

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	CR-89-2017
	:	
JORDAN RAWLS,	:	Notice of Intent to Dismiss
Petitioner	:	PCRA Petition and Order
	:	Granting Motion to
	:	Withdraw as Counsel

OPINION AND ORDER

Petitioner, Jordan Rawls filed a *pro se* Post Conviction Relief Act Petition (PCRA) on January 18, 2023. Donald F. Martino, Esquire was appointed to review the petition 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). PCRA counsel filed a Motion to Withdraw as Counsel-*Turner/Finley* letter with the Court on June 22, 2023. Preliminary conference on the petition was held on June 23, 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, and the Petition therefore should be dismissed.

Factual Background

Jordan Rawls was charged with Criminal Homicide (two open counts);¹ Criminal Conspiracy (criminal homicide),² Robbery;³ Criminal Conspiracy (robbery);⁴ Criminal Attempt

¹ 18 Pa.C.S. § 2501(a).

² 18 Pa.C.S. § 903(a)(1).

³ 18 Pa.C.S. § 3701(a)(1)(iii).

⁴ 18 Pa.C.S. § 903(a)(1).

(robbery);⁵ Persons not to Possess Firearms;⁶ Firearms not to be Carried without a License;⁷ and Possessing Instruments of a Crime.⁸ The charges arose from a shooting that occurred on October 31, 2016, at 613 Poplar Street in Williamsport, PA.

Original trial counsel⁹ died on December 24, 2017 and co-counsel, Edward J. Rymsza, Esquire continued to represent Petitioner. A jury trial was held April 1-5, 2019, on all of the offenses excluding the Persons not to Possess as they were severed for trial. He was convicted on all of the charges presented to the jury, and by the Court on the related firearms offense. Defendant was sentenced to life in prison.

Petitioner filed an appeal to the Superior Court which was denied on January 10, 2020. Trial counsel perfected a timely appeal to the Pennsylvania Supreme Court on February 14, 2020. The Supreme Court affirmed the decision of the Superior Court on August 17, 2021. Trial Counsel filed a Petition for Writ of Certiorari with the United States Supreme Court requesting review of the constitutional issues which were raised in the case. Petitioner alleged that the denial of the suppression of his statements was a violation of the Fifth and Sixth Amendments of the United States Constitution. The United States Supreme Court denied his petition on January 18, 2022. Petitioner has filed a timely PCRA petition.

⁵ 18 Pa.C.S. § 901(a).

⁶ 18 Pa.C.S. § 6105(a)(1).

⁷ 18 Pa.C.S. § 6106.

⁸ 18 Pa.C.S. § 907(b).

⁹ Ronald C. Travis, Esq.

Petitioner alleges in his petition claims that there were violations of *Brady*¹⁰ and *Batson*¹¹, and ineffective assistance of original trial counsel, who failed to request a “corrupt and polluted source” instruction regarding the testimony of a co-defendant and failed to call a witness, Dr. Richard Ofshe, to testify at trial.

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. §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. § 9544(a)(2). An allegation is deemed 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. §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

¹⁰ *Brady v. Maryland*, 373 U.S. 83 (1963). While he states a violation of his rights under *Brady* in section 6(c) of his *pro se* petition, he does not elaborate anywhere else in his petition as to what he refers.

¹¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

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).

Failure to challenge jury selection under Batson v. Kentucky

Petitioner challenges the jury selection in his initial trial alleging that it violated the law set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* held the government denies a defendant equal protection of the laws when it “puts him on trial before a jury from which members of his race have been purposefully excluded.” *Batson*, 476 U.S. at 85, 106 S.Ct. at 1716. Petitioner is of African American descent.

Batson established the following three-part inquiry for evaluating a defendant's claim of racial discrimination in jury selection: First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-59, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991) (plurality) (citing *Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1722-24).⁵ See also *Commonwealth v. Uderra*, 580 Pa. 492, 508, 862 A.2d 74, 83–84 (2004).

As PCRA counsel noted in his *Turner/Finley* letter to Petitioner, the Court cannot find that there were any African- Americans who appeared for jury selection for Petitioners trial. PCRA counsel confirmed this with trial counsel. Since there were none on the jury panel to have

been excluded by the Commonwealth during jury selection, Petitioner cannot allege a violation of *Batson*. Therefore, this issue lacks merit.

Did trial counsel have a conflict with counsel for co-defendant

Petitioner alleges that trial counsel had a conflict representing him as counsel was business partners with a co-defendant's attorney. 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). Trial counsel was business and firm partners with William J. Miele, Esq,¹² who was representing co-defendant Joseph Coleman.¹³

While on its face there would appear to be a conflict, in order for the Petitioner to prevail on this issue he must show actual prejudice. Prejudice is presumed when counsel is burdened by an actual conflict of interest, this is so only if the defendant demonstrates that counsel “*actively represented conflicting interests*” and “that an actual conflict of interest adversely affected his lawyer's performance.” *Commonwealth v. Smith*, 380 Pa. Super. 619, 630, 552 A.2d 1053, 1059 (1988) citing *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348, 100 S.Ct. 1708, 1719, 1718, 64 L.Ed.2d 333 (1980).

In his *pro se* petition, Petitioner has not alleged any prejudice which would result in him being eligible for PCRA relief. PCRA counsel in his *Turner/Finley* letter has communicated with Petitioner who was unable to direct counsel to where he was prejudiced to support a claim of arguable merit. While trial counsel became involved with the case initially as co-counsel and was

¹² At the time, Mr. Miele was also Chief Public Defender for Lycoming County.

¹³ Coleman's case was severed for trial by this Court's order of July 23, 2018.

elevated to trial counsel after the death of original counsel, that in and of itself is not sufficient to show actual prejudice. Additionally, the Court cannot find any conflicts between trial counsel and Petitioner as no witnesses or legal issues were raised during the trial that illustrated trial counsel was “actively representing conflicting interests.” Therefore, Petitioner will not prevail on this issue.

Should the jury have been told about the extent of Casey Wilson’s involvement in the case

One of the witnesses called by the Commonwealth at trial was Casey Wilson (Wilson), who was a charged co-defendant in the case. Petitioner in his *pro se* petition alleges that trial counsel was ineffective for his failure to request the “corrupt and polluted source instruction” for the jury as the jury should have been told of his role in the case.

During the trial, counsel did request that this Court instruct the jury immediately after Wilson testified as to his role in the case and that he could be considered a “corrupt and polluted source.” Notes of Testimony, 4/2/2019 at 6-9. This Court denied that request to read the instruction at that time, but did give the instruction¹⁴ to the jury during the jury instruction portion of the trial.

The trial judge may give any other instructions to the jury before the taking of evidence or at any time during the trial as the judge deems necessary and appropriate for the jury's guidance in hearing the case. Pa. R. Crim. P. 647(e). Where a charge to the jury adequately states the law and creates no likelihood of confusion, counsel will not be deemed ineffective in failing to oppose the charge. *Commonwealth v. Rowles*, 501 Pa. 514, 462 A.2d 619 (1983). In reviewing

¹⁴ ACCOMPLICE TESTIMONY, Pa. SSJI (Crim), §4.01

a jury's instruction, we must look to the whole charge, and not just isolated excerpts therefrom. *Commonwealth v. Davis*, 331 Pa. Super. 285, 301–02, 480 A.2d 1035, 1043 (1984) citing *Commonwealth v. Waller*, 322 Pa. Super. 11, 468 A.2d 1134 (1983).

The rationale behind instructing a jury that it should view the testimony of an accomplice with suspicion when the accomplice testifies for the prosecution, lies in the recognition that such a witness, out of a reasonable expectation of leniency, has an interest in inculcating others. *Commonwealth v. Russell*, 477 Pa. 147, 383 A.2d 866 (1978). For an accomplice charge to be required, the facts need not require the inference that the witness was in fact an accomplice, they need only permit such an inference. *Commonwealth v. Sisak*, 436 Pa. 262, 259 A.2d 428 (1969). If the evidence is sufficient to present a jury question with respect to whether the prosecution's witness was an accomplice, the defendant is entitled to an instruction as to the weight to be given to that witness's testimony. *Commonwealth v. Thomas*, 479 Pa. 34, 37–38, 387 A.2d 820, 822 (1978); *Commonwealth v. Mouzon*, 456 Pa. 230, 318 A.2d 703 (1974); *see also Commonwealth v. Coades*, 454 Pa. 448, 311 A.2d 896 (1973).

While trial counsel did request the instruction be given earlier than it was, he did make sure that the Court did instruct the jury on the issue which it did during the Court's instruction to the jury. Under Rule 647(e) the Court has the discretion as to when the instruction is read. Since trial counsel requested the jury instruction, this claim lacks merit. Furthermore, since the court gave the instruction, albeit during closing instructions rather than at the time Wilson testified, Petitioner was not prejudiced. The law presumes that the jury follows the court's instructions. *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 1111, 1184 (2011). As Petitioner cannot satisfy either the first or the third prong of an ineffective assistance of counsel claim, this claim fails.

Failure to present the testimony of Dr. Richard Ofshe

As his last issue, Petitioner alleges that trial counsel was improperly denied the opportunity to present the testimony of Dr. Richard Ofshe. If he were called to testify, he would have presented information to the jury as an expert on the issue of police interrogation and tactics. The Commonwealth filed a Motion in *Limine* to preclude Ofshe to testify for the jury to educate them about how interrogations work generally. The Commonwealth alleged that they would be inadmissible opinions and invade the province of the jury as the finder of the credibility of witnesses or evidence. Commonwealth's Motion in Limine, 2/7/2019 at 1. The Commonwealth also alleged that Ofshe would also discuss the influences by the police on Petitioner during interrogation and potentially how police use coercion during questioning in order to obtain a confession. *Id.* After consideration of the arguments presented by both sides, this Court granted the Commonwealth's Motion in Limine and precluded the testimony of Ofshe. Notes of Testimony, 3/5/2019, at pp. 2-8. Trial Court Order, 3/29/2019. In its argument the Commonwealth relied on the case of *Commonwealth v. Alicia*, 92 A.3d 753 (Pa. 2014).

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. §9543(a)(3).

One of the issues that trial counsel raised on direct appeal to the Superior Court was this Court's ruling precluding Ofshe from testifying for the jury. *Commonwealth v. Rawls*, No. 89-2017, 2020 WL 119659 (Pa. Super. 1/10/2020). After review, the Superior Court upheld the decision of the trial court. Although the Supreme Court granted allocatur, the issue of Ofshe's testimony was not taken up on appeal.¹⁵ The Superior Court was the highest appellate court in

¹⁵ Order of Supreme Court, 8/17/2020

which Petitioner could have had review as a matter of right. Review by the Pennsylvania Supreme Court is by allowance, not right. Although Petitioner's claim of ineffective assistance of counsel was not litigated on appeal, the underlying issue was. Since the Superior Court affirmed the Court's preclusion of the testimony of Dr. Oshfe this claim lacks merit. Trial counsel is not ineffective for failing to raise a meritless claim. *Commonwealth v. Fears*, 86 A.3d 795, 804 (Pa. 2014).

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

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CP-41-CR-0089-2017

v.

JORDAN RAWLS

Defendant

MOTION TO

WITHDRAW AS COUNSEL

ORDER

AND NOW this 5th 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