IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**CR-1075-2014**
v.	:	**CRIMINAL DIVISION**
DANTE WASHINGTON, Petitioner	:	**PCRA**

OPINION AND ORDER

On December 20, 2016, a jury found Dante Washington (Petitioner) guilty of Criminal Attempt Homicide[1], Aggravated Assault Serious Bodily Injury caused[2], Aggravated Assault with a Deadly Weapon[3], four counts of Robbery[4], and Theft by Unlawful Taking[5]. Following the jury trial, the Petitioner was found guilty by this Court of Firearms Possessed by a Prohibited Person[6] and Firearms not to be Carried without a License[7]. This Court sentenced Petitioner to state incarceration for a minimum of twenty (20) years and maximum of forty (40) years for the Attempted Homicide conviction. For Robbery, Inflicting Serious Bodily Injury (SBI), Petitioner was sentenced to state incarceration for a minimum of ten (10) years and a maximum of twenty (20) years. For Persons not to Possess a Firearm, Petitioner was sentenced to state incarceration for five (5) years to a maximum of ten (10) years. For Firearms not to be Carried without a License, Petitioner was sentenced to state incarceration for a minimum of one (1) year and

[1] 18 Pa.C.S. § 901(a).
[2] 18 Pa.C.S. § 2702(a)(1).
[3] 18 Pa.C.S. § 2702(a)(4).
[4] 18 Pa.C.S. § 3701(a)(1)(i); 18 Pa.C.S. § 3701(a)(1)(ii); 18 Pa.C.S. § 3701(a)(1)(iii); 18 Pa.C.S. § 3701(a)(1)(iv).
[5] 18 Pa.C.S. § 3921(a).
[6] 18 Pa.C.S. § 6105(c)(2).
[7] 18 Pa.C.S. § 6106(a)(1).

a maximum of two (2) years. The aggregate state incarceration sentence totaled a minimum of thirty-six (36) years to a maximum of seventy-two (72) years.

Petitioner filed timely Post Sentence Motions that were summarily denied by this Court on March 6, 2017. Petitioner then filed a notice of appeal to the Superior Court that was also denied on November 2, 2018. Petitioner also filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court that was denied on May 23, 2019. Therefore, Petitioner's sentence became final on August 21, 2019. On September 20, 2019, Petitioner filed a timely *pro se* Post-Conviction Relief Act (PCRA) petition. Donald F. Martino, Esq. was appointed to represent Petitioner on October 9, 2019. Petitioner, through counsel, filed an Amended PCRA Petition on December 23, 2019. An initial conference was held on January 23, 2020. Due to the COVID-19 pandemic, an evidentiary hearing was delayed to allow for the Petitioner to be transported and participate in person and eventually held on October 5, 2020. At the evidentiary hearing, one of Petitioner's trial/appellate attorneys, Nicole Spring, Esq., testified.

Petitioner advances five issues in his petition, alleging that the Trial and Appellate Counsel provided ineffective assistance of counsel in violation of his rights under the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. First, Petitioner asserts that Trial Counsel was ineffective for stipulating to SBI caused on the Attempted Murder charge and failing to object to the Court using the Deadly Weapon enhancement on the Attempted Murder and Aggravated Assault-SBI counts. Second, Petitioner alleges that Trial and Appellate Counsel were ineffective for failing to appeal to the Superior Court this Court's Denial of Motion for Mistrial in response to statements made by Juror 29 during *voir dire*. Third, Petitioner

alleges Trial Counsel was ineffective for failing to pursue suppression of the photographic lineup shown to the victim and the victim's subsequent tainted in-court identification of Petitioner. Fourth, Petitioner asserts that this Court erred in denying defense's request to argue Eric Williams committed the offenses charged and Defense Counsel erred by waiving this argument and then later arguing on appeal defense was denied the right to make this argument to the jury. Lastly, Petitioner argues that Trial Counsel was ineffective for offering Nathaniel Adams as a DNA Data Analysis expert, which undermined his credibility and bolstered the credibility of the Commonwealth's expert, leaving key Commonwealth evidence unchallenged. After hearing, consideration of briefs and review of the entire record in the above captioned case, this Court GRANTS in part and DISMISSES in part Petitioner's Amended PCRA Petition.

Background

In the early hours of May 15, 2014, Eugene Phillips (Phillips) an employee of the Billtown Cab Company was robbed at gunpoint after having just begun his shift. He was dispatched for a fare at 677 Campbell Street, City of Williamsport and was surprised to see a man, who he ultimately identified as the Petitioner, come out of 679 Campbell Street rather than the address for which the cab had been called. Phillips described Petitioner as wearing his sunglasses and hoodie throughout the incident. Phillips further testified that his customer sat in the rear passenger side of the taxi during the three-minute ride from 679 Campbell Street to 417 Hawthorne Avenue. At the time of drop off, Petitioner only offered payment in the form of a $20 bill for which Phillips had no change. Phillips was given permission from his employer to proceed to the Uni-Mart at 6th and High Streets to allow Petitioner to make change. When Petitioner refused to go inside, Phillips did and

then drove Petitioner to the alley behind 417 Hawthorne Avenue. For a $4.60 fare, Phillips supplied Petitioner with $15.40 in change. It was then that Defendant shot Phillips and told him "I want it all." Phillips testified that he saw the gun before Petitioner fired the weapon. Grasping his abdomen after he was shot, Phillips started to drive away but was stopped by a construction roadblock on Elmira Street. A witness testified he saw a taxicab come down the alley to Elmira Street, bounce up behind the garbage truck, go up onto the sidewalk and then back down on the street. The taxi took off, came to the stop sign and there he saw a black male get out and take off running away from the cab while the taxi quickly sped off towards the hospital. The trauma surgeon from Geisinger testified that Phillips would have died had he not undergone surgery.

Evidentiary Hearing

Chief Public Defender Nicole Spring, Esq., (Spring) was the only testifying witness at the evidentiary hearing. At the time of Petitioner's trial and appeal, William Miele, Esq., (Miele) who was Chief Public Defender at that time, along with another attorney whose name Spring was unsure of, were both assigned to Petitioner's case. Spring testified that she became involved in the case with Miele after the other attorney assigned left the office. Her assignment began before trial and lasted through Petitioner's direct appeal. Miele was lead counsel during the trial portion of Petitioner's case. In that capacity, he and Spring alternated between handling direct and cross-examination of the witnesses presented. Spring was in charge of the opening statements while Miele did the closings. After trial, Spring was mainly responsible for the post-sentence motions and Petitioner's appeal. At the hearing, Spring testified to each of the issues addressed in Petitioner's PCRA petition which we will discuss individually.

Discussion

Incarcerated petitioners, or those on probation or parole for a crime, are eligible for relief under the PCRA when they have pled and proved by a preponderance of the evidence the following four components:

1) Petitioner has been convicted of a crime under the laws of PA and is at the time relief is granted currently serving a sentence of imprisonment, probation or parole for the crime.

2) Conviction or sentence resulted from one or more of the following:

i. Violation of the US or PA Constitution that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

ii. Ineffective assistance of counsel – same undermining the truth determining process standard as above "undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place".

iii. Plea of guilty induced where inducement caused Petitioner to plead guilty when he is innocent.

iv. Improper obstruction by government officials of petitioner's appeal right where a meritorious appealable issue was properly preserved in the Trial Court.

v. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial had it been introduced.

vi. Imposition of sentence greater than the lawful maximum.

vii. Proceeding in a tribunal without jurisdiction.

3) Allegation of the error has not been previously litigated or waived; and

4) Failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel.

42 Pa.C.S. § 9543 (eligibility for relief).

The Pennsylvania Supreme Court has held that, to make 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 of counsel's ineffectiveness. Commonwealth v. Pierce, 527 A.2 973, 975 (Pa. 1987); *see also*

Commonwealth v. Miller, 987 A.2d 638, 648 (Pa. 2009). "In order to be eligible for relief on a claim alleging ineffective assistance of counsel, a defendant must establish that counsel's representation fell below accepted standard of advocacy and that as a result thereof, prejudice resulted". Strickland v. Washington, 466 U.S. 688, 674 (1984). "Prejudice results when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Strickland, 466 U.S. 688 at 694; *see also* 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).

Serious Bodily Injury and Deadly Weapon Enhancement

Petitioner's first issue consists of two parts: first, that trial counsel's stipulation to Serious Bodily Injury (SBI) for Count One Attempted Murder was erroneous because SBI is a factor that enhances the maximum sentence and the question of whether SBI was caused should have been presented to the jury to decide; and second, that the deadly weapon sentencing enhancement should have not have been used by the Court in sentencing as it also had not been presented to the jury. The Court will discuss these issues separately.

On February 14, 2017 on the charge of Attempted Murder, serious bodily injury caused, this Court imposed a sentence of state incarceration for a minimum of twenty (20) years and a maximum of forty (40) years. Sentencing Order, 2/14/17; *see also* 18 Pa.C.S.

§ 1102(c). This sentence was based on Petitioner's Prior Record Score of five (5) and an Offense Gravity Score of fourteen (14) for Attempted Murder, Serious Bodily Injury caused. The determination of SBI also increased the statutory maximum for the charge to forty (40) years. Attempted Murder, no finding of serious bodily injury caused is scored as a thirteen (13) which, when combined with Petitioner's prior record score, would have a sentence guideline range of ninety-six (96) months to one hundred and fourteen (114) months and a statutory limit of only twenty (20) years. Spring testified that the jury was not asked to determine SBI for the Attempted Murder charge and instead the attorneys discussed in chambers on the record after the jury left and agreed, "it was clear that the jury found serious bodily injury was caused for purposes of Count 1, criminal attempted murder." N.T. 10/5/2020 at 4. Spring stated that she agreed to this based on the guilty verdict the jury handed down for Count Two, Aggravated Assault. Id. at 7. Spring also admitted that the possible ramifications of SBI were not discussed with Petitioner prior to agreeing in chambers, nor were they discussed afterwards. Id. at 8-9. Petitioner was not given an explanation from Spring or Miele what a finding of SBI would do to his sentencing maximum or the guideline range. Id. at 11. Spring agreed that whether SBI was caused or not should have been decided by the jury and that it was an element of the offense. Id. She also testified that she did not have a strategic reason for agreeing to SBI nor was such an agreement discussed with Petitioner prior to doing so. Id. In their responsive brief, the Commonwealth agreed with the Petitioner there was no reason for trial counsel to stipulate to the SBI element but asserts that even if Petitioner's sentence were vacated, he could receive either an equal or greater sentence because the two charges

of Attempted Murder and Aggravated Assault, Serious Bodily Injury Caused would no longer merge.

The facts of this case are similar to Commonwealth v. Barnes, where the defendant challenged his sentence after the jury failed to make a finding of serious bodily injury for the charge of attempted murder. Commonwealth v. Barnes, A.3d 110, 116 (Pa. Super. 2017). In Barnes, the defendant was charged with attempted murder and aggravated assault causing SBI but the court sentenced him as if he had been charged with attempted murder causing SBI. Id. The Pennsylvania Superior Court held that it was improper to sentence using the inference of SBI when he was only charged with attempted murder generally and the jury made no finding of SBI. Id. at 117-18. In doing so, the Court cited to Commonwealth v Johnson, which held that "any finding by the jury of serious bodily injury for aggravated assault could not be used to infer that the jury found serious bodily injury for the attempted murder charge." Id. at 119; *see* Commonwealth v. Johnson, 910 A.2d 60, 68 n. 10 (Pa. Super. 2006). In addition, "where predicated on the same act of violence, the offenses of attempted murder and aggravated assault merge". Commonwealth v. Rovinski, 704 A.2d 1068, 1075 (Pa. Super. 1997); *see* Commonwealth v. Anderson, 650 A.2d 20, 24 (Pa. 1994). In comparing the elements of the two offenses, the elements of attempted murder are: an act consisting of a substantial step towards an intentional killing with the specific intent to kill. 18 Pa.C.S. §§ 901(a), 2502(a). The elements of aggravated assault found at 18 Pa.C.S. § 2702(a)(1), are the infliction of serious bodily injury which is either committed intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. At the Petitioner's sentencing hearing the Court found that Count one, Attempted Murder with

the stipulation of SBI and Count four, Aggravated Assault serious bodily injury merged together. Even with a general count of Attempted Murder it is clear that the offense of Aggravated Assault is included within the offense of attempted murder and would still merge.

> "…every element of aggravated assault is subsumed in the elements of attempted murder. The act necessary to establish the offense of attempted murder-a substantial step towards an intentional killing-includes, indeed, coincides with, the same act which was necessary to establish the offense of aggravated assault, namely, the infliction of serious bodily injury. Likewise, the intent necessary to establish the offense of attempted murder-specific intent to kill-is greater than and necessarily includes the intentional, knowing, or reckless infliction of serious bodily injury, the intent required for aggravated assault. Inasmuch as aggravated assault, the lesser offense, contains some, but not all the elements of the greater offense, attempted murder, the two offenses merge for purposes of sentencing.

Commonwealth. v. Anderson, 650 A.2d 20, 24, decision modified on denial of re-argument, 653 A.2d 615 (Pa. 1994).

Therefore, Counsel was ineffective for stipulating to the finding of SBI on the Attempted Murder charge, and the Petitioner shall be granted relief on this issue.

Part two of Petitioner's first claim alleges that the, 204 Pa Code § 303.17(b) was erroneously applied to Counts One and Four without being submitted to a jury. Applying both SBI and the weapon enhancement on the Attempted Murder charge, Petitioner's sentencing range was two hundred and ten (210) months to forty (40) years. Attempted Murder without serious bodily injury but with the deadly weapon enhancement, taken with a prior record score of five (5) and an Offense Gravity Score of thirteen (13) would set the standard guideline range at one hundred fourteen (114) months to one hundred thirty two (132) months. For the Aggravated Assault SBI, the Court applied the deadly weapon enhancement, which placed the sentencing range at one hundred and two (102) months to one hundred and twenty (120) months. Without applying the deadly weapon enhancement

on the aggravated assault SBI, Petitioner's range would have been eighty-four (84) months to one hundred and two (102) months. Spring confirmed at the evidentiary hearing that the jury did not make a finding for this issue either. N.T. 10/5/20 at 13. Once again, Spring testified that she did not consult Petitioner before stipulating to the enhancement nor did trial counsel explain to Petitioner what the ramifications of agreeing to it would mean for him. N.T. 10/5/20 at 12, 14. The Commonwealth disagrees with Petitioner and argues that a stipulation on the part of trial counsel was not needed. The Court agrees with the Commonwealth that such an enhancement is within the discretion of the trial judge and the failure to object to the enhancement was not ineffective assistance.

Sentencing enhancements, particularly weapon enhancements, do not need to be presented to the jury in Pennsylvania. Commonwealth v. Buterbaugh, 91 A.3d 1247 (Pa. Super. 2014)(not an abuse of discretion for the trial court to apply the weapon enhancement at sentencing without asking jury to determine if the defendant's car was a deadly weapon when defendant used it to run over the victim, causing his death). It is important to note that the jury was instructed on the separate charge of Aggravated Assault with a deadly weapon, finding that the use of a deadly weapon was an integral part of the injury caused to the victim by Petitioner. However, since the decision to apply the weapon enhancement rests with the judge, a special verdict question on either Count One or Count Four were not necessary to determine its applicability. Therefore, the Petitioner is not entitled to relief on the challenge of the Court's ability to utilize the deadly weapon enhancement to the guideline range for Petitioner's sentencing on Counts one and four.

Failure to appeal statements made by Juror 29 during voir dire.

Jury selection for Petitioner's case occurred on December 13, 2016. In the beginning, this Court asked prospective jurors if anyone was acquainted with Petitioner either socially or professionally. *Voir Dire* Transcript, 12/13/16 at 2. Juror 29 answered by saying he believed he had seen Petitioner's name "in a professional capacity", and inquired whether he should elaborate further in case it would bias other potential jurors. N.T. 10/5/20 at 16. A bit later, Juror 29 also stated in front of all potential jurors that he is a staff physician at the federal penitentiary in Allenwood. Id. at 19. Upon hearing this, Miele made a motion for a mistrial. Id. at 18. Spring testified at the PCRA hearing that her concern was that the other potential jurors would assume that Petitioner had been in federal prison based on Juror 29's statements, when he had never been federally incarcerated. Id. at 19. The Commonwealth's attorney suggested a cautionary instruction dictating Petitioner has never been to federal prison, rather than declaring a mistrial. Id. This Court did not grant either request and continued with jury selection. Id. at 20. Spring testified that she believed these statements were prejudicial to Petitioner and included this issue in her post-sentence motions, which were summarily denied. Id. at 21-22. However, this particular issue was not raised on appeal to the Superior Court. Id. at 22. Spring clarified that she had two briefs due at the same time, one of which was Petitioner's brief for the Superior Court. Id. at 23. Spring assigned each brief to new staff members, but when the projects were returned to Spring, nothing had been done with them. Id. As a result, Spring was forced to rush to prepare both briefs and, after requesting an extension, decided to remove this issue from the brief to be submitted to the Superior Court. Id. Spring testified that, upon reflection, she believed that the other issues actually raised on

appeal were not as strong as the issue with Juror 29's statements. Id. at 28. Spring believes her omission of this issue from the brief was a "mighty big" error. Id. at 29.

"The minimal standards of constitutional due process guarantees to the criminally accused a fair trial by a panel of impartial and 'indifferent' jurors. . . ." Commonwealth v. Stewart, 295 A.2d 303, 304 (Pa. 1972); *see also* Commonwealth v. Bobko, 309 A.2d 576 (Pa. 1973). The requisite impartiality is a state of mind for which there are no "particular tests" or procedural formula. United States v. Wood, 299 U.S. 123, 145 (1936). Conclusions of guilt or innocence are to be "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print". Patterson v. Colorado, 205 U.S. 454, 462 (1907). "The mandate for a fair and impartial jury does not require that the prospective jurors be free of all knowledge of the facts and circumstances surrounding the incident which forms the basis of the trial". Commonwealth v. Hoss, 364 A.2d 1335, 1388 (Pa. 1976). "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard". Irvin v. Dowd, 366 U.S. 717, 721 (1961).

Petitioner relies on two cases to articulate his position. *See* Commonwealth v. Fisher, 591 A.2d 710 (Pa. 1991); Commonwealth v. Santiago, 318 A.2d 737 (Pa. 1974). In Fisher, the defendant was granted a new trial after the prosecution asked a potential jury member during *voir dire* about the defendant's conviction for violating the civil rights[8] of a witness that was later overturned. Fisher at 347. In Santiago, the defendant was granted a new trial when members of the jury heard from a witness that the defendant "killed an innocent boy and it isn't the first one he has killed". Santiago at 739. The issue presented

[8] Murder. 18 U.S.C.A. § 241.

here is essentially asking this Court to ensure that every potential juror be blissfully unaware of the realities of living in a modern society, which, to quote Dowd, establishes an "impossible standard" for jurors to maintain. Dowd, 366 U.S. 717, 721 (1961). We acknowledge that Juror 29's statements were not factual as Petitioner has never served a federal prison sentence. There is no indication that the juror's connected the potential juror's statements to one another casting a negative mark on Petitioner. Further, nothing in the record showed that any of the selected jurors for Petitioner's trial had any notion of what Juror 29's statements meant or were influenced to convict by them or that Juror 29 was certain that he had seen the Petitioner. This Court does not believe that these statements rise to the level of seriousness as those found in Santiago or Fisher nor were they severe enough to make the jurors incapable of objectivity, therefore, relief on this issue is denied.

Failure to suppress photographic lineup.

Spring testified that a photo array of eight (8) color photographs was shown to the victim in an attempt to identify the victim's assailant. N.T. 10/5/20 at 29-30. The photo included seven (7) other men with similar facial features to Petitioner wearing street clothes while the photo included for Petitioner, he argues, makes it appear that he is wearing a prison-issued orange jumpsuit. Id. at 30. Spring indicated that this was a concern for her but was not sure if a layperson would be able to discern what Petitioner appeared to be wearing in the picture. Id. However the victim stated at the preliminary hearing that his assailant was wearing an "orange jumpsuit" in the photo array. Id. at 30, 35. The issue Spring had was that the photo array was overly suggestive because Petitioner appears to be in a prison jumpsuit so anyone who looked at it would assume that

Petitioner was already a criminal and that such a suggestion is prejudicial to Petitioner. Id. at 32. However, this issue was not litigated. Id. Spring testified that, Mr. Osokow, Esquire (Osokow), who was serving as the First Assistant District Attorney for Lycoming County at the time, approached her with a case that held if bad faith conduct by police was not alleged as the reason for suggestiveness, it is a question of weight instead of admissibility. Id. at 32-33; *see* Commonwealth v. Sanders, 42 A.3d 325 (Pa. Super. 2012). After reading the case, Spring's interpretation of Sanders aligned with Osokow's interpretation. N.T. 10/5/20 at 33. However, upon revisiting the case, Sanders focuses on the mental state and ability of the person performing the identification, which goes to the weight of the evidence rather than admissibility, and does not address the identification procedures used by police since the defendant in that case did not argue that any police conduct was suggestive. Id. at 331.

"A photographic identification is unduly suggestive when the procedure creates a substantial likelihood of misidentification". Commonwealth v. Johnson, 668 A.2d 97, 103 (Pa. 1995); *see also* Commonwealth v. Fisher, 769 A.2d 1116, 1126 (Pa. 2001). "If a suspect's photograph does not stand out from the others, and the people depicted all exhibit similar facial characteristics the photographs used are not unduly suggestive. Commonwealth v. Crork, 966 A.2d 585, 589 (Pa. Super. 2009). To determine if there was an independent basis for an identification, the court looks at, "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness during the confrontation; and (5) the length of time between the crime and the confrontation." Commonwealth v. Abdul-Salaam, 678 A.2d 342, 380

(Pa. 1996). The Commonwealth disagrees with Petitioner's argument that the photo array is unduly suggestive or that it subsequently tainted the victim's in-court identification of Petitioner. As such, Spring's failure to include it in argument to the Superior Court is of no importance because there is no argument to be made. This Court agrees with the Commonwealth on this issue. The people in the photos all have reasonably similar facial features, no one person is portrayed larger than the other, and the orange shirt Petitioner is wearing in the array is not immediately apparent as a prison-issued jumpsuit. Even if the jumpsuit were to indicate prior criminality, the average person would likely be aware that it is police practice to pull photos from some sort of database. Additionally, there is no indication that the victim waivered in his identification of Petitioner or that the color of Petitioner's clothes influenced the victim's identification. Therefore, Petitioner is denied relief on this issue as well.

Eric Williams as an alternative perpetrator of the crime.

Petitioner believes that various attributes and facts of the case point to Mr. Williams as the assailant, including matching physical descriptions, clothing, gunshot residue consistent with handling or firing a gun, intoxication on the night in question, as well as the location of the phone call that sent for the cab the victim was driving. N.T. 10/5/20, at 40-41. During closing arguments, Miele began to make the argument that Mr. Williams was the potential assailant and the evidence found supported that assertion. Id. at 43. However, Spring testified that Miele backed away from this alternative after this Court precluded Miele from making the argument that Mr. Williams committed the shooting. Id. Nevertheless, Spring raised this issue on appeal based on her belief that the "evidence could equally point to Mr. Williams" and that precluding Petitioner's counsel from

arguing this defense to the jury denied Petitioner's right to a fair trial. Id. at 44. The Superior Court denied this issue stating that Miele waived the right to argue this on appeal because he essentially stated that he was never going to argue Mr. Williams was the assailant and, as a result, this issue was not preserved at the trial level. Id. Petitioner now argues that this preclusion is not supported by Pennsylvania case law and his counsel erred in waiving the issue.

Criminal defendants have a "fundamental right to present evidence provided that it is relevant and not subject to exclusion under one of our established evidentiary rules". Commonwealth v. McGowan, 635 A.2d 113, 115 (Pa. 1993); *see also* Commonwealth v. Thompson, 779 A.2d 1195 (Pa. Super. 2001). "It is well established that evidence which tends to show that the crime for which an accused stands trial was committed by someone else is relevant and admissible." McGowan 635 A.2d at 115. The Pennsylvania Supreme Court has held that, in general, "evidence tending to show that someone other than the defendant committed the charged offense is undeniably relevant." Commonwealth v. Paddy,800 A.2d 294 (Pa. 2002); *see also* Commonwealth v. Boyle, 368 A.2d 661 (Pa. 1977). New trials have been granted to defendants who were able to present evidence to support their argument that another could have committed the crime. Boyle, at 669. Here Petitioner argues that evidence was presented at his trial indicating that the police clearly thought Mr. Williams was also a suspect because he was taken into custody after the shooting, interviewed, and tested for gunshot residue. Trial Transcript, 12/13/16 at 35. Petitioner also points to various statements from law enforcement and other witnesses, scientific and circumstantial evidence, as well as physical characteristics (listed above) that would suggest Mr. Williams was a suspect and could have been the victim's true

assailant. N.T. 10/5/20, at 40-42; Trial Transcript, 12/13/16 – 12/20/16. The Commonwealth counters that Petitioner is asking this Court to change its mind without presenting new information because this Court did not permit Petitioner to make these arguments at trial and again in its 1925(a) Opinion. The Commonwealth also argues that, even if this Court made an error in disallowing Petitioner to pursue this argument, Petitioner was still ultimately able to argue to the jury that Mr. Williams was a more credible suspect because he was able to assert the facts that tied Mr. Williams to the incident and the police's failure to continue investigating him. N.T. 12/20/16, at 27, 46-47. Additionally, the Commonwealth argues that Petitioner has failed to show that the outcome of his trial would have been different if allowed to make this argument. The Commonwealth points to the fact that Petitioner himself testified at trial and his subsequent conviction goes to show that the jury did not believe him and therefore, Petitioner has not suffered the requisite prejudice. The Commonwealth also points to the Petitioner's failure to show that the decision by his counsel was unreasonable. This Court agrees with the Commonwealth. Petitioner showed some evidence of an alternative shooter as required for the granting of a new trial but failed to demonstrate that the outcome of his trial would have changed. Even after hearing these facts about Mr. Williams and Petitioner's direct testimony, the jury still chose to convict. As a result, Petitioner has not shown that his counsel was ineffective in this matter and is not eligible for relief.

Expert witness testimony.

Spring testified that the Pennsylvania State Police did not make a positive finding on DNA in this case. N.T. 10/5/20 at 45. Whatever DNA evidence was found was sent to Dr. Perlin and processed through the True Allele system. Id. No absolute or positive identification was made as a result of this information, but testimony showed that it was likely the DNA came from Petitioner. Id. Spring was aware that DNA and the True Allele system would be a significant issue at trial. Id. at 46. To combat the Commonwealth's evidence regarding True Allele, Petitioner's trial counsel chose Nathaniel Adams (Adams), a statistician who had been involved in an attack on True Allele and Cybergenetics systems in Colorado litigation. Id. at 46-47. Spring testified that they "hadn't found anyone else" to testify on this issue. Id. at 46. At trial, Adams was permitted to testify as an expert, but was limited to speaking only on computer science and statistics and excluded from testifying as to matters of DNA. Trial Transcript 12/15/16, at 154. Spring testified that, because of this limitation, she believed Adams' testimony was ineffectual and rendered him impotent. N.T. 10/5/20, at 50. Spring also testified that counsel attempted to reach out to a professor in New York to be an expert but their phone calls were never returned. Id. at 49. The Commonwealth argues that Spring was not ineffective for calling Adams as an expert because she had a reasonable basis for doing so. This Court agrees. As plainly stated by Spring, there was no one else for her to call as a witness to counter the expert testimony from the Commonwealth on the issue of DNA. Calling a statistician to attack the function of a computer software program that interprets DNA can hardly be called ineffective, particularly when no other expert witness was available to defense counsel that could speak more directly to the DNA evidence. It would

be unjust to label an attorney as ineffective when there were no other options for an expert witness to choose from. Furthermore, this Court also believes that in allowing Adams to testify in the same manner in which he was permitted in other cases against True Allele and other DNA software that his testimony was not rendered impotent. *See* United States v. Gissantaner, 1:17-CR-130 (W.D. Mich. 2019); *see also* Nebraska v. Simmer, 304 Neb. 369 (Nebr. 2019). As such, Petitioner has failed to show a valid claim of ineffectiveness and relief will not be granted.

ORDER

AND NOW, this 2nd day of February, 2021, upon review of the record and after an evidentiary hearing, Petitioner's Amended PCRA Petition is hereby **GRANTED IN PART AND DENIED IN PART**. The Court **GRANTS** relief on the first issue in that Petitioner was prejudiced by the stipulation by trial counsel to a finding of serious bodily injury caused on Count One Attempted Murder rather than submitting the issue to the jury. Relief on all other issues is **DENIED**. Petitioner is hereby notified that he has the right to appeal 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 with 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
Donald A. Martino, Esq.

NLB/jmh