

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

PETER FRANK BORELLI,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1575 MDA 2012

Appeal from the Order entered August 6, 2012,  
in the Court of Common Pleas of Berks County,  
Criminal Division, at No(s): CP-06-CR-0003664-2005.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

PETER FRANK BORELLI,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1644 MDA 2012

Appeal from the Order entered August 24, 2012,  
in the Court of Common Pleas of Berks County,  
Criminal Division, at No(s): CP-06-CR-0002479-2006.

BEFORE: SHOGAN, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY ALLEN, J.:

**FILED NOVEMBER 22, 2013**

In these consolidated *pro se* appeals, Peter Frank Borelli ("Appellant"), claims the PCRA court erred in denying his petitions pursuant to the Post Conviction Relief Act. 42 Pa.C.S.A. §§ 9541-9546. We affirm.

Appellant appeals from two different docket numbers. We first consider his appeal at No. 1575 MDA 2012. The PCRA court summarized the pertinent facts and procedural history as follows:

On March 16, 2005, Alfredo Alicea ("Alicea") shot and killed Jamar O'Bryant ("O'Bryant"). Alicea, [Appellant's] co-defendant at trial, was acting under [Appellant's] orders to settle a drug dispute with a rival drug dealer. The dispute arose out of a debt that [Appellant's] brother, Frank Borelli ("Frank"), owed to O'Bryant. [Appellant] and some other individuals met with O'Bryant at a bar, and eventually [Appellant], Alicea, Frank, and O'Bryant all convened at 538 Walnut Street, Reading, PA. Frank and O'Bryant held a conversation regarding the debt owed, culminating in O'Bryant calling his supplier. Immediately after the phone call ended, Alicea unloaded his gun at O'Bryant, inflicting nine (9) gunshot wounds which proved fatal.

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On June 12, 2008, a jury found [Appellant] guilty of Murder in the First Degree, Conspiracy to Commit Murder in the First Degree, Corrupt Organizations, Criminal Conspiracy to Commit Delivery of a Controlled Substance, and Criminal Use of a Communication Facility. On June 28, 2008, with a deadlocked jury, the Court sentenced [Appellant] to life imprisonment for murder with an additional period of incarceration for the remaining charges. After timely appeal, the Superior Court affirmed the judgment of sentence. The Supreme Court of Pennsylvania denied [Appellant's] Petition for Allowance of Appeal on June 2, 2010.

On March 24, 2011, [Appellant] filed a timely *pro se* PCRA petition. On May 2, 2011, [the PCRA court appointed counsel, and PCRA counsel] was granted thirty (30) days to file an amended [PCRA] petition . . . or in the alternative file a "Finley" petition, ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988), detailing the reasons [the PCRA court] should allow counsel to withdraw. Due to the complexity of the case, the Court

granted counsel extensions of time to file the appropriate documents. On April 26, 2012, [PCRA] counsel filed a Motion for Leave to Withdraw as Counsel and "No-Merit" letter, wherein he certified that after reviewing the record . . . it was counsel's professional judgment that [Appellant's] petition was without merit. On May 3, 2012, the [PCRA court] issued a Notice of Intent to Dismiss, pursuant to Pa.R.Crim.P. 907(1). On May 23, 2012, the Court granted [Appellant] a sixty (60) day extension, pursuant to [Appellant's] request. On July 25, [2012], [Appellant filed] his *pro se* Answer to the [Pa.R.Crim.P. 907] Notice. . . . The [PCRA court, on August 6, 2012,] dismissed [Appellant's] PCRA Petition.

On August 29, 2012, [Appellant] filed a *pro se* Notice of Appeal. On September 19, 2012, the [PCRA court] ordered [Appellant] to file a Concise Statement of [Errors] Complained of on Appeal. On October 1, 2012, [Appellant] filed a Concise Statement raising one claim of error.

**See** PCRA Court Opinion, 12/4/12, at 2-5 (footnotes omitted).

Appellant raises the following issue in his appeal at No. 1575 MDA 2012:

A. THE [PCRA] COURT COMMITTED AN ERROR OR ABUSED ITS DISCRETION FOR CONCURRING WITH PCRA COUNSEL'S "NO-MERIT" LETTER AND SUMMARILY DISMISSING APPELLANT'S PCRA PETITION WHERE APPELLANT RAISED ADEQUATE AND SPECIFIC CLAIMS OF INEFFECTIVE ASSISTANCE OF **ALL PRIOR** COUNSEL SUCH THAT WARRANTED A HEARING [sic] TO DETERMINE THE SPECIFIC FACTUAL ISSUES RAISED IN HIS PRO SE ANSWER (AS IDENTIFIED AND ARGUED **INFRA**) TO THE [PCRA] COURT'S RULE 907 NOTICE?

1. Trial [C]ounsel was ineffective for failing to seek severance of [Appellant's] trial?

2. Trial Counsel was ineffective for failing to object to and preserve for appellate review the trial court's grossly improper charge to the jury on corrupt organizations?

3. Trial Counsel was ineffective for failing to object and/or request a mistrial where the prosecutrix committed misconduct during her grossly improper closing argument?

4. Appellate Counsel was ineffective for failing to raise on direct appeal that the trial court abused its discretion when it denied trial counsel's motion claiming double jeopardy or collateral estoppel on the charges of corrupt organizations?

Appellant's Brief at 5. Additionally, in the argument portion of his brief, Appellant further asserts that "TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AT TRIAL AND PRESERVE FOR APPELLATE REVIEW THE TRIAL COURT PERMITTING THE COMMONWEALTH TO ADD THE CHARGE OF CONSPIRACY TO COMMIT CRIMINAL HOMICIDE DURING TRIAL WHERE SAID CHARGE WAS NOT PART OF THE ORIGINAL INFORMATION." Appellant's Brief at 34. With regard to all of these issues, Appellant also asserts that PCRA counsel was ineffective for failing to raise these issues in an amended petition.

In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). We pay great deference to the findings of the PCRA court, "but its legal determinations are subject to our plenary review." ***Id.*** Furthermore, to be entitled to relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the

errors enumerated in section 9543(a)(2) of the PCRA. One such error involves the ineffectiveness of counsel.

To obtain relief under the PCRA premised on a claim that counsel was ineffective, a petitioner must establish by a preponderance of the evidence that counsel's ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. **Id.** "Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner." **Id.** This requires the petitioner to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) petitioner was prejudiced by counsel's act or omission. **Id.** at 533. A finding of "prejudice" requires the petitioner to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Id.** In assessing a claim of ineffectiveness, when it is clear that appellant has failed to meet the prejudice prong, the court may dispose of the claim on that basis alone, without a determination of whether the first two prongs have been met. **Commonwealth v. Travaglia**, 661 A.2d 352, 357 (Pa. 1995). Counsel cannot be deemed ineffective for failing to pursue a meritless claim. **Commonwealth v. Loner**, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*), *appeal denied*, 852 A.2d 311 (Pa. 2004).

Additionally, the PCRA provides no absolute right to a hearing and the post-conviction court may elect to dismiss a petition after thoroughly reviewing the claims presented and determining that they are utterly without support in the record. ***Commonwealth v. Quarani***, 763 A.2d 941, 942 (Pa. Super. 2000). Before an evidentiary hearing will be granted, a PCRA petitioner “must set forth an offer to prove at an appropriate hearing sufficient facts upon which a reviewing court can conclude that trial counsel may have, in fact, been ineffective.” ***Commonwealth v. Begley***, 780 A.2d 605, 635 (Pa. 2001) (quoting ***Commonwealth v. Pettus***, 424 A.2d 1332, 1335 (Pa. 1981)).

In his Pa.R.A.P. 1925(b) statement, Appellant raised issue “A” above. Based on the paucity of the Pa.R.A.P. 1925(b) statement, the Commonwealth argues all of Appellant’s claims are waived. **See** Commonwealth Brief at 24-29. Although the PCRA court recognized the deficiency in Appellant’s statement, it nevertheless addressed the claims of ineffectiveness Appellant raised in his answer to the PCRA court’s Pa.R.Crim.P. 907 notice, and determined that they lacked merit. **See** PCRA Court Opinion, 12/4/12, at 6-11. We do the same.

Appellant first claims that prior counsel was ineffective for failing to seek to sever his trial from that of his co-defendant, Alicea, because “it was clear from the record that the separate and distinct defenses of each

defendant were clearly antagonistic and prejudicial to each other.” Appellant’s Brief at 19 (capitalization removed).

“Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.” Pa.R.Crim.P. 582(A)(2). “The court may order separate trials of offenses of defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.” Pa.R.Crim.P. 583. This Court has further explained:

Although the possibility of conflicting defenses is a factor to be considered in deciding whether to grant severance, it is clear that more than a bare assertion of conflict is required. The mere fact that there is hostility between the defendants, or that one may try to save himself at the expense of another, is in itself not sufficient grounds to require separate trials. Further, defenses become antagonistic only when the jury, in order to believe the essence of testimony offered on behalf of one defendant, must necessarily disbelieve the testimony of his co-defendant.

***Commonwealth v. Childress***, 680 A.2d 1184, 1187 (Pa. Super. 1996) (citation omitted).

Joint trials are encouraged when judicial economy will be promoted by avoiding expensive and time-consuming duplication of evidence. ***Commonwealth v. Jones***, 668 A.2d 491 (Pa. 1995). Joint trials are preferred when conspiracy is charged. ***Commonwealth v. Cull***, 688 A.2d 1191, 1197 (Pa. Super. 1997). The decision of whether to sever trials of co-

defendants is within the sound discretion of the trial court. ***Commonwealth v. Lopez***, 739 A.2d 485, 501 (Pa. 1999).

The PCRA court found no merit to Appellant's claim because the defenses presented by Appellant and Alicea at their joint trial were not antagonistic. ***See*** PCRA Court Opinion, 12/4/12, at 8. Our review of the record reveals that Alicea claimed he shot at O'Bryant in self-defense, while Appellant argued his complete innocence. Contrary to Appellant's argument within his brief, these defenses are not "antagonistic" as that term is defined by pertinent case law. ***See Childress, supra***. Thus, any claim of ineffectiveness based on Appellant's first claim would fail. ***Loner, supra***.

In his second claim, Appellant asserts prior counsel was ineffective for failing to raise and/or preserve for review the trial court's alleged error in instructing the jury with regard to the corrupt organizations charge. We disagree.

When reviewing a challenge to part of a jury instruction, we must review the jury charge as a whole to determine if it is fair and complete. A trial court has wide discretion in phrasing its jury instructions, and can choose its own words as long as the law is clearly, adequately, and accurately presented to the jury for its consideration. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law. ***Commonwealth v. Roser***, 914 A.2d 447, 455 (Pa. Super. 2006) (citation omitted).



Our standard for reviewing such a challenge is well-settled:

In reviewing a challenged jury instruction, we must review the charge as a whole and not simply isolated portions, to ascertain whether it fairly conveys the required legal principles at issue. We are reminded, as well, that a trial court possesses broad discretion in phrasing its instructions to the jury and is not limited to using particular language provided that the law is clearly, adequately and accurately presented to the jury.

***Commonwealth v. Bracey***, 831 A.2d 678, 684 (Pa. Super. 2003), *appeal denied*, 844 A.2d 551 (Pa. 2004) (citations omitted). “A jury instruction will be upheld if it clearly, adequately, and accurately reflects the law.” ***Commonwealth v. Smith***, 956 A.2d 1029, 1034-35 (Pa. Super. 2008) (*en banc*) (citation omitted).

In support of this claim, Appellant asserts that the trial court, when instructing on the corrupt organization charge “stated to the jury, ‘The Borelli Drug Organization’ and ‘Borelli Organization’ on four different occasions.” Appellant’s Brief at 27. The PCRA court rejected Appellant’s claim, “because the Commonwealth presented overwhelming evidence that [Appellant] organized, operated, and otherwise ran a large, complex, violent drug ring in Berks County[,]” and Appellant “has not shown how the language prejudiced him.” PCRA Court Opinion, 12/4/12, at 8.

Our review of the record supports the trial court’s conclusion. Appellant makes the bare assertion that the trial court, in its instructions, “chose wording that directly formed in the jury’s minds the guilt of

[Appellant] related to” the corrupt organization charges. Appellant’s Brief at 28. Our review of the record refutes Appellant’s assertion. Because the trial court’s jury instruction accurately reflected the law regarding the corrupt organization charges, any claim raised by counsel would have been meritless. **Loner, supra.**

In his third claim, Appellant asserts prior counsel was ineffective for failing to raise and/or preserve multiple instances of prosecutorial misconduct during the Commonwealth’s closing argument to the jury. We disagree.

Our standard of review for a claim of prosecutorial misconduct is limited to “whether the trial court abused its discretion.” **Commonwealth v. Harris**, 884 A.2d 920, 927 (Pa. Super. 2005) (citation omitted), *appeal denied*, 928 A.2d 1289 (Pa. 2007). In considering such a claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one. **Id.** This Court has observed:

Not every unwise remark on a prosecutor’s part constitutes reversible error. Indeed, the test is a relatively stringent one. Generally speaking, a prosecutor’s comments do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward Appellant so that they could not [weigh] the evidence objectively and render a true verdict. Prosecutorial misconduct, however, will not be found where the comments were based on evidence or proper inferences therefrom or were only oratorical flair. In order to evaluate whether comments were improper, we must look to the context in which they were made.

**Id.** Moreover, “the prosecutor is permitted to respond to defense arguments and is free to present his or her case with logical force and vigor.” **Commonwealth v. Koehler**, 737 A.2d 225, 240 (Pa. 1999) (citation omitted).

The PCRA court found no merit to Appellant’s claim because “[m]ost of the instances labeled by [Appellant] as ‘prosecutorial misconduct’ are simply instances where evidence harmful to [his] defense were allowed to reach the jury[.]” PCRA Court Opinion, 12/4/12, at 9. Our review of the record supports this conclusion. Indeed, within his brief Appellant solely refers to comments made by the prosecutor with regard to his co-defendant’s defense. **See** Appellant’s Brief at 29-31. According to Appellant, in making these comments regarding Appellant’s co-defendant and co-defendant’s counsel, “the prosecutrix indirectly inferred that [Appellant] was also a liar and bad person that was guilty of the crimes charged because since [Appellant] and Alicea were jointly tried for the same offenses.” Appellant cites no pertinent authority for this proposition. **See Commonwealth v. Tielsch**, 934 A.2d 81, 93 (Pa. Super. 2007) (holding that undeveloped claims will not be considered on appeal). Thus this claim of ineffectiveness is without merit.

In his fourth claim of ineffectiveness, Appellant asserts that prior counsel was ineffective for failing to preserve for review “trial counsel’s motion claiming double jeopardy on the charges of Pennsylvania Corrupt

Organizations Act.” Appellant’s Brief at 31 (capitalization removed). Appellant does not refer to the place in the record where trial counsel raised such a pre-trial challenge and our review of the certified record reveals that a double jeopardy claim was not raised in Appellant’s omnibus pre-trial motion. **See** Omnibus Pretrial Motion for Relief, 12/18/05. Nevertheless, Appellant’s claim is specious. Appellant was charged at two separate dockets with the crime of corrupt organizations. Appellant cites no case law that prevents the Commonwealth from pursuing that offense at both dockets. Thus, we do not consider Appellant’s claim further. **Tielsch, supra.**

In his final claim of ineffectiveness regarding No. 1575 MDA 2012, Appellant asserts that prior counsel was ineffective for failing to raise and/or preserve for appellate review the trial court’s allowing the Commonwealth to amend the original criminal information to include a charge of conspiracy to commit criminal homicide.

This Court has summarized:

According to Pa.R.Crim.P. 564, the court may permit amendment of an information when there is a defect in the form, the description of the offense(s), the description of any person or any property, or that date charged, provided the information as amended does not charge an additional or different offense. Moreover, upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice. The purpose of Rule 564 is to ensure that a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed. Our courts apply the rule with

an eye toward its underlying purposes and with a commitment to do justice rather than be bound by a literal or narrow reading of the procedural rules.

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[W]hen presented with a question concerning the propriety of an amendment, we consider: whether the crimes specified in the original indictment or information involve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct. If, however, the amended provision alleges a different set of events, or the elements or defenses to the crime differ to the amended crime are materially different from the elements of defenses to the crimes originally charged, such that the defendant would be prejudiced by the change, then amendment is not permitted.

Additionally, in reviewing a grant to amend an information, the Court will look to whether the appellant was fully apprised of the factual scenario which supports the charges against him. Where the crimes specified in the original information involved the same basic elements and arose out of the same factual situation as the crime added by the amendment, the appellant is deemed to have been placed on notice regarding his alleged criminal conduct and no prejudice to the defendant results.

***Commonwealth v. Roser***, 914 A.2d 447, 456-54 (citations omitted).

The PCRA court found no merit to Appellant's claim and explained:

Here, the [trial court] permitted the Commonwealth to amend the Information to add Conspiracy to Commit First Degree Murder. . . . [Appellant] was apprised of the charge of First Degree Murder at the original filing of the Information. The Conspiracy charge arose from the exact same actions, and it involves the exact same elements as the murder and other conspiracy charges. As such, [Appellant] was not prejudiced, and his claim should be dismissed.

PCRA Court Opinion, 12/4/12, at 10-11.

Our review of the record and relevant case law supports the trial court's conclusion. "If there is no showing of prejudice, amendment of an information to add an additional charge is proper even on the day of trial, and the mere possibility of that amendment of an information may result in a more severe penalty due to the additional charge is not, of itself, prejudice." **Roser**, 914 A.2d at 455 (citation omitted). Appellant has not specified how he was prejudiced in this case by the Commonwealth's amendment of the original information. Thus, Appellant cannot establish his claim of ineffectiveness. **Travaglia, supra**.

In sum, because all of Appellant's ineffectiveness claims with regard to his appeal at No. 1575 MDA 2012 lack merit, we affirm the PCRA court's order denying him relief.

In his appeal docketed at No. 1644 MDA 2012, Appellant first takes issue with the PCRA court's conclusion that he filed his PCRA petition in an untimely manner. Thus, we must review this determination before we address the merits of any claims raised by Appellant in his brief.

The timeliness of a post-conviction petition is jurisdictional. **Commonwealth v. Albrecht**, 994 A.2d 1091, 1093 (Pa. 2010) (citation omitted). Thus, if a PCRA petition is untimely, neither an appellate court nor the PCRA court has jurisdiction over the petition. **Id.** "Without jurisdiction,

we simply do not have the legal authority to address the substantive claims” raised in an untimely petition. **Id.**

Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, an exception to the time for filing the petition. **Commonwealth v. Gamboa-Taylor**, 753 A.2d 780, 783 (Pa. 2000); 42 Pa.C.S.A. § 9545(b)(1). Under these exceptions, the petitioner must plead and prove that “(1) there has been interference by government officials in the presentation of the claim; or (2) there exists after-discovered facts or evidence; or (3) a new constitutional right has been recognized.” **Commonwealth v. Fowler**, 930 A.2d 586, 591 (Pa. Super. 2007) (citations omitted). A PCRA petition invoking one of these statutory exceptions must “be filed within sixty days of the date the claim first could have been presented.” **Id. See also** 42 Pa.C.S.A. § 9545(b)(2). Moreover, exceptions to the time restrictions of the PCRA must be pled in the petition, and may not be raised for the first time on appeal. **Commonwealth v. Burton**, 936 A.2d 521, 525 (Pa. Super. 2007); **see also** Pa.R.A.P. 302(a) (“Issues not raised before the lower court are waived and cannot be raised for the first time on appeal.”).

Appellant’s judgment of sentence became final on or about February 7, 2010, thirty days after the time for filing a direct appeal to this Court had expired. 42 Pa.C.S.A. § 9545(b)(3). Therefore, Appellant had to file his

PCRA petition by February 7, 2011, in order for it to be timely. As Appellant filed the instant petition on March 25, 2011, it is untimely unless he has satisfied his burden of pleading and proving that one of the enumerated exceptions applies. **See Commonwealth v. Beasley**, 741 A.2d 1258, 1261 (Pa. 1999).

Appellant has failed to plead the applicability of any of the exceptions to the PCRA's time restrictions. Instead, Appellant asserts that the PCRA court should have considered a prior civil action he had filed against prison authorities and other state entities, to be a "defective" first PCRA petition, such that the March 2011 petition constituted an amendment to that filing. We disagree.

Initially, we note that the civil action is not part of the certified record in No. 1644 MDA 2012. Thus, for review purposes, it does not exist. **See Commonwealth v. Kennedy**, 868 A.2d 582, 593 (Pa. Super. 2005) (explaining that, "[a]ny document which is not part of the official certified record is considered to be non-existent, which deficiency may not be remedied by inclusion in the reproduced record"). Moreover, although Appellant's filing is not in the record, in his no-merit letter, PCRA counsel averred:

[A] review of [Appellant's] civil action demonstrates that [he] failed to address any PCRA claims, even if the document had been properly filed. The civil cover sheet claims the actions were for "malicious prosecution" and asserts that money damages were requested. Accordingly,



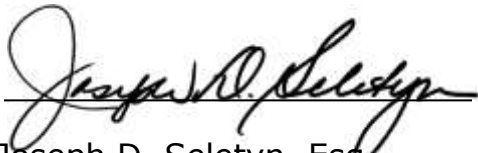
[Appellant's] claim does not fall with[in] the governmental interference exception.

No-Merit Letter, 4/26/12 at 4. Thus, the PCRA court properly determined that Appellant's PCRA petition filed at No. 1644 MDA 2012 was untimely, and that it lacked jurisdiction to consider the claims Appellant raised within the petition.

Orders affirmed.

Judge Shogan concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/22/2013