

APPENDIX 3

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COMMONWEALTH OF PENNSYLVANIA,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MICHAEL DEEP

Appellant

No. 1592 WDA 2010

Appeal from the PCRA Order September 27, 2010
In the Court of Common Pleas of Washington County
Criminal Division at No(s): CP-63-CR-0001722-2005

BEFORE: BOWES, PANELLA and FITZGERALD*

MEMORANDUM:*

FILED: SEPTEMBER 16, 2011

Appellant, Michael Deep, appeals from the order denying relief pursuant to the Post-Conviction Relief Act¹ entered on September 27, 2010, by the Honorable Paul M. Pozonsky, Court of Common Pleas of Washington County. After careful review, we affirm in part, and vacate and remand in

part

A previous panel of this Court summarized the factual and procedural history of this matter as follows:

On August 7, 2005, K.D. arrived home and discovered her husband, Deep, sexually assaulting her daughter (Deep's step-daughter), H.D. (d.o.b. 4/14/89). H.D. asserted that Deep had been sexually assaulting her since the age of 10. Police subsequently arrested Deep and charged him with 87 counts each of sexual assault and corruption of minors. Police also charged Deep with 87

¹ 42 PA.CON.S.TAT.ANN. §§ 9541-9546.

*Former Justice specially assigned to the Superior Court.

* BY: PANELLA, J.

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counts each of statutory sexual assault, involuntary deviate sexual intercourse (victim less than 16 years of age), rape by forcible compulsion, aggravated sexual assault, and endangering the welfare of children. At the preliminary hearing, the Commonwealth dismissed all but six counts of each statutory violation set forth above. On October 27, 2006, a jury convicted Deep of the two counts each of sexual assault, endangering the welfare of children and corruption of minors. On March 22, 2007, the trial subsequently sentenced Deep to consecutive prison terms of five to ten years for each of Deep's convictions of sexual assault, one to seven years for each of his convictions of endangering the welfare of children, and one to five years for each of his convictions of corruption of minors. Thus, the trial court imposed an aggregate sentence of 14 to 44 years in prison.

Commonwealth v. Deep, No. 736 WDA 2007, at 1-2 (filed April 15, 2009) (unpublished memorandum) (footnotes and citations omitted). In that same memorandum, this Court affirmed Deep's judgment of sentence on the first five issues Deep raised, while finding that Deep's challenge to the discretionary aspects of his sentence had not been properly preserved for appellate review. Deep then filed a Petition for Allowance of Appeal, which the Supreme Court of Pennsylvania denied on October 20, 2009.

Deep initiated the instant action by filing a PCRA petition on August 6, 2010. Thereafter, the PCRA court entered an order notifying Deep of its intention to dismiss Deep's petition without a hearing. Deep filed an objection, but on September 27, 2010, the PCRA court filed an order dismissing Deep's petition. This timely appeal followed.

On appeal, Deep raises four issues for our review:

- I. Whether the trial court erred as a matter of law when it dismissed the Petitioner's Petition for Post-Conviction Collateral Relief without a hearing, where the Petition set forth specific allegations of ineffective assistance of counsel against trial counsel, Robert Brady, Esquire, concerning his refusal to file a pre-trial request for a Bill of Particulars, and such issue could not be determined from the existing record since no testimony concerning said claim was taken by the court and the Petition set forth specific claims as to how the outcome of the proceedings would have been different absent this ineffectiveness.
- II. Whether the trial court erred as a matter of law when it dismissed the Petitioner's Petition for Post-Conviction Collateral Relief without a hearing, where the Petition set forth specific allegations of ineffective assistance of counsel against trial counsel, Robert Brady, Esquire, concerning his lack of pre-trial investigation and preparation in numerous regards such that a reliable adjudication of guilt or innocence could not have taken place, and accordingly that such issues could not be determined from the record since no testimony concerning said claims was taken by the court.
- III. Whether the trial court erred as a matter of law when it dismissed the Petitioner's Petition for Post-Conviction Collateral Relief without a hearing, where the Petition set forth specific allegations of ineffective assistance of counsel against trial counsel, Robert Brady, Esquire, concerning his failure to present and preserve the Petitioner's sentencing issues during post-sentence and appellate proceedings, and such issue could not be determined from the record since no testimony concerning said claims was taken by the court and that such claim equates with a constructing denial of counsel in this regard.
- IV. Whether the trial court erred as a matter of law when it dismissed the Petitioner's Petition for Post-Conviction Collateral Relief without a hearing, where the Petition set forth specific

allegations of ineffective assistance of counsel, including properly preserved layered ineffectiveness claims, against appellate counsels, Charles Lopresti, Esquire, and Noah Geary, Esquire, and such issues could not be determined from the existing record since no testimony concerning said claims was taken by the court.

Appellant's Brief, at 7.²

Our standard of review of a PCRA court's denial of a petition for post-conviction relief is well-settled. We must examine whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. **See Commonwealth v. Hall**, 867 A.2d 619, 628 (Pa. Super. 2005), **appeal denied**, 586 Pa. 756, 895 A.2d 549 (2006). The PCRA court's findings will not be disturbed unless there is no support for its findings in the certified record. **See Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001). Our scope of review is limited by the parameters of the PCRA. **See Commonwealth v. Heilman**, 867 A.2d 542, 544 (Pa. Super. 2005), **appeal denied**, 583 Pa. 669, 876 A.2d 393 (2005).

² We note that Appellee, Commonwealth of Pennsylvania, by and through its attorney, Office of the District Attorney of Washington County, failed to file a brief as required pursuant to Pa.R.A.P. 2185. While the Rules of Appellate Procedure provide no consequences for an appellee's failure to file a brief (for submitted cases), this Court did not have the benefit of Appellee's argument in consideration of this appeal.

All four of Deep's issues on appeal raise allegations of ineffectiveness of counsel. The following principles of law apply to allegations of ineffective assistance of counsel:

In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, 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 ... Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Johnson, 868 A.2d 1278, 1281 (Pa. Super. 2005), ***appeal denied***, 583 Pa. 680, 877 A.2d 460 (2005).

Failure to satisfy any prong of the test requires the claim to be dismissed. ***See Commonwealth v. O'Bidos***, 849 A.2d 243, 249 (Pa. Super. 2004). Thus, if it is clear that the appellant has not met the prejudice prong of the ineffectiveness standard, the claim may be dismissed on that basis alone and the court need not determine whether the first and second prongs have been met. ***See Commonwealth v. Jones***, 571 Pa. 112, 126, 811 A.2d 994, 1002-1003 (2002) (citing ***Commonwealth v. Albrecht***, 554 Pa. 31, 46-48, 720 A.2d 693, 701 (1998)).

Deep's first argument on appeal is that his trial counsel was ineffective for failing to request a bill of particulars prior to trial. Deep contends that a bill of particulars would have allowed counsel to pin down the exact dates

that the offenses were alleged to have occurred. Absent this information, Deep argues that counsel could not present alibi defenses or effectively cross-examine witnesses.

"The function of a bill of particulars . . . is to give notice to the accused of the offenses charged in order to permit him to prepare a defense, avoid surprise, and be placed on notice as to any restrictions upon the Commonwealth's proof." **Commonwealth v. March**, 551 A.2d 232, 235-36 (Pa. Super. 1988). Once a bill of particulars has been filed, "the Commonwealth is restricted to proving what it has set forth in the bill." **Commonwealth v. Bartman**, 367 A.2d 1121, 1127 (Pa. Super. 1976). However, the Commonwealth is not always required to prove a specific date for every crime. **See Commonwealth v. Einhorn**, 911 A.2d 960, 978 (Pa. Super. 2006). "Permissible leeway varies with the nature of the crime and the age and condition of the victim balanced against the rights of the accused." **Id.** Additionally, when a course of conduct is alleged to have occurred over a period time, there is no requirement that a specific date be given for each offense. **See Commonwealth v. Dennis**, 618 A.2d 972, 978-79 (Pa. Super. 1992). Furthermore, when the case involves a minor victim, such leeway is necessary, given the practical limitations of minor's memories. **See id.**

Deep does not specify what additional defenses he would have raised or avenues of cross-examination would have been available if the

Commonwealth had filed a bill of particulars. Therefore, we conclude that Deep has failed to establish that the Commonwealth would have been required to supply more specific dates pursuant to a request for a bill of particulars. Accordingly, Deep has failed to establish that he was prejudiced by trial counsel's failure to request the same. Deep's first issue on appeal therefore affords him no relief.

Next, Deep contends that trial counsel was ineffective by failing to meet with him and prepare for trial. In his petition, Deep asserts, *inter alia*, that trial counsel failed to meet with him prior to trial and failed to discuss potential witnesses whom counsel subsequently failed to call at trial. PCRA petition, 8/6/2010, at ¶ 35(B). As noted previously, the PCRA court dismissed these claims without a hearing.

The Supreme Court of Pennsylvania has held that, in capital cases, counsel's failure to meet face-to-face with his client prior to trial is prejudice *per se*. ***See Commonwealth v. Brooks***, 576 Pa. 332, 839 A.2d 245 (2003). However, it is also true that "it is well settled that, by itself, the amount of time an attorney spends consulting with his client before trial is not a legitimate basis for inferring" ineffectiveness. ***Id.***, at fn. 7 (citation omitted). A close reading of the majority opinion in ***Brooks*** along with the three separate concurring opinions reveals that the Supreme Court of Pennsylvania intentionally limited the *per se* prejudice rule to capital cases.

Accordingly, we must apply the traditional "but for" prejudice standard quoted *supra*.

Taken in isolation, and assuming their truthfulness, Deep's allegations of ineffectiveness describe a situation where counsel: (a) did not meet with Deep at all prior to trial; (b) did not discuss potential witnesses with Deep prior to trial; and (c) failed to request that the victim be examined by an independent expert. These allegations are sufficient to require a hearing on the issue of trial counsel's effectiveness in preparing for the trial. To be clear, we are not holding that Deep has, at this point, established ineffectiveness. For example, after testimony by trial counsel, it may very well be the case that, *inter alia*,: (a) the PCRA court finds that counsel did meet with Deep; or (b) the PCRA court finds that despite the lack of a face-to-face meeting, counsel's other actions constituted sufficient preparation for the trial. However, Deep's allegations are sufficient to require an evidentiary hearing on trial counsel's preparations. Accordingly, we must vacate this portion of the PCRA court's order and remand for an evidentiary hearing.

In his third issue on appeal, Deep challenges the PCRA court's conclusion that he has failed to establish prejudice arising from counsels' failure to preserve a challenge to the discretionary aspects of his sentence on direct appeal. Initially, we must note that "[c]hallenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right." ***Commonwealth v. Moury***, 92 A.2d 162, 170 (Pa. Super. 2010).

Where a defendant challenges the discretionary aspects of sentencing for which there is no automatic right to appeal, his appeal is "more appropriately considered a petition for allowance of appeal." ***Commonwealth v. Marts***, 889 A.2d 608, 611 (Pa. Super. 2005). Therefore, in order to establish prejudice, Deep must preliminarily establish that his challenge to the discretionary aspects of his sentence would have been reviewed on appeal.

To be reviewed on the merits, a challenge to the discretionary aspects of a sentence must identify "a *substantial question* that the sentence imposed is not appropriate under [the Sentencing Code]." ***See Commonwealth v. Koren***, 646 A.2d 1205, 1207 (Pa. Super. 1994). The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. ***See Marts***, 889 A.2d at 612. Generally, however, in order to establish a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process. ***See id.***

Deep argues that his sentence was contrary to the fundamental norms underlying the sentencing process as it consisted of sentences in the aggravated guideline ranges run consecutively. Deep does not argue that the sentencing court failed to consider mitigating circumstances, or that it relied upon an improper reason in fashioning the sentence. Long standing

precedent of this Court recognizes that 42 PA. CONS. STAT. ANN. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. **See Commonwealth v. Graham**, 541 Pa. 173, 184, 661 A.2d 1367, 1373 (1995). In general, a challenge to the discretionary imposition of consecutive sentences ordinarily does not raise a substantial question. **See Commonwealth v. Moury**, 992 A.2d 162, 171-72 (Pa. Super. 2010); **Commonwealth v. Johnson**, 873 A.2d 704, 709 n. 2 (Pa. Super. 2005); **Commonwealth v. Hoag**, 665 A.2d 1212, 1214 (Pa. Super. 1995). “[T]he key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to . . . an excessive level in light of the criminal conduct at issue in the case.” **Commonwealth v. Mastromarino**, 2 A.3d 581, 587 (Pa. Super. 2010).


“The imposition of consecutive, rather than concurrent, sentences may raise a substantial question *in only the most extreme circumstances*, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment.” **Moury**, 992 A.2d at 171-72 (emphasis added). We conclude that Deep’s sentence was not unduly harsh, considering he was convicted on, *inter alia*, two counts of sexual assault. Therefore, Deep has failed to establish that counsel’s failure to preserve his

challenge to the discretionary aspects of his sentence prejudiced him, and his third issue on appeal merits no relief.

Finally, Deep contends that appellate counsel were ineffective for failing to preserve his challenge to the discretionary aspects of his sentence. As we have previously concluded that Deep's challenge did not raise a substantial question, we further conclude that Deep has failed to establish prejudice on this issue. Accordingly, Deep is entitled to no relief on his fourth and final argument.

PCRA order affirmed in part and vacated and remanded in part. Jurisdiction relinquished.

Judgment Entered:

A handwritten signature in cursive script, reading "Eleanor K. Valecko", is written over a horizontal line.

Deputy Prothonotary

DATE: September 16, 2011