

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-1634-2017
v.	:	CR-1635-2017
	:	
GRAHAM NORBY-VARDAC,	:	Notice of Intent to Dismiss
Petitioner	:	PCRA Petition and Order
	:	Granting Motion to
	:	Withdraw as Counsel
	:	

**OPINION AND ORDER**

Graham Norby-Vardac (Petitioner), filed a writ of Habeas Corpus ad Subjiciendum on November 10, 2021 which was scheduled before Judge Ryan M. Tira for disposition. Since Petitioner's claims fall within the jurisdiction of a Post Conviction Relief Act (PCRA),<sup>1</sup> by Judge Tira's order on March 14, 2022 the Writ was transferred to this Court which handled the original trial matters.<sup>2</sup> Donald F. Martino, Esquire was appointed to review the writ and file an Amended Petition or a response pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 379 Pa. Super. 390 (1988). A conference on PCRA counsel's response was held June 12, 2023. Upon review of the petition and case materials, the Court agrees with PCRA counsel and finds that Petitioner has failed to raise any meritorious issues in his PCRA Petition in either case, and the Petition therefore should be dismissed.

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<sup>1</sup> 42 Pa. C.S. A. § 6503 states:

**(a) General rule.**--Except as provided in subsection (b), an application for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever.

**(b) Exception.**--Where a person is restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law.

<sup>2</sup> Petitioner's filing was treated as a PCRA petition in accordance with *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super 2003.).

### ***Factual Background***

On April 11, 2017, Petitioner was charged with Criminal Homicide;<sup>3</sup> two counts of Aggravated Assault, a felony of the first and second degree; Burglary, felony of the first degree; Robbery, felony of the first degree; Criminal Trespass, felony of the second degree; Possession of an Instrument of a Crime, misdemeanor of the first degree; Criminal Mischief, misdemeanor of the third degree; and one count of Theft by Unlawful Taking, a misdemeanor of the third degree. Petitioner's preliminary hearing was delayed pending a competency evaluation.

Petitioner's request for a competency evaluation only was initially made on June 1, 2017. The initial competency evaluation, completed by John K. Northrop, M.D. dated July 1, 2017, determined that Petitioner was competent to stand trial. Petitioner's preliminary hearing was then scheduled for September 25, 2017. He was held for trial on all counts.

As a result of the initial competency evaluation, trial counsel requested the opportunity to have Petitioner evaluated by its own psychiatrist. After examination on October 4, 2017, Poghos H. Voskanian, M.D., determined that Petitioner was not competent to stand trial. Trial counsel also filed a notice of insanity or mental infirmity on November 15, 2017, asserting that Petitioner was not competent to stand trial.

The Commonwealth disputed that finding and conducted its own examination of Petitioner. Commonwealth's witness, John Sebastian O'Brien M.D. after exam on June 18, 2018, found that Petitioner was competent. A hearing on the competency issues raised was held by this Court on August 30, 2018. In its opinion and order entered on October 16, 2018, this Court found Petitioner competent to stand trial. See Opinion and Order, October 16, 2018.

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<sup>3</sup> 18 Pa. C.S.A. § 2501(a)

No evidence on the issue of insanity was presented by any of the witnesses.

On November 28, 2018, Commonwealth filed a motion to preclude Petitioner's expert on the basis that trial counsel was going to argue diminished capacity as a defense to the charges filed. After argument, this Court ruled that in order to assert a defense of diminished capacity, Petitioner would have to admit his guilt.<sup>4</sup> See Order, 4/9/2019. Since Petitioner was not willing to admit his guilt to the offenses charged, he was precluded from calling Dr. Voskanian as a witness to his mental state at the time the offenses were committed. On August 7, 2019, the Court reconsidered its decision, provided Petitioner with the opportunity to present a diminished capacity defense as long as he admitted killing the victim. Since Petitioner was not willing to do so, Dr. Voskanian did not testify at trial.

On June 11, 2019, Petitioner waived his right to a jury trial and was convicted after trial held on June 24, 27, and December 11, 2019 of Murder in the First Degree and the remaining offenses. The Court sentenced Petitioner to life in prison without the possibility of parole.<sup>5</sup>

Petitioner filed a timely Post Sentence Motion which was denied by this Court on May 8, 2020. Petitioner's appeal to the Superior Court was filed on June 1, 2020. By memorandum opinion, the Superior Court denied Petitioner's direct appeal. A petition for Allowance of appeal was denied by the Supreme Court on January 5, 2022.

Petitioner filed a Writ of Habeas Corpus ad Subjiciendum on November 10, 2021 which Judge Ryan Tira ruled should be considered a PCRA petition and issued an order accordingly. Conference on the writ turned PCRA petition was held on June 12, 2023. Therefore, Petitioner has filed a timely petition.

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<sup>4</sup> *Commonwealth v. Tharp*, 101 A3d 736, 756 (Pa. 2014).

<sup>5</sup> 42 Pa. C.S.A. § 9711

Petitioner alleges several issues in his petition. First, Petitioner asserted that the Commonwealth's expert witness in the competency hearing held by the Court created a conflict of interest because he was both a J.D. and M.D. Second, Petitioner asserted that the Court and the Commonwealth colluded in allowing the Commonwealth's psychiatric expert to testify and acted in bad faith. Next, Petitioner asserted that the Court denied the Petitioner the opportunity for mental health treatment by failing to find him guilty but mentally ill. Finally, Petitioner asserted that the Court failed to advise the Petitioner of his post sentence rights on the record.

Once PCRA counsel notified Petitioner of his intent to file a *Turner/Finley* motion to withdraw as counsel, objections were filed. In his objections, Petitioner<sup>6</sup> alleges that PCRA counsel misrepresented facts in the *Turner/Finley* motion, that the Court misstated the law regarding insanity defense, the Court failed to bifurcate the Mental Health Procedures Act at 50 P.S. § 7402(g); the Court ruled on pretrial motions while the Petitioner's competency was pending; and failed to address the issues raised in his *habeas* motion.

To be eligible for relief under the PCRA, the Petitioner must plead and prove that his conviction or sentence resulted from ineffective assistance of counsel which 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), and that the allegation of error has not been previously litigated or waived. 42 Pa.C.S.A. §9543(a)(3). A claim is previously litigated under the PCRA if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. 42 Pa.C.S.A. § 9544(a)(2). An allegation is deemed

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<sup>6</sup> Both the Writ and Objections were filed by an inmate paralegal citing his authority to do so at 42 Pa. C.S. Section 6503. As outlined above this does not confer authority on the drafter of the motion to act on his behalf, just entitles the Petitioner to file such a request, provided it is not precluded by post conviction proceedings.

waived “if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state post-conviction proceeding.” 42 Pa.C.S.A. §9544(b).

The law presumes counsel has rendered effective assistance, and to rebut that presumption, the petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. *Commonwealth v. Kohler*, 36 A.3d 121, 132 (Pa. 2012).

“[T]he burden of demonstrating ineffectiveness rests on [the petitioner].” *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010). To satisfy this burden, a petitioner must plead and prove by a preponderance of the evidence that: “(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different.” *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the petitioner's ineffective assistance of counsel claim. *Commonwealth v. Jones*, 811 A.2d 994, 1002 (Pa. 2002).

***Did Commonwealth’s witness have a conflict of interest in evaluating Petitioner***

Petitioner alleged that the Commonwealth’s witness, Dr. John Sebastian O’Brien had a conflict of interest in testifying because he is both a licensed psychiatrist and attorney in the Commonwealth of Pennsylvania. Although Petitioner claims there is a conflict, he does not explain where the conflict exists.

A defendant cannot prevail on a conflict of interest claim absent a showing of actual prejudice. *Commonwealth v. Faulkner*, 528 Pa. 57, 77, 595 A.2d 28, 38 (1991), *cert. denied*, 503 U.S. 989, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992). *Commonwealth v. Karenbauer*, 552 Pa. 420, 437, 715 A.2d 1086, 1094 (1998).

Petitioner has not shown where the fact that O'Brien's dual license has prejudiced him. As stated in his *Turner/Finley* response, PCRA counsel highlights the fact that O'Brien is dually licensed actually made him more qualified to render the opinion he gave on Petitioner's competency. Therefore, this issue has no merit.

In the event that Petitioner wishes to challenge the Court's ruling on his competency based upon the opinion of O'Brien, who he wishes to discredit, this issue also has no merit.

In order to be eligible for PCRA relief, "the petitioner must plead and prove by a preponderance of the evidence...that the allegation of error has not been previously litigated or waived." 42 Pa. C.S.A. §9543(a)(3). The highest court in which Petitioner had a right to appellate review is the Pennsylvania Superior Court, as review by the Pennsylvania Supreme Court in noncapital criminal cases is only by allowance. *See* 42 Pa. C.S.A. §§ 722, 724(a); Pa. R.A.P. 1112, 1114. The Superior Court in its opinion on direct appeal affirmed the Court's finding of Petitioner's competency. *See* Superior Court Opinion, August 19, 2021. Since this issue has been previously litigated, it does not qualify for PCRA relief.

***The Court committed a felony by misstating the lack of insanity defense***

Petitioner alleges that, in misstating the fact that an insanity defense was not presented, the Court has committed a felony. There is no such charge. This issue has no merit.

First, in the testimony presented by both the Commonwealth and Defense psychiatrists did not opine whether Petitioner met the legal determination of insanity during the commission of the offense. The only mental health issue before the court was merely whether he was competent to assist in his own defense. While the Superior Court affirmed this Court's decision on competency, it made an additional finding.

In its opinion, the Superior Court restated the law of competency. “Whenever a person who has been charged with a crime is found to be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense, he shall be deemed incompetent to be tried, convicted or sentenced so long as such incapacity continues.” 50 P.S. § 7402.

In addition to affirming this Court’s ruling that the Petitioner was competent to stand trial, it also found that Petitioner was competent at the time of trial. Superior Court Opinion, 8/19/21 at 13. Since the only testimony presented was whether the Petitioner was competent, no insanity examination was performed or testimony presented. Just because testimony was offered about a mental health diagnosis of the Petitioner, that testimony is not relevant to a determination of whether the defendant was legally insane. *Commonwealth v. Fortune*, 302 A.3d 780, 785 (Pa. Super. 2023), citing *Commonwealth v. Faulkner*, 528 Pa. 57, 595 A.2d 28, 36 (1991). Therefore, this claim has no arguable merit.

***The Court failed to notify the Petitioner of his Post Sentence rights***

Petitioner alleges that the Court failed to notify the Petitioner of his post sentence rights. Because this issue has no arguable merit, this issue fails under the PCRA.

Rule 704 of the Pennsylvania Rules of Criminal procedure states:

**(C) Sentencing Proceeding.**

- (1) At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.
- (2) The judge shall state on the record the reasons for the sentence imposed.
- (3) The judge shall determine on the record that the defendant has been advised of the following:
  - (a) of the right to file a post-sentence motion and to appeal, of the time within which the defendant must exercise those rights, and of the right to assistance of counsel in the preparation of the motion and appeal;
  - (b) of the rights,

- (i) if the defendant is indigent, to proceed *in forma pauperis* and to proceed with appointed counsel as provided in Rule 122, or,
- (ii) if represented by retained counsel, to proceed with retained counsel unless the court has granted leave for counsel to withdraw pursuant to Rule 120(B);
- (c) of the time limits within which post-sentence motions must be decided;
- (d) that issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion; and
- (e) of the defendant's qualified right to bail under Rule 521(B).

On December 11, 2019, Petitioner was sentenced on the charge of Murder of the First Degree to life in prison without the possibility of parole. Sentencing Hearing, 12/11/2019. After the Court finished explaining the sentence it would be imposing, and prior to dictating its final order, it reviewed Petitioner's post sentence rights with him. N.T., 12/11/2019 at 66. Petitioner appeared to understand those rights and had no questions based upon his responses to the Court. *Id.* Petitioner filed a timely post sentence motion, as well as an appeal. Petitioner clearly understood his rights and exercised them. Therefore, this issue has no arguable merit. Even if the issue did have merit, Petitioner cannot demonstrate where he was prejudiced as he exercised his post sentence rights in a timely way.

***The Commonwealth prosecuted Petitioner in bad faith***

Petitioner claims that the Commonwealth prosecuted him in bad faith. In his original petition, he does not elaborate how the Commonwealth has exhibited bad faith.

In defining bad faith on the part of the Commonwealth, the Superior Court in *Commonwealth v. Yost*, identified certain circumstances were relevant in finding whether bad faith existed:

- (1) the absence of any actions undertaken by the prosecutor to preserve the trial and to enhance the defendant's prospects for a fair trial after the misconduct occurred,
- (2) the absence of either abundant or convincing evidence of the defendant's guilt, so that the prosecutor's misconduct might reasonably be perceived as an attempt to rescue an inadequate prosecution,
- (3) the absence of misconduct causing serious and incurable prejudice to the



defendant, (4) the absence of any neutral explanations, including inexperience, trial strategy, or inadvertence on the part of the government, to show that it did not, in fact, act purposely, (5) observations of the trial judge concerning the prosecutor's motives, and (6) defiance by the prosecutor of any direct order or clear admonition by the trial court to refrain from specific conduct prejudicing the defendant's prospects for acquittal.

*Yost*, 305 Pa. Super. 316, 319–20, 451 A.2d 549, 551 (1982).

In reviewing the circumstances to be considered, the Court cannot find that the Commonwealth has acted in bad faith. First, Petitioner does not cite to any actions or failure to act on the part of the Commonwealth rising to the level of misconduct. Next, the Court cannot find any action or failure to act that demonstrated that the Commonwealth caused prejudice to the Petitioner. Neither were there any circumstances nor actions that the Commonwealth needed to explain. Finally, the Commonwealth did not engage in any activity that was in violation of a direct order or admonition by the court to refrain from specific behaviors.

PCRA counsel explained in his *Turner/Finley* response to Petitioner that there were certain events which occurred which contradicted the Petitioner's claim of bad faith. Petitioner was convicted of all of the crimes charge beyond a reasonable doubt after a non-jury trial. On direct appeal, trial counsel argued that the Commonwealth failed to present sufficient evidence at this trial to sustain his convictions of second-degree murder, robbery, burglary and first-degree murder. Petitioner's conviction was affirmed by the Superior Court. Opinion, 8/19/21, at 13-18. Therefore, there was sufficient and convincing evidence to prove Petitioner's guilt demonstrating that Petitioner was not tried in bad faith.

In addition, Petitioner would have made inculpatory statements to the police both in Buffalo, NY where the Petitioner was found after committing the murder as he attempted to go to Canada, and to Corporal Reeves of the Pennsylvania State Police. No allegation was made

or ruling issued by the Court that either of these statements was taken from Petitioner in violation of his Constitutional rights. Therefore, the issue of bad faith has no merit.

***Defendant's Objections to Turner/Finley letter***

While PCRA counsel had outlined that he had several direct communications with Petitioner, Petitioner also filed an objection to PCRA counsel's *Turner/Finley* letter filed before the conference on Petitioner's *pro se* petition. The Court will address each objection.

First, Petitioner alleges that PCRA counsel misrepresented facts in his letter to the detriment of Petitioner. Petitioner's objection claims that PCRA counsel omitted the fact that in his handling of the writ of Habeas Corpus ad Subjiciendum, Judge Tira granted the writ. Judge Tira did not grant the writ but rather transferred the matter to the criminal case as provided for at 42 Pa. C.S.A. § 6503. See Order, 3/14/22. Since PCRA relief was the proper remedy and was still available to Petitioner, the writ was not granted.

Petitioner also alleges that PCRA counsel misrepresented the fact that a notice of insanity was sought so that the Court would have had the option of finding Petitioner guilty but mentally ill. This is not a factual statement. While there was an initial notice of insanity defense<sup>7</sup> filed in the early stages of the case by trial counsel, no testimony or evidence was presented on the defense. This issue has no merit as well.

Next, Petitioner alleges that the Court failed to stay any pretrial determinations pending the decision on Petitioner's competency. According to the docket transcript, Petitioner's preliminary hearing was delayed from the time of his arrest to the results of his initial competency exam which resulted in a finding of competency. Once again, Petitioner cannot

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<sup>7</sup> 18 Pa. C.S.A. § 314.

cite to any hearing that was held on substantive matters while the determination of Petitioner's competency was pending. This objection has no merit.

Petitioner also alleges that the Court, in making statements that he alleges to be untrue, has committed the charge of Tampering with Public Records or Information.

In order to establish the crime of Tampering with Public Record or Information, the Commonwealth must prove that:

A person commits the crime of tampering with public records or information if he or she "knowingly makes a false entry in, or false alteration of, any record, document or thing belonging to, or received or kept by, the government for information or record, or required by law to be kept by others for information of the government[.]" 18 Pa.C.S. § 4911(a)(1). The statute provides that "[a]n offense under this section is a misdemeanor of the second degree **unless the intent of the actor is to defraud or injure anyone**, in which case the offense is a felony of the third degree." 18 Pa.C.S. § 4911(b) (emphasis added).

*Commonwealth v. Kitchen*, 162 A.3d 1140 (Pa. Super. 2017).

Petitioner alleges that since the Court made a false statement of the circumstances surrounding the Petitioner's choice of not pursuing an insanity defense and since it was not a true statement of fact and it appeared in the written transcript of the case, the Court committed a felony. The evidence of the case does not support Petitioner's claim.

The Court accurately detailed the fact that Petitioner only challenged his competency and did not litigate an insanity defense. No testimony was presented or argument made on whether Petitioner was insane at the time of the offense. Since the statement was not false and the Court did not alter the written record of the case in some way, the required elements of the offense have not been established.

Finally, Petitioner alleges that PCRA counsel did not give him sufficient time to respond to his *Turner/Finley* no merit letter. Petitioner cites *Commonwealth v. Bush* 197 A.3d 285 (Pa. Super. 2018).

In *Bush*, the Superior Court found that trial court erred in its dismissal of the Petitioner's PCRA petition for failure to file a concise statement pursuant to 1925(b) of the Rules of Appellate Procedure. The trial court's request failed to comply with the notification requirements and failed to establish that the notice was even served on defendant. In addition, PCRA counsel failed to comply with the technical requirements of *Turner* and *Finley* as well.

Here, PCRA counsel documented that he contacted Petitioner after he was appointed to represent him on March 7, 2023. He would have reached out to Petitioner by letter on March 24, 2023 requesting additional information which was included in his *Turner/Finley* filing. PCRA counsel pled in his Motion to Withdraw that he heard from Petitioner on two separate occasions but that Petitioner did not provide any additional information to assist him in his review of Petitioner's case.

PCRA counsel gave Petitioner 20 days to respond to his *Turner/Finley* letter in a letter dated April 11, 2023. PCRA counsel indicated that he did receive another letter from Petitioner, but it did not provide any additional information changing his position on whether his PCRA petition has arguable merit.

Petitioner filed his own objections with the Court on June 5, 2023. A conference was held with the Court on June 12, 2023. Petitioner's June 5<sup>th</sup> objections have been considered along with PCRA counsel's request to withdraw under *Turner/Finley*. When the Court makes a final ruling on Petitioner's PCRA claims, he will be provided with proper notice pursuant to Pa.R.Crim.P. 114. Therefore, Petitioner has not been denied his due process opportunities to raise his claims in a "meaningful time and in a meaningful manner." See *Commonwealth v. Bennett*, 930 A.2d 1264, 1273 (Pa. Super. 2007).

### ***Conclusion***

Based on the foregoing, this Court finds no basis upon which to grant Petitioner's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to deny Petitioner's PCRA Petition. Petitioner may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the petition.

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

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	<b>CP-41-CR-1634-2017</b>
	:	<b>CP-41-CR-1635-2017</b>
<b>v.</b>	:	
<b>GRAHAM NORBY-VARDAC</b>	:	<b>MOTION TO</b>
<b>Defendant</b>	:	<b>WITHDRAW AS COUNSEL</b>

**ORDER**

**AND NOW** this 17<sup>th</sup> day of January, 2024, it is hereby **ORDERED AND DIRECTED** as follows:

1. Petitioner is hereby notified, pursuant to Pennsylvania Rule of Criminal Procedure 907(1), that it is the intention of this Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The application for Leave to Withdraw Appearance filed on April 14, 2023 by Donald F. Martino, Esquire is hereby **GRANTED**. Mr. Martino no longer represents Petitioner. Petitioner may represent himself or he may hire counsel to represent him.
3. **Petitioner will be notified at the address below through means of certified mail.**

By the Court,

Nancy L. Butts, President Judge

cc: DA (MWade)  
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