NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEROME T. ROBINSON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1663 WDA 2011

Appeal from the PCRA Order September 15, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0006720-2008

BEFORE: STEVENS, P.J., MUSMANNO, J., and ALLEN, J.

MEMORANDUM BY STEVENS, P.J. Filed: January 11, 2013

This is an appeal from the order entered in the Court of Common Pleas of Allegheny County dismissing Appellant's first petition filed under the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546. Appellant raises numerous claims of ineffective assistance of counsel associated with his non-jury trial, sentencing, and PCRA proceedings below. For the following reasons, we affirm.

This case stems from events occurring in the City of Pittsburgh during the early morning hours of September 30, 2007. At approximately 2:20 a.m., jitney driver Jerald Johnson had driven a customer to a housing complex in the Hill District of the city. According to Johnson's testimony at trial, he assisted the customer with carrying bags to the entrance of the complex. As he did, Appellant and his cohort, Alonzo McKenzie, confronted

him with firearms pointed and demanded his money. Johnson, however, offered resistance. He attempted to gain control of Appellant's rifle, prompting Appellant to fire a shot into Johnson. Johnson continued, however, striking Appellant in the face with enough force to cause a laceration and grabbing McKenzie's handgun as well. Appellant then shot Johnson twice more before fleeing into a nearby wooded area.

Police responded soon afterward and observed two men emerging from the wooded area and into a housing complex. Police followed the two men inside and stopped them on the third floor. Police determined their clothes matched a description of those worn by the suspects and noticed Appellant had what appeared to be a new laceration over his eye. The two men also appeared nervous and were perspiring.

Additional evidence offered at trial included police recovering clothes and a rifle from the woods in which Appellant and McKenzie were seen. The clothing matched descriptions given to police and DNA obtained from the rifle and the handgun recovered at the scene matched Appellant's DNA. Furthermore, Johnson identified Appellant as his shooter in a photo array, at the preliminary hearing, and at the non-jury trial.

On June 23, 2008, Appellant was charged with two counts of Criminal Attempt--Murder, 18 Pa.C.S.A. §§ 901(a) and one count each of Aggravated Assault, 18 Pa.C.S.A. §§ 2702(a)(1), Robbery--Inflicting Serious Bodily Injury, 18 Pa.C.S.A. §§ 3701(a)(1), Recklessly Endangering Another Person

(REAP), 18 Pa.C.S.A. §§ 2705, and Criminal Conspiracy to Commit Robbery, 18 Pa.C.S.A. §§ 903(a)(1). At his non-jury trial, Appellant faced all charges, save the Criminal Attempt -- Murder charge, and was found guilty of Aggravated Assault, Robbery, REAP, and Criminal Conspiracy to Commit Robbery. The court sentenced Appellant to 10 to 20 years' incarceration for Aggravated Assault, and 5 to 10 years' incarceration on charges of Criminal Conspiracy and Robbery, to run concurrently to one another but consecutively to the sentence for Aggravated Assault. An aggregate sentence of 15 to 30 years thus resulted. Appellant filed no post-sentence motions. Appellant filed a direct appeal through appointed counsel, but the appeal was eventually discontinued on January 3, 2011.

The next entry on Appellant's docket is the filing of his first PCRA petition on January 26, 2011. The PCRA court appointed counsel to file an amended petition, but, on May 31, 2011, counsel filed a motion to withdraw as counsel pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 379 Pa.Super. 390, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On June 6, 2011, Appellant filed a responsive petition challenging counsel's decision. Nevertheless, On July 21, 2011, the PCRA court notified Appellant of its intention to grant counsel's request and dismiss Appellant's petition without a hearing. No further response forthcoming from Appellant, the court dismissed his petition and

granted counsel's motion to withdraw on September 15, 2011. This timely appeal followed.

Our standard of review of the denial of a PCRA petition is limited to examining whether the court's rulings are supported by the evidence of record and free of legal error. ***Commonwealth v. Anderson***, 995 A.2d 1184, 1189 (Pa. Super. 2010). This Court treats the findings of the PCRA court with deference if the record supports those findings. ***Id***. It is an appellant's burden to persuade this Court that the PCRA court erred and that relief is due. ***Commonwealth v. Bennett***, 19 A.3d 541, 543 (Pa. Super. 2011).

A PCRA petitioner may be entitled to relief if the petitioner effectively pleads and proves facts establishing ineffectiveness of prior counsel. ***Commonwealth v. Miner***, 2012 WL 1383058, 3 (Pa. Super. filed April 23, 2012).

> To establish ineffectiveness, a petitioner must plead and prove the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. Counsel's actions will not be found to have lacked a reasonable basis unless the petitioner establishes that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different.

Id. (internal citations omitted).

In Appellant's first issue, he alleges counsel provided ineffective assistance of counsel in failing to either secure a pretrial hearing on his

motion to suppress evidence obtained through his illegal seizure or require the court to rule on this challenge during the course of his non-jury trial. Because the Commonwealth never presented evidence supporting a seizure based on probable cause, Appellant argues, pretrial/trial counsel rendered ineffective assistance of counsel in pressing this fact with the trial court and demanding a ruling on this basis. We disagree.

Examining the merits of Appellant's claim, we find it lacking an argument developed with facts and citation to authority establishing the existence of a stop and subsequent arrest unsupported by reasonable suspicion and probable cause, respectively. Indeed, the most Appellant provides is a single sentence conclusion that the Commonwealth presented no evidence supporting probable cause to arrest and actually presented testimony of the arresting officer who believed Appellant's arrest may have been illegal. As for citation to pertinent authority, Appellant offers none applying Fourth Amendment/Article 1 Section 9 jurisprudence as applied to similar facts and circumstances to his case. Instead, the only purpose to the two cases he cites is to supply the most general statements of law on the Commonwealth's burden to prove it obtained evidence lawfully and on the doctrine of harmless error. In so failing to develop his claim with requisite specificity, Appellant fell short of his appellate burden to prove the arguable merit of his first ineffective claim. ***See Commonwealth v. McLaurin****,* 45

A.3d 1131, 1139 (Pa. Super. 2012) (argument waived for lack of development).

Even if we were to find Appellant's argument sufficient to warrant review on the merits, the record discloses that officers had reasonable suspicion to stop and detain Appellant and his cohort, as they observed two men emerging from the woods near the crime scene and enter a residential building. The officers followed and stopped the two men on the third floor to ask them questions. They noticed Appellant matched the description given of one suspect dressed in a black hooded sweatshirt, as Appellant carried a black hooded sweatshirt at the moment. Moreover, officers observed a fresh laceration over Appellant's eye, both men were nervous and sweating, and Appellant offered an improbable explanation that the men entered the building to buy beer.

> Probable cause is made out when "the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." ***Commonwealth v. Rodriguez***, 526 Pa. 268, 585 A.2d 988, 990 (1991). The question we ask is not whether the officer's belief was "correct or more likely true than false." ***Texas v. Brown***, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). Rather, we require only a "probability, and not a *prima facie* showing, of criminal activity." ***Illinois v. Gates***, 462 U.S. 213, 235, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (citation omitted) (emphasis supplied). In determining whether probable cause exists, we apply a totality of the circumstances test. ***Commonwealth v. Clark***, 558 Pa. 157, 735 A.2d 1248, 1252 (1999) (relying on ***Gates***, ***supra***).

Commonwealth v. Williams, 2 A.3d 611, 616 (Pa. Super. 2011) (citation omitted)(emphases in original).

> Probable cause is a flexible, common-sense standard. As the Supreme Court in Texas v. Brown, supra commented 103 S.Ct. at 1543: .... A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 [93 L.Ed. 1879] (1949). . . . Moreover, when examining a particular situation to determine if probable cause exists, a court must consider all factors and not concentrate on any individual element. Furthermore, it is important to focus on the circumstances as seen through the eyes of a trained officer and not to view the situation as an average citizen might.

Commonwealth v. Kendrick, 490 A.2d 923, 927 (Pa.Super. 1985).

Under the totality of circumstances recounted above, we conclude an officer of reasonable caution would have suspected that Appellant and his cohort had committed the crime just reported. Accordingly, Appellant cannot prove counsel's failure to press this issue with the court caused him prejudice.

In his second issue, Appellant contends all prior counsel were ineffective for failing to raise and preserve a claim of prosecutorial misconduct. Specifically, Appellant argues the Commonwealth "ambushed" the defense by revealing to the jury the extent of the victim's injuries through reference to hospital medical records. Appellant contends he was "highly unaware" such inculpatory evidence existed and charges defense counsel with ineffectiveness for failing to object to the records' admission.

> To succeed on a claim of ineffective assistance of counsel based on trial counsel's failure to object to prosecutorial

> misconduct, the defendant must demonstrate that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process. ***Commonwealth v. Hanible***, [612 Pa. 183,] 30 A.3d [426,] 464–65 [2011]. "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." ***Id***. at 465 (*quoting* ***Greer v. Miller***, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987)).

Commonwealth v. Busanet, 54 A.3d 35, 64 (2012).

Appellant has failed to satisfy this burden and his layered ineffectiveness claim fails for lack of arguable merit. In advancing his argument on this issue, Appellant states only the following:

> [The prosecutor] assured the trial court upon introduction of the medical/hospital records that they confirm the permanent conditions the alleged victim is left to suffer, as a result of being shot twice by the Appellant with an Assault rifle. However, due to the Appellant's claim of being innocent, in the Robbery-Assault of Mr. Johnson, he contends that a timely inspection of the aforementioned medical/hospital records, would have put both [the prosecutor] and the alleged victim's testimony at odds, thus providing a different outcome in the trial proceeding/verdict.

Brief for Appellant at 9.

The argument appears to state, therefore, that because Appellant claimed innocence at trial, his inspection of medical records would have revealed fatal inconsistencies between the records and both the prosecutor's theory of the case and the victim's testimony. Neither logic nor evidence adduced at trial support this perplexing argument. Indeed, Appellant utterly fails to explain what part of the medical records would have enabled his innocence

defense to undermine the Commonwealth's case. Instead, he simply states it is so and asks this court to hold counsel ineffective accordingly. Our independent review of the record discloses neither an irregularity with the admission of the victim's hospital records to confirm the extent of his injuries nor any inconsistency between the records and the victim's testimony. Appellant's meritless argument to the contrary may not support a claim of ineffectiveness.

Appellant's third claim assails trial counsel's decision to forego calling two prisoners prepared to testify in his defense. According to sworn affidavits, the first witness would have testified that he saw the victim take a gun from his grey mercedes and go into a hallway from where just moments later gunshots rang out. The second witness would have testified to seeing a man known a "Big G" (the victim) trying to sell a handgun and rifle in a different neighborhood on or about September 30, 2007. Because this testimony would have differed from the victim's testimony regarding the night in question and cast him in an unsympathetic light, Appellant contends, counsel prejudiced Appellant as a result of his unreasonable decision to forego such testimony.

When raising a claim of ineffectiveness for the failure to call a potential witness, a petitioner satisfies the performance and prejudice requirements of the Strickland test by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or

should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial. ***Commonwealth v. Johnson***, 600 Pa. 329, 966 A.2d 523, 536 (2009); ***Commonwealth v. Clark***, 599 Pa. 204, 961 A.2d 80, 90 (2008). To demonstrate Strickland prejudice, a petitioner "must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case." ***Commonwealth v. Gibson***, 597 Pa. 402, 951 A.2d 1110, 1134 (2008). Thus, counsel will not be found ineffective for failing to call a witness unless the petitioner can show that the witness's testimony would have been helpful to the defense. ***Commonwealth v. Auker***, 545 Pa. 521, 681 A.2d 1305, 1319 (1996). "A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy." ***Id.***

Here, Appellant has not shown that the testimony of the two witnesses would have had a reasonable possibility of making a difference in his case. Significantly, the statements on which Appellant relies are not exculpatory; rather, they demonstrate only that the witnesses in question saw the victim possess a gun at the scene moments before the shooting and at another moment proximate in time. When viewed among the totality of incriminating evidence offered against Appellant, including evidence of Appellant's DNA on the handgun and assault rifle involved, the proffer of two

prisoner statements that the victim possessed a gun fails to exculpate Appellant in any way. Appellant's defense was that he had no involvement whatsoever with the shooting, not that he acted in self-defense. How the witnesses testimony related to his defense Appellant fails to explain. Therefore, Appellant has not demonstrated the necessary prejudice to prevail on this claim.

Underlying Appellant's fourth ineffectiveness claim is the alleged insufficiency of evidence offered on the charges of Robbery and Conspiracy, as the victim testified he was unable to hand over money to his assailants and no evidence of an agreement to rob victim existed. Because prior counsel failed to raise and/or preserve this issue on his abandoned direct appeal, Appellant argues, this claim is properly raised herein.

Our standard for reviewing the sufficiency of the evidence is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and

> all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Brown, 23 A.3d 544, 559–60 (Pa. Super. 2011) (*en banc*).

A sufficiency of the evidence claim requires an assessment of whether the evidence introduced at trial established the offense charged. ***Commonwealth v. May***, 584 Pa. 640, 887 A.2d 750, 753 n. 10 (2005). Proof of an attempted theft is sufficient to establish the "in the course of committing a theft" element of robbery. ***Commonwealth v. Sanchez***, ___ Pa. ___, 36 A.3d 24 (2011). Here, evidence found credible by the finder of fact included the victim's testimony that Appellant and his cohort told him to give up his money before a struggle ensued. This testimony established an attempted theft and, thus, a necessary element to the robbery charge.

Likewise, Appellant's bare allegation of "no testimony, physical or circumstantial evidence provided in the instant criminal matter to support the offense of criminal conspiracy" fails. Implicit in Appellant's argument is the misguided belief that evidence of an explicit conspiracy is necessary to convict on the charge. Our jurisprudence instructs otherwise.

The Pennsylvania Crimes Code defines conspiracy as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S.A. § 903(a). This requires proof that: 1) the defendant entered into an agreement with another to commit or aid in the commission of a crime; 2) he shared the criminal intent with that other person; and 3) an overt act was committed in furtherance of the conspiracy. ***Commonwealth v. Devine***, 26 A.3d 1139, 1147 (Pa. Super. 2011). "This overt act need not be committed by the defendant; it need only be committed by a co-conspirator." ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038 (Pa. Super. 2002) (citation omitted).

> The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation. The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. Even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators in furtherance of the conspiracy.

Commonwealth v. McCall, 911 A.2d 992, 996–97 (Pa.Super.2006) (citation omitted).

Evidence at trial established that Appellant and McKenzie acted in concert during every phase of their involvement in the victim's robbery. Together they: lay in wait as the victim approached; overtook him; demanded money; fought and shot him when he resisted; left the scene; entered a building in an attempt to elude law enforcement; and lied to police when questioned. This body of evidence sufficed to establish an agreement between Appellant and McKenzie to commit the crime of robbery against victim.

Appellant next asserts the ineffectiveness of all prior counsel in failing to raise and develop the claim that trial counsel ineffectively denied Appellant his right to testify on his own behalf. Prior to trial, Appellant contends, he and defense counsel agreed that Appellant would testify to acting in self-protection in a life or death struggle with victim for control of a gun, pursuant to 18 Pa.C.S.A. SS 505. Counsel's decision in open court to decline to call Appellant to the stand was both unilateral and unreasonable given the facts of the case, Appellant concludes.

The decision to testify on one's own behalf:

> is ultimately to be made by the accused after full consultation with counsel. In order to support a claim that counsel was ineffective for "failing to call the appellant to the stand," [the appellant] must demonstrate either that (1) counsel interfered with his client's freedom to testify, or (2) counsel gave specific

> advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf.

Commonwealth v. O'Bidos, 849 A.2d 243, 250 (Pa. Super. 2004) (citation omitted). "Counsel is not ineffective where counsel's decision to not call the defendant was reasonable." ***Commonwealth v. Breisch***, 719 A.2d 352, 355 (Pa. Super. 1998).

From the time of his arrest to the time he was sentenced, Appellant steadfastly maintained he was not involved in the attack on victim. Indeed at his sentencing hearing, Appellant stated that he felt sympathy for the victim but that he had "nothing to do with it." N.T. 8/20/10 at 13. Moreover, at trial, the court asked counsel in open court whether Appellant would be testifying in his own defense. "Appellant is seated right next to you and can hear what I say to you. Which is you have advised him he has a right to remain silent. A decision to remain silent cannot be used against him in any way. No inference of guilt can be created by his right to remain silent." N.T. 5/21/10 at 2. Counsel stood and answered that Appellant would not testify. Appellant offered no comment or objection at counsel's answer. It is further notable that despite Appellant's appellate claim his testimony would further a self-protection defense strategy, the record reflects no such defense was ever so much as intimated by the defense. In short, nothing of record supports Appellant's claim that counsel impermissibly interfered with his right to testify. Belied by the record, this claim fails.

The sixth claim before us presents a challenge to the legality of sentence. Specifically alleged is that the imposition of a mandatory ten to twenty year sentence for Aggravated Assault exceeded the statutory limits applicable to the offense. Moreover, the court neither specified what mandatory sentencing statute it applied nor completed a written sentencing order to authorize his sentence, Appellant claims.

The Commonwealth counters that the court did not impose a mandatory sentence pursuant to Section 9714, the second strike provision, but instead imposed a 10 to 20 year sentence for Aggravated Assault that came within statutory limits. Run consecutively to that sentence were two 5 to 10 year sentences for robbery and conspiracy, which ran concurrently to one another, for an aggregate sentence of 15 to 20 years' incarceration. As all three sentences were within statutory limits, the Commonwealth argues, Appellant's challenge is devoid of merit.

Issues relating to the legality of a sentence are questions of law to which our standard of review is de novo and our scope of review is plenary. ***Commonwealth v. Leverette***, 911 A.2d 998, 1002 (Pa.Super.2006). The Pennsylvania Supreme Court has stated that an illegal sentence is one that exceeds the statutory maximum. ***See Commonwealth v. Bradley***, 575 Pa. 141, 834 A.2d 1127, 1131 (2003). Furthermore:

> "[u]nder Pennsylvania law, a challenge to the validity of a sentence is a challenge to its legality." ***Commonwealth v. Arest***, 734 A.2d 910, 912 n. 2 (Pa.Super.1999). "If a court does not possess statutory authorization to impose a particular

> sentence, then the sentence is illegal and must be vacated." Id. (citation omitted). ***See also [Commonwealth v.] Robinson***, 931 A.2d [15], 21 [(Pa.Super.2007)] (an illegal sentencing claim is one which implicates "the fundamental legal authority of the court to impose the sentence it did."); ***Commonwealth v. Pinko***, 811 A.2d 576, 577 (Pa.Super.2002) ("The matter of whether the trial court possesses the authority to impose a particular sentence is a matter of legality.").

Commonwealth v. Wilson, 11 A.3d 519, 524 (Pa.Super.2010) (en banc) (plurality).

We agree that Appellant's sentence is within legal limits, and Appellant raises no claim that the court lacked authority to impose the sentences. Moreover, we find the record belies Appellant's additional claim that the court failed to reduce his sentence to a written sentencing order, as a signed written order of sentence dated August 30, 2011 is incorporated as entry #30 in the certified record. Appellant's challenge to the legality of his sentence therefore fails.

Appellant's seventh issue, couched in terms of ineffectiveness of PCRA counsel in Appellant's ninth issue, is contingent upon the validity of his second argument, which we have already rejected as devoid of merit. We therefore reject as well issues seven and nine. Likewise, Appellant's tenth issue depends on the success of the underlying claim we rejected in issue five, and so it fails as well.

Finally, Appellant raises a challenge to the discretionary aspects of sentencing that appears nowhere in his statement of questions presented or his PCRA petition. Appellant, however, fails to couch this challenge within an

ineffective assistance of prior counsel claim, as the claim could have been raised in either a direct appeal or within an ineffective assistance of trial counsel claim in his PCRA petition. Accordingly, we find this issue waived. See ***Commonwealth v. Figueroa***, 29 A.3d 1177 (Pa. Super. 2011) (collecting cases on PCRA waiver; holding "an issue 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 post-conviction proceeding." 42 Pa.C.S. §9544(b)); ***Commonwealth v. Jette***, 23 A.3d 1032, 1042 (Pa. 2011) (issues of counsel's effectiveness cannot be raised for the first time on appeal). ***See also Commonwealth v. Davis***, 393 Pa. Super. 88, 97, 573 A.2d 1101, 1105 (1990), appeal denied, 527 Pa. 597, 589 A.2d 688 (1991) (Waiver is an issue which may be raised *sua sponte* by the PCRA court)

Order is affirmed.