

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

RICKY WELBORNE

Appellant

No. 1756 EDA 2012

Appeal from the PCRA Order June 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0204481-2005

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

MEMORANDUM BY GANTMAN, J.:

Filed: March 19, 2013

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

This Court previously set forth the relevant facts and procedural history of this case as follows:

This case arises from the shooting of [Victim] on May 2, 2004. In the early morning hours of that day, [Victim], a known drug dealer, returned to his residence in Philadelphia, with his wife, Ebony Morse, and proceeded to eat a meal. Shortly thereafter, he responded to a knock on his door by [Appellant] (also known as "Rolex"), who burst through the entryway of the premises brandishing a .357 revolver. In response to [Victim's] question "What's up?", [Appellant] stated "You know what's up" and proceeded to shoot him twice in the abdomen. [Appellant]

¹ 42 Pa.C.S.A. §§ 9541-9546.

then turned to [Victim's] wife, asked her the location of certain monies, and confiscated a safe containing \$1,650.00 in cash from [Victim's] bedroom. He then exited the premises and was subsequently arrested on charges arising from this incident.

Thereafter, [Appellant] was tried before a jury on the charges of attempted murder, aggravated assault, carrying a firearm without a license, carrying a firearm on public streets or public property of Philadelphia, and other theft-related offenses. During the proceedings, the Commonwealth produced sufficient evidence establishing that [Appellant] came to [Victim's] residence and shot him twice in the abdomen, resulting in serious bodily injuries that required [Victim] to undergo several surgeries and a lengthy hospitalization. [Appellant] was positively identified by [Victim's] wife, and by [Victim].

[Appellant] also testified, before the jury, that he had entered [Victim's] residence and discharged his weapon upon [Victim], proffering that he had done so in "self-defense." [Appellant] alleged that the dispute had erupted over money that he owed to [Victim] and that [Victim] had threatened him on the date of the incident. After considering the evidence, including [Appellant's] testimony supporting an alleged theory of self-defense, which it found incredible, the jury rendered a verdict convicting [Appellant] of aggravated assault, carrying a firearm without a license, and carrying a firearm on public streets or public property of Philadelphia. The trial court subsequently sentenced [Appellant] to an aggregate term of 15 to 30 years in a state correctional institution, followed by 7 years of reporting probation.

Commonwealth v. Welborne, 970 A.2d 485 (Pa.Super. 2009), *appeal denied*, 608 Pa. 667, 13 A.3d 478 (2010). This Court affirmed the judgment of sentence, and our Supreme Court denied review on December 7, 2010.

See id.

Appellant timely filed a *pro se* PCRA petition on December 30, 2010.

The court appointed counsel, who filed an amended petition. On April 27, 2012, the court issued a notice of intent to dismiss pursuant to Pa.R.Crim.P. 907, and dismissed the petition on June 1, 2012. Appellant timely filed a notice of appeal on June 26, 2012. The court did not order a concise statement of errors complained on appeal pursuant to Pa.R.A.P. 1925(b).

Appellant presents seven issues for our review:

DID THE [PCRA] COURT ERR IN DISMISSING APPELLANT'S PCRA CLAIM ON THE ISSUE OF WHETHER PROSECUTORIAL MISCONDUCT OCCURRED WHEN THE PROSECUTOR FAILED TO CORRECT EVIDENCE IN THE CASE WHEN THE WITNESS TESTIFIED FALSELY OR IN STARK CONTRAST TO THE STATEMENT HE PROVIDED TO THE PROSECUTOR IMMEDIATELY PRIOR TO COMMENCEMENT OF THE TRIAL, WHERE THE PROSECUTOR STATED THAT THERE WAS "NO GUN" DURING HER CLOSING ARGUMENT, WHEN [VICTIM] TOLD HER IMMEDIATELY PRIOR TO TRIAL THAT HE DID POSSESS A GUN THAT APPELLANT TOOK AWAY FROM THE HOUSE AFTER THE SHOOTING?

WHETHER THE PCRA COURT ERRED IN DETERMINING THAT A MISTRIAL WAS NOT WARRANTED WHEN [VICTIM] TOOK OR ATTEMPTED TO CLAIM A PRIVILEGE AGAINST SELF INCRIMINATION UNDER THE PENNSYLVANIA (PA.CONST. ART. I, § 9) AND U.S. CONSTITUTIONS (U.S. CONST., V AMEND.) IN THE PRESENCE OF THE JURY?

WHETHER THE PCRA COURT ERRED IN DETERMINING THAT APPELLANT'S CLAIM THAT HEARSAY TESTIMONY WAS ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE U.S. CONST., (VI AMEND.) AND PENNSYLVANIA (PA.CONST., ART. 1, SEC. 9) CONSTITUTIONS LACKED MERIT?

WHETHER THE PCRA COURT ERRED IN NOT HOLDING AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO MOVE THE COURT FOR A

MISTRIAL WHEN [VICTIM] TOOK OR ATTEMPTED TO CLAIM A PRIVILEGE AGAINST SELF INCRIMINATION UNDER THE PENNSYLVANIA (PA.CONST. ART. I, § 9) AND U.S. CONSTITUTIONS (U.S. CONST., V AMEND.) IN THE PRESENCE OF THE JURY?

DID THE [PCRA] COURT ERR IN DISMISSING APPELLANT'S PCRA CLAIM ON THE ISSUE OF WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO CHALLENGE ON APPEAL THE COURT'S RULING ON COMPLAINANT'S ASSERTION OF HIS PRIVILEGE AGAINST SELF INCRIMINATION UNDER THE PENNSYLVANIA (PA.CONST. ART. I, § 9) AND U.S. CONSTITUTIONS (U.S. CONST., V AMEND.), PARTICULARLY WHERE THE ASSERTION WAS MADE IN THE PRESENCE OF THE JURY?

WHETHER THE PCRA COURT ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING BECAUSE TRIAL COUNSEL'S ACTIONS WERE REASONABLE AND EVIDENT FROM THE RECORD WHERE: (A) TRIAL COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S FAILURE TO CORRECT EVIDENCE OR FACTS KNOWN TO BE FALSE OR INCORRECT; AND (B) TRIAL COUNSEL FAILED TO QUESTION [VICTIM] ABOUT HIS POSSESSION OF A WEAPON DURING THE INCIDENT IN THE MIDST OF A SELF DEFENSE CLAIM?

WHETHER THE PCRA COURT ERRED IN DETERMINING THAT APPELLANT'S CLAIM THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE ADMISSION OF HEARSAY TESTIMONY IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE U.S. CONST., VI AMEND.) AND PENNSYLVANIA (PA.CONST., ART. 1, SEC. 9) CONSTITUTIONS LACKED MERIT?

(Appellant's Brief at 5-6).

Appellant's issues are inter-related; we combine them for purposes of disposition. In issues one and six, Appellant complains the prosecutor committed misconduct by misstating and omitting material facts about

Victim's gun possession. Prior to trial, Victim informed the prosecutor he possessed a gun on the day in question; the Commonwealth informed the court and defense counsel about Victim's new recollection of events. In light of Victim's statement about a gun, Appellant argues the prosecutor blatantly distorted the record by failing to question Victim about the gun and arguing to the jury that there was "no gun" recovered at the scene. Appellant recognizes that the prosecutor's statement was accurate, as there was no gun found at the scene, but effectively claims the Commonwealth committed prosecutorial misconduct by declining to pose questions to Victim on direct examination that would have supported Appellant's self-defense claim. In Appellant's view, trial counsel's failure to object to such misconduct represented ineffective assistance.

In issues two, four, and five, Appellant argues trial counsel was ineffective in declining to seek a mistrial after the court wrongly denied Victim's request to assert his Fifth Amendment privilege. Appellant takes the position that Victim had a Fifth Amendment right not to respond to the Commonwealth's questions about "drug dealing," but the court interfered with that right by requiring Victim to testify. Appellant contends a mistrial was warranted, and counsel was prejudicially ineffective in failing to seek one. Relatedly, Appellant states appellate counsel was serially ineffective in not raising this issue on direct appeal.

In issues three and seven, Appellant asserts trial counsel was ineffective where counsel did not object to hearsay testimony that violated the Confrontation Clause. According to Appellant, police testimony referencing "identification of two witnesses" fell within the scope of the Confrontation Clause because it was testimonial. Appellant concludes the failure to object was prejudicial and tainted the outcome of his trial. On each issue, we disagree with Appellant's contentions.

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Sandy L.V. Byrd, we conclude Appellant's issues merit no relief. The PCRA court opinion properly disposes of the questions presented. (**See** PCRA Court Opinion, dated August 15, 2012, at 2-11) (finding: **(1; 6)** counsel's decision not to question Victim about gun was reasonable tactical decision where Victim had given favorable testimony about Appellant by disclaiming all memory of incident and refusing to identify Victim at trial; counsel reasonably avoided asking Victim about gun out of concern that gun reference could open door to unfavorable testimony; Appellant testified at length about Victim's possession of gun at scene; prosecutor did not commit misconduct in choosing not to ask Victim about gun and objection to prosecutor's examination would have been meritless; **(2; 4; 5)** Victim had no Fifth Amendment privilege with respect to "drug dealing" question because he had already been convicted and sentenced on drug dealing activities referenced

in question; any objection to court's privilege ruling would have been meritless; appellate counsel was not serially ineffective; **(3; 7)** passing reference to "identification from two witnesses" was not testimonial, nor was it even hearsay; testifying detective made no specific references about statements by Mustafa; objection on Confrontation Clause grounds would have been overruled; counsel was not ineffective for failing to raise baseless objection). Accordingly, we affirm on the basis of the PCRA court opinion.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0204481-2005

v. :

RICKY WELBORNE :

PCRA

FILED

AUG 15 2012

Criminal Appeals Unit
First Judicial District of PA

August 15, 2012

OPINION

Byrd, J.

On September 20, 2007, a jury found petitioner Ricky Welborne guilty of aggravated assault and violations of sections 6106 and 6108 of the Uniform Firearms Act. Petitioner then entered an open guilty plea to violating Section 6105 of the Uniform Firearms Act. Petitioner was sentenced to an aggregate term of imprisonment in a state correctional facility for a period of fifteen (15) to thirty (30) years of incarceration followed by seven (7) years of probation on October 26, 2007. Petitioner pursued a direct appeal¹, and on February 26, 2009, the Superior Court affirmed the judgment of sentence. On May 5, 2009, petitioner filed a *pro se* petition under the Post-Conviction Relief Act ("PCRA") seeking *nunc pro tunc* relief to file a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. On June 4, 2010, petitioner was granted the right to file a Petition for Allowance of Appeal, *nunc pro tunc*, and he filed said petition on July 2, 2010. On December 7, 2010, said Petition for Allowance of Appeal was denied. Counsel was appointed to represent petitioner, and filed an amended PCRA petition on January 12, 2012. Said

¹ Petitioner's direct appeal can be found at 2895 EDA 2007.



petition was dismissed on June 1, 2012, and counsel filed a timely Notice of Appeal on June 26, 2012.

STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

Petitioner raised the following issues in his PCRA petition²:

1. That the court committed error in failing to order a mistrial when the complainant took or attempted to claimed the Fifth in the presence of the jury;
2. That trial counsel was ineffective for failing to request a mistrial when the complainant claimed or attempted to claim the Fifth;
3. That appellate counsel rendered ineffective assistance of counsel for failing to challenge the court's ruling on the complainant's assertion of his Fifth Amendment privilege during the trial in the presence of the jury;
4. That the prosecutor's failure to correct evidence in the case where the witness testified falsely or where the prosecutor permitted evidence to be presented to the jury when she knew that the evidence was false or may have been false constituted prosecutorial misconduct;
5. That trial counsel provided ineffective assistance of counsel by failing to object to the prosecutor's failure to correct evidence in the case where the witness may have testified falsely or where the prosecutor permitted evidence to be presented to the jury when she knew that the evidence was false or may have been false which constituted prosecutorial misconduct and where trial counsel failed to question the complainant and eyewitness regarding the possession of a weapon by the complainant;
6. That hearsay testimony was admitted in violation of the confrontation clause; and
7. That trial counsel provided ineffective assistance of counsel for failing to object to the admission of hearsay testimony in violation of the confrontation clause.

DISCUSSION

Petitioner's first argument is that this court committed error in failing to order a mistrial when complainant attempted to claim the Fifth in the presence of the jury. "A

² The following is a verbatim account of the claims advanced by petitioner.

mistrial is an extreme remedy and is required only when the incident is of such nature that the unavoidable effect is to deprive the petitioner of a fair trial.” Commonwealth v. Montalvo, 641 A.2d 1176, 1188 (Pa. Super. 1994). It is well settled that the trial court need not grant every request for a mistrial. Id. The Fifth Amendment affords an individual the privilege against answering official questions in a proceeding where he believes the answer may incriminate him in subsequent proceedings. See Commonwealth v. Brown, 26 A.3d 485, 494 (Pa. Super 2011). There is no specific formula to determine when the Fifth Amendment privilege can be asserted, and the trial court is in the best position to determine when the Fifth Amendment privilege is applicable. See Commonwealth v. Kirwan, 847 A.2d 61, 65 (Pa. Super. 2004); Commonwealth v. Treat, 848 A.2d 147, 148 (Pa. Super. 2004).

In this case, counsel for the Commonwealth asked complainant about his occupation in the spring of 2004. (N.T., 09/18/07, p. 55). Knowing that he was a drug dealer, and in an attempt to prevent incriminating himself, complainant declined to answer the question and “plead the Fifth.” (N.T., 09/18/07, p. 56-57). Following this exchange, this court instructed complainant that he did not have a Fifth Amendment privilege. (N.T., 09/18/07, p. 56-57). The court can properly overrule a claim of Fifth Amendment privilege if it is “perfectly clear” that the witness is mistaken in the use of the privilege against self-incrimination and the answers demanded cannot implicate criminal activity that could be tried in a subsequent hearing. Commonwealth v. Carrera, 227 A.2d 627, 629 (1967). This instruction was proper because, after the incident in this case, but before it came to trial, complainant had already been convicted and sentenced for the drug dealing activities referenced in the question. In light of this fact, it is abundantly clear that complainant was mistaken in the

assertion of his Fifth Amendment privilege. The witness could not possibly have implicated himself in criminal activity that could be tried in a future hearing, because he had already been convicted and sentenced for the criminal activity his answer referenced. (N.T., 09/18/07, p. 84-85). Complainant attempted to assert a Fifth Amendment privilege, and that invocation was immediately and appropriately overruled by this court. As a result, there was no basis petitioner's request for a mistrial, and it was properly denied. Accordingly, this allegation is wholly without merit.

Petitioner's second argument is that trial counsel was ineffective for failing to request a mistrial when complainant attempted to claim the Fifth Amendment privilege. A petitioner may seek relief under the PCRA if his conviction or sentence resulted from "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. § 9543(a)(2)(ii). There is a presumption that counsel was effective and the petitioner has the burden to prove otherwise. Commonwealth v. Payne, 794 A.2d 902, 906 (Pa. Super. 2002). To establish ineffectiveness, petitioner must show: "the underlying claim is of arguable merit; counsel's performance lacked a reasonable basis, and counsel's ineffectiveness caused him prejudice." Commonwealth v. Smith, 995 A.2d 1143, 1150 (Pa. 2010). Prejudice in this context involves, "demonstrating there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." Id. at 1151.

Here, petitioner fails the first prong required to successfully demonstrate ineffective assistance of counsel because the underlying claim has no arguable merit. As the foregoing discussion makes clear, complainant was mistaken regarding the application of the Fifth

Amendment and erroneously asserted the privilege. (N.T., 09/18/07, p. 56). This court then properly instructed him that he had no privilege and to answer the questions. There was no meritorious reason for trial counsel to request a mistrial because complainant's attempted assertion of the Fifth Amendment privilege was unfounded. It is well settled that counsel cannot be deemed ineffective for failing to pursue a meritless claim." Payne, 794 A.2d at 906. Likewise, counsel will not be deemed ineffective for failing to assert a meritless objection. Commonwealth v. Spotz, 896 A.2d 1191, 1222 (Pa. 2006). Where any prong of the test for ineffectiveness is not met, the entire claim must fail. Commonwealth v. Kersterter, 877 A.2d 466, 468 (Pa. Super. 2005). It would have been fruitless for counsel to move for a mistrial after this court properly instructed complainant that he had no such privilege. Thus, petitioner's claim has no arguable merit and trial counsel cannot be deemed ineffective. Accordingly, this allegation of error is meritless.

Petitioner's third argument is that appellate counsel was ineffective for failing to challenge the court's ruling on complainant's assertion of his Fifth Amendment privilege during the trial in the presence of the jury. The same analysis for ineffectiveness that is applied to trial counsel must be applied to appellate counsel. *See* Commonwealth v. Hall, 582 Pa. 526, 872 A.2d 1177 (2005) (the court noted that the three-prong standard for reviewing ineffectiveness claims, applied to the performance of counsel at any level of representation). Based on the foregoing analysis, petitioner's claim has no arguable merit, and therefore his claim of ineffective assistance of counsel must fail.

Petitioner next alleges that the Commonwealth committed prosecutorial misconduct by knowingly presenting false evidence, failing to correct said evidence, failing to present exculpatory evidence to the jury, and presenting a witness who took the Fifth

Amendment. “[A]n 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.A. § 9544(b). “A claim that has been waived is not cognizable under the PCRA.” Commonwealth v. Tedford, 960 A.2d 1, 12 (Pa. 2008). Petitioner did not raise the issue of prosecutorial misconduct on direct appeal, therefore it is waived and he cannot seek relief for it under the PCRA. Further, petitioner is not eligible for relief under the PCRA because this issue does not fall under any of the requirements listed in § 9543(a)(2). In order to get relief under the PCRA the conviction or sentence must have resulted from one or more of the specifically enumerated categories, and petitioner’s claim of prosecutorial misconduct does not. Therefore, as this claim has been waived, it must fail.

Petitioner next contends that trial counsel was ineffective because he failed to object to the prosecutor’s failure to correct false testimony or to the prosecutor’s presentation of false evidence to the jury. In assessing the standard for a finding of ineffectiveness, counsel’s actions are judged by an objective standard. Commonwealth v. Johnson, 966 A.2d 523, 533 (Pa. 2009). A petitioner has no reasonable basis for complaint so long as he received objectively reasonable representation. Commonwealth v. Smith, 995 A.2d 1143, 1171 (Pa. 2010) (citation omitted). Counsel’s choices cannot be evaluated in hindsight, but must be examined in light of the circumstances present at the time he undertook the disputed action or inaction. Commonwealth v. Colavita, 993 A.2d 874 (Pa. 2010). “If counsel’s actions were grounded on some reasonable basis to advance his client’s interests, such assistance may be deemed constitutionally effective.” Commonwealth v. Robinson, 682 A.2d 831, 835 (Pa. Super. 1996). Petitioner “must allege more than a bare assertion that counsel failed to interview ‘X, Y or Z’ and their testimony would have been helpful, for

claims of ineffectiveness cannot be abstractly reviewed in a vacuum.” Commonwealth v. Anderson, 461 A.2d 208, 214 (Pa. 1983). In order to succeed in this prong, petitioner must prove that, “in light of all the alternatives available to counsel, the strategy actually employed was so unreasonable that no competent lawyer would have chosen it.” Commonwealth v. Hill, 235 A.2d 347, 349 (Pa. 1967).

In this case, the false evidence, as alleged by petitioner, includes the fact that just before the trial began, complainant informed the prosecutor that he also had a gun when petitioner came to his home and shot him. Almost immediately, the prosecutor brought this information to the attention of this court and defense counsel, but did not pursue it on direct examination. Petitioner contends that, armed with this information, trial counsel was ineffective for failing to question complainant regarding said gun possession. Our courts have repeatedly held that “[t]rial counsel inherently has broad discretion to determine the course of defense tactics employed.” Commonwealth v. Fowler, 670 A.2d 153, 155-56 (Pa. Super. 1996). In order to succeed in this prong, petitioner must prove that, “in light of all the alternatives available to counsel, the strategy actually employed was so unreasonable that no competent lawyer would have chosen it.” Hill, 235 A.2d at 349. However, this claim must fail, as trial counsel’s actions had a reasonable basis.

Obviously, trial counsel’s decision not to ask about complainant’s gun was a tactical one, fueled by the desire to avoid unfavorable testimony from a victim whose presentation was less than hostile toward defendant. The reasonableness of counsel’s strategy is heightened when considered in context with the facts of this case. Petitioner went to complainant’s home and shot him twice in the abdomen. Even if complainant had been in possession of a gun, he was inside of his own home when defendant attacked him and had

no duty to retreat under these circumstances. See Commonwealth v. Helm, 402 A.2d 500, 505 (Pa. 1979) (no duty to retreat in your own home when faced with an aggressor who is not privileged to be there). As aforementioned, complainant was not an especially forthcoming witness, and his resistance to testifying in this matter was evident throughout his time on the witness stand. During direct examination, he not only failed to mention having a gun when petitioner approached him, he also stated that he was shot within seconds of opening his door. (N.T. 9/18/07 pp. 69-70). In addition, although complainant only informed the prosecutor about his gun possession on the eve of trial, defense counsel extensively questioned Detective Fried about complainant's drug dealing activities, search and arrest warrants issued for complainant and his wife, and Detective Fried's discovery of a weapon during the execution of a search warrant on complainant's home. (N.T. 9/18/07 pp. 186-87)

Moreover, petitioner testified at length regarding what happened inside the house with complainant, detailing complainant's threatening demeanor, his comments to petitioner, and his possession of a gun as the catalyst that prompted petitioner to draw and fire his own weapon. (N.T. 9/19/07 pp. 68-71). Petitioner further explained that he took the alleged gun from complainant prior to fleeing his home. (N.T. 9/19/07 p. 71). It is well-settled that "[t]he factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." Commonwealth v. Diggs, 949 A.2d 873, 879 (Pa. 2008). The jury was free to draw inferences from complainant's unwillingness to cooperate with the trial process, and to believe the testimony of petitioner regarding his claim of self-defense. The question of credibility is left to the jury and the verdict will not be disturbed if the jury determines that the Commonwealth's evidence is worthy of belief. Commonwealth

v. Karkaria, 625 A.2d 1167 (Pa. 1993). The jury was free to believe the testimony of complainant or petitioner, and chose not to accept petitioner's self-defense assertions. It cannot be said that counsel pursued an unreasonable trial strategy, or that the result would have been substantially different if counsel had chosen to ask complainant the disputed questions. Therefore, as counsel's chosen strategy had a reasonable basis, he cannot be deemed ineffective. Accordingly, this claim must fail.

Petitioner's next claim is that hearsay testimony was admitted in violation of the Confrontation Clause. However, a challenge to the admissibility of this evidence would have been proper on direct appeal, but it was not raised and cannot be asserted for the first time in a PCRA petition. "[A]n 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.A. § 9544(b). "A claim that has been waived is not cognizable under the PCRA." Tedford, 960 A.2d at 12. Petitioner did not advance this challenge to the admissibility of the evidence, and therefore, as it has been waived, this allegation is without merit.

Finally, petitioner alleges that the hearsay testimony of complainant's brother Mustafa was admitted in violation of the Confrontation Clause. Indisputably, "[t]he Confrontation Clause affords the accused in criminal prosecutions the right to confront adverse witnesses." Commonwealth v. Carson, 913 A.2d 220, 250 (Pa. 2006). This "right of confrontation, when the government attempts to introduce testimonial hearsay, requires that the witness who made the statement be unavailable for trial and that the defendant had a prior opportunity to cross examine that witness." Commonwealth v. Mollett 5 A.3d 291, 308 (Pa. Super. 2010).

In this case, petitioner mischaracterizes the challenged evidence as a testimonial statement within the purview of the Confrontation Clause. However, petitioner's argument overlooks the fact that, when testifying about the identifications by the witnesses, Detective Fried never mentioned Mustafa, and made no specific representations about what was said by Mustafa. Specifically, the disputed interaction with Detective Fried went as follows:

Q. Detective Fried, following your taking of the statement from Kenneth Hill, the completion of the photo array that you made, what, if anything, did you do with respect to this investigation and the defendant?

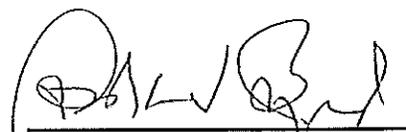
A. Well, actually, before taking the statement from Kenneth Hill, since we had identification from the two witnesses, we obtained not only an arrest warrant but a search warrant for Ricky Welborne's residence.

(N.T. 9/18/07 p. 172). Both complainant, and complainant's wife Ebony, testified regarding the presentation of photographic array, and their signatures above petitioner's picture.

(N.T. 9/18/07 pp. 95, 140). Detective Fried never mentioned Mustafa or any representations made by Mustafa, so as to warrant an objection on hearsay grounds. In addition, the only photographic arrays referenced at trial and received into evidence were those signed by complainant and his wife, and both parties were available and testified at trial. Therefore, the passing reference to "identification from the two witnesses" was not sufficient to warrant a hearsay objection. As our courts have repeatedly held, counsel will not be deemed ineffective for failing to assert a meritless objection. Spotz, 896 A.2d at 1222. Finally, as trial counsel's alleged failure to act was proper, this allegation of error is baseless. It is well settled that the failure to satisfy any prong of the ineffectiveness test will mandate that the Court reject the ineffectiveness claim in its entirety. Commonwealth v. Fulton, 830 A.2d 567, 572 (Pa. 2003). Accordingly, petitioner's claim must fail.

In light of the foregoing, the dismissal of petitioner's PCRA petition should be
AFFIRMED.

BY THE COURT,



SANDY L.V. BYRD, J.