NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RONALD CHAPMAN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1513 EDA 2012

Appeal from the PCRA Order May 1, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No.: CP-09-CR-0004286-2008

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

Appellant, Ronald Chapman, appeals from the Order of May 1, 2012, which denied, following a hearing, his first counseled petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The underlying facts in this matter are as follows:

> Janet Woodrow testified that on May 10, 2008, she was working as the "shift runner" or supervisor during the 11:00 p.m. to 7:00 a.m. shift at the Wawa store located on Bristol Oxford Valley Road in Falls Township, Bucks County, Pennsylvania. Woodrow [testified that an armed robber wearing a grey hooded sweatshirt with hood up and baggy pants held her up at gunpoint and demanded cash from the register and safe. A second suspect wearing black and baggy clothes assisted. After the robbers left, she and her fellow employee Tammy Boyd called police, and they were taken to another crime scene where

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* Retired Senior Judge assigned to the Superior Court.

Woodrow identified co-defendant Kaylan Walker as the hooded armed robber from her store. Woodrow could not definitively identify Appellant as the other robber].

Tammy Boyd [also testified about her observations of the robbery, and described how she was able to see the other robber's face, noticed he held a gun in his left hand, and was able to describe his clothing to police in detail. Boyd, however, was unable to positively identify either robber when brought to a separate location by police].

* * *

Officer Kimberly Caron, an officer with the Bristol Township Police Department, testified that she patrols the Croydon section of that Township, and was on duty for the "midnight to 8:30" shift on May 10, 2009, when police radio reported this armed robbery. [After notifying the only other convenient store open in the area that the WaWa eight miles away had just been robbed, Officer Caron parked her patrol car across the street and waited for unusual activity. She subsequently noticed a gold or tan Ford Explorer pull into the lot of a closed business directly behind the convenient store. After five minutes with no activity coming from the vehicle, Officer Caron called for backup].

[Other officers testified that, minutes later, they descended on the vehicle and found Appellant and his co-defendant asleep inside. Co-defendant and Appellant matched the descriptions given by the Wawa clerks, with Walker dressed in a grey hooded sweatshirt with a rolled up black ski mask 'wrap' around his head and dark cargo pants, and Appellant was wearing baggy black pants. Both men wore shoes covered in mud, a point of interest to police since muddy footprints were discovered at the Wawa store just robbed. A Wawa bag was also found in the car, along with several rolls of wrapped coins, two or three cigarette cartons, $311 in U.S. currency bundled in specific denominations, and a black hooded sweatshirt with a fully operational Colt .45 revolver and a neoprene ski mask to cover from the nose down found rolled up inside. When asked his name, Appellant falsely identified himself as "Jeffrey Jones"].

[Because co-defendant Walker was a juvenile, police contacted his mother, who came to the station. After speaking privately with his mother for one-half hour, Walker told police he would

> sign a prepared statement if police drafted one as he explained what happened. He confessed to committing the robbery at the WaWa and admitted the bag found in their car along with the money was from the robbery. He described the crime in detail and admitted that "I know the person I was arrested with," that "I was not driving the silver SUV with New Jersey plates. I was the front passenger[,]" "I did not cut the phone wire," and "I did not have a gun, I stuck my hand in the pocket of my hoodie and pointed it." This statement was read at trial.]

(***Commonwealth v. Chapman***, No. 58 EDA 2009, unpublished memorandum at 3-4 (Pa. Super. filed December 15, 2010) (citing Trial Court Opinion, 9/03/09, at 2-14) (bracketed material in original)).

In its opinion of July 11, 2012, the PCRA court fully and correctly sets forth the relevant procedural history of this case. Therefore, we have no reason to restate it.

On appeal, Appellant raises the following issues for our review:

> I. Was trial counsel ineffective for stipulating to the admission of the non-testifying co-defendant's redacted confession when the redactions failed to eliminate all references to Appellant and thereby failed to preserve the issue of trial court error for appeal?
>
> II. Was trial counsel ineffective for failing to object when the prosecutor used the non-testifying co-defendant's statement in her closing argument in a manner that vitiated the protections of the Confrontation Clause[?]
>
> III. Was trial counsel ineffective for failing to seek exclusion of Appellant's post-arrest use of an alias and for failing to rebut any inference of guilt arising from the use of that alias?

(Appellant's Brief, at 4).[1]

We review a denial of a post-conviction petition to determine whether the record supports the PCRA court's findings and whether its order is otherwise free of legal error. ***See Commonwealth v. Faulk***, 21 A.3d 1196, 1199 (Pa. Super. 2011), *appeal denied*, 2011 Pa. Lexis 3041 (Pa. 2011). To be eligible for relief pursuant to the PCRA, Appellant must establish, *inter alia*, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in 42 Pa.C.S.A. § 9543(a)(2). He must also establish that the issues raised in the PCRA petition have not been previously litigated or waived. ***See*** 42 Pa.C.S.A. § 9543(a)(3). An allegation of error "is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." ***Id.*** at § 9544(b).

Appellant claims that he received ineffective assistance of counsel during trial. (***See*** Appellant's Brief, at 10). Counsel is presumed effective, and Appellant bears the burden to prove otherwise. The test for ineffective assistance of counsel is the same under both the Federal and Pennsylvania Constitutions. ***See Strickland v. Washington***, 466 U.S. 668 (1984); ***Commonwealth v. Jones***, 815 A.2d 598, 611 (Pa. 2002). Appellant must demonstrate that: (1) his underlying claim is of arguable merit; (2) the

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[1] We have reordered the issues in Appellant's brief.

particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. ***See Commonwealth v. Pierce***, 786 A.2d 203, 213 (Pa. 2001), *abrogated on other grounds by* ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. ***See Jones***, ***supra*** at 611.

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the trial court, we conclude that there is no merit to the issues Appellant has raised on appeal. The PCRA court opinion properly disposes of the questions presented. (***See*** PCRA Court Opinion, 7/11/12, at 8-21) (finding that trial counsel was not ineffective, because: (1) there was no arguable merit to the claim counsel should not have stipulated to the admission of the co-defendants statement because it had been properly redacted and the jury was given an appropriate cautionary instruction; (2) there was no arguable merit to the claim counsel did not object to the Commonwealth's closing argument because the prosecutor made only a brief reference to the co-defendant's statement and did not implicate Appellant by name in her remarks; and (3) there was a reasonable basis not to seek exclusion of Appellant's pre-arrest and post-arrest use of an alias because it was properly admitted as showing

consciousness of guilt and the proffer of Appellant's explanation could have potentially exposed the jury to other evidence of his prior convictions for armed robbery.). Accordingly, we affirm on the basis of the PCRA court's opinion.

Order affirmed. Jurisdiction relinquished.

IN THE COURT OF COMMON PLEAS
BUCKS COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. 4286 of 2008
	:	POST-CONVICTION RELIEF ACT
v.	:	
RONALD CHAPMAN	:	

OPINION

Ronald Chapman appeals from this Court's Order of May 1, 2012 denying his Petition for Post-Conviction Relief.

On May 10, 2008, Chapman was arrested and charged with three counts of Robbery, 18 Pa.C.S. § 3701(a)(1)(ii), (iv) and (v), one count of Theft by Unlawful Taking - Movable Property, 18 Pa.C.S. § 3921(a), one count of Receiving Stolen Property, 18 Pa.C.S. § 3925(a), one count of Possession of an Instrument of Crime, 18 Pa.C.S. § 907(a), one count of Criminal Conspiracy, 18 Pa.C.S. § 903, and one count of Simple Assault, 18 Pa.C.S. § 2701(a)(2).

On December 1, 2008, at the start of Chapman's trial, this Court granted the Commonwealth's Motion to Consolidate Criminal Information Numbers 2008-4286 (Ronald Chapman) and 2008-4287 (co-defendant Kalyn Walker, also identified in other court documents as "Kaylan Walker"), and denied Chapman's Motion to Sever. N.T. December 1, 2008, pp. 1-14.

After the subsequent three-day trial by jury, Chapman was found guilty of Theft, Receiving Stolen Property, Possession of an Instrument of Crime, Criminal Conspiracy, and one count of Robbery. The other two counts of Robbery and one count of Simple Assault were *nolle prossed* by the Commonwealth.

On December 4, 2008, pursuant to 42 Pa.C.S. § 9714 [Sentences for Second and Subsequent Offenses], this Court sentenced Chapman on Count 1 [Robbery] to pay the costs of prosecution and undergo imprisonment in a State Correctional Facility for not less than ten (10) nor more than twenty (20) years. On Count 6 [Possession of an Instrument of Crime], this Court sentenced Chapman to pay the costs of prosecution and undergo imprisonment in a State Correctional Facility for not less than two-and-a-half (2 ½) nor more than five (5) years. On Count 7 [Criminal Conspiracy], this Court sentenced Chapman to pay the costs of prosecution and undergo imprisonment in a State Correctional Facility for not less than ten (10) nor more than twenty (20) years. All sentences were to be served consecutively. No additional sentences were imposed on Count 4 [Theft] or Count 5 [Receiving Stolen Property].

On December 31, 2008, Chapman filed a Notice of Appeal to the Superior Court of Pennsylvania from the denial of his post-trial motions on December 4, 2008.

On January 23, 2009, pursuant to this Court's Order of January 9, 2009, Chapman filed an Amended Notice of Appeal to the Superior Court of Pennsylvania from the judgment of sentence and his Statement of Matters Complained of on Appeal.

On September 3, 2009, this Court filed an Opinion pursuant to Pa.R.A.P. 1925(a), which addressed Chapman's allegations of error and described the factual and procedural background of this case. *See* 83 Bucks Co. L. Rep. 38 (2010).

On July 21, 2010, the Superior Court of Pennsylvania remanded this matter to the trial court to "conduct an evidentiary hearing for the purpose of determining whether a breakdown in the judicial process or appellate counsel was at fault for missing transcripts."

A hearing was accordingly held on August 13, 2010, and this Court issued a Supplemental Opinion on September 3, 2010, in which we concluded that "there was an effective failure of the system due to the late transmittal on appeal of the notes of testimony by the Clerk of Courts" which had resulted in an incomplete transmittal of the appellate record.

Satisfied with this determination, the Superior Court then reviewed the merits of Chapman's appeal, and on December 15, 2010, issued an Opinion affirming Chapman's judgment of sentence.

[Copies of this Court's Opinion of September 3, 2009, the Supplemental Opinion of September 3, 2010, and the Superior Court's Opinion of December 15, 2010 are attached hereto.]

On January 13, 2011, Chapman filed a Petition for Permission to Appeal to the Supreme Court of Pennsylvania.

On February 11, 2011, Chapman filed a Post-Conviction Relief Act Petition.

On April 14, 2011, due to Chapman's appeal to the Supreme Court of Pennsylvania, this Court entered an Order cancelling the Post-Conviction Relief Act hearing originally scheduled for July 29, 2011, and continued the matter pending the decision of the Supreme Court of Pennsylvania.

On July 14, 2011, the Supreme Court of Pennsylvania denied Chapman's Petition for Permission to Appeal.

On November 4, 2011, Chapman filed a another Post-Conviction Relief Act Petition.

After a Post-Conviction Relief Act hearing was held on March 1, 2012, this Court entered an Order on May 1, 2012, denying Chapman's Post-Conviction Relief Act Petition.

On May 29, 2012, Chapman filed a Notice of Appeal to the Superior Court of Pennsylvania from this Court's Order of May 1, 2012, denying his PCRA Petition.

On June 25, 2012, pursuant to this Court's Order of June 4, 2012, Chapman filed a "Concise Statement of Matters Complained of on Appeal" in which he questions *verbatim*:

1. Whether Appellant was denied effective assistance of counsel, a fair trial, and Due Process of Law, when trial counsel stipulated to the admission of non-testifying co-defendant's redacted confession when the redactions failed to eliminate all references to Appellant.

2. Whether Appellant was denied effective assistance of counsel, a fair trial, and Due Process of Law, when trial counsel failed to object to the prosecutor's closing argument which used the non-testifying co-defendant's statement in a manner that violated the trial court's limiting instruction and Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

3. Whether Appellant was denied effective assistance of counsel, a fair trial, and Due Process of Law, when trial counsel failed to file a Motion in Limine or object when the prosecutor presented evidence of Appellant's use of an alias.

4. Appellant was denied effective assistance of counsel, a fair trial, and Due Process of Law, when trial counsel failed to object to the trial court's instruction on "consciousness of guilt."

Statement of Matters, June 25, 2012.

In appellate review of the denial of PCRA relief the Superior Court of Pennsylvania has instructed that:

> Our scope of review when examining a PCRA court's denial of relief is limited to whether the court's findings are supported by the record and the order is otherwise free of legal error. Commonwealth v. Jermyn, 551 Pa. 96, 709 A.2d 849 (1998); Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516 (1997); Commonwealth v. Carbone, 707 A.2d 1145 (Pa. Super. 1998). We will not disturb findings that are supported by the record. Commonwealth v. Yager, 454 Pa. Super. 428, 685 A.2d 1000 (1996) (*en banc*), *appeal denied,* 549 Pa. 716, 701 A.2d 577 (1997); Commonwealth v. Bell, 706 A.2d 855 (Pa. Super. 1998), *appeal denied,* 557 Pa. 624, 732 A.2d 611 (1998). Likewise, the PCRA court's credibility determinations are binding on the reviewing court, where there is record support for those determinations. Commonwealth v. White, 557 Pa. 408, 734 A.2d 374 (1999) (citing Commonwealth v. Abu-Jamal, 553 Pa. 485, 720

A.2d 79 (1998), *cert. denied,* 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 38 (1999)).

Commonwealth v. Lambert, 765 A.2d 306, 323 (Pa. Super. 2000).

Chapman's eligibility for relief under the PCRA is governed by 42 Pa.C.S. § 9543, which states in relevant part:

§ 9543. Eligibility for relief

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

(ii) awaiting execution of a sentence of death for the crime; or

(iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States 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.

(ii) 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.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been previously litigated or waived.

<Subsec. (a)(4) is permanently suspended insofar as it references "unitary review" by Pennsylvania Supreme Court Order of Aug. 11, 1997, imd. effective.>

(4) That the failure to litigate the issue prior to or during trial, during unitary review 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.

Chapman is currently serving his sentences for the above-enumerated crimes, and his Petition for Post-Conviction Relief is predicated entirely upon claims of ineffective assistance of counsel.

The Superior Court of Pennsylvania has stated that

[i]n evaluating a claim of ineffective assistance of counsel, our standard of review is well-settled. We presume that trial counsel is effective and place on the defendant the burden of proving otherwise. Commonwealth v. Williams, 524 Pa. 218, 230, 570 A.2d 75, 81 (1990). We are first required to determine whether the issue underlying the claim is of arguable merit. Commonwealth v. Johnson, 527 Pa. 118, 122, 588 A.2d 1303, 1305 (1991). If the claim is without merit our inquiry ends, because counsel will not be deemed ineffective for failing to pursue an issue which is without basis. Id. If, however, the claim has merit, the defendant still must establish that the course of action chosen by his or her counsel had no reasonable basis designed to effectuate the client's interests. Id. Finally, the defendant must show that counsel's ineffectiveness so prejudiced his or her case that he or she was denied a fair trial. Commonwealth v. Pierce, 515 Pa. 153, 159-60, 527 A.2d 973, 975-76 (1987).

Commonwealth v. Poindexter, 646 A.2d 1211, 1214 (Pa. Super. 1994).

It is well-established that "[u]nder the PCRA, a claim of ineffective assistance of counsel provides a basis for relief only when it '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)(ii)." Commonwealth v. Henry, 706 A.2d 313, 323 (Pa. 1997).

Furthermore, "[t]he threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness, is of arguable merit, for counsel cannot be considered to be ineffective for failure to assert a meritless claim." Commonwealth v. Pursell, 495 A.2d 183, 189 (Pa. 1985) (*citing* Commonwealth v. Stoyko, 504 Pa. 455, 475 A.2d 714 (1984)).

In addressing claims of ineffective assistance of counsel, the Supreme Court of Pennsylvania has instructed that:

> To prove ineffectiveness of trial counsel, [the appellant] must prove that: "(1) the underlying argument has merit; (2) counsel had no reasonable strategic basis for his 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. Tilley, 566 Pa. 312, 780 A.2d 649, 652 (2001). "Counsel is presumed to have been effective and the defendant has the burden of proving otherwise." Id. "Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." Commonwealth v. Howard, 553 Pa. 266, 719 A.2d 233, 237 (1998). "Nor can a claim of ineffective assistance generally succeed through comparing, by hindsight, the trial strategy employed with alternatives not pursued." Id. "A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." Id.

Commonwealth v. Miller, 819 A.2d 504, 517 (Pa. 2002). *See also* Commonwealth ex rel. Washington v. Maroney, 235 A.2d 349 (1967).

Moreover, "[a]ll three prongs of this [ineffective assistance of counsel] test must be satisfied. If an appellant fails to meet even one prong of the test, his conviction will not be

reversed on the basis of ineffective assistance of counsel." Commonwealth v. Pappas, 845 A.2d 829, 844 (Pa Super. 2004).

In his initial claim seeking post-conviction relief, Chapman argues that his trial counsel was ineffective for "stipulat[ing] to the admission of the non-testifying co-defendant's redacted confession when the redactions failed to eliminate all references to Appellant."

At his PCRA hearing on March 1, 2012, Chapman alleged that the statement of his co-defendant, Kalyn Walker, impermissibly referred to him when it stated "we got $600" and "I know the person I was arrested with." N.T. March 1, 2012, p.10.

The issue of the admissibility of Kalyn Walker's redacted statement was fully addressed in our previous Opinion of September 3, 2009.

In that Opinion we noted:

> Detective Hanks stated that because Walker was a juvenile, they contacted Walker's mother who came to the police station. After Detective Hanks initially spoke with her alone she then spoke with her son privately for about a half-hour. Detective Hanks testified that Walker then indicated he wanted to speak with him and told him that "he (Walker) did not want to give a written statement," but said if Detective Hanks "prepared a statement, he would sign it." Detective Hanks then read to the jury the typed statement that was prepared at Falls Township Police headquarters on May 10, 2008, and noted that the end of each sentence contained Walker's handwritten initials:
>
> I have already been apprised of my rights and the following statement is the truth.
> My name is Kalyn Walker and I'm here with my mother Tracy Trammel.
> I know the person I was arrested with.
> I was not driving the silver SUV with New Jersey plates. I was the front passenger.
> I got out of the SUV at the housing complex across the road from the Wawa (Liberty Drive).
> I walked behind the Wawa through the construction site.
> I was the last one in the Wawa.
> I went to the cash register and the female clerk was already putting money in a Wawa bag. That bag is in the car.
> I said to the lady "it'll be okay, just follow instructions."
> I took the bag from her.

> I then went to the back of the store with everyone else; there was a male customer in there.
> I did not cut the phone wires.
> I did not have a gun. I stuck my hand in the pocket of my hoodie and pointed it. We barely got six hundred dollars.
> The photograph of the money Detective Hanks showed me was the money from the Wawa and the time is 9:38 a.m.
>
> N.T. December 2, 2008, pp. 219-222.

Commonwealth v. Chapman, 83 Bucks Co. L. Rep. 38, 46 (2010).

In our Opinion we reviewed the issue concerning the introduction of Kalyn Walker's statement into evidence at trial. We discussed the relevant controlling case law supporting our original decision that the introduction of Walker's statement was constitutionally permissible, and noted:

> In the case *sub judice*, it is clear that Walker's written statement is not "of such a powerfully incriminating nature" to prohibit its introduction. Walker's redacted statement that was read to the jury does not refer directly to Appellant, and only refers to the possible presence of another defendant in its excerpts ["I know the person I was arrested with" and "we barely got six hundred dollars"].
>
> Prior to permitting the introduction of Walker's written statement into evidence, this Court employed specific precautions to insure that the subject statement was properly redacted and any impermissibly incriminating references to Appellant had been removed. Walker's written statement was completely sanitized to insure that there was absolutely no direct mention of Appellant.
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> In addition, this Court gave the following limiting instruction during its charge to the jury:
>
> > Members of the jury, it's for you to recall, it's not for me, but as I understand the evidence, and I don't think it's disputed, the Commonwealth has alleged that Kalyn Walker made a statement to the police before trial after his arrest. Please understand, and this is important, that you can only utilize that statement and consider that statement as against Kalyn Walker only. And again, I wish to underscore that. Any statement which may have been made by Kalyn Walker, if you find that he did, is only evidence against him and him alone. You must not consider that statement as any evidence against the co-defendant, Ronald Chapman, and you must not use any statement made by Kalyn Walker against Ronald Chapman.

N.T. December 3, 2008, pp. 68-69.

> It is therefore clear that Appellant's Sixth Amendment right to confrontation has not been violated by the introduction of Walker's written statement.

Id. at 52-53.

At the PCRA hearing on March 1, 2012, Bradley Bastedo, the Public Defender who had represented Chapman at trial, testified that he filed a pre-trial motion to preclude Kalyn Walker's statement from admission into evidence. Although he testified that he never conceded to the admission of that statement, he realized that this Court was going to permit its admission in redacted form. Moreover, in believing he had preserved the issue of the admissibility of that statement through his pre-trial motions, Mr. Bastedo testified that he did not "object in front of the jury" because "if something hurts you, you don't call attention to it." N.T. March 1, 2012, pp. 81-86.

Chapman's request for post-trial relief in this instance is tenuously based upon his claim that his co-defendant's statement allegedly "failed to eliminate all references to Appellant" by using the pronoun "we," which impermissibly implicated him in the commission of the armed robbery. It was, however, the pre-trial objections to the admission of that statement by Chapman's trial counsel that led to the redaction of all direct references to Chapman. Chapman's trial counsel was not ineffective for stipulating to the admission of the statement because all direct references to him had been eliminated and, in addition, specific, limiting and cautionary instructions were provided to the jury in accordance with Commonwealth v. Whitaker, 878 A.2d 914 (Pa. Super. 2005). Chapman was not impermissibly prejudiced and this allegation of ineffective assistance is meritless.

Chapman next alleges that his trial counsel was ineffective for "fail[ing] to object to the prosecutor's closing argument which used the non-testifying co-defendant's statement in a manner that violated the trial court's limiting instruction and Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)."

Chapman is presumably referring to the following excerpt from the prosecutor's closing argument at his trial on December 3, 2008:

> ... And we know that those footprints were found by the dumpsters next to the store, behind the air conditioning units behind the store, and we also know by Kalyn Walker's statement to the police that he was there when Officer Gribbon, or Corporal Gribben came to the WaWa and, that was several minutes before the robbery took place. So we know from that evidence that they were there ahead of time, and ladies and gentlemen, I'd submit to you they had this plan and were waiting for their right time to come into the store.

N.T. December 3, 2008, p. 35.

As noted above, the issue of the admissibility of Kalyn Walker's redacted statement was fully addressed in our previous Opinion of September 3, 2009, and affirmed by the Superior Court of Pennsylvania. In our Opinion we observed in relevant part:

> The Superior Court of Pennsylvania most recently expounded upon this very issue in Commonwealth v. Whitaker, 878 A.2d 914 (Pa. Super. 2005). In that case, the appellant contended that his rights under the Sixth Amendment of the United States Constitution were violated due to the entry into evidence at a joint trial of his co-defendant's confession in which the appellant's name had been redacted and replaced with the words "the other guy." Id. at 918-919. The Whitaker Court affirmed the judgment of sentence and rejected the appellant's argument, after observing that:
>
> > In the seminal case of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the United States Supreme Court held that Bruton's Sixth Amendment right to confront witnesses was violated by the introduction of statements by Bruton's non-testifying co-defendant, Evans, that implicated Bruton by name, despite a limiting instruction from the trial court that Evans' statement should be considered only against him. Bruton, 391 U.S. at 135-36, 88 S.Ct. 1620. The Court held that, although the limiting instruction was given, the statements were of such a powerfully incriminating nature that it was unlikely that the jury would have followed the trial court's instruction. *Id.*, 391 U.S. at 135-36, 88 S.Ct. 1620.
>
> Id. at 919. (emphasis added)
>
> The Whitaker Court explained that in order to comply with the Bruton holding, "most state and federal jurisdictions approved the practice of redacting confessions of non-testifying codefendants to remove references that expressly implicated the nonconfessing defendant," and noted that this practice had been

validated by the United States Supreme Court in Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Id.

The Whitaker Court explained that although the appellant in Richardson had argued that "despite the redaction, admission of the co-defendant's confession violated her confrontation rights because it implicated her in the crime when linked with other evidence" and was therefore a "contextual implication,"

> [t]he United States Supreme Court expressly rejected the theory of contextual implication, recognizing the important distinction between co-defendant confessions that expressly incriminate the defendant and those that become incriminating only when linked to other evidence properly introduced at trial, as was the case in Richardson. Id., 481 U.S. at 208, 107 S.Ct. 1702. Where an incrimination arising from a redacted confession is merely inferential, the Court stated that, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." Id., 481 U.S. at 208, 107 S.Ct. 1702. Where such linkage was required to implicate the defendant, the Court held, a proper limiting instruction was sufficient to satisfy Bruton. Id., 481 U.S. at 208, 107 S.Ct. 1702.

Id.

Chapman, 83 Bucks Co. L. Rep. at 51-52.

In the instant matter, the prosecutor's closing argument was a review and discussion of the circumstantial evidence that placed Chapman and his co-defendant, Kaylyn Walker, at the crime scene. The complete text of the prosecutor's closing argument reveals that the above-noted excerpt is the only portion of that argument that referred to Kalyn Walker's statement, and it is clear that the prosecutor did not impermissibly implicate Chapman by name in those remarks. In fact, the prosecutor displayed a clear awareness and sensitivity to the issue of the introduction of a non-testifying co-defendant's statement by explicitly stating that "we also know by Kaylyn Walker's statement to the police that ***he*** was there when ... Corporal Gribben came to the WaWa." The "he" clearly refers to Kalyn Walker, and the prosecutor specifically did not state "they were there" or "Walker and Chapman were there" when referring to Walker's statement. Moreover, Chapman conceded at his PCRA hearing that he was never directly identified in that statement. N.T. March 1, 2012, p. 54.

The circumstantial evidence placing Chapman at the crime scene was overwhelming, and limiting instructions concerning the possible consideration of Walker's statement in

conjunction with all of that other evidence were provided to the jury. Chapman's trial counsel was not ineffective for failing to object to the prosecutor's reference to co-defendant Kalyn Walker's statement during closing arguments because the prosecutor did not directly implicate or refer to Chapman by name when referring to Walker's statement. Chapman's trial counsel cannot be considered to be ineffective for failure to assert a meritless claim.

Next, Chapman alleges that his trial counsel was ineffective for "failing to file a Motion *in Limine* or object when the prosecutor presented evidence of Appellant's use of an alias."

"A motion *in limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered." Commonwealth v. Freidl, 834 A.2d 638, 641 (Pa. Super. 2003) (*citing* Commonwealth v. Johnson, 582 A.2d 336, 337 (1990), *affirmed,* 626 A.2d 514 (1993)).

> The admissibility of evidence is a matter directed to the sound discretion of the trial court, and an appellate court may reverse only upon a showing that the trial court abused that discretion. Commonwealth v. Wallace, 522 Pa. 297, 561 A.2d 719 (Pa.1989). The threshold inquiry with admission of evidence is whether the evidence is relevant. "Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact." Commonwealth v. Spiewak, 533 Pa. 1, 8, 617 A.2d 696, 699 (1992). In addition, evidence is only admissible where the probative value of the evidence outweighs its prejudicial impact. Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978).

Commonwealth v. Robinson, 721 A.2d 344, 350 (Pa. 1998).

In our Opinion of September 3, 2009, we noted that Officer Kimberly Caron of the Bristol Township Police Department "testified that when the defendants were taken from the vehicle and asked for identification, Kalyn Walker correctly identified himself but Appellant Ronald Chapman identified himself as 'Jeffrey Jones.' N.T. 12/2/08, pp. 111-114." Chapman, 83 Bucks Co. L. Rep. at 43. We also noted that Sergeant Sean Cosgrove of the Bristol Township Police Department, who assisted in the apprehension of the defendants, testified that when Chapman was "placed under arrest, he identified himself as 'Jeff Jones.' Sergeant

Cosgrove confirmed that there was no valid driver's license or identification for that name or the date of birth that Chapman had provided at his arrest. N.T. December 2, 2008, pp. 118-121." Id.

We further observed that "Officer Howard Shook, Jr., a patrol officer with the Falls Township Police Department, testified that he had been called to assist in processing the defendants, Ronald Chapman and Kalyn Walker after their arrest. He witnessed Chapman sign his fingerprint identity card as 'Jeffrey Jones.' N.T. December 2, 2008, pp. 141-143." Id. at 44.

Prior to jury deliberations, this Court instructed the jury on evidence of consciousness of guilt:

> ... You are the sole judges of the facts and upon that no one can intrude, certainly not me, but I wish to relate to you something which the Commonwealth has alleged. They have alleged that one of the defendants, remember it's only one in this case, Ronald Chapman, made a false statement when he was questioned by the police, specifically, that he gave a false name of Jeffrey Jones. Now, if you believe that evidence, you may consider that evidence of the false name as tending to prove Ronald Chapman's consciousness of his guilt. You're not required to do so, and you should consider and weigh that evidence together with all other evidence in this case.

N.T. December 3, 2008, p. 75.

At his PCRA hearing of March 1, 2012, Chapman testified that he was told he "was under arrest for trespassing" and he was not aware that he had been arrested for the armed robbery of the WaWa store "until he got to bail." He stated that he "wasn't aware about no robbery," and explained that he used an alias at his arrest because he had "left the state halfway house without permission" where he was "serving a ... felony sentence [for] robbery" and believed that he was being apprehended for the commission of the lesser crime of "trespassing." Chapman admitted, however, that he continued to provide the name "Jeffrey Jones," even when he signed his fingerprint card after his arrest. N.T. March 1, 2012, pp. 36-48, 67-69.

Chapman argues that because he allegedly did not know that he was being arrested for armed robbery, there was "insufficient evidence to give rise to the inference of consciousness of guilt." As a result, he contends that he has been impermissibly prejudiced by the improper jury instruction on consciousness of guilt associated with the use of an alias, and his trial counsel was therefore ineffective for failure to object to the provision of that instruction to the jury. N.T. March 1, 2012, pp. 42-48.

Although Chapman insists that he did not know he had been arrested for the armed robbery of the WaWa store when he provided an alias, his assertion is contradicted by the evidence that the two WaWa employees who were victimized, Janet Woodrow and Tammy Boyd, were brought to the location where he and Walker were initially apprehended to identify him as a possible suspect in that robbery. Thereafter, Chapman continued to use the alias "Jeffrey Jones" when he signed his fingerprint card, well after his arrest. N.T. March 1, 2012, pp.64-69.

In this claim of ineffective assistance of counsel Chapman now argues that his alleged reason for providing an alias to the police should control the admissibility of the evidence of his use of an alias.

At the PCRA hearing Chapman's trial counsel testified that he did not file a motion *in limine* to preclude evidence of Chapman's use of an alias "because [he] thought clearly it would come in under the consciousness of guilt, because the problem for [him] was [Chapman] acknowledged or he was under arrest for trespass. It wasn't like they just came up to him and he gave a name." His counsel testified that he was aware from his case assessment that Chapman had a prior criminal record and it "didn't make any sense to me to have him testify" as to the reason for his use of an alias. He explained that the jury would then be presented with unfavorable evidence of Chapman's prior criminal convictions, which included another armed robbery. His counsel also explained that Chapman's "subsequent signing [of] the fingerprint card made it a little more difficult to try to attack [the admission of Chapman's use of an alias]." N.T. March 1, 2012, pp. 90-93.

It is a well-established principle that "[u]se of an alias has been recognized as evidence of a consciousness of guilt." Commonwealth v. Robinson 554 Pa. 293, 309, 721 A.2d 344, 352 (Pa. 1998) (*citing* Commonwealth v. Collins, 440 Pa. 368, 269 A.2d 882 (1970)). *See also* Commonwealth v. Toro, 638 A.2d 991, 998 (Pa. Super. 1994) (evidence of the use of an alias "was relevant to the issue of appellant's consciousness of guilt and was properly admissible for this purpose").

The permissibility of introducing a defendant's use of an alias was also addressed by the United States District Court for the Eastern District of Pennsylvania in U.S. v. Brown, 2005 WL 1532538, 17 (E.D. Pa. 2005). There, the Court observed that:

> Defendant claims that trial counsel should have objected to references to defendant's alias, "Tyree Bryant," because it improperly suggested that he was guilty of the crime and that he has a criminal history. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 17, 18.) Under Federal Rule of Evidence 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Courts that have applied this rule to alias evidence have determined that prosecutors may introduce evidence of the use of an alias to show that a defendant believed that he was guilty of the crime at issue, *see* United States v. Glass, 128 F.3d 1398, 1408 (10th Cir.1997) ("A defendant's use of an alias to conceal his identity from law enforcement officers is relevant as proof of consciousness of guilt.") (citation omitted); United States v. Boyle, 675 F.2d 430, 432 (1st Cir.1982) (same), but not to suggest that the defendant has a criminal history or a general criminal propensity. United States v. Scarborough, 128 F.3d 1373, 1379 (10th Cir.1997) (acknowledging the argument that "the jury might infer from the presence of an alias ... that defendant had been involved in illegal activities long before the crime in question."); United States v. Jasinski, No. 89-224-1, 1989 U.S. Dist. LEXIS 15503, at *5-*6 (E.D.Pa.1989 Dec. 21, 1989) (determining that the use of an "a/k/a name" was not unfairly prejudicial because it "is not a name which in itself connotes criminality"). Here, defendant himself used the name "Tyree Bryant" when he was interviewed by Detective Brooks after his arrest. Evidence of defendant's use of an alias was part of the history of the case and was clearly relevant to show that defendant was trying to conceal his identity, which suggests that defendant was conscious of his guilt of the crime. As I described above, this was a permissible use of such evidence. *See* Glass, 128 F.3d at 1408. Moreover, defendant's alias, "Tyree Bryant," is the not the type of name that might unfairly prejudice defendant because it does not "in itself connote[ ] criminality, as do nicknames such as 'Frankie the Beast,' 'The Snake, or 'Fast Eddie" " Jasinski, 1989 U.S. Dist. LEXIS 15503 at *6 (citations omitted). *See also* United States v. Trice, 1996 U.S. Dist. LEXIS 15154, at *17-*18 (E .D. Pa. Oct. 9, 1996) ("The use of an alias such

as 'Larry Leggett' is simply not likely 'to arouse the jury's sense of horror, provoke its instinct to punish, or lead the jury to base its decision on something other than the established facts in the case.' ") (citation omitted). Additionally, the court specifically instructed the jury that it could not infer from defendant's use of an alias alone that he was guilty. (N.T. Trial, June 1, 2000, at 45-46.) For these reasons, defendant's claim is frivolous and trial counsel was not deficient for failing to object to the government's introduction of this evidence.

United States v. Brown, 2005 WL 1532538, 17 (E.D.Pa.,2005) (footnote omitted).

In addition, the Superior Court of Pennsylvania addressed a defendant's argument that it was necessary to first demonstrate that a suspect was aware that he was wanted for the crime before an instruction on consciousness of guilt could be issued. In Commonwealth v. Harris, 386 A.2d 108 (Pa. Super. 1978), the Court observed:

Appellant cites Pennsylvania authority to the effect that while concealment may be used as evidence of consciousness of guilt, it must first be proved that the suspect knew he was wanted for the crime. In the most quoted case on the subject, it is said:

When a person commits a crime, knows that he is wanted therefor, and flees or conceals himself, such conduct is evidence of consciousness of guilt, and may form the basis in connection with other proof from which guilt may be inferred . . ..

Commonwealth v. Coyle, 415 Pa. 379, 393, 203 A.2d 782, 789 (1964).

If we were to apply this statement of the law literally, we should hold that the charge here was error, for it permitted the jury to infer guilt simply from appellant's use of an alias; it did not instruct the jury that before guilt could be inferred there must be evidence, not only that appellant used an alias, but also that he knew he was wanted by the police.

It seems to us, however, that a statement such as the one in Coyle reflects an abundance of caution; if taken literally, it would require the Commonwealth to prove that the defendant had committed the crime in order to introduce at the trial for that crime evidence that the defendant had fled or concealed himself. Some subsequent cases have recited the requirement that the defendant know he is wanted for the crime, but have always found it met, for example by circumstantial evidence. See, e. g., Commonwealth v. Tinsley, 465 Pa. 329, 350 A.2d 791 (1976), Commonwealth v. Osborne, 433 Pa. 297, 249 A.2d 330 (1969). And in Commonwealth v. Collins, 440 Pa. 368, 269 A.2d 882 (1970), the Court makes no mention of the requirement. No case has actually held that for lack of proof that the defendant knew he was wanted, evidence of flight or concealment was

inadmissible. We now hold that such a requirement is an unnecessary restriction on admissibility. As Dean Wigmore noted:

> When Robinson Crusoe saw the human footprint on the sand, he could not argue inductively that the presence of another human being was absolutely proved. There was at least (for example) the hypothesis of his own somnambulism. Nevertheless, the fact of the footprint was for his conclusion evidence of an extraordinary degree of probability, i. e. it passed beyond the line of mere Admissibility.
>
> The requirement or test, then, for this lower standard Admissibility would be something like this: Does the evidentiary fact point to the desired conclusion (not as the only rational hypothesis, but) as the hypothesis (or explanation) more plausible or more natural out of the various ones that are conceivable? Or (to state the requirement more weakly), is the desired conclusion (not, the most natural, but) a natural or plausible one among the various conceivable ones?
>
> I Wigmore on Evidence, s 32 at 419 (3d Ed. 1940) (emphasis in original).

The conclusion that if a person gives the police an alias, he is trying to conceal evidence of guilt, satisfies this test of probability. No useful purpose is served by adding to the test the requirement that the suspect know he is wanted for the crime; it is eminently reasonable to assume that a person may use an alias from fear that he may be wanted for a crime long before he knows that in fact the police are on his trail. Thus, on the analogous subject of flight as evidence of consciousness of guilt, Wigmore says:

> It is occasionally required by a Court that the accused should have been aware that he was charged or suspected. This is unnecessary; it is the act of departure that is itself evidential; ignorance of the charge is merely a circumstance that tends to explain away the guilty significance of the conduct.
>
> II Wigmore, supra, s 276 at 116 (emphasis in original).

Indeed, a requirement that the defendant know he is wanted is less necessary with respect to evidence of the use of an alias than evidence of flight, for there would seem to be many more innocent explanations for a sudden change of location than there are for the use of an alias.

Accordingly, the charge to the jury that while they were not required to find consciousness of guilt, they could consider the alias along with all the other evidence in the case, adequately protected appellant.

Harris, 386 A.2d at 110-111.

As noted in Miller, *supra*, the Supreme Court of Pennsylvania observed that "[c]ounsel is presumed to have been effective and the defendant has the burden of proving otherwise," and that "where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." Here, Chapman's trial counsel was not ineffective for failing to challenge the admission of Chapman's use of an alias because he carefully assessed Chapman's situation and determined that it was not prudent to challenge the admission into evidence of Chapman's use of an alias when he was arrested. Pursuant to Harris, *supra*, and contrary to Chapman's argument, there is no requirement for the Commonwealth to demonstrate that Chapman was aware that he was being arrested for the armed robbery of the WaWa store before evidence of his use of an alias could be admitted.

More significantly, Chapman's trial counsel recognized that a challenge to, or proffer of an explanation for, Chapman's use of an alias at the time of his arrest would have potentially exposed the jury to other evidence of his client's prior criminal record which may have been even more prejudicial to his case.

We also note parenthetically that Chapman's prior criminal record was highlighted in our previous Opinion of September 3, 2009, when we addressed the issue of the appropriateness of Chapman's sentence:

> At Appellant's sentencing on December 4, 2001, evidence was received that Appellant had been found guilty of a prior armed robbery in 2001. In that case, Appellant, together with two other co-defendants, placed a shotgun to the neck of an employee of a 7-11 store and also, as here, attempted to open the store safe. After committing that 2001 robbery, Appellant, who was driving the getaway car, led the Bristol Township police on a high-speed chase. He subsequently crashed his vehicle into a police cruiser and seriously and violently injured Officer Ed Wallace, who suffered, among other injuries, a broken left hip, facial injuries and injuries to his knees. As a result, Officer Wallace required multiple surgeries. In February of 2008, Appellant was permitted to serve a portion of his sentence of 5 to 10 years imprisonment at a less restrictive "halfway house." Appellant left that halfway house without approval in March 2008, and two months later committed the instant robbery. In addition, Appellant had an extensive criminal history which included convictions for Burglary as a juvenile (1994); Theft, Burglary and Escape (1996); Recklessly Endangering Another Person (1994); Receiving Stolen

> Property (2000); Retail Theft, Unsworn Falsification to Authorities and Possession of Drug Paraphernalia (2000); Unauthorized Use of an Auto (2001), and Possession With Intent to Deliver a Controlled Substance (2001) for which he was sentenced to 9 to 23 months in the Bucks County Correctional Facility.

Chapman, 83 Bucks Co. L. Rep. at 56-57.

The Supreme Court in Miller also reiterated the well-established principles that "a claim of ineffective assistance [cannot] generally succeed through comparing, by hindsight, the trial strategy employed with alternatives not pursued," and "[a] finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." Chapman is attempting to compare in hindsight his trial counsel's strategy with alternatives not pursued, but he has not demonstrated how a challenge by his trial counsel to the admission of his use of an alias would have "offered a potential for success substantially greater than the course actually pursued." As noted, that alternative strategy of proffering an explanation for the use of an alias was based upon his prior and extensive criminal activity, and such a course may have actually resulted in greater prejudice to him by allowing the jury to learn of Chapman's prior criminal record for a similar crime.

At trial, this Court permitted the introduction of evidence of Chapman's use of an alias because it was clearly relevant to the surrounding circumstances. We do not accept the suggestion that the admissibility of that evidence is in some way dependent upon Chapman's mindset. After reviewing the legal basis supporting our decision to admit that evidence, it is clear that Chapman's trial counsel was not ineffective for failing to object to that evidence when the alternative explanation that Chapman now proffers was based upon evidence of his prior criminal activity.

Chapman lastly argues that he was "denied effective assistance of counsel, a fair trial, and Due Process of Law, when trial counsel failed to object to the trial court's instruction on 'consciousness of guilt.' "

We are mindful that court-appointed PCRA counsel has not complained about the content of that jury instruction – only that it should not have been given.

As previously noted, Chapman alleges that at the time of his arrest he had no knowledge of the robbery of the WaWa for which he was convicted, and as a result, he contends that there was insufficient evidence to infer his consciousness of guilt when he provided an alias to police officers. According to Chapman, he believed he was being arrested for trespassing, and provided an alias because he had "run away from his halfway house" where he was serving a sentence for a previous armed robbery he had committed. He contends that "there should have been evidence elicited by the Commonwealth that at the time [he] gave the alias, [he] knew that [he] was wanted for the [armed robbery] at the WaWa." *See* N.T. March 1, 20102, pp. 42-43. Because evidence of his excuse for providing an alias was not presented at trial and there was no subsequent objection to the standard "consciousness of guilt" instruction provided to the jury, Chapman claims he was prejudiced by the inference of guilt that resulted from that instruction. Therefore, he was ineffectively represented.

Chapman's claim collapses upon observance of the holding by the Superior Court of Pennsylvania in Harris, *supra*, that it is not necessary to first demonstrate that a suspect was aware that he was wanted for a particular crime before consciousness of his guilt may be inferred from his use of an alias.

Evidence of Chapman's use of an alias at trial was clearly constitutionally permissible, and as noted, his trial counsel explained the futility of challenging the admissibility of that evidence. His counsel also explained that his decision to prevent Chapman from testifying and explaining to the jury about his alleged reason for using an alias was reasonably based upon a desire to avoid exposing the jury to evidence of Chapman's prior extensive criminal history. Chapman's counsel therefore had no basis upon which to object to the consciousness of guilt instruction provided to the jury.

For the foregoing reasons, we recommend that this appeal be denied.

BY THE COURT:

DATE: 7/11/12

ALAN M. RUBENSTEIN, J.