NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. WILBERT TORILLO ROBINSON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 132 MDA 2013

Appeal from the Order Entered August 28, 2012
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0001502-2006
CP-36-CR-0005141-2005

BEFORE: BENDER, P.J., LAZARUS, J., and FITZGERALD, J.*

MEMORANDUM BY LAZARUS, J. **FILED DECEMBER 17, 2013**

Wilbert Torillo Robinson appeals from the order of the Court of Common Pleas of Lancaster County denying his petition filed pursuant to the Post Conviction Relief Act (PCRA).[1] Robinson tendered a guilty plea to four counts of robbery (F1), two counts of robbery (F2), two counts of criminal conspiracy to commit robbery (F1) and one count of aggravated assault. Robinson was sentenced on August 2, 2007, to an aggregate term of 12½ to 25 years' incarceration. After his appellate rights were reinstated *nunc pro tunc* through PCRA proceedings, this Court affirmed his judgment of

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* Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S.A. §§ 9541-9546.

sentence on April 14, 2011. Robinson filed the instant PCRA petition on May 5, 2012; counsel was appointed and filed an amended petition on July 23, 2012. The PCRA court dismissed Robinson's petition without a hearing by order dated September 8, 2012. This timely appeal followed, for which new counsel was appointed.

On appeal, Robinson's counsel seeks to withdraw. Thus, before we can address the merits of the case, we must first determine if counsel satisfied the technical requirements of ***Turner***/***Finley***.[2] ***Commonwealth v. Mosteller***, 633 A.2d 615, 617 (Pa. Super. 1993). In order to withdraw from an appeal pursuant to ***Turner***/***Finley***, counsel must submit a "no-merit" letter/brief that includes a description of the nature and extent of counsel's review, a list of the issues the petitioner wished to raise, and an explanation of why those issues lack merit. ***See Commonwealth v. Karanicolas***, 836 A.2d 940, 947 (Pa. Super. 2003). Counsel must also send to the appellant: (1) a copy of counsel's "no-merit" letter/brief; and (2) a statement advising the appellant that, in the event the court grants counsel's application to withdraw, he has the right to proceed *pro se* or with privately retained counsel. ***Commonwealth v. Friend***, 896 A.2d 607, 615 (Pa. Super. 2006). If counsel fails to satisfy the foregoing technical

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[2] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1998); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988).

requirements, this Court will not reach the merits of the underlying claims but, rather, will deny counsel's request to withdraw and remand the case with appropriate instructions. ***Mosteller***, ***supra*** at 617.

Here, counsel's amended ***Turner***/***Finley*** brief includes a description of the nature and extent of counsel's review, a list of the issues the petitioner wished to raise, and an explanation of why those issues lack merit. In addition, counsel sent Robinson a copy of counsel's "no-merit" brief and a statement advising Robinson, in the event the court grants counsel's application to withdraw, he has the right to proceed *pro se* or with privately retained counsel. Accordingly, counsel has complied with the requirements of ***Turner***/***Finley***. As such, we proceed to our own independent review of Robinson's issues to determine whether they are truly meritless.

In his amended ***Turner***/***Finley*** brief, counsel states that Robinson wished to raise the following issues for our review, which we have restated for the sake of clarity:

1. Trial counsel was ineffective for failing to file a motion to suppress Robinson's post-arrest statements to police.

2. Appellate counsel was ineffective for failing to challenge the discretionary aspects of Robinson's sentence where the trial court imposed upon Robinson a sentence identical to those imposed upon his co-defendants.

We have reviewed the transcripts, the briefs, the relevant law, and the record as a whole and conclude that the excellent opinion of the Honorable David L. Ashworth thoroughly, comprehensively and correctly disposes of the issues Robinson raises on appeal. First, Judge Ashworth correctly

determined that Robinson cannot demonstrate that he was prejudiced by trial counsel's failure to file a motion to suppress, as the remainder of the Commonwealth's evidence, including "[t]he physical evidence, the eyewitness evidence of Officer Hagen, and the incriminating statements of [Robinson's] co-defendants was more than sufficient evidence to tie [Robinson] to these robberies." PCRA Court Opinion, 8/28/12, at 15. Second, with respect to Robinson's sentence, Judge Ashworth engaged in an on-the-record sidebar discussion with counsel memorializing an earlier discussion in chambers regarding the individualization of the sentences of Robinson and his co-defendants. ***See*** N.T. Sentencing, 8/2/07, at 17-27. Judge Ashworth emphasized that, despite the similarity of the co-defendants' sentences, he had considered the age, rehabilitative needs, presentence reports and involvement in the offenses of each individual defendant. ***See*** N.T. Sentencing, 8/2/07, at 18. He made his sentencing determination based upon those factors, as well as the nature and severity of the offenses and the combined efforts of everyone involved. ***Id.*** In fashioning Robinson's sentence, the court

> took into account the following factors: [Robinson's] age (19); his family history; his educational background, having completed the 11th grade prior to his arrest on these charges and having obtained his GED diploma while incarcerated; his substance abuse history, starting with his use of marijuana and alcohol at age 16; his lack of employment history; his prior juvenile record; his character; his lack of remorse; and his rehabilitative needs and potential.

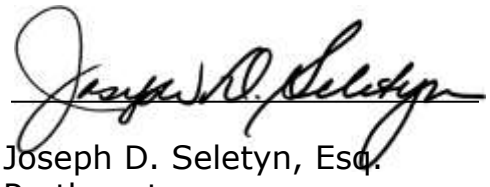
PCRA Court Opinion, 8/28/12, at 18-19.

As Judge Ashworth correctly concludes in his opinion, Robinson suffered no prejudice as a result of appellate counsel's failure to challenge the discretionary aspects of his sentence, as any such challenge would have garnered him no relief. Accordingly, we affirm based on Judge Ashworth's opinion. Counsel is directed to attach a copy of that opinion in the event of further proceedings in this matter.

Order affirmed.

FITZGERALD J., Concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :
:
v. : Nos. 5141-2005A & 1502-2006
:
WILBERT TORILLO ROBINSON :

OPINION

BY: ASHWORTH, J., AUGUST 28, 2012

Wilbert Torillo Robinson has filed *pro se* and amended petitions pursuant to the Post Conviction Collateral Relief Act (PCRA), 42 Pa. C.S.A. §§ 9541-9546. For the reasons set forth below, this Petition will be denied without a hearing.[1]

I. Procedural Background

By Information No. 5141-2005A, Petitioner was charged with five counts of robbery, one count of criminal conspiracy, and one count of aggravated assault.[2] Petitioner was later charged at Information No. 1502-2006 with criminal conspiracy, and robbery.[3] These offenses occurred on August 15, 2005, and August 25, 2005.

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[1]Under Rule 907 of the Pennsylvania Rules of Criminal Procedure, a PCRA court may dispose of post conviction collateral relief petitions without a hearing if it is satisfied after reviewing the materials submitted that no genuine issues of material fact exist and that the petitioner is not entitled to post conviction relief. Pa. R.Crim.P. 907.

[2]18 Pa. C.S.A. § 3701(a)(1), 18 Pa. C.S.A. § 903, 18 Pa. C.S.A. § 2702(a)(1), respectively.

[3]18 Pa. C.S.A. § 3701(a)(1) and 18 Pa. C.S.A. § 903, respectively.

Because Petitioner was 17 years of age at the time these offenses were committed, Petitioner filed a motion to transfer proceedings to juvenile court on November 11, 2006. A juvenile decertification hearing was held in this matter before the Honorable Michael J. Perezous on December 27, 2006. By Opinion and Order dated March 8, 2007, Judge Perezous denied the petition, and ordered that Petitioner be tried as an adult on all charges.

Thereafter, Petitioner's cases were consolidated, for purposes of trial, with his six accomplices, Geollius Robinson (#5138-2005), Gaston Robertson-Stewart (#5142A-2005), Garry S. Dorsey (#5137-2005), William A. White (#5140-2005), Tavon Robertson (#1481-2006),[4] and Dominique Boyer (#5139-2005).[5] After numerous continuances by the co-defendants, their case was scheduled for trial for the May 2007 trial term, at which time the Commonwealth was prepared to proceed to trial.

Before a jury was selected, Petitioner and his co-defendants chose to enter open pleas on May 7, 2007. At that time, the Court accepted Petitioner's plea, after determining that Petitioner had knowingly, voluntarily, and intelligently chosen to plead guilty. (N.T., Guilty Plea at 25-26.) Sentencing was deferred pending a pre-sentence investigation report. Petitioner was represented at his plea by court-appointed counsel, Paul Campbell, Esquire.

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[4]Tavon Robertson was involved only in the incident on August 15, 2005, involving Stephen Ruhl.

[5]Dominique Boyer was involved only in the initial incident on August 25, 2005, involving Anthony Pugliese.

On August 2, 2007, Petitioner appeared before me and was sentenced on Information No. 5141-2005A to an aggregate sentence of 9-1/2 to 19 years. On Information No. 1502-2006, Defendant received a sentence of three to six years incarceration on the robbery charge and two to four years on the criminal conspiracy charge. The sentences on these charges were concurrent to each other but consecutive to the sentence at No. 5141-2005A. Thus, the aggregate effect of these sentences was 12-1/2 to 25 years. Petitioner was represented by Attorney Campbell at this sentencing hearing.

On August 10, 2007, Petitioner filed a timely motion to modify sentence claiming that the sentence imposed by the Court (1) was "unjust and inequitable," (2) was disproportionate to the sentences imposed on two co-defendants by another judge, and (3) failed to consider his individual achievements and mitigating circumstances of age, rehabilitative potential and limited involvement in the criminal episodes. On August 20, 2007, I entered an order denying Petitioner's motion to modify and reduce sentence.

Petitioner filed a direct appeal with the Superior Court of Pennsylvania on September 19, 2007, from his judgment of sentence entered on August 2, 2007, as finalized by the denial of Petitioner's post sentence motion by Order dated August 20, 2007. Thereafter, Petitioner was directed to identify the matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) and on October 10, 2007, he filed a Rule 1925(b) statement listing two issues.[6] On October 16, 2007, I

[6]The two bases for appeal were: (1) the sentence imposed by the court failed to give due consideration to the mitigating factors in this case; and (2) the sentence imposed by the court and the order denying reconsideration of that sentence constituted an abuse of discretion by the Court.

filed an opinion pursuant to Rule 1925(a) addressing each of the issues raised on appeal.

The Superior Court directed trial counsel, on behalf of Petitioner, to file a brief in support of the appeal on or before December 12, 2007. On January 15, 2008, an Order was issued by the Superior Court dismissing the appeal for trial counsel's failure to file a brief.

On November 19, 2008, Petitioner filed a timely *pro se* motion for post conviction collateral relief. Pursuant to Rule 904(A) of the Pennsylvania Rules of Criminal Procedure, Jeffrey A. Conrad, Esquire, was appointed on December 11, 2008, to represent Petitioner on his collateral claims. Counsel filed an amended petition on March 30, 2009, in which he raised two issues: (1) whether trial counsel's failure to file a brief with the Pennsylvania Superior Court was *per se* ineffective assistance of counsel; and (2) whether trial counsel unlawfully induced Petitioner to plead guilty to Counts 2 and 3 on Information No. 5141-2005A.

By Order and Opinion dated April 16, 2009, I found that trial counsel's failure to file a brief with the Superior Court did constitute *per se* ineffective assistance of counsel. Accordingly, Petitioner's amended petition for post conviction collateral relief was granted and his direct appeal rights were reinstated, *nunc pro tunc*. I further directed that PCRA counsel should continue in his representation of Petitioner through the appellate process.

On June 22, 2009, Petitioner filed a post sentence motion, *nunc pro tunc*, in which he raised two issues: (1) whether "[Petitioner's] guilty plea was unlawfully induced and was not the produce [sic] of a knowing or intelligent waiver of his Constitutional

rights"; and (2) whether "the sentence dealt to [Petitioner] was excessive and inequitable when fully considered and individually applied" by the Court. (*See* Post-Sentence Motion *Nunc Pro Tunc* at ¶¶ 34 and 42.) By Order and Opinion dated July 2, 2009, Petitioner's post sentence motion, *nunc pro tunc*, was denied.

Petitioner filed a direct appeal to the Superior Court of Pennsylvania from the Court's judgment of sentence.[7] The Superior Court affirmed the judgment of sentence in an unpublished memorandum dated June 15, 2010. A petition for allowance of appeal was denied by the Supreme Court of Pennsylvania on March 16, 2011. Petitioner was represented on appeal by court-appointed counsel, Jeffrey Conrad.

On May 2, 2012, Petitioner, acting *pro se*, filed a timely[8] petition for post conviction collateral relief. In this pleading, Petitioner raised claims relating to ineffective assistance of counsel. Pursuant to Rule 904(A) of the Pennsylvania Rules of Criminal Procedure, Carolyn Flannery, Esquire, was court-appointed on May 10, 2012, to represent Petitioner on his collateral claims and was granted leave to file an amended petition, if appropriate.

On July 23, 2012, counsel filed an amended petition in which she raised two issues: (1) Attorney Campbell was ineffective for failing to file an omnibus pretrial motion seeking the suppression of Petitioner's statements to the police after his arrest;

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[7]Pursuant to the Court's directive, on September 1, 2009, Petitioner furnished a statement of errors complained of on appeal which raised two issues: (1) the trial court erred when it denied Petitioner's motion challenging the validity of the guilty plea and request to withdraw plea; and (2) the trial court erred when it denied Petitioner's motion to modify sentence.

[8]In order to be considered timely, PCRA petitions must be filed within one year of the date that the judgment becomes final. 42 Pa. C.S.A. § 9545(b)(1). I consider this Petitioner's first petition and it was timely filed. (*See* discussion *infra* at p. 6-7.)

and (2) Attorney Conrad was ineffective for failing to include in his appeal to the Superior Court a challenge to Petitioner's judgment of sentence based on the identical nature of that sentence to those of his co-defendants also sentenced by this Court.

The Commonwealth filed a timely response on July 31, 2012, in which it challenged the timeliness of the *pro se* PCRA petition. Specifically, the Commonwealth claims that Petitioner's judgment of sentence became final on the date the Supreme Court of Pennsylvania denied allowance of appeal – March 16, 2011.[9] Since Petitioner's *pro se* PCRA petition was not filed until May 2, 2012 (over one year after his judgment was allegedly final), the Commonwealth claims Petitioner's petition is untimely and that he has further failed to plead and prove any of the timeliness exceptions found at 42 Pa. C.S.A. § 9545(b)(1)(i-iii).

Under 42 Pa. C.S.A. § 9545(b)(1), "[a]ny petition under this subchapter . . . shall be filed within one year of the date the judgment becomes final," subject to exceptions which do not apply here. Under § 9545(b)(3), "a judgment becomes final at the conclusion of direct review, *including discretionary review in the Supreme Court of the United States* and the Supreme Court of Pennsylvania, *or at the expiration of time for seeking the review*." 42 Pa. C.S.A. § 9545(b)(3) (emphasis added). Here, Petitioner's petition for allowance of appeal was denied by the Pennsylvania Supreme Court on March 16, 2011. United States Supreme Court Rule 13 provides that "[a] petition for

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[9]Defense counsel mistakenly set forth in her amended petition that "[o]ur Supreme Court denied the defendant's petition for allowance of appeal on April 12, 2011." (*See* Amended PCRA Petition at ¶ 7.) The Commonwealth repeated that error when it stated in it's answer to the Amended PCRA Petition: "On April 12, 2011, the Supreme Court of Pennsylvania denied [the] allowance of appeal." (*See* Commonwealth's Answer at 2.)

writ of *certiorari* seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when filed with the Clerk within 90 days after entry of the order denying discretionary review." U.S. Sup.Ct. Rule 13, 28 U.S.C.A. Under this rule, Petitioner had 90 days to seek review of his conviction by the United States Supreme Court, or until June 14, 2011. Thus, Petitioner's judgment became final on June 14, 2011.[10] 42 Pa. C.S.A. § 9545(b)(3). Under 42 Pa. C.S.A. § 9545(b)(1), Petitioner had one year from this date 2012, to file his PCRA petition. Because Robinson's petition was filed on May 2, 2012, it was timely.

After reviewing the *pro se* and amended petitions, and the record in this case, I found that there were no disputed issues of fact, Petitioner was not entitled to post conviction collateral relief, and no purpose would be served by any further proceedings. Therefore, on August 16, 2012, pursuant to Pa. R.Crim.P. 907(1), I filed a notice of my intention to dismiss the PCRA petition without a hearing. Petitioner was given 20 days to file an amended petition or to otherwise respond to the Court's Notice.

On August 22, 2012, I received Petitioner's response to the Rule 907(1) Notice. In this reply, Robinson addressed the Commonwealth's allegation of a time-bar, and reiterated that "an allegation that trial counsel was ineffective for failing to pursue a

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[10]Our appellate courts have held that a defendant's one-year period to file a PCRA petition, including second or subsequent petitions, begins to run 90 days after the Pennsylvania Supreme Court's denial of the defendant's petition for allowance of appeal, where the defendant fails to seek review of his conviction by the United States Supreme Court. *See* **Commonwealth v. Fairiror**, 809 A.2d 396, 398 (Pa. Super. 2002). *See also* **Commonwealth v. Owens**, 718 A.2d 330, 331 (Pa. Super. 1998) (statute of limitations for filing petition for post conviction relief did not begin to run until defendant's period for filing petition for *certiorari* in the United States Supreme Court lapsed).

suppression motion is cognizable under the PCRA," *citing* **Commonwealth v. Franklin**, 990 A.2d 795 (Pa. Super. 2010).

III. Eligibility for PCRA Relief

A petitioner seeking relief pursuant to the PCRA is eligible only if he pleads and proves, by a preponderance of the evidence, that (1) he has been convicted of a crime under the laws of this Commonwealth and is currently serving a sentence of imprisonment, probation or parole for the crime, (2) his conviction has resulted from one or more of the enumerated errors or defects found in § 9543(a)(2) of the PCRA, (3) he has not waived or previously litigated the issues he raises, and (4) the failure to litigate the issue prior to and during trial, or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel. 42 Pa. C.S.A. § 9543(a)(2), (3), (4).

A petitioner has previously litigated an issue if (1) the highest appellate court in which a petitioner could have had review as a matter of right has ruled on the merits of the issue, **Commonwealth v. Spotz**, — Pa. —, 47 A.3d 63, 76 (2012), or (2) the issue has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa. C.S.A. § 9544(a); **Commonwealth v. Phillips**, 31 A.3d 317, 320 (Pa. Super. 2011). In this case, the issues contained in the *pro se* and amended petitions have not been previously litigated in the appellate courts.

With respect to claims that have not been previously litigated, a petitioner must also demonstrate that the claims have not been waived. A petitioner has waived an

issue if the petitioner could have raised the issue but failed to do so before trial, on appeal, or in a prior state post conviction proceeding. 42 Pa. C.S.A. § 9544(b); **Spotz**, — Pa. at —, 47 A.3d at 76. However, waiver will be excused under the PCRA if petitioner can meet the conditions of 42 Pa. C.S.A. § 9543(a)(3)(ii) or (iii)[11] or by making a showing of ineffective assistance of counsel. **Commonwealth v. Morales**, 549 Pa. 400, 409, 701 A.2d 516, 520 (1997).

In order to prevail on a claim of ineffective assistance of counsel made in the post conviction context, a petitioner must overcome the presumption that counsel is effective by establishing by a preponderance of the evidence that: the underlying claim has arguable merit; trial counsel had no reasonable basis for proceeding as he did; and the petitioner suffered prejudice. *See* 42 Pa. C.S.A. § 9543(a)(2)(ii); **Spotz**, — Pa. at —, 47 A.3d at 76 (*citing* **Commonwealth v. Pierce**, 515 Pa. 153, 158-59, 527 A.2d 973, 975-76 (1987)). The client has the burden of establishing counsel's ineffectiveness because counsel is presumptively effective. Id.

With respect to whether counsel's acts or omission were reasonable, defense counsel is accorded broad discretion to determine tactics and strategy. **Commonwealth v. Fowler**, 447 Pa. Super. 534, 670 A.2d 1153 (1996), *aff'd* 550 Pa.

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[11]Section 9543(a)(3) provides:
[T]hat the allegation of error has not been previously litigated and one of the following applies: (i) The allegation of error has not been waived. (ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual. (iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.
42 Pa. C.S. § 9543(a)(3).

152, 703 A.2d 1027 (1997). The applicable test is not whether alternative strategies were more reasonable, employing a "hindsight" evaluation of the record, but whether counsel's decision had *any* reasonable basis to advance the interests of the defendant. **Commonwealth v. Chmiel**, — Pa. —, 30 A.3d 1111, 1127 (2011). The appellate courts will conclude that counsel's chosen strategy lacked a reasonable basis only if the petitioner proves that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." **Commonwealth v. Williams**, 587 Pa. 304, 312, 899 A.2d 1060, 1064 (2006) (citation omitted).

To establish the prejudice prong, the petitioner must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness. **Chmiel**, 30 A.3d at 1127. "We stress that boilerplate allegations and bald assertions of no reasonable basis and/or ensuing prejudice cannot satisfy a petitioner's burden to prove that counsel was ineffective." Id. (*quoting* **Commonwealth v. Paddy**, — Pa. —, 15 A.3d 431, 443 (2011)).

Petitioner has raised two issues regarding the ineffective assistance of counsel which have not been waived or previously litigated and, therefore, are subject to review by this Court.

IV. Discussion

A. Trial Counsel Ineffectiveness

Initially, Petitioner claims trial counsel, Paul Campbell, was ineffective for failing to file an omnibus pretrial motion requesting this Court suppress his statements to the

police after being arrested. "Given that none of the victims positively identified [Petitioner] as participating in the robberies, [Petitioner's] incriminating statements constitute a substantial portion of the evidence the Commonwealth could have used against him at trial." *See* Amended PCRA Petition at ¶ 10.

It is correct that none of the victims positively identified Petitioner. However, there is substantial evidence tying Petitioner to each of the charged robberies. The first offense occurred on August 15, 2005, at approximately 11:30 p.m. Stephen Ruhl was confronted in the 600 block of North Shippen Street in the City of Lancaster by a group of at least three males as he walked home from Stubby's Bar after having purchased a six-pack of beer. Mr. Ruhl was struck in the face with a handgun and told to remove his belongings. He complied, turning over his wallet, which contained approximately $150.00 in cash, and credit cards. He was then struck in the face with the six-pack of beer before the perpetrators fled in a waiting get-away car being driven by Petitioner. (Notes of Testimony ("N.T."), Guilty Plea at 13-14; *see also* No. 1502-2006 Criminal Complaint, Affidavit of Probable Cause at ¶¶ 1-4.)

Approximately 40 minutes later, there was an attempt by one of the perpetrators to use one of Mr. Ruhl's stolen credit cards at the Wal-Mart on Lincoln Highway East, just outside the City. Police responded to the store and obtained the surveillance video, which they later determined contained photos of Petitioner, along with his charged accomplices, William Anthony White and Tavon Robinson. (N.T., Guilty Plea at 14; *see also* No. 1502-2006 Criminal Complaint, Affidavit of Probable Cause at ¶¶ 5-9.) Thus, there is physical evidence tying Petitioner to the first robbery.

The next robbery occurred on August 25, 2005, at approximately 9:42 p.m., when Anthony Pugliese was approached by a group of six males as he walked home from the Green Briar Café in the 300 block of North Shippen Street in the City of Lancaster. Mr. Pugliese was kicked and punched repeatedly all over the upper half of his body, resulting in serious bodily injury, including eight facial fractures. In the course of the assault, the actors rummaged through Mr. Pugliese's pockets and removed $1.50. (N.T., Guilty Plea at 17-18; *see also* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶ 6.)

Mr. Pugliese heard someone come to the scene to assist him by yelling at the group and telling them "to leave him alone"; however, Mr. Pugliese was unable to see anything at that time because he had blood in both of his eyes, and the assault continued. The individuals who came to Mr. Pugliese's assistance were Gina Boley and Erica Sheneberger, who pulled up in a vehicle and yelled at the group. Ms. Boley and Ms. Sheneberger observed five or six individuals assaulting Mr. Pugliese. The women fled the scene when they were approached by a male who pointed a black handgun at their car and told them to leave. Ms. Boley and Ms. Sheneberger drove around the block and returned to aid Mr. Pugliese after calling the police. (*See* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶ 3.)

Within minutes of being radioed to the scene, the City police observed three black males matching the descriptions of the robbery suspects walking south in the first block of North Shippen Street. When the officer ordered the suspects to stop, they separated and ran in all directions. One suspect, later identified as Dominique Boyer, was caught in the area of 457 Pershing Avenue and arrested. Petitioner was observed

by Officer Michael Hagen running from the scene but was not apprehended. (*See* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶ 2.) Thus, there is eyewitness evidence linking Petitioner to the first robbery on August 25, 2005.

The next robbery occurred approximately one hour later. At 10:45 p.m., Michael Martin and Josh Wolpert left Cherry's Jubilee (a restaurant) and traveled down Park Avenue in the City of Lancaster to Stubby's Bar. As they walked, they passed a black male who was seated on a porch with a shirt pulled over his face. As they passed him, the male stood up and approached them and said he had a gun under his shirt, and that they should walk down the alley or he would "put something hot in [them]." Mr. Martin and Mr. Wolpert complied with the directive and walked down the alley where they were approached by four other males with red bandanas on their faces. The men were told to empty their pockets and they complied, giving their wallets, cell phones, keys, cigarettes, and other items to the perpetrators. Mr. Wolpert saw what he believed to be a firearm under one man's shirt. The victims were told to walk down the alley and not turn around, and they complied. They went directly to the City Police Station and reported the incident. (N.T., Guilty Plea at 20-21; *see also* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶¶ 8-12.)

Petitioner's brother and co-defendant, Geollius Robinson, told the police that Petitioner was in the get-away car while Martin and Wolpert were being robbed. (*See* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶ 24.) Petitioner's cousin and co-defendant, Gaston Robertson-Stewart, also gave a statement to the police implicating Petitioner in the robbery of Martin and Wolpert. (Id. at ¶ 23.)

The last robbery occurred approximately 50 minutes later at 11:36 p.m. on August 25, 2005. Stephen Smoker and Bethany DeGaetano were standing in front of 404 West James Street in Lancaster City embracing and saying goodbye as they were approached by five black males who walked passed them and turned the corner. Moments later, the group of males returned walking at a fast pace and struck Mr. Smoker in his face, causing him to fall to the ground. Mr. Smoker was encircled by the individuals so he got in the fetal position as the individuals were throwing punches. The perpetrators rummaged through Mr. Smoker's pockets and removed his wallet. As one of the individuals was about to kick Mr. Smoker in the face, Ms. DeGaetano came to his aid by attempting to push the individual. He responded by punching Ms. DeGaetano in the face. The group of individuals then walked away west on James Street towards Franklin and Marshall College. Mr. Smoker immediately called the police and reported the incident. (N.T., Guilty Plea at 22-23; *see also* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶¶ 13-14.)

Officer Mark Radmore of the Lancaster City Bureau of Police responded to a dispatch of the robbery and proceeded toward Franklin and Marshall College in a marked patrol car where he observed a black male at an ATM machine located at the Turkey Hill convenience store on Harrisburg Pike with a tan vehicle parked in front of the ATM with four black male occupants. The male at the ATM machine became visibly nervous when he observed the police car and began to walk away at which time he was directed to stop, but he refused and fled on foot. He was later apprehended and identified as William White. (*See* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶¶ 16, 27, 29, 31-32.)

The driver of the vehicle was identified as Wilbert Robinson, the petitioner herein, the front passenger was his brother, Geollious Robinson, and the rear passengers were Gaston Robertson-Stewart, cousin to the Robinson brothers, and Garry S. Dorsey, Jr. (N.T., Guilty Plea at 23; *see also* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶ 17.) Ms. DeGaetano told the police that all four subjects "looked similar to and matched the same general appearance of the robbery suspects." (*See* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶ 18.) Moreover, a subsequent search of the car revealed items belonging to some of the robbery victims, including the cell phone of Josh Wolpert, the wallet of Stephen Smoker, and a bank deposit slip of Michael Martin. (Id. at ¶¶ 21, 30.) Additionally, the police discovered a red bandana in the vehicle of the type used in the robbery of Martin and Wolpert. (Id. at ¶ 17.)

Again, co-defendants Geollious Robinson and Gaston Robertson-Stewart identified Petitioner as a participant in the James Street robbery. (*See* No. 5141-2005A Criminal Complaint, Affidavit of Probable Cause at ¶¶ 23, 24.) Co-defendant Garry Dorsey also identified Petitioner as a participant in all three robberies on August 25 and 26. (Id. at ¶ 28.)

The physical evidence, the eyewitness evidence of Officer Hagen, and the incriminating statements of Petitioner's co-defendants was more than sufficient evidence to tie Petitioner to these robberies. Thus, even had trial counsel filed a motion to suppress Petitioner's statements, and been successful,[12] under the circumstances of

[12]Given the fact that Petitioner's incriminating statements were made in the presence of his father after being properly Mirandized (*see* No. 5141-2005A Criminal Complaint, Affidavit of

this case, Petitioner would most probably have still entered a guilty plea to all charges as the Commonwealth could present sufficient evidence to convince a jury beyond a reasonable doubt that Petitioner was guilty of the charges.

As noted above, the Commonwealth was prepared to proceed to trial on May 7, 2007. Over 30 witnesses had been subpoenaed by the Commonwealth, including two of the victims who had flown in from Chicago, Illinois, and another who traveled from Virginia. Just prior to the jury being selected, Petitioner's co-defendants chose to plead guilty. Had Petitioner proceeded to trial and his co-conspirators testified against him, a conviction would have been assured. Accordingly, Petitioner has failed to establish that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's alleged ineffectiveness in failing to file a suppression motion. *See* **Chmiel**, 30 A.3d at 1127. As Petitioner has suffered no actual prejudice, he cannot prevail on his claim of ineffective assistance of trial counsel made in this post conviction context. *See* 42 Pa. C.S.A. § 9543(a)(2)(ii).

B. Appellate Counsel Ineffectiveness

Petitioner further contends that appellate counsel, Jeffrey Conrad, failed to include in his Rule 1925 statement of errors complained of on appeal a challenge to the fact that Petitioner received an identical sentence to those of his three co-defendants also sentenced by this Court and, consequently, the Superior Court deemed this issue waived on appeal. As stated above, in order to prevail on a claim of ineffective

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Probable Cause at ¶¶ 25-26), as the Judge who would have ruled on the motion, I can attest to the fact that it is highly doubtful that a suppression motion would have been successful.

assistance of counsel made in the post conviction context, a petitioner must establish by a preponderance of the evidence that the petitioner suffered *actual* prejudice, *i.e.*, that the outcome of the proceedings would have been different. Petitioner has failed to prove actual prejudice resulting from appellate counsel's omission in his Rule 1925 statement because counsel did include a motion to modify Petitioner's sentence in his *nunc pro tunc* post sentence motion which resulted in an extensive, thorough and reasoned analysis of Petitioner's individually crafted sentence.

In my Opinion of July 2, 2009, I addressed the discretionary aspects of Petitioner's sentence. I noted there that Petitioner's sentence was based "solely on the facts of his case and on his prior record," and that "[t]he fate of [Petitioner's] co-conspirators was not, and should not be, considered in determining [Petitioner's] sentence." (*See* July 2, 2009, Opinion at 22.)

Our legislature has determined that for each defendant, "the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa. C.S.A. § 9721(b). Because each co-defendant in a crime may pose a different threat to the community and may have different rehabilitative needs, it is not *required* that co-defendants receive identical sentences. *See* **Commonwealth v. Mastromarino**, 2 A.3d 581, 589 (Pa. Super. 2010); **Commonwealth v. Krysiak**, 369 Pa. Super. 293, 535 A.2d 165, 167 (1987). But neither is it required that co-defendants receive disparate sentences.

To the contrary, it is well-settled that "there should not be a great disparity in the sentences imposed on codefendants unless facts exist to warrant the unequal sentences." **Commonwealth v. Szczesniewski**, 404 Pa. Super. 617, 621, 591 A.2d 1055, 1056 (1991) (*quoting* **Commonwealth v. Holler**, 326 Pa. Super. 304, 473 A.2d 1103, 1107 (1984)). Our Superior Court further cautioned that judges "should endeavor to mete out similar sentences to co-defendants when justice so dictates." Id. at 621 n.2, 591 A.2d at 1057 n.2. For

> when two defendants occupy roughly the same position in terms of those factors which bear on the severity of a sentence, there can be nothing suspect about the imposition of identical sentences. Only when the sentencing judge is blind to some important circumstance unique to an accused is uniformity improperly placed at a premium over an individual's rights.

Commonwealth v. Chestnut, 347 Pa. Super. 609, 611, 500 A.2d 1225, 1225 (1985).

Thus, courts may impose identical sentences on co-defendants. But, in order for different sentences to withstand appellate scrutiny, a sentencing court must give reasons particular to each defendant explaining why they received their individual sentences. **Mastromarino**, 2 A.3d at 589 (*citing* **Commonwealth v. Krysiak**, 369 Pa. Super. 293, 535 A.2d 165, 167 (1987)).

It is clear that the penalty in this case was imposed based upon an evaluation of all of the individual circumstances concerning Petitioner and particularly any mitigating factors. *See* **Commonwealth v. Hoch**, 936 A.2d 515, 519 (Pa. Super. 2007); s*ee also* 42 Pa. C.S.A. § 9781(d). As noted at the sentencing hearing, the Court took into account the following factors: Petitioner's age (19); his family history; his educational background, having completed the 11th grade prior to his arrest on these charges and

having obtained his GED diploma while incarcerated; his substance abuse history, starting with his use of marijuana and alcohol at the age of 16; his lack of employment history; his prior juvenile record; his character; his lack of remorse[13]; and his rehabilitative needs and potential.[14] (N.T., Sentencing at 9-11.) The record clearly establishes that this Court thoughtfully reviewed Petitioner's individual circumstances as set forth in the pre-sentence investigation report.[15] *See* **Commonwealth v. Fowler**, 893 A.2d 758, 766-67 (Pa. Super. 2006) ("Since the sentencing court had and considered a presentence report, this fact alone was adequate to support the sentence, and due to the court's explicit reliance on that report, we are required to presume that the court properly weighed the mitigating factors present in the case.").

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[13]Defense counsel represented to the Court that his client was "very remorseful for his involvement in these incidents." (N.T., Sentencing at 4.) This statement conflicted with the testimony of psychologist, Lynn Anderson, Ph.D., at the Juvenile Decertification Hearing. At that time, approximately 16 months after the crimes, Robinson had still "expressed no remorse for the situation" and, in fact, denied all guilt, claiming that he had been wrongfully accused by his co-defendants, including his own brother and two cousins. (N.T., Juvenile Decertification Hearing at 6-8, 16, 26, 28.) Robinson took this position at the Juvenile Decertification Hearing despite having confessed to the crimes in a lengthy statement to the police, made in the presence of his father just hours after being arrested. (Id. at 41, 44.) In that statement, Robinson unequivocally admitted to conspiring with four others to drive around Lancaster looking for people to rob and, in fact, robbing them. (Id. at 45-63.)

[14]This criminal defendant had the benefit of services provided by the Juvenile Court system. Regrettably, Petitioner did not learn from his experience while under supervision in Juvenile Court. Juveniles who come back in adult court are judged more harshly by me because they have had the benefit of being provided with the tools necessary to make the right decisions. By coming back as adult criminals, they have demonstrated that they have chosen to make the wrong decisions and live a life of crime. Petitioner has chosen, on multiple occasions, to conduct himself as a criminal. Rehabilitation has clearly not been successful.

[15]At the sentencing hearing the Court asked Petitioner if he had reviewed the written presentence investigation report that had been prepared. His counsel responded that it was accurate and, therefore, it was considered by the Court. (N.T., Sentencing at 2-3.)

Where the court's sentencing colloquy "shows consideration of the defendant's circumstances, prior criminal record, personal characteristics and rehabilitative potential, and the record indicates that the court had the benefit of the presentence report, an adequate statement of the reasons for the sentence imposed has been given." **Commonwealth v. Brown**, 741 A.2d 726, 735 (Pa. Super. 1999) (*quoting* **Commonwealth v. Phillips**, 411 Pa. Super. 329, 601 A.2d 816, 823-24 (1992)). These requirements have been met in this case and Petitioner received a legal and just sentence that was based upon an evaluation of all of the individual circumstances concerning Petitioner.

Accordingly, had Attorney Conrad included in the Rule 1925 statement of errors complained of on appeal a challenge to the fact that Petitioner received an identical sentence to those of his three co-defendants also sentenced by the Court, Petitioner would not have prevailed before the Superior Court. *See* **Commonwealth v. Parry**, 306 Pa. Super. 390, 452 A.2d 781 (1982) (where judge fully complied with the philosophy of individual sentencing by considering the facts of the crime, appellant's background and characteristics, and need for rehabilitation, the sentence will be affirmed; "[t]hat appellant's co-defendant received a similar sentence reflects a decision by the sentencing judge that these actors shared a similar degree of culpability [and] does not in any way indicate that appellant's sentence fails to comport with the case law and statutory requirements of this Commonwealth").

Petitioner, therefore, cannot satisfy the actual prejudice prong of the **Pierce** test for ineffective assistance of appellate counsel. Accordingly, this claim must fail.

V. Conclusion

For the reasons set forth above, Petitioner's *pro se* and amended post conviction collateral relief petitions must be denied.

Accordingly, I enter the following:

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	Nos. 5141-2005A & 1502-2006
	:	
WILBERT TORILLO ROBINSON	:	

ORDER

AND NOW, this 28th day of August, 2012, it is hereby ORDERED that Wilberto Torillo Robinson's *pro se* and amended petitions for post conviction collateral relief are DISMISSED without a hearing. There are no genuine issues concerning any material fact, Petitioner is not entitled to post conviction collateral relief, and no purpose would be served by any further proceedings.

Pursuant to Pa. R.Crim.P. 907(4), this Court advises Petitioner that he has the right to appeal from this Order. Petitioner shall have 30 days from the date of this final Order to appeal to the Superior Court of Pennsylvania. Failure to appeal within 30 days will result in the loss of appellate rights. It is further ORDERED that Petitioner shall have the right to appeal *in forma pauperis.*

I certify this document to be filed in the Lancaster County Office of the Clerk of the Courts.

ATTEST: Joshua G. Parsons
Clerk of the Courts

BY THE COURT:

DAVID L. ASHWORTH
JUDGE

Copies to: Todd P. Kriner, Assistant District Attorney
Carolyn Flannery, Esquire, 53 North Duke Street, Suite 318, Lancaster, PA 17602
Wilberto Torillo Robinson, #HE-8913, SCI Fayette, P.O. Box 9999, LaBelle, PA 15450 – CERTIFIED MAIL/RETURN RECEIPT REQUESTED