

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CR-1046-2015
	:	
	:	
v.	:	
	:	CRIMINAL DIVISION
TERRANCE PEREZ,	:	
Petitioner	:	PCRA

**OPINION AND ORDER**

On November 1, 2016, Terrance Perez (Petitioner) was found guilty of Murder of the First Degree and accompanying charges by a jury and found guilty separately by this Court of Persons Not to Possess a Firearm. Petitioner was then sentenced on that same day to an aggregate sentence of twenty-five to fifty years. Petitioner filed Post-Sentence Motions on November 8, 2016, which were subsequently denied. Then Petitioner filed an appeal to the Pennsylvania Superior Court on March 21, 2017. The Superior Court then affirmed this Court’s sentence on November 29, 2018, and review was denied by the Pennsylvania Supreme Court on April 17, 2019. *See Commonwealth v. Perez*, 486 MDA 2017 (Pa. Super. 2018), *appeal denied* 854 MAL 2018 (Pa. 2019). Therefore, Petitioner’s sentence became final on July 16, 2019. *See* U.S. Sup. Ct. Rule 13 (Appellant has ninety days from a final order in the highest court of a state to petition United States Supreme Court). On August 23, 2019, Petitioner filed a timely *pro se* Motion for Post-Conviction Collateral Relief. Attorney Jeana Longo was appointed to represent Petitioner on September 9, 2019. Petitioner, through counsel filed an Amended PCRA Petition on November 14, 2019. An initial conference was held on November 25, 2019. This Court granted Petitioner’s request for an evidentiary hearing on January 2, 2020 and the hearing was held on July 6, 2020. At the evidentiary hearing, one of Petitioner’s trial/appellate attorneys, Nicole Spring, Esq. (Spring), testified.

Petitioner advances only one issue in his petition.<sup>1</sup> He seeks to have this Court find that his trial/appeals counsel was ineffective for failure to preserve his claim of improperly admitted evidence. After review of the entire record in the above captioned case this Court disagrees with Petitioner, and dismisses Petitioner's Amended PCRA Petition.

### **Background and Testimony**

Chief Public Defender Spring testified at the time of the evidentiary hearing. At the time of Petitioner's trial and appeal, Spring was serving as First Assistant Public Defender. Both Spring and Joshua Bower, Esq. (Bower) were assigned to handle Petitioner's case. Spring was both supervisor and second chair during the trial portion of Petitioner's case. In that capacity she handled some of the cross-examination and potentially either the opening or closing statements. After trial, Spring was solely responsible for the post-sentence motions and Petitioner's appeal. One of the issues Spring raised in both her post-sentence motions and in her concise statement of matters complained of on appeal was the trial court allowing the Commonwealth to introduce the contents of a duffel bag, more specifically the introduction of the "ugly gun."<sup>2</sup> Petitioner's Motion to Exclude Testimony regarding the "ugly gun" was initially granted by this Court. *See* Order 10/24/16, at 1. In a subsequent Opinion and Order explaining the decision, this Court held that the prejudicial effect of an additional gun outweighed the probative value. *See* Opinion and Order 10/29/16, at 3. At trial, Bower cross examined Petitioner's mother, Sabina Kent (Kent) regarding the contents of the duffel bag:

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<sup>1</sup> Petitioner originally claimed two issues, but withdrew his second argument regarding failure to request a *Kloiber* instruction at the evidentiary hearing on July 6, 2020.

<sup>2</sup> The "ugly gun" as it was referred to in pre-trial motions through the appeal is a revolver, which was not used in the shooting, but was located in the duffel bag with the gun that was used in the shooting. The term "ugly gun" was used by Petitioner's mother Sabina Kent, who testified at trial, and this Court will continue to refer to the gun at issue as the "ugly gun."

Q. Now, I want to talk about the gun. You said that you had seen that gun about a week ahead of time before the shooting?

A. Yes.

Q. Do you recall telling the police that in that bag, in addition to a towel and bullets, there would be a scope?

A. Yes.

Q. And that was kept in the bag?

A. Yes.

Q. There also a tripod?

A. Yes.

Q. That the gun would sit on?

A. Yes, it was.

Q. That you thought would be in the bag?

A. Yes, I did.

\* \* \* \* \*

Q. And you told them that the scope on the gun we saw in Commonwealth's No. 7 was broken?

A. Yes.

Q. Did you see a scope on Commonwealth's Exhibit 7? If you could if we could put 7 back up again. There is not a scope there?

A. That's how I identified the gun because there was no scope there.

Q. And you didn't see a scope in the bag?

A. No.

N.T. 10/27/16, at 15-16, 19.

Following, this testimony the Commonwealth requested a sidebar with counsel and the Court to discuss introduction of the "ugly gun," claiming Petitioner had opened the door through his cross-examination. The District Attorney at side bar argued:

I believe that the Defense has opened the door to other items that were, in fact, in the bag. . . . In light of the fact that they have crossed the Defendant that the bag was missing a scope and tripod suggesting that she was mistaken about the items in the bag, we believe it would be appropriate to rehabilitate her by her also being able to positively identify the revolver that we found in the bag, which the Court had previously precluded us from doing.

*Id.* at 22.

The Court agreed with the Commonwealth that the questions asked on cross-examination enabled "them to get back into the issue of whether or not she identified something properly in

the bag,” which included the “ugly gun.” Spring testified at the evidentiary hearing that she included the “ugly gun” issue in both her post sentence motions and 1925B statement, but did not brief the issue on appeal. In the handling of her twenty to fifty homicide appeals while at the Public Defender’s office, Spring stated that she typically focuses on what she believes are the strongest issues and often does reduce the issues between her 1925B and briefing to not dilute those stronger issues. In this case Spring reduced the issues from twelve to seven. Spring stated that she should have included the “ugly gun” issue.

### **Discussion**

An individual seeking relief under the PCRA “must plead and prove by a preponderance of the evidence” all requirements under the statute. 42 Pa. C.S. § 9543(a).

Therefore a petitioner must plead and prove:

(2) That the conviction or sentence resulted from one or more of the following:

- (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

42 Pa. C.S. § 9543 (a)(2).

To establish a claim for ineffective assistance of counsel, a petitioner must show 1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the

outcome of the proceeding would have been different. *Commonwealth v. Cooper*, 941 A.2d 655, 664 (Pa. 2007); *see Commonwealth v. Carpenter*, 725 A.2d 154, 161 (Pa. 1999). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. *Cooper*, 941 A.2d at 664; *see Commonwealth v. Sneed*, 899 A.2d 1067, 1076 (Pa. 2006). Finally, “counsel is presumed to be effective and a [petitioner] has the burden of proving otherwise.” *Commonwealth v. Williams*, 570 A.2d 75, 81 (Pa. 1990).

Petitioner advances the claim that trial/appellate counsel failed in pursuing the issue that the trial court erred in finding defense counsel opened the door, thereby allowing questioning by the Commonwealth regarding the previously excluded “ugly gun.” Despite Petitioner’s claims, this Court finds that Petitioner does not satisfy a single prong of the three-prong test.

First, it is clear that Petitioner’s counsel opened the door to the admittance of the “ugly gun.” “It is well settled that the defendant must assume the risk of his counsel's questions and he cannot benefit on appeal when his own cross-examination elicited an unwelcome response.” *Commonwealth v. Gilliard*, 446 A.2d 951, 954 (Pa. Super. 1982). This is commonly referred to as “opening the door,” which occurs when a party “present[s] proof that creates a false impression refuted by the otherwise prohibited evidence.” *Commonwealth v. Nypaver*, 69 A.3d 708, 716 (Pa. Super. 2013). Here, Petitioner’s counsel attempted to create a false impression that Kent was unaware of the contents of the duffel bag or had not seen the duffel bag with Petitioner. This was accomplished by eliciting past statements from Kent where she stated that she witnessed a scope and a tripod in the duffel bag, in contrast to no scope and/or tripod being found in the bag by police. Therefore to refute the false impression, the Commonwealth was permitted to introduce Kent’s account of seeing the “ugly gun” in the bag at her residence and identifying it in the pictures of the bag found by police.

Second, Spring had a reasonable basis for not pursuing the claim on appeal. Besides the claim being meritless, she cut five appeal issues to consolidate her brief to her seven strongest claims. Although Spring now states that she should have pursued the claim, “unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued” then counsel will not be found to have no reasonable basis for their actions. *Commonwealth v. Koehler*, 36 A.3d 121, 132 (Pa. 2012). Therefore, Spring had a rational basis for not pursuing the “ugly gun” issue.

Lastly, Petitioner was not prejudiced by this omission. As the Commonwealth pointed out at the evidentiary hearing, the Pennsylvania Superior Court has previously held that

the properly admitted and uncontradicted independent evidence of Appellant's guilt was so overwhelming, and the prejudicial effect of the ostensibly erroneous admission of Agent Kontz's limited testimony regarding the scope and results of the investigation so insignificant by comparison, that any error could not have contributed to the verdict. Multiple witnesses testified as to the day-long feud involving Appellant, Love, and the victim; Appellant's statements regarding his intent to shoot the victim; his unsuccessful efforts to obtain ammunition for the silver revolver; his retrieval of the assault rifle and ammunition from the storage facility; and his statements confirming that he had shot the victim. The jury was also presented with DNA and ballistics evidence that linked Appellant to the murder weapon and the ammunition used to shoot the victim.

*Commonwealth v. Perez*, 486 MDA 2017, \* 8 (Pa. Super. 2018) (in finding the introduction of other evidence was harmless error).

The Superior Court reached this conclusion without taking into consideration the “ugly gun” introduced by Kent. Therefore, Petitioner would not have been prejudiced, even if its introduction was improper.

## **Conclusion**

Petitioner’s claim of ineffective assistance of counsel has no merit. Bower opened the door to allow the introduction of the “ugly gun.” As Spring testified, she then made a rational decisions in pursuing claims she believed had a greater probability of success. Even if allowing

the “ugly gun” testimony was improper, the evidence was so overwhelming, such that Petitioner was not prejudiced by its introduction. Therefore, Petitioner’s Amended PCRA Petition is dismissed.

**ORDER**

**AND NOW**, this 23<sup>rd</sup> day of July 2020, upon review of the record, Petitioner’s Amended PCRA Petition is hereby **DISMISSED**. Petitioner is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa. R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Petitioner may lose forever his right to raise these issues.

By The Court,

Nancy L. Butts, President Judge

CC: DA (MW)  
Jeana Longo, Esq.

NLB/kp