Cir. 1997)(per curiam). The forfeiture principle is designed to prevent a defendant from thwarting the operation of the criminal justice system. *Id.* at 912. The theory in support of forfeiture is based on the fact that the witness is "rendered unavailable to testify at trial" because of the defendant's wrongful acts. *Giles v. California,* 554 U.S. 353, 359, 128 S.C. 2678, 2682 (2008).

It makes no sense that a witness can be rendered unavailable or essentially kept away from trial, yet be called as a witness. A finding of unavailability renders the witness absent. As indicated in *Giles,id.,* the distinction advanced by defendant would eviscerate the forfeiture by wrongdoing rule. A defendant should not be permitted to benefit from his own wrong. 554 U.S. at 365. When a witness is absent by the defendant's wrongful procurement, the defendant is in no position to assert that his Constitutional rights have been violated by not being able to call that witness. See, *id.* at 365. The Constitution does not guarantee rights to an accused person against the legitimate consequences of his own wrongful acts. *Id.*, citing, *Reynolds v. United States,* 98 U.S. 145, 159 (1878).

Finally, Martin cannot establish prejudice. There is no alleged fact that would have been advanced by Ford that could have resulted in a different verdict or even cast doubt upon the reliability of the verdict. At trial, Mr. Ford indicated that he could not remember **anything** due to his drug usage. Martin now contends that Ford would testify that he does

not recall Martin being there. This is still a lack of memory. It is not an assertion that Ford recalls the incident and Martin was not present. Furthermore, while Martin also alleges that Ford could explain why he may have said certain things to Trooper Havens, the certification attached to the PCRA fails to reference any specifics whatsoever.

III. Alleged Ineffectiveness for Failing to Object to Trooper Havens' Testimony regarding Jessica Brown

During day one of the trial, on January 28, 2016, the Commonwealth presented testimony from Trooper Havens. Trooper Havens went to the hospital and he interviewed Ford. Ford made a statement that his assailant was "Snoop" whose girlfriend was Jessica Brown. Trooper Havens had encountered Jessica Brown and Martin walking into a pretrial bail hearing together.

During Trooper Haven's testimony, he indicated that Martin's girlfriend was "a person named Jessica Brown." (Transcript, 1/28/2016, at 188). He further indicated that he "got to know" Jessica Brown because a year or two earlier, he arrested a person for drug dealing and she was with him. (Transcript, at 188-89). Further, Trooper Havens testified that he would encounter her on the street on a regular basis when he was "in a criminal interdiction unit." (Transcript, at 189). Trooper Havens identified Ms. Brown as Martin's girlfriend who was with him at a prior hearing. (Transcript, at 188-190).

Martin claims that trial counsel was ineffective in not objecting to this evidence as it was not relevant and even if relevant, it was overly prejudicial.

More specifically, Martin argues that the evidence insinuated that he was in a sexual relationship with and was frequently with a person known for drugs, drug dealing and

crime, and also tended to show that Martin was a person known for drugs, drug dealing and crime. (Second Amended Supplemental PCRA Petition, paragraph 84).

Martin's claim is without arguable merit.

The admissibility of evidence is within the discretion of the court. *Commonwealth v. Johnson,* 42 A.3d 1017, 1027 (Pa. 2012). The determinative standard is relevancy. Pa. R.E. 402.

Relevant evidence is admissible if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference regarding a material fact. *Commonwealth v. Wade,* 226 A.3d 1023, 1032 (Pa. Super. 2020). In other words, evidence is relevant if the inference sought to be raised by it bears upon a matter at issue and renders the desired inference more probable than it would be without the evidence. *Commonwealth v. Elliott,* 80 A.3d 415, 446-47 (Pa. 2013). The court may exclude relevant evidence if its probative value is outweighed by a danger of unfair prejudice. Pa.R.E. 403. "'Unfair prejudice' means a tendency to suggest a decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403, cmt.

Further, the admissibility of evidence is a matter addressed to the sound discretion of the trial court and may not be reversed absent a showing of abuse of discretion. *Commonwealth v. Cox,* 115 A.3d 333, 336 (Pa. Super. 2015). An abuse of discretion is not a mere error in judgment but rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness or a misapplication of the law. *Id.*

In addressing the relevancy of the testimony, and while the court appreciates

zealous advocacy, Martin's interpretation of the testimony is factually inaccurate. The testimony did not insinuate that Martin was in a "sexual relationship" or was "frequently" with someone "known for drugs, drug dealing and crime." There was no testimony whatsoever upon which an inference could be made that Ms. Brown was "known for drugs, drug dealing and crime." There was no testimony as to the nature of the relationship between Martin and Ms. Brown except that she was his girlfriend. There was no testimony whatsoever as to how long they had been in a relationship let alone that he "frequently" was with her.

Trooper Havens got to "know her", because she was previously with someone who he arrested for drug dealing, not that she was known for drugs, drug dealing or crime. He also encountered her on the street on a regular basis while he was working in a criminal interdiction unit. There was no testimony whatsoever about her being known for drugs, drug dealing or crime. Moreover, even if the evidence could somehow be construed as Ms. Brown being previously associated with criminal activity, it did not implicate Martin in any way in those activities.

The evidence was relevant evidence to establish that Martin was "Snoop." Trooper Havens explained to the jury how he knew who Ms. Brown was and how she may have been involved with Martin in light of the fact that she was mentioned in the interview with Mr. Ford. The evidence or testimony was not unduly prejudicial to Martin.

IV. Alleged Ineffectiveness for Withdrawing Hearsay Objection to Trooper Havens' Testimony

During the trial on January 28, 2016, Trooper Havens was asked if he ever

heard Martin answer to the name "Snoop." (Transcript, 01/28/2016, at 190). Trooper Havens indicated "yes…as recently as today with attorney Jerry Lynch." (Transcript, at 190-191). Defense counsel objected on hearsay grounds but then withdrew the objection following the court indicating that it did "not understand." (Transcript, at 191). Trooper Havens then testified that earlier in the day, Attorney Lynch had been seated in the courtroom and during a break said "Hi Snoop, how you doing?" and Martin engaged him in a greeting back and forth. (Transcript, at 191).

Martin argues that the question from Attorney Lynch "Hi, Snoop, how you doing" was inadmissible hearsay. Martin further argues that trial counsel was ineffective for withdrawing the objection and that Martin suffered prejudice as a result.

This claim is without arguable merit.

Pursuant to Pennsylvania Rule of Evidence 801, hearsay is a statement that the declarant does not make while testifying at trial and a party offers in evidence to prove the matter asserted in the statement. A statement, as alleged in this issue, is a person's oral assertion, if the person intended it as an assertion. While questions may be considered hearsay if they include implied assertions, *Commonwealth v. Parker,* 104 A.3d 17, 24 (Pa. Super. 2014), a greeting does not constitute hearsay because it does not rise to the level of an assertion. See Pa. R. E. 801, cmt. ("Communications that are not assertions are not hearsay. These would include … greetings….").

In this case, the greeting was not intended as an assertion. Its only import was the fact that it was made and then Martin responded. *Commonwealth v. Tselepis,* 181 A.2d 710, 712 (Pa. Super. 1962). An out-of-court statement offered to explain a course of conduct

is not hearsay. *Commonwealth v. Cruz,* 414 A.2d 1032, 1035 (1980).

Furthermore and assuming that it was hearsay and should have been precluded, Martin was not prejudiced. This court is not at all concerned that because of counsel's apparent error, the result of the trial was unreliable. The admission of the greeting/question by Attorney Lynch does not create a reasonable probability that the result of the trial would have been different.

Some of Martin's factual assertions as set forth in his petition also are without basis in the record. First, at trial there was no testimony that Mr. Lynch was a "member of the defense Bar." There was no testimony as to how well Mr. Lynch knew Martin or to support the inference that Mr. Lynch knew Martin "well enough." There is no support in the record that the statement allowed the Commonwealth to credibly establish that Martin went by the name Snoop simply because Mr. Lynch greeted him as Snoop. Trooper Havens testified that in response, the defendant "engaged him in a greeting back and forth." (Transcript, at 191).

Moreover, there was an abundance of evidence that Martin went by the nickname Snoop. "Mr. Ford called Snoop." (Transcript, at 195). "Snoop as being the person in the sweats" (Transcript, at 200). Mr. Ford identified Martin as "Snoop." (Transcript, at 203-204). Ford "identified Snoop as Kenneth Martin." (Transcript, at 205). The telephone number associated with an Instagram account for "Snoop" matched Martin's (Transcript 01/29/2016, at 26). Martin's picture was depicted on "Snoop's" Instagram (Transcript, at 32-33). Ford's picture was posted on "Snoop's Instagram page with detailed information about Ford's injuries and owing Snoop a debt." (Transcript, at 34-35).

IV. Alleged Ineffectiveness for Failing to Introduce Agent Sorage's Recorded Interview of Noor Ford

At the conference in this matter on March 2, 2020, Martin withdrew the assertion of ineffectiveness.

V. Alleged Ineffectiveness for Failing to Confront Trooper Havens with Ford's Statements

At an omnibus hearing in this matter, Noor Ford indicated, among other things, that he did not trust Trooper Havens, Havens illegally searched his home, he knew multiple "Snoops", and one of the reasons he did not testify is that he did not trust the prosecution.

Martin argues that his trial counsel failed to impeach Trooper Havens regarding these statements, that impeaching Havens' credibility was "more important than a normal case", that the statements would have led the jury to question Havens' credibility and that impeaching the credibility of Trooper Havens on these grounds would have provided a substantially greater chance of gaining an acquittal at trial, than not impeaching Havens.

During trial, outside the presence of the jury, the court discussed with counsel proposed testimony about why Mr. Ford was afraid of testifying. (Transcript, 1/28/2016, at 123-124). Martin's counsel noted that he couldn't cross-examine Havens regarding Ford's state of mind and why he said the things he said. (Transcript, at 126). Subsequently, the court granted defense counsel's oral motion to preclude the Commonwealth from introducing hearsay statements of Mr. Ford relating to the alleged wrongdoing. (Transcript, at 129). The court concluded that any "mention" of post-incident conduct alleged against Martin would

severely prejudice Martin. (Transcript, at 129). By way of a request for clarification, the court was precluding the Commonwealth "in any form through any witness" from introducing any testimony that Mr. Ford was allegedly scared or threatened by Martin or "anyone else." (Transcript, at 132).

Given Martin's motion and the granting of it by the court, the courts fails to find any arguable merit in Martin's ineffectiveness claim. Clearly, counsel's decision to preclude the testimony resulted in Martin being precluded from offering opposing testimony.

VI. Alleged Ineffectiveness for Arguing Incorrect Legal Standard and Improper remedy as a Result of Alleged Judge Shopping

This court will address Martin's next two claims together in that they essentially relate to the same issue. Martin argues that his trial counsel was ineffective in two ways relating to his claim that the Commonwealth was judge shopping. First, Martin argues that his trial counsel should have argued that the case should have been returned to Judge Williamson, versus being dismissed, based upon the appearance of an impropriety and not actual prejudice.

As the Superior Court noted in its June 26, 2018 Opinion, "A new trial was scheduled before the Honorable Michael J. Williamson but on the day before it was to begin, the case was assigned to [the undersigned]. As a result of the sudden reassignment, prior to trial, [Martin] presented an oral motion to dismiss, alleging ex parte communication between the prosecutor's office and President Judge Nancy L. Butts. According to Martin, he was prejudiced by the removal of Judge Williamson." Martin suggested, "without support that Judge Williamson may have ruled favorably on his pretrial motions."

"On the day of trial, the court conducted a hearing on the motion and permitted [Martin] to call District Attorney Eric Linhardt to testify. He testified that he was: concerned about [Judge Williamson's]…at best I would describe it as unprofessional conduct during those three trials [earlier in the week] and what I believed was possible judicial misconduct, that I felt I had a responsibility to let the President Judge know about that…I didn't ask that he be reassigned to other criminal cases. I just asked that he not preside over any more cases in the county because I didn't think that it was appropriate that he was presiding over trials."

On the morning of the trial, the undersigned met with counsel. Trial counsel for Martin argued that the case should be dismissed believing that the District Attorney "purposefully and in a calculated fashion" spoke with the President Judge to have the case removed from Judge Williamson. (January 28, 2018 Transcript, p. 7). Martin argued that it smacked of judge shopping by the District Attorney's office. (Transcript, p. 8).

Following the testimony of then District Attorney Linhardt, Martin renewed his motion to dismiss arguing that "there was ex parte communication" with President Judge Butts and that he was anticipating some favorable rulings from Judge Williamson. (Transcript, pp. 20-21). Trial counsel summarized saying "it was ex parte communication and I think it smacks of judge shopping. I think these charges should be dismissed." (Transcript, p. 22).

In response, the court inquired of counsel as to whether there was a prejudice requirement or other alternatives available to the court such as reassigning the case back to Judge Williamson. (Transcript, p. 23). Counsel declined noting that prejudice can be

presumed and that the misconduct was attributed to the Commonwealth and not judicial misconduct. (Transcript, pp. 24-25).

This court denied Martin's motion to dismiss noting that there was no nexus between Mr. Linhardt's action and the decision of President Judge Butts. The court noted that it was "just speculation to guess why she did what she did." (Transcript, p. 27). Furthermore, the court declined to dismiss the charges because Martin did not establish prejudice. (Transcript, p. 27).

On appeal, Martin argued that the court erred in denying the motion to dismiss. Martin argued that the ex parte communication between the Commonwealth and Judge Butts was an impermissible attempt at judge shopping. Martin conceded that there was no direct evidence of judge shopping but suggested that the Commonwealth's actions created the appearance of an impropriety constituting prosecutorial misconduct warranting dismissal. (Superior Court Opinion, p. 18). The Superior Court concluded that there was no evidence of judge shopping, and therefore no undue prejudice. (Superior Court Opinion, p. 18).

While Martin attempts to fashion the issue differently now, Martin's appellate counsel never complained about any alleged court misconduct; the misconduct was alleged on the part of the Commonwealth. The Superior Court ruled that there was no evidence of judge shopping by the Commonwealth and therefore no undue prejudice. Martin's claim was previously litigated. The Superior Court ruled on the merits of the issue. *Commonwealth v. Crispell,* 193 A.3d 919 (Pa. Super. 2018).

Even if not previously litigated, Martin's claim of ineffectiveness, although intriguing and clever, is without merit.

This was not an issue involving a request that the court recuse itself. Martin presented no evidence that the Commonwealth either requested or preferred that the undersigned preside over the case.

Moreover, the fact that counsel may have argued an incorrect legal standard or not requested that Judge Williamson be reassigned to this case, assumes that there was at the very least some evidence of judge shopping. In fact, and as indicated above, there was no such evidence.

Finally, Martin's interpretation of the cases he cites in favor of his argument is flawed. They are factually or legally distinguishable.

In *Joseph v. Scranton Times,* 987 A.2d 633 (Pa. 2009), unlike in this case where there was no evidence of judge shopping, there was sufficient evidence of judicial impropriety concerning the assignment at trial of the case. *Id.* at 634. The evidence of record amply demonstrated that the assignment and trial of the case was "infected with the appearance of judicial impropriety." *Id.* at 635.

In *Commonwealth v. Darush,* 459 A.2d 727 (Pa. 1983), the issue concerned whether the remarks made by a judge raised a reasonable question concerning his impartiality. *Id.* at 730.

In *Commonwealth v. Wallace,* 561 A.2d 719 (Pa. 1989), the issue concerned the propriety of a judge denying defendant's request to proceed non-jury because the judge determined that the defendant was judge shopping. *Id.* at 727. In *Commonwealth v. Kellam,* 489 A.2d 758 (Pa. Super. 1985), the issue was similar to that in *Wallace,* where the court's determination that the defendant was judge shopping was called into question. *Id.* at 761.

In *Commonwealth v. Pettiford,* 402 A.2d 532 (Pa. Super. 1979), the issues concerned whether the trial judge should have recused himself and whether the judge's refusal of the jury waiver because of judge shopping, was proper. *Id.* at 533.

Finally, in *Municipal Publications, Inc., v. Court of Common Pleas of Philadelphia County,* 489 A2d 1286 (Pa. 1985), the issue involved whether a judge should recuse himself when he had personal knowledge of disputed facts. *Id.* at 1288.

VII. Alleged Ineffectiveness for Failing to Lodge an Objection to Instagram Photograph of Martin Counting Stacks of Money

In this Court's 1925 (a) Opinion, the court noted that there was a photograph of Martin posted on Instagram counting a few stacks of cash posted by someone that goes by the name Snoop-Rock (1925 (a) Opinion, p. 3).

At trial and on appeal, Martin argued that there was no reliable evidence connecting the Instagram postings to him. (Superior Court Opinion, p. 21). The Superior Court concluded that the direct and circumstantial evidence presented by the Commonwealth tended to support the authentication of the photos of Mr. Ford's assault. (Superior Court Opinion, p. 23). The issue involved Mr. Ford's assault and the photograph at issue was properly admitted as circumstantial evidence of both Martin's use of the nickname Snoop and the authentication of the relevant photographs of Ford's assault. Accordingly, this claim is without arguable merit.

VIII. Alleged Ineffectiveness for Failing to Request a Mistrial when the Commonwealth Played a Recording regarding Ford possibly being Threatened in Violation of the Court's Prior Ruling

A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. *Commonwealth v. Chamberlain,* 30 A.3d 381, 422 (Pa. 2011). As a general rule, the trial court is in the best position to gage potential bias and deference is due to the trial court when the grounds for the mistrial relate to jury prejudice. *Commonwealth v. Walker,* 954 A.2d 1249, 1255-1256 (Pa. Super. 2008).

Martin claims that trial counsel should have requested a mistrial following the playing of an audiotape interview with Mr. Ford when during the interview he stated that he didn't want them coming after him (Transcript, at 167) and can this be off the record? (Transcript, at 172).

While the Commonwealth was playing Ford's audiotaped statements, trial counsel objected to something that Ford said during that statement. (Transcript, at 164). The court held a sidebar with counsel. (Transcript, at 164-166). The court sustained trial counsel's objection. The court found that the evidence was not relevant, and it was too prejudicial. The Commonwealth, however, indicated that it needed some time. (Transcript, at 166). The court concluded the sidebar conference. The court then explained to the jury that it needed to decide some issues regarding the tape and had the jury removed from the courtroom. (Transcript, at 166-167). Once the jury left and the courtroom doors were shut, the court had the Commonwealth rewind the tape about 30 seconds. The court and the attorneys then reviewed the recording, outside the presence of the jury, including Ford's statements that "I don't want them to come after me" (Transcript, at 167) and "can this be off

the record." (Transcript, at 172). After the court and counsel reviewed these statements, the jury was brought back into the courtroom. (Transcript, at 172).

Although the transcript is not clear at the time of trial counsel's objection what the objectionable statement was (Transcript, at 164), it appears that the objection related to Ford's statement "I don't want them to come after me." Transcript, at 167.[2]

The court will grant Martin an evidentiary hearing on this issue.

IX. Alleged Ineffectiveness for Failing to Call Jermaine Mullen as a Witness

Martin asserts that trial counsel was ineffective for failing to call Jermaine Mullen as a witness. Martin asserts that Jermaine Mullen was at the Econo Lodge on June 19, 2012 and that he would have testified regarding "what occurred in Ford's hotel room." He further argues that trial counsel was aware of Mr. Mullen and declined to interview Mr. Mullen or call him at trial.

In establishing whether counsel was ineffective for failing to call a witness, a petitioner must prove:

> (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness was so prejudicial as to have denied the defendant a fair trial.

[2] THE COURT: …Let's do this Mr. Wade. Play it. We'll just hear it now and we'll all decide together what's what. Okay? Go ahead. Go back about 30 seconds.
MR. WADE: Yeah.
(The tape was played).
THE COURT: Okay. Stop it there. Stop it there. So you're objecting to, I don't want them to come after me on that, right?
MR. RYMSZA: Yeah. Judge, again, I thought that was your ruling previously.

Commonwealth v. Treiber, 121 A.3d 435, 463-64 (Pa. 2015), quoting *Commonwealth v. Puksar*, 597 Pa. 240, 951 A.2d 267, 277 (2008)(citation omitted); *Commonwealth v. Goodmond,* 190 A.3d 1197, 1202 (Pa. Super. 2018).

Martin filed numerous certifications pursuant to 42 Pa. C.S.A. § 9545 (d) (1). The certification filed on September 24, 2019 and signed by Martin's counsel stated only that Mr. Mullen would testify to his knowledge surrounding the events that took place on June 19, 2012. Counsel filed amended certifications on November 4, 2019 and November 12, 2019. Those certifications set forth Mullen's address but did not set forth any facts as to how Mullen's testimony would have helped the defendant. The only reference was the conclusory statement that his testimony "would have helped" defendant. However, on June 12, 2020, counsel filed another witness certification for Mr. Mullen. In this certification, Mullen states:

> I will testify that on June 19, 2012, I was present in the hotel room with Noor Ford. I did not know Kenneth Martin at this time. Noor Ford called Kenneth Martin to come over to the hotel room. Noor Ford and Kenneth Martin got into an argument and fought. Noor Ford did not lose any of his property and all of his property went to Noor Ford's aunt's house. I was in the hotel room with Noor Ford for approximately ten (10) minutes after Kenneth Martin left. Noor Ford told me that the police made it out as a robbery when it was not. Noor Ford also told me that Trooper Havens coerced him into making statements to him. I also saw the text messages on Noor Ford's phone between him and Trooper Havens. I also spoke with Kenneth Martin's attorney before Kenneth Martin's first trial and relayed what I would say if I testified. I was willing to testify at trial. I was not called as a witness at Kenneth Martin's first trial. I did not know that Kenneth Martin had a second trial until recently.

Although the court has several concerns regarding Mr. Mullen's proposed

testimony,[3] the court will grant Defendant an evidentiary hearing on this issue. To the extent that the Commonwealth contends Mr. Mullen's proposed testimony is inconsistent with an interview he gave to Trooper Havens on July 1, 2013 and/or the video surveillance at the crime scene, it can cross-examine Mr. Mullen with this information at the evidentiary hearing.

X After Discovered Evidence

In order to obtain relief on a substantive after discovered evidence claim, a PCRA petitioner must demonstrate that: the evidence has been discovered after trial and that it could not have been obtained at or prior to trial through reasonable diligence; it is not cumulative; it is not being used solely to impeach credibility; and it would likely compel a different verdict. *Commonwealth v. Diggs,* 220 A.3d 1112, 1117 (Pa. Super. 2019); *Commonwealth v. Payne,* 210 A.3d 299, 302 (Pa. Super. 2019).

Martin alleges that a written statement by Noor Ford dated February 10, 2017 is new evidence. Martin cannot sustain this claim because he has not pled nor can he prove that it could not have been obtained prior to trial through reasonable diligence. While the statement that was written may be new, the information contained in it is not. Furthermore, a substantial portion of the information would have been used solely to impeach the credibility of Trooper Havens.

XI. Ineffectiveness for Failing to Object to the Prosecutor's Argument

[3] The court questions whether Noor Ford's statements to Mr. Mullen would be admissible, as it appears they would be hearsay. The court is also concerned that Mr. Mullen's statements that Kenneth Martin was present in the hotel room and he got into an argument and fought with Noor Ford may be inconsistent with the defense presented at trial. See Transcript, 01/29/2016 (Closing Arguments), at 14 "not one of the witnesses testified that

Encouraging the Jury to send a Message to the Community

Not every unwise, intemperate or improper remark by a prosecutor justifies a mistrial or new trial. The prosecutor may make fair comment on the admitted evidence and may provide for rebuttal to defense arguments. Even an otherwise improper comment may be appropriate if it is a fair response to defense counsel's remarks. Any challenge to a prosecutor's comments must be evaluated in the context the comment was made. *Commonwealth v. Chimel,* 30 A.3d 1111, 1118 (Pa. 2011).

During trial counsel's closing argument, he argued that the jury's role was not to determine what happened in this case and it was not to sit in judgment of his client. Instead, the jury was sitting in judgment of the Commonwealth and whether or not it had proven its case beyond a reasonable doubt. Transcript, January 29, 2016 (Closing Arguments), at 4. Trial counsel then expounded upon the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and Martin's right not to testify. Closing Arguments, at 5-7, 19-20. He argued that the evidence consisted of hunches, speculation and innuendo and claimed that the prosecution was "looking through dirty glasses." Closing Arguments, at 7-9. He also made comments about the evidence or types of evidence that the prosecution had not presented such as the failure to recover any stolen property from Martin and the lack of forensic evidence. Closing Arguments at 17-19.

The prosecutor responded to trial counsel's arguments. With respect to trial counsel's arguments about sitting in judgment of the Commonwealth and Martin's rights, the prosecutor stated:

Mr. Martin was responsible or involved in this offense").

> Another thing that [trial counsel] said which struck me as simply not being accurate is his initial assertion that you're not here today sitting in judgment of his client. That is the only reason you're here today, is sitting in judgment of his client. The judge is going to hand you a verdict slip with all the charges. You're going to see one name at the top. Kenneth Martin. He's the person on trial. He's the person whose case you are sitting in judgment of. So let's keep that in mind because that's really why all of us are here.
>
> [Trial counsel] raised some points about some legal principles that are very important and they are sacred. He raised the presumption of innocence, the Fifth Amendment right of his client not to testify. These are sacred rights and you should take them very seriously. But you know what else is just as sacred? The laws in your community, ladies and gentlemen. The laws that govern our behavior, the laws that prevent your neighbor, for instance, from coming inside your house without being invited and taking your wife's jewelry, the laws that prevent your neighbor from pulling out a gun if you get in an argument with him, the rules and laws that prevent your landlord from, say, whacking you over the head when you are late with your rent payment.
>
> We have laws for a reason because there are certain standards, certain acceptable behaviors and certain unacceptable behaviors. If you have a debt with somebody the way to solve it isn't through physical violence. Call a lawyer. Call [trial counsel]. Take him to court. There are ways to settle disputes and physical violence is not one of those ways that is acceptable in our society. The law sets down boundaries, doesn't it? The laws are boundaries. Says, you shall not cross this line. If you cross this line you will be arrested, you will be prosecuted, you will be held responsible.
>
> And I would assert to you that from what you've seen throughout the course of this trial I think you can conclude that the Defendant in this case believed that those rules did not apply to him, and that's why your job here is so important, ladies and gentlemen. Your job to sit in judgment of this human being is so important because this man can file charges. This man can make an arrest but ultimately you have the final say. It's what you think that counts in the end ultimately. It's you the citizens of this community that have the final say in holding people accountable for breaking the laws. It's up to you. You have a great responsibility. It's an awesome responsibility. (Closing Arguments, at 23-25).

The prosecutor then discussed the evidence presented and how the evidence showed that the defendant was the person who committed these crimes. (Closing Arguments, 25-42). It was in this context that the prosecutor made the following final statement:

> I want to thank you for your patience, as [trial counsel] did, and in closing I just want to remind you that this is the community that you all live in, and when a guy like the Defendant assembles a group of people like that and does something this violent in broad daylight and walks away with stolen property casually like it's no big deal, it's up to you, the citizens of this community, to stop him in his tracks and say, you're not going to do something like this in my community. It's up to you. You're not going to carry a gun around in my community and use it for purposes like this. You're not going to knock someone unconscious and leave him on the floor bleeding without calling for help. Today is the day for you to send a message that nobody is above the law so I would urge you to hold this Defendant responsible for what he's done and find him guilty of all counts. (Closing Arguments, at 42).

When viewed in context, the prosecutor's statements were an impassioned argument for the jury to send a message **to the defendant** that he was not above the law and to hold him responsible for his actions. He did not ask the jurors to send a message to the community or the justice system. He asked the jurors (as the representatives of the community) to send a message to Martin.

"Prosecutorial remarks encouraging a jury to 'send a message' to the defendant, rather than the community or the criminal justice system, do not invite consideration of extraneous matters and are not considered misconduct….Every verdict sends a message of some sort to the parties, and clearly the message of 'guilty' is sought by prosecutors as a matter of course." *Commonwealth v. Patton*, 604 Pa. 307, 985 A.2d 1283, 1288 (2009).

Trial counsel made an argument impassioned and thorough. The prosecutor made remarks with passion and oratorical flair, which were a fair comment on the evidence and an appropriate response to trial counsel's arguments.[4] Accordingly, Martin's claim of

[4] While the court finds the prosecutor's comments were not improper in this case, it may be a better practice for the prosecutor to retire the phrase "send a message." As the Pennsylvania Supreme Court warned in *Patton*:

ineffectiveness has no arguable merit. See *Commonwealth v. Ligon,* 206 A.3d 515, 520-521 (Pa. Super. 2019).

XII. Alleged Ineffectiveness for Failing to Request and Review Transcript of Opening Argument, Closing Argument, Jury Instructions and Jury Verdict

Martin's allegation with respect to this is without merit. It is nothing but a fishing expedition. Moreover, Martin's counsel has received these transcripts and he has not amended his claim.

XIII. Cumulative Impact of Constitutional Errors

Martin argues that the cumulative impact of the constitutional errors merits a new trial. Cumulative prejudice may be assessed in the aggregate when the individual claims fail but there must be a specific, reasoned and record-supported argument. *Commonwealth v. Miller,* 212 A.3d 1114, 1131 (Pa. Super. 2019). In this case there is none.

ORDER

AND NOW, this ____day of July, 2020, the court will grant an evidentiary hearing with respect to the claim that trial counsel was ineffective for failing to request a mistrial and failing to call Jermaine Mullen as a witness. The court will hold the evidentiary

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"prosecutors would do well to put 'send a message' on the taboo list, lest this Court be compelled in the future to send its own message in the form of a rule with more restraints." 985 A.2d at 1289.

hearing on **September 24, 2020 at 9:00 a.m. in courtroom #4 of the Lycoming County Courthouse.** Absent any COVID-19 related restrictions, the court will arrange for Defendant to be present in person. However, if Defendant wishes to participate by Polycom or Zoom, PCRA counsel must notify the court as soon as possible but no later than August 10, 2020, so that staff can determine if the video equipment at SCI-Forest is available and reserve it for this hearing.

As for the remaining issues, the court is satisfied that there is no genuine issues concerning any material fact, that Martin is not entitled to post-conviction collateral relief and no legitimate purpose would be served for further proceedings. *Commonwealth v. Paddy*, 15 A.3d 431, 442 (Pa. 2011). Martin has not raised any issue of fact, which if resolved in his favor, would entitle him to relief. *Id.* at 442.

The court advises Martin of its intent to dismiss the remaining issues without holding an evidentiary hearing. Martin may respond to this proposed dismissal within twenty (20) days. If the court does not receive a timely response, the court will dismiss these claims when it issues a decision after the evidentiary hearing. If Martin files a response, the court will review it and determine whether it alters the court's intent to dismiss the claims without holding an evidentiary hearing.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
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CR-1662-2012
Work file