NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DEVIN RYAK Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1308 EDA 2012

Appeal from the PCRA Order April 16, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0910761-2003

BEFORE: BOWES, J., GANTMAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.: Filed: March 19, 2013

Appellant, Devin Ryak, appeals from the order entered in the Philadelphia County Court of Common Pleas, denying his petition brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

The PCRA court correctly set forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

Appellant raises eight issues for our review:

> 1. DID THE PCRA COURT ERR AND VIOLATE APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY ERRONEOUSLY AND IMPROPERLY USING THE WRONG LEGAL STANDARD REQUIRING THAT APPELLANT USE EXTRAORDINARY DILIGENCE IN OBTAINING AND BRINGING PREVIOUSLY UNAVAILABLE NEWLY DISCOVERED EVIDENCE TO THE COURT'S ATTENTION?

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[1] 42 Pa.C.S.A. §§ 9541-9546.

2. DID THE PCRA COURT ERR AND VIOLATE APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WHEN IT FOUND, WITHOUT CONDUCTING A HEARING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ADEQUATELY PREPARE FOR TRIAL?

3. DID THE PCRA COURT ERR AND VIOLATE APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT FOUND THAT KEY COMMONWEALTH WITNESSES PARKER AND JAMES' EXPOSURE TO APPELLANT AT THE POLICE STATION WAS AN "INNOCENT ENCOUNTER" AND WAS NOT UNDULY SUGGESTIVE BECAUSE IT WAS NOT THE PRODUCT OF ANY IMPROPER POLICE ACTION AND THEREFORE, TRIAL COUNSEL'S DECISION TO WITHDRAW THE MOTION TO SUPPRESS WAS TACTICAL AND REASONABLE?

4. THE PCRA COURT ERRED AND VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BY FINDING, WITHOUT CONDUCTING A HEARING, THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR OPENING THE DOOR AND FAILING TO PROPERLY OBJECT TO PREJUDICIAL HEARSAY TESTIMONY THAT [APPELLANT] AND APPELLANT'S CO-CONSPIRATOR WERE COUSINS.

5. DID THE PCRA COURT ERR AND VIOLATE APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHEN IT FOUND TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A ***KLOIBER***[2] CHARGE BE GIVEN TO THE JURY AND THAT APPELLATE COUNSEL WAS NOT SERIALLY INEFFECTIVE FOR FAILING TO ALLEGE RELATED TRIAL COURT ERROR?

6. WAS APPELLANT DENIED HIS RIGHTS UNDER ARTICLE 1 SECTION 9 OF THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA AND THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA TO EFFECTIVE ASSISTANCE OF

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[2] ***Commonwealth v. Kloiber***, 378 Pa. 412, 106 A.2d 820 (1954).

> COUNSEL IN THAT TRIAL COUNSEL FAILED TO BRING A RULE 600 MOTION?
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> 7. DID THE PCRA COURT ERR AND VIOLATE APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS IN HOLDING THAT APPELLANT'S CLAIM THAT A MEDICAL EXAMINER'S STIPULATED TESTIMONY WAS NOT COGNIZABLE UNDER ***MELENDEZ-DIAZ V. MASSACHUSETTS***, 129 S.CT. 2527 (2009).
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> 8. DID THE PCRA COURT VIOLATE APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY DISMISSING THE PETITION WITHOUT THE BENEFIT OF CONDUCTING A HEARING?

(Appellant's Brief at 4-5).

As an initial matter, we address Appellant's seventh issue, the ***Melendez-Diaz*** claim. Appellant presented the issue in his PCRA petition but failed to include it in his Rule 1925(b) statement. Therefore, the issue is waived. ***See Commonwealth v. Hill***, 609 Pa. 410, 427, 16 A.3d 484, 494 (2011) (restating general rule that waiver occurs when party does not preserve issue in Rule 1925(b) statement).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Leon W. Tucker, we conclude Appellant's remaining issues merit no relief. The trial court opinion properly disposes of the questions presented. (***See*** Trial Court Opinion, dated September 23, 2012, at 7-19) (finding: **(1)** Appellant did not exercise reasonable diligence in discovering witnesses Nael Reddy, Rashena Carter, and Desjanava Kinslow; several years have passed since trial and Appellant's explanation that witnesses "did not want to get involved, were

scared, or feared retaliation" is insufficient reason to excuse lack of reasonable diligence; additionally, testimony would have only limited impeachment value; **(2)** Appellant failed to produce evidence in support of his bald assertions that counsel was unprepared for trial; **(3)** counsel was not ineffective in abandoning suppression motion, as motion was meritless; there is no evidence police contrived inadvertent meeting between Appellant and witness; **(4)** counsel was not ineffective for "opening the door" to hearsay testimony; statements at issue were non-hearsay because they were not offered for truth of contents; **(5)** there is no arguable merit to claim counsel should have requested ***Kloiber*** instruction; witnesses did not have difficulty identifying Appellant; **(6)** ineffective assistance of counsel claim in connection with Rule 600 motion is entirely without evidentiary support; **(8)** Appellant was not entitled to hearing on PCRA petition as of right and produced no facts to warrant hearing). Accordingly, we affirm on the basis of the PCRA court opinion.

Order affirmed.

COMMONWEALTH OF PENNSYLVANIA

COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT

VS.

CP-51-CR0910761-2003

DEVIN RYAK

SUPERIOR COURT NO.

1308 EDA 2012

OPINION

LEON W.TUCKER, J.

DATE: September 23, 2012

I. PROCEDURAL HISTORY

On March 29, 2006, The Honorable Karen Streeter Lewis of the Philadelphia County Court of Common Pleas, after a jury trial, sentenced Devin Ryak to life in prison without parole on the charge of Murder in the First Degree, ten to twenty (10-20) years for Criminal Conspiracy, to run consecutively, and guilt without further penalty for Possessing Instruments of Crime. Ryak filed post-sentence motions which were denied by Judge Streeter Lewis in August 2006. Daniel P. Alva, Esquire served as Ryak's Trial counsel.

On August 25, 2006, Ryak appealed Judge Streeter Lewis's August 2006 order denying Ryak's Motion for Post-Sentence Relief from the March 29, 2006 judgment of sentence. Notice of Appeal (08/25/2006). On October 23, 2007, the Superior Court of Pennsylvania affirmed Judge Streeter Lewis's judgment of sentence. On November 20, 2007, Ryak filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania; the Supreme Court of Pennsylvania denied *allocator* on March 26, 2008. Elayne Bryn, Esquire served as Ryak's Appellate counsel. Judge Streeter Lewis has since retired from the bench and the matter was assigned to this Court to respond to Ryak's Post Conviction Relief Act Petition.

Ryak filed a *pro se* Post Conviction Relief Act Petition (hereinafter referred to as "PCRA") on May 08, 2008.

On February 3, 2009, John P. Cotter, Esquire entered his appearance as Ryak's PCRA counsel.

On March 19, 2009, Ryak, through John P. Cotter, Esquire, filed an Amended PCRA wherein incorporating allegations in Ryak's *pro se* PCRA; Ryak supplemented the March 2009 Amended PCRA with another Amended PCRA on May 20, 2010 after two Defense requests for further investigation and additional time. Ryak's March 2009 PCRA and May 2010 supplement PCRA allege ineffective assistance of Trial counsel for not interviewing one new witness until just before the witness testified at trial; and for not interviewing and calling to testify another new witness at trial. Ryak alleges that Trial Counsel was also ineffective for allowing hearsay testimony into evidence without objection and for other mistakes made at trial. Ryak alleges the general ineffective assistance of Appellate counsel. In addition, Ryak alleges that he has newly discovered evidence from an eyewitness who was afraid to testify at Ryak's 2006 trial.

The Commonwealth of Pennsylvania filed a Motion to Dismiss Ryak's PCRA petition without a hearing on May 20, 2010.

On December 1, 2010, Teri Himebaugh, Esquire entered her appearance as Ryak's private PCRA counsel.

Ryak was granted leave to file an additional amended PCRA petition. Ryak filed his third Amended PCRA petition on February 8, 2011 wherein alleging ineffective assistance of Trial counsel for opening the door to and for failing to object to hearsay evidence; ineffective assistance of Trial counsel for failing to adequately prepare for trial; ineffective assistance of trial counsel for withdrawing a pretrial motion to suppress an out of court identification of Ryak by a

witness; ineffective assistance of both Trial and Appellate counsel for failing to request a Kloiber charge and for failing to pursue such error on appeal; and ineffective assistance of Trial counsel for failing to file a Rule 600 Motion. Ryak also alleges that he has newly discovered exonerating witnesses. The February 2011 Amended PCRA was supplemented with another Amended PCRA Petition, filed April 21, 2011, wherein alleging ineffective assistance of Trial counsel for stipulating to trial testimony of a medical examiner who had not performed an autopsy in the trial and who was not qualified to give an opinion about ballistics.[1]

The Commonwealth of Pennsylvania filed its second Motion to Dismiss Ryak's PCRA petition on July 22, 2011. Ryak filed his reply to the Commonwealth's Motion to Dismiss on August 16, 2011.

The Court entered a Notice of Intent to Dismiss on February 13, 2012. The Court entered a Notice of Dismissal on February 15, 2012. The Court vacated the February 15, 2012 Notice of Dismissal on March 5, 2012. On March 5, 2012, pursuant to Pa. R.Crim.P. 907, this Court filed another Notice of Intent to Dismiss Ryak's Amended PCRA Petition within forty-two (42) days of the Notice.

On April 16, 2012, after careful review, this Court filed an Order dismissing Ryak's Amended PCRA Petition and deemed the claims therein as meritless. Ryak, through private PCRA Counsel Himebaugh, timely filed a Notice of Appeal.

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[1] Ryak raised this issue for the first time in a supplement to an Amended PCRA Petition. Ryak has not addressed this in his 1925(b) Statement. Nevertheless, Ryak seeks to bring the Court's attention to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), where the Supreme Court held that lab reports admitted to establish a defendant's guilt constitute testimonial statements, and that such statements are inadmissible unless the defendant had the opportunity to cross-examine the laboratory analyst at trial. *Melendez-Diaz* was deemed to apply retroactively to the Commonwealth of Pennsylvania in *Commonwealth v. Barton-Martin*, 5 A.3d 363 (Pa. Super. 2010). Although applied retroactively, the Court finds that Ryak's assertion that a medical examiner's stipulated testimony was outside the scope of his expertise is not cognizable under *Melendez-Diaz*. Furthermore, Trial counsel could not have been ineffective for failing to raise a claim that was neither cognizable nor retroactive at trial in 2006.

On April 25, 2012, pursuant to PA.R.A.P. 1925(b), this Court ordered Ryak to file a Concise Statement of the Matters Complained of on Appeal (hereinafter "1925(b) Statement) by May 16, 2012.

On May 10, 2012, PCRA Counsel Himebaugh timely filed a 1925(b) Statement, raising eleven issues for this Court's consideration by alleging, in essence:

1. that the Court erred "by dismissing the petition without benefit of conducting a hearing"

2. that the Court erred "by improperly finding, without benefit of holding a hearing, that Nael Reddy's testimony would not be credible"

3. that the Court erred "by erroneously and improperly using the wrong legal standard requiring that [Ryak] show that witnesses Carter and Kinslow were available at the time of trial and that [Ryak] use (extraordinary) diligence to bring this information to the court's attention."

4. that the Court erred by "presuming facts without having any evidentiary support to do so when it hypothesized that perhaps Karen Reddy was testifying about a different fight that day before the shooting than the one that Nael Reddy asserts he had with "Black"; the PCRA Court violated [Ryak's] rights by failing to conduct a hearing where the testimony of Nael and Karen Reddy could be taken.

5. that the Court erred by "finding that the issue of whether it was [Ryak's] or someone else who had a fight the day before with the victim was a collateral matter."

6. that the Court erred "when it found that key Commonwealth witnesses Parker and James exposure to [Ryak] at the police station was an 'innocent encounter' and was not unduly suggestive because it was not the product of any improper police action."

7. that the Court erred "when if found , without conducting a hearing, that trial counsel was not ineffective and that his decision to withdraw the motion to suppress was tactical and reasonable."

8. that the Court erred "when it found that there was no prejudice caused by counsel's failure to call someone other than Ms. Boost as a character witness."

9. that the Court erred "by finding , without conducting a hearing, that trial counsel was not ineffective or opening the door and failing to properly object to prejudicial hearsay testimony that he and the Petitioner's co-conspirator Jerome Adams were cousins."

10. that the Court erred when it "found, without conducting a hearing that trial counsel was not ineffective for failing to adequately prepare for trial."

11. that the Court erred when it "found trial counsel was not ineffective for failing to request a Kloiber charge be given the jury and that appellate counsel was not serially ineffective for failing to allege related trial court error."

II. DISCUSSION

A. Facts

The Trial Court and Superior Court provided the factual background necessary for the Court's discussion of Ryak PCRA Petition:

> On the night of July 25, 2003, Hakim Williams (hereinafter "Hakim"), Letitia Parker (hereinafter "Letitia"), Reniece James (hereinafter "Reniece") and Tyree Boyd (hereinafter "Tyree") were standing on the corner of Wingohocking and Colorado Streets, in Philadelphia, PA. Some time after midnight on July 26, [Ryak] and ""Romy" (later identified as Jerome Adams), walked past the corner of Wingohocking and Colorado on the south side of Wingohocking Street heading east toward Broad Street. At approximately 12:59 a.m., [Ryak] and Romy walked back toward the corner of Wingohocking and Colorado Streets this time on the north side of Wingohocking Street where Hakim and his friends were standing.
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> Letitia testified that [Ryak] and Romy passed by and an argument ensued. Tyree testified that Hakim asked [Ryak] "what are you looking at?" Letitia testified that [Ryak] told Hakim, "I told you I wouldn't fight you no more." [Ryak] handed a food container which he was holding to Romy and then pulled a gun from his back pocket. Romy took the gun from [Ryak] and said [Ryak] and Hakim "might as well fight like grown men." Letitia testified that Hakim and Romy exchanged a few words and then Romy handed the gun back to [Ryak] and told him to "[d]o what you got to do." [Ryak] pointed the gun at Hakim and started shooting. Tyree and Hakim both turned to run away from [Ryak]. Tyree ran past two or three houses before he stopped and turned around. Reniece testified that Hakim got approximately 6 to 7 feet from [Ryak] before he fell to the ground. Reniece, Letitia, and Tyree testified that [Ryak] stood over Hakim and shot him multiple times. Then [Ryak] ran west down Wingohocking Street towards 18th Street.
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> At approximately 10 a.m., Sergeant Rosa was driving east bound past the 1700 block of Wingohocking Street when he heard several shots. He also observed a lone black male in a white T-shirt jog west down Winghocking Street and turn on to [Bouvier] Street heading north. On the corner where a crowd had gathered, Sergeant Rosa saw Hakim on the ground bleeding from his head and body. Sergeant Rosa went over police radio to request an ambulance. He also asked the crowd if anyone had any information about the shooting. Someone from the

crowd said that the shooter "went up Bouvier Street"[.] Sergeant Rosa radioed a description of the lone male he observed to the police dispatcher.

Shortly thereafter, Officer Lorenzo and his partner responded to a radio call of a shooting at 1717 Wingohocking Street. They were driving west on Courtland Street when flash information came over police radio describing a []black male with a dark complexion and wearing a white T-shirt[] who was last seen heading north on [Bouvier] Street. Just as Officer Lorenzo received the flash information, he saw [Ryak] walking briskly through the intersection of [Bouvier] Street and Courtland Street into Stenton Park. [Ryak] matched the flash description and was the only individual coming from [Bouvier] Street. Officer Lorenzo exited the car to follow [Ryak] through the park on foot while his partner drove to the north side of the park. Officer Lorenzo's partner stopped [Ryak] in the vicinity of 1600 Wyoming Avenue. No gun was recovered from [Ryak]. However, [Ryak] was wanted on an outstanding warrant from another crime. He was arrested and transported to the Homicide Division.

Hakim was transported by ambulance to Einstein Hospital and was pronounced dead at 1:30 a.m. Deputy Medical Examiner Dr. Ian Hood testified that Hakim died of multiple gun shot wounds. Bullets fired into Hakim's body struck his head, lungs, spleen, liver, stomach, iliac artery, and intestines. At least three of the eight wounds would have been fatal. Dr. Hood also testified that several of [the] wounds suggested that Hakim had been lying against a hard surface when he was shot. Officer Stott of the Firearms Identification Unit confirmed that the four bullets recovered from Hakim's body were .9 mm Marakov bullets. All seven of the recovered cartridges casings recovered from the crime scene were .9 mm Marakov cartridges.

At approximately 5:00 a.m., Officer Stallbum drove Letitia and Reniece to the Homicide Division to be interviewed. Officer Stallbum testified that Letitia and Reniece "said they saw the buys arguing. Then shots rang out and they seen the shooter run west on Wingohocking." While waiting to be interviewed Letitia and Reniece saw [Ryak], accompanied by a police officer, walk by. Tyree picked [Ryak's] photo out of a photo array. Letitia returned to the police station on July 27 and identified [Ryak] as the shooter from a photo array. At the preliminary hearing and at trial, Letitia and Tyree identified [Ryak] as the person who shot Hakim. At trial, Reniece also identified [Ryak] as the person who shot Hakim. For approximately two months before the shooting Letitia saw [Ryak] with Romy on 4-5 occasions around the neighborhood before the shooting. Tyree also saw [Ryak] "a couple" times over a three month period prior to the shooting. Letitia and Reniece further testified that they believed [Ryak] was Romy's cousin.

Karen Reddy (hereinafter "Karen") saw [Ryak] and Hakim fighting in the street on July 24; she broke the fight up. Karen spoke with Romy and [Ryak] after the fight and [Ryak] stated that the fight between him and Hakim "was over." Karen

> asked Romy who [Ryak] was and Romy responded that [Ryak] was "his cousin." Karen did not see the shooting on July 26.

Trial Court Opinion, 11/08/2006, at 2-5; *Commonweatlh v. Ryak*, No. 2458 EDA 2006, slip op. at 1-3 (Pa. Super. October 23, 2007).

B. **Legal Issues**

1. The Court did not err in dismissing Ryak's PCRA petition without an evidentiary hearing pursuant to Pa.Crim. P. 907.

Under the Pennsylvania Rules of Criminal Procedure, the Court may dismiss a PCRA petition without a hearing where:

> the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings.

Pa.Crim.P. 907. To this end, a Court may decline to hold a hearing on the PCRA if the petitioner's claims is "patently frivolous and is without a trace of support either in the record or from other evidence." *Commonwealth v. Holmes*, 905 A.2d 507, 509 (Pa. Super. Ct. 2006); Pa.R.Crim.P. 907 ("Comment"). In short, there is no absolute right to an evidentiary PCRA hearing if the Court can determine from the record that no genuine issues of material fact exist. *Commonwealth v. [Jonathan Paul] Jones*, 942 A.2d 903, 906 (Pa. Super. 2008). Such is the case here, where Ryak essentially argues that the Court erred in failing to order an evidentiary hearing on proposed after-discovered testimony of three witnesses and on the alleged ineffectiveness of Trial counsel. A discussion ensues:

a. Ryak did not meet the burden of showing the existence of after-discovered evidence warranting the grant of relief under Post Conviction Relief Act.

Under the *42 Pa. C.S. § 9543*, commonly known as the Post Conviction Relief Act ("PCRA"), petitioner must plead and prove by a preponderance of the evidence, that his or her

conviction or sentence resulted from one or more of the circumstances enumerated in *42 Pa. C.S. § 9543(a)(2)*. 42 Pa. C.S. § 9543(a)(2). At issue in the instant PCRA petition is whether Ryak met his burden of showing that his conviction resulted from 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." *Id.* at § 9543(a)(2)(iv). The petitioner must also plead and prove by a preponderance of the evidence that the allegation of error has not been previously litigated or waived. *Id.* at § 9543(a)(3).

To prove that he or she is entitled to PCRA relief under the after-discovered evidence rationale, petitioner must establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it has not being used solely to impeach credibility; and (4) it would likely compel a different verdict. *Commonwealth v. Smith*, 17 A.3d 873, 887 (Pa. 2011). Ryak's after-discovered evidence claim fails.

Here, Ryak alleges the existence of after-discovered evidence which, if admitted at trial, would have changed the outcome of the trial. Specifically, Ryak claims that he has after-discovered exculpatory evidence from three witnesses. Ryak claims that the first witness, Nael Reddy, would testify that Ryak was not the person involved in an altercation with the victim the day before the shooting incident. Instead, Mr. Reddy would testify that a person known as "Black" fought with the victim the day before his death and that the victim was shot as a direct result of a fight between the victim and "Black." Ryak argues that this new testimony would contradict or undermine the eyewitness identification testimony given by Karen Reddy, Mr. Reddy's aunt, at trial. Mr. Reddy became acquainted with Ryak while incarcerated at SCI Graterford. Ryak states that Mr. Reddy failed to come forward before now, some eight (8) years

after the shooting incident, due to his guilt in being a part of the circumstances leading the the victim's death.

Ryak claims that the second witness, Ms. Rashena Carter witnessed the shooting incident and, according to her affidavit, she was confident that the shooter was not Ryak. Ryak states that Ms. Carter did not come forward after the shooting because she was scared and did not want to get involved. Ryak claims the third witness, Desjanava Kinslow also witnessed the shooting incident, and that she saw someone who was not Ryak shoot the victim. Ryak states that Ms. Kinslow did not come forward because she was afraid that the shooter's associate, Nael Reddy, would retaliate against her. Ryak states that all three witnesses will fully corroborate his misidentification defense.

First, in regards to the alleged after-discovered identification evidence proffered by Ryak, Ryak fails to offer any explanation as to any reasonable diligence to obtain this evidence at or prior to trial. Ryak must offer an explanation as to *why* he could not produce after-discovered evidence at or prior to trial. *Commonwealth v. Padillas*, 997 A.2d 356, 363-364 (Pa. Super. 2010)(citing *Commonwealth v.[Joseph Robert] Jones*, 402 A.2d 1065, 1066 (Pa. Super. 1979)(emphasis added). Instead, Ryak merely states that the three witnesses failed to come forward because of guilt; a desire to not get involved; and because of fear of retaliation. The bare assertion that witnesses did not come forward until after the trial finished is not sufficient to explain why Ryak or his counsel did not discover the witnesses at or prior to trial. *Commonwealth v.[Joseph Robert] Jones*, 402 A.2d 1065, 1066 (Pa. Super. 1979). Ryak simply failed to meet this burden in his PCRA Petition. The Court did not err in placing this burden upon Ryak on his after-discovered exculpatory witness testimony claim. *Id.*

Second, Ryak must show that the alleged after-discovered evidence is "not just corroborative or cumulative of the evidence already presented at trial. *Padillas*, 997 A.2d at 365. As stated in *Padillas*, new evidence to support a claim of innocence is less likely to be deemed cumulative if the conviction is based largely on circumstantial evidence; however, where the new evidence merely supports claims that the defendant made and litigated at trial, it is most likely cumulative or corroborative. *Id.* at 364-365.

Here, Ryak seeks to offer corroborative and cumulative after-discovered witness testimony. Ryak's conviction was affirmed by the Superior Court in October 2007 specifically because the evidence presented at trial was sufficient to identify Ryak as a participant in the crime. As the Superior Court stated on appeal on the merits of this case:

> Ryak's arguments are utterly unpersuasive: he was identified as the shooter by three witnesses, each of whom observed Ryak for several minutes just prior to the shooting, and each of whom testified that they knew him from the neighborhood before the shooting.

Commonweatlh v. Ryak, No. 2458 EDA 2006, slip op. at 5-6 (Pa. Super. October 23, 2007). Ryak's conviction was not based on circumstantial evidence; instead, it was based on testimony from three eyewitnesses. *Commonwealth v. Tallon*, 387 A.2d 77, 81 (Pa. 1978)(citing *Commonwealth v. Blevins*, 309 A.2d 421 (1973) and distinguishing eyewitness testimony, or direct evidence, from circumstantial evidence). New evidence to support a claim of innocence in the face of this direct eyewitness testimony is cumulative. Furthermore, Ryak's proposed new after-discovered evidence merely restates the same misidentification claims that Ryak made and litigated at trial. Ryak has failed to show that his alleged after-discovered evidence is not corroborative or cumulative to evidence already presented at trial.

Third, Ryak must show that after-discovered evidence will not be used solely to impeach the credibility of a witness. *Padillas*, 997 A.2d at 365. As the Court stated in *Padillas*,

> [W]henever a party offers a witness to provide evidence that contradicts other evidence previously given by another witness, it constitutes impeachment...Where eyewitness identification tied the defendant to the crime charged and the defendant challenged the identification in his trial, third-party testimony exculpating the defendant impeaches the eyewitness.

Id. at 365. Here, Ryak's proposed after-discovered evidence will be used to contradict the eyewitness testimony given by Karen Reddy at trial. Ryak has failed to demonstrate that he will not use the alleged after-discovered evidence solely to impeach the credibility of a witness.

Ryak must show, by a preponderance of the evidence, that each of the factors for after-discovered evidence has been met. *Id.* at 363 (stating that the test is conjunctive). The Court, having found that Ryak failed to show that the alleged after-discovered evidence could not have been obtained at or prior to trial through reasonable diligence; the evidence is not cumulative; and that the evidence is not being used solely to impeach credibility; the Court did not reach the fourth element of the test, which is to assess whether the alleged after-discovered evidence is of a nature and character that it would likely compel a different verdict if a new trial is granted. *Id.* at 365. The Court made its decision to dismiss Ryak's PCRA Petition on the standards discussed herein, and not based on Ryak's charges of error to this Court in paragraphs 1-6 of his 1925(b) Statement, including determinations of credibility or any reliance on statements made by the Commonwealth in its Motion to Dismiss Ryak's PCRA petition.

b. Ryak did not meet the burden of showing that his Trial Counsel was ineffective at trial.

Ryak did not meet the burden of demonstrating that his Trial Counsel was ineffective. Under the *42 Pa. C.S. § 9543*, petitioner must plead and prove by a preponderance of the evidence, that his or her conviction resulted from "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." 42 Pa. C.S. § 9543(a)(2).

It is well settled that in order to make a claim for ineffective assistance of counsel, the petitioner must show that: (1) the underlying issue is of arguable merit; (2) that counsel's actions lacked an objective reasonable basis; and (3) that petitioner was prejudiced by counsel's act or omission. *Commonwealth v. Koehler*, 36 A.3d 121, 132 (Pa. 2012)(citing *Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987)). Counsel is presumed to be effective; the petitioner has the burden of proving otherwise. *[Jonathan] Jones*, 942 A.2d at 906. The failure of petitioner to show any prong on this three part test will result in the entire ineffective assistance of counsel claim to fail. *Id.*

The Court is not obligated to grant appellant an evidentiary hearing on an ineffective assistance of counsel claim. Indeed, if one of the three prongs in the ineffective assistance of counsel test may be found wanting based on an examination of the record as it exists, an evidentiary hearing is unnecessary. *Id.* at 907. As the Court explained in *[Jonathan] Jones*, while the Court may need a hearing to determine the second prong, the validity of counsel's trial strategy, the Court does not need a hearing to determine the third prong, prejudice to the appellant, where the Court can determine that there has been no prejudice from the existing record. *Id.* at 907. The Court also does not need a hearing or additional evidence where it can determine from the record that there is no arguable merit to the petitioner's claims, the first prong of the ineffective assistance of counsel analysis. *Id.* at 906.

Under the first prong in the ineffective assistance of counsel test, appellant must prove that the underlying legal claim, the issue appellant claims was improperly pursued, has "arguable merit." *Commonwealth v. Steele*, 961 A.2d 786, 821 (Pa. 2008)(emphasis in original). Under

the third prong, appellant must prove prejudice due to counsel's act of omission. *Koehler*, 36 A.3d at 132. Ryak claims trial counsel ineffectiveness due to: 1) counsel's decision to interview Karen Reddy for the first time right before Karen Reddy testified at trial and general lack of trial preparedness; 2) counsel's decision not to interview and call to testify Naiesha Reddy at trial; 3) counsel allowing hearsay testimony into evidence without objection; 4) counsel withdrawing a pretrial motion to suppress an out of court identification of Ryak by a witness; 5) counsel's failure to request a Kloiber charge; and 6) and counsel's failure to file a Rule 600 Motion.

Counsel's alleged failure to promptly interview witnesses or otherwise adequately prepare for trial

Ryak alleges that his Trial Counsel was ineffective for failing to promptly interview Karen Reddy before Trial. Essentially, Ryak argues that Trial Counsel was ineffective for waiting to interview Karen Reddy right before she testified at trial; Trial Counsel had at least three (3) days to interview Ms. Reddy prior to her testimony. The Court finds this claim without arguable merit. Counsel cannot automatically be held ineffective for failure to interview a witness at all, let alone for failing to interview a witness at the exact point in time that a petitioner thinks would be prompt. *Commonwealth v. Washington*, 927 A.2d 586, 598 (Pa. 2007).

To the extent that Ryak claims that Trial counsel as generally ineffective due to lack of trial preparedness, these claims are without arguable merit. While a multiple instances of deficient performance of counsel may constitute cumulative ineffectiveness, "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually." *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2007) (citing *Commonwealth v. Washington*, 927 A.2d 586, 617)(Pa. 2007)). Here, Ryak makes multiple bald assertions that Trial counsel was generally ill prepared for trial because he: decided to raise a pre-trial motion right before

trial; he didn't have copies of necessary exhibits; hadn't reviewed crime scene photos; did not do any pre-trial investigation; was ineffective in his cross-examination of witnesses; presented only a single character witness, Ms. Boost; failed to make sure another potential character witness was present to testify; and for being distracted. Although compelling, Ryak simply makes bald assertions of cumulative error which is below the standard for arguable merit. *Commonwealth v. Sattazahn*, 952 A.2d 640, 671 (Pa. 2008).

Counsel's failure to call Naiesha Reddy as a witness at trial

Ryak alleges that his Trial Counsel was ineffective for failing to call Naiesha Reddy as a witness at trial. Ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense. *Commonwealth v. McLaurin*, 45 A.3d 1131, 1137-1138 (Pa. Super. 2012). Ryak does not offer any evidence that Naiesha Reddy would have been willing to testify at trial. *Commonwealth v. Clark*, 961 A.2d 80, 90 (Pa. 2008)(listing willingness to testify as one of five elements for determining whether counsel was ineffective for failing to call a witness). Furthermore, the Trial Court precluded Naiesha Reddy's testimony on behalf of the Commonwealth, explaining that the Commonwealth planned to call Naiesha Reddy to testify that Ryak spit at the victim's former girlfriend. Lastly, Ryak has not shown that the "uncalled witnesses' testimony would have been beneficial under the circumstances of the case." *Commonwealth v. Gibson*, 951 A.2d 1110, 1134 (Pa. 2008). This claim of trial counsel ineffectiveness is without merit.

Withdrawal of pretrial motion to suppress an out-of-court identification of Ryak

Ryak alleges that his Trial Counsel was ineffective for withdrawing a pre-trial motion to suppress an out-of-court identification of Ryak. As a threshold issue, Ryak must prove the merit

of the underlying suppression claim to establish the merit of the ineffective assistance of counsel claim. *[Jonathan Paul] Jones*, 942 A.2d at 909. Here, Ryak claims that trial counsel was ineffective for withdrawing a motion to suppress Leticia Parker's out-of-court identification of Ryak because, as Ryak claims, the identification was unduly suggestive. Specifically, Ryak claims that while Ms. Parker was waiting to be interviewed in the Homicide Division, she observed Ryak, accompanied by a police officer, walk back in forth to the bathroom, which is unduly suggestive. At this point, another witness who was with Ms. Parker commented that Ryak was the shooter; to which Ms. Parker responded in the affirmative.

There is no arguable merit that Ms. Parker's out-of-court identification was unduly suggestive; therefore there is no arguable merit that Trial Counsel was ineffective for withdrawing the motion to suppress Ms. Parker's out-of-court identification. There is no evidence that the police contrived the inadvertent meeting between Ryak and Ms. Parker. *Commonwealth v. Butler*, 512 A.2d 667, 671-672 (Pa. Super. 1986). Therefore, there is no merit to the claim that the court-of-court identification was unduly suggestive. Furthermore, Ryak agreed to Trial counsel's withdrawal of the motion to suppress Ms. Parker's out-of-court identification after a full colloquy by the Trial Court. Cmwlth. Mot. to Dismiss (07/22/2011); 42 Pa. C.S. § 9544(b).

Counsel allowing hearsay testimony into evidence without objection

Ryak claims that Trial counsel was ineffective for withdrawing an objection to testimony that Ryak and co-conspirator were cousins. This claim in without arguable merit. Hearsay is an out-of-court statement offered for the truth of the matter asserted; statements offered for other purposes besides the truth of the matter asserted are not hearsay and will not be excluded as such. *Commonwealth v. Cassidy*, 462 A.2d 270, 272 (Pa. Super. 1983). Even if testimony as to

familial relationship in this context is hearsay, it falls within the "reputation concerning personal or family history" exception to hearsay under the Pennsylvania Rules of Evidence. Pa.R.E. 803(19); *Commonwealth v. Collins*, 957 A.2d 237, 270 (Pa. 2008)(explaining why reputations as to family members or in the community as to such facts are inherently trustworthy).

Here, multiple witnesses testified that Ryak and a co-conspirator were known in the neighborhood as cousins. Ryak claims that this testimony was used by the Commonwealth to rebut Ryak's misidentification defense. Trial counsel made no objection to this testimony when first admitted; and later withdrew an objection to this testimony during the examination of Karen Reddy. The Court agrees with the Trial Court that the statements linking Ryak and a co-conspirator together as cousins were not hearsay because they were not offered for the truth of the matter, that Ryak was actually blood-related to the co-conspirator, but rather that the statements were offered to show that Ryak and the co-conspirator held themselves out to be cousins. Nevertheless, even if these statements were hearsay, they fall within an exception to the hearsay exclusion under the Pennsylvania Rules of Evidence. Therefore, a claim of ineffectiveness due to Trial counsel's failure to object to this testimony is without arguable merit.

Lastly, Ryak has not shown any prejudice due to Trial counsel's failure to object to the statements that he was known in the neighborhood as the cousin of the co-conspirator in light of the evidence sufficient to identify Ryak as the perpetrator of the crime of which he was convicted. *Collins*, 957 A.2d at 244 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Counsel's alleged failure to request a Kloiber instruction

Ryak claims that Trial counsel was ineffective for failing to request a Kloiber instruction pursuant to *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954). A Kloiber instruction is

warranted were the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past." *Commonwealth v. Ali*, 10 A.3d 282, 303 (Pa. 2010). Where there is an independent basis for an in-court identification of the defendant due to prior familiarity, an appellant's ineffectiveness claims for failure to seek a Kloiber instruction are weakened. *Id.* (citing *Commonwealth v. Fisher*, 813 A.2d 761, 770-771).

Here, Ryak claims that Trial counsel was ineffective for failing to request a Kloiber instruction in regards to the in-court identification at trial by Reniece James. Ryak bases this claim on the fact that Ms. James saw Ryak at the police station while waiting to be interviewed by the detective and that Ms. James did not tell the detective that she had just seen Ryak pass by her in the hallway. Also, Ryak claims that Ms. James did not identify him while she was in the same courtroom with Ryak the day before the trial. Based on these alleged failures to positively identify Ryak, Ryak claims that Trial counsel should have requested a Kloiber instruction.

Ms. James testified that she saw Ryak stand over the victim, shoot him several times, and then run down Wingohocking Street towards 18th Street. Ms. James saw Ryak with the co-conspirator on four to five (4-5) occasions around the neighborhood prior to the shooting. Ryak has not shown any of the three circumstances warranting a Kloiber instruction. To the extent that Ryak argues prong three (3) of the Kloiber test, Ms. James did not have a problem identifying Ryak, just because she did not immediately tell someone that Ryak was the shooter during situations where she was not explicitly being asked to identify him. This is not a situation where Ms. James failed to identify Ryak, for instance, in a photo array or line-up. Furthermore, the evidence establishes that Ms. James was already familiar with Ryak prior to the shooting,

which creates and independent basis for her in-court identification. Ryak's claim of Trial counsel ineffectiveness for failure to request a Kloiber instruction is without merit.

Counsel's alleged failure to file a Rule 600 Motion

Ryak claim that his Trial counsel was ineffective for failing to file a motion to dismiss for lack of speedy trial pursuant to *Pa.R.Crim.P. 600* ("Rule 600 Motion"). This claim is without arguable merit. Under the Pennsylvania Rules of Criminal Procedure, criminal defendants in the Commonwealth of Pennsylvania have the right to a prompt trial. Pa.R.Crim.P. 600. A defendant may file a Rule 600 Motion to dismiss the charges against him or her where the record supports the conclusion that the defendant's trial was commenced outside of the specific limits in the Rules of Criminal Procedure. *Id.* Certain types of continuances are excluded from the calculation for a prompt trial. *Id.*

Like all claims of PCRA counsel ineffectiveness, appellant must show the three prongs necessary to obtain relief. Here, Ryak fails to direct the Court's attention to any facts to support a claim of Trial counsel ineffectiveness for failure to file a Rule 600 Motion. Ryak simply states that a complaint was filed against him in 2003 and that he went to trial in 2006. Furthermore, a review of the docket in this case reveals that there were numerous continuances from 2003 through 2006; Ryak does not distinguish which continuance were due to his own counsel and which were attributed to the Commonwealth. The Court will not speculate as to these essential facts for a Rule 600 Motion.

c. Ryak did not meet the burden of showing that his Appellate Counsel was ineffective.

Ryak's claim that Appellate counsel was ineffective is not of arguable merit. *Koehler*, 36 A.3d at 132. Ryak states that his Appellate counsel was serially ineffective for failing to raise

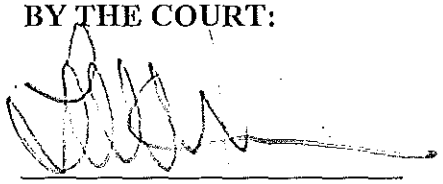
the issue of whether a Kloiber instruction was necessary based on Ms. James in-court identification of Ryak. Ryak's *pro se* allegation of general Appellate counsel ineffectiveness is incorporated herein. In order for Appellate counsel to be deemed ineffective, appellant must plead, present, and prove a layered ineffectiveness claim against Appellate counsel. *Commonwealth v. McGill*, 832 A.2d 1014, 1022 (Pa. 2003). To succeed on a layered ineffectiveness claim, appellant must prove all three prongs of the Strickland/Pierce ineffective assistance of counsel test for Trial counsel, which is incorporated in prong one of the ineffectiveness test for Appellate counsel. Appellant then has to prove prongs two and three of the ineffective assistance of counsel test independently for Appellate counsel. *Id.* at 1022-1024. If any one of the prongs as to Trial counsel's ineffectiveness is not established, then the claim of appellate counsel's ineffectiveness fails. *Id.*

Here, Ryak's claim that Trial counsel was ineffective for not requesting a Kloiber instruction is without arguable merit because such an instruction would not be warranted where there is an independent basis for Ms. James' in-court identification of Ryak. In addition, Ryak did not otherwise show any of the three circumstances warranting a Kloiber instruction. As such, Ryak's claim of general Appellate counsel ineffectiveness is without arguable merit. Moreover, Ryak's claim of general Appellate counsel ineffectiveness is without merit because Ryak failed to show Trial counsel ineffectiveness on any of his claims.

III. CONCLUSION

The Court did not err in dismissing Ryak's PCRA petition without a hearing. There is no arguable merit to Ryak's claims of after-discovered evidence; Trial counsel ineffectiveness; and Appellate counsel ineffectiveness.

BY THE COURT:



LEON W. TUCKER, JUDGE