NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOSEPH W. JADCZAK, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1773 EDA 2012

Appeal from the PCRA Order entered May 29, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0002475-2009

BEFORE: LAZARUS, OLSON AND FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.: **FILED MAY 14, 2013**

Appellant, Joseph W. Jadczak, Jr., appeals from an order entered on May 29, 2012 in the Criminal Division of the Court of Common Pleas of Montgomery County that denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court aptly summarized the relevant facts and procedural history in this matter as follows:

> On July 6, 2009, Appellant entered an [o]pen [g]uilty [p]lea to the charges of homicide by vehicle and permitting the operation of a vehicle with unsafe equipment. In pleading guilty, Appellant admitted that he was the owner of Pratt's Auto Service, located in Philadelphia. He was the station's only mechanic licensed to inspect tractor-trailers. On December 2, 2008, Appellant sold two inspection stickers to a trucking company without conducting an inspection of the tractor[-]trailers for which he issued stickers. Two months later, one of the tractor[-]trailers, that should have been inspected, experienced mechanical problems, resulting in a fatal accident. On April 26, 2010,

*Former Justice assigned to the Superior Court.

Appellant was sentenced to three to twenty-three months' imprisonment, and an aggregate fine of $1,500[.00] and costs.

On May 7, 2010, Appellant filed a Petition for Withdrawal of Guilty Plea, alleging the ineffectiveness of guilty plea counsel, John I. McMahon, Esquire. On July 12, 2010, a hearing was held on the Petition. On that same date, an order was issued denying the Petition.

A direct appeal was filed on July 26, 2010. Appellant's judgment of sentence was affirmed by the Pennsylvania Superior Court on April 7, 2011.[] The Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal on October 31, 2011.

On January 17, 2012, Appellant filed a counseled PCRA petition. An evidentiary hearing was held on May 25, 2012. At the hearing, Appellant testified on his own behalf. In significant part, Appellant testified that he only met with Mr. McMahan three or four times prior to entering his guilty plea. Appellant stated that during his discussions and meetings with Mr. McMahon he never saw all of the charges that he was arrested for, and that he never received any discovery from Mr. McMahon despite his numerous requests to do so.

Appellant recalled that in his conversations about going to trial and pleading not guilty, Mr. McMahon was very concerned with all of the pre-trial publicity and that because of all of the publicity Mr. McMahon believed Appellant's chances at trial to be minimal. In fact, it was Appellant's testimony that Mr. McMahon advised against going to trial because of all of the pre-trial publicity.

Appellant also testified that he did not think he was criminally liable. Appellant told th[e PCRA c]ourt that Mr. McMahon did not review all of the charges with him, nor did he review the elements of those charges with him. Appellant stated that there were witnesses that he believed that could be helpful at trial as character witnesses and even an eyewitness to the accident.

According to Appellant's testimony, on the day that he entered his guilty plea, he told Mr. McMahon that he did not believe he was guilty. Appellant also testified that Mr. McMahon told him to just say yes and no when he told him to, and he would "make this thing go away." Although Appellant felt uncomfortable

signing the colloquy he did so anyway based upon Mr. McMahon's advice. Finally, at the PCRA hearing, Appellant told th[e PCRA c]ourt that he was innocent.

The Commonwealth presented the testimony of Mr. McMahon. The credible testimony of Mr. McMahon revealed that he is a seasoned criminal attorney with 22 years of criminal defense experience. Mr. McMahon was contacted by Appellant shortly after his arrest. Mr. McMahon immediately met with Appellant at the Montgomery County Correctional Facility on March 17, 2009, where he was being held on $250,000[.00] bail. Mr. McMahon testified that this first meeting was extremely crucial because that meeting was the basis of how this case was handled. Mr. McMahon knew at that meeting that Appellant was facing a homicide by vehicle charge in a horrific case in which a married man of three children died as a result of the accident. He reviewed the criminal complaint with Appellant and the 21-page affidavit of probable cause. Mr. McMahon unequivocally testified that at no time did Appellant have any disputes with the facts as set forth in the affidavit of probable cause and he did not maintain that he was innocent, and that Appellant's proclamation in his PCRA petition that he was innocent is blatantly false.

The most memorable part of the initial meeting to Mr. McMahon was how desperate Appellant was to get out of jail, and how the conversation between them turned on being able to get Appellant's bail lowered. Per Appellant's request, Mr. McMahon discussed with the First Assistant District Attorney the possibility of lowering the bail in return for Appellant's cooperation. Mr. McMahon was successful in doing so.

On March 19, 2009 a proffer agreement was signed by Appellant. At that proffer meeting it was clearly discussed that part of Appellant's cooperation would require him to plead guilty. Appellant was fully aware as of that date, that any cooperation benefit he would receive was premised on a guilty plea. After Appellant signed the proffer agreement, it was arranged for him to be interviewed by the investigating detective the following day.

On March 20, 2009, Appellant did in fact provide detectives with a 16-page statement with Mr. McMahon present. At that meeting and in his statement, Appellant clearly admitted his criminal conduct, when he admitted that in return for a cash

payment, he would put inspection stickers, not only on the vehicle involved in the fatal accident, but also on many other vehicles, when he had in fact not inspected the vehicles. Based on Appellant's cooperation, his bail was reduced from $250,000[.00] to $50,000[.00]. Appellant was able to post this bail and was able to get out of jail, until he was sentenced, many months later.

Mr. McMahon testified at the PCRA hearing[] that Appellant understood what was taking place at the March 20, 2009 meeting[] and that he was right there with Appellant to answer any questions that he had along the way. In fact, Mr. McMahon recalled and emphasized that he and Appellant took breaks during the statement to answer Appellant's questions. Mr. McMahon also recalled that at times Appellant was not truthful with the detective, until he was confronted with some of the Commonwealth's evidence, such as the inspection and log books. Eventually the lengthy statement was completed.

At the PCRA hearing, Mr. McMahon rejected Appellant's assertion that he was concerned about pre-trial publicity and that he told Appellant he could make this go away. Mr. McMahon emphatically rejected Appellant's testimony in that regard. Rather, Mr. McMahon testified that although there was some pre-trial publicity, as a defense attorney he was more concerned with the overwhelming evidence that the Commonwealth had against Appellant. For instance, Mr. McMahon knew that Appellant would not be able to mount a defense of mistake or accident, in that the Commonwealth had the inspection books which documented a course of conduct that Appellant regularly sold inspection stickers for vehicles he did not actually inspect, including the vehicle involved in the fatal accident. Additionally, the Commonwealth had evidence that the tractor[-]trailer's entire brake system failed. Further, the affidavit of probable cause had an expert opinion and a damaging statement from one of Appellant's employees. Mr. McMahon believed this to be very strong evidence and under his analysis, Appellant was the direct cause of the fatal accident. Mr. McMahon believed that this case was a loser if it had gone to trial. Mr. McMahon opined that the only viable defense that could have been mounted at trial is the legal argument of causation.

Mr. McMahon testified that he made Appellant aware of the option of going to trial, but that as of the time Appellant

> executed the proffer agreement a few days after his arrest, appellant understood that he would be pleading guilty in order to get any kind of benefit from his cooperation. Nevertheless, prior to Appellant's guilty plea on July 6, 2009, Mr. McMahon reviewed with Appellant the guilty plea colloquy and the rights he was giving up by pleading guilty. Mr. McMahon opined that at that time Appellant knew that the course of cooperation and his guilty plea was the best course of action and best option, rather than going to trial. Had Appellant gone to trial and been convicted he could have received a lengthy prison sentence, rather than 90-days of work release that he was ultimately sentenced to. [The PCRA court dismissed Appellant's petition, concluding that Mr. McMahon's testimony was credible and that Appellant's testimony was inconsistent and inaccurate.]

PCRA Court Opinion, 9/5/12, at 1-7.

In his brief, Appellant asks us to review the following issues:

> Whether the PCRA court erred in determining that Appellant failed to plead and prove that he was entitled to relief.
>
> Whether the PCRA court erred in determining that trial counsel did not render ineffective assistance by failing to investigate and/or present witnesses at the trial court level.
>
> Whether the PCRA court's determination that the testimony of John McMahon, Esquire was accurate and worthy of belief and that the testimony of the Appellant is inconsistent and inaccurate is not supported by the record.
>
> Whether the PCRA court erred in determining that trial counsel did not render ineffective assistance by failing to fully review and present the discovery at the trial court level with the Appellant where Appellant specifically requested that trail counsel provide the discovery, thereby rendering his guilty plea involuntary and intelligent.
>
> Whether the PCRA court erred in failing to determine that the actual strategy chosen by trial counsel was one which a reasonable attorney would have pursued in light of the other alternatives available and that as a result of trial counsel's actions, in their totality that the Appellant suffered actual, substantial prejudice.

> Whether the PCRA court erred in failing to allow the Appellant to present a witness at the PCRA hearing and/or by not allowing or ordering that PCRA Petition to be amended in accordance with Pennsylvania Rule of Criminal Procedure 905.

Appellant's Brief at 4.

We have carefully reviewed the certified record in this appeal, including the appellate submissions of the parties, the excellent opinion of the PCRA court, the filings before the PCRA court, and the notes of testimony from Appellant's PCRA hearing. Based upon our examination of these materials, we conclude that the findings of the PCRA court are supported by the record and that the court's legal determinations are free of error. Accordingly, we hold that the PCRA court did not error in dismissing Appellant's petition and that Appellant is not entitled to relief. Because we find that the PCRA court's opinion has adequately and accurately examined all of the issues raised by Appellant in this appeal, we adopt the court's opinion as our own. ***See*** PCRA Court Opinion, 9/5/12.

The parties are instructed to include a copy of the PCRA court's September 5, 2012 opinion with all future filings relating to our disposition in this appeal.

Order affirmed.

Judgment Entered.

Prothonotary

Date: 5/14/2013

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-46-CR-0002475-2009

V. :

JOSEPH JADCZAK, JR. :

OPINION

CARPENTER J. **SEPTEMBER 5, 2012**

FACTUAL AND PROCEDURAL HISTORY

Appellant, Joseph Jadczak, Jr., appeals from the Order dated May 29, 2012, dismissing his petition for post-conviction relief filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546.

On July 6, 2009, Appellant entered an Open Guilty Plea to the charges of homicide by vehicle and permitting the operation of a vehicle with unsafe equipment. In pleading guilty, Appellant admitted that he was the owner of Pratt's Auto Service, located in Philadelphia. He was the station's only mechanic licensed to inspect tractor-trailers. On December 2, 2008, Appellant sold two inspection stickers to a trucking company without conducting an inspection of the tractor trailers for which he issued stickers. Two months later, one of the tractor trailers, that should have been inspected, experienced mechanical problems, resulting in a fatal accident. On April 26, 2010, Appellant

was sentenced to three to twenty-three months' imprisonment, and an aggregate fine of $1,500 and costs.

On May 7, 2010, Appellant filed a Petition for Withdrawal of Guilty Plea, alleging the ineffectiveness of guilty plea counsel, John I. McMahon, Esquire. On July 12, 2010, a hearing was held on the Petition. On that same date, an order was issued denying the Petition.

A direct appeal was filed on July 26, 2010. Appellant's judgment of sentence was affirmed by the Pennsylvania Superior Court on April 7, 2011.[1] The Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal on October 31, 2011.

On January 17, 2012, Appellant filed a counseled PCRA petition. An evidentiary hearing was held on May 25, 2012. At the hearing, Appellant testified on his own behalf. In significant part, Appellant testified that he only met with Mr. McMahon three or four times prior to entering his guilty plea. (PCRA Hearing 5/25/12 p. 8). Appellant stated that during his discussions and meeting with Mr. McMahon he never saw all of the charges that he was arrested for, and that he never received any discovery from Mr. McMahon despite his numerous requests to do so. Id. at 8 - 9.

Appellant recalled that in his conversations about going to trial and pleading not guilty, Mr. McMahon was very concerned with all of the pre-trial

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[1] The trial court authored a 1925(a) opinion, suggesting that the direct appeal was untimely, based upon the untimely nature of underlying Petition for Withdrawal of Guilty Plea. However, the Pennsylvania Superior Court disagreed, finding that the Petition was timely; therefore the direct appeal was also timely. The appeal was ultimately denied on the merits.

publicity and that because of all of the publicity Mr. McMahon believed Appellant's chances at trial to be minimal. Id. at 10. In fact, it was Appellant's testimony that Mr. McMahon advised against going to trial because of all of the pre-trial publicity. Id. at 10 -11.

Appellant also testified that he did not think he was criminally liable. Id. a t 11. Appellant told this Court that Mr. McMahon did not review all of the charges with him, nor did he review the elements of those charges with him. Id. at 11 - 12. Appellant stated that there were witnesses that he believed that could be helpful at trial as character witnesses and even an eyewitness to the accident. Id. at 13 -14.

According to Appellant's testimony, on the day that he entered his guilty plea, he told Mr. McMahon that he did not believe he was guilty. Id. at 17. Appellant also testified that Mr. McMahon told him to just say yes and no when he told him to, and he would "make this thing go away." Id. at 17. Although Appellant felt uncomfortable signing the colloquy he did so anyway based upon Mr. McMahon's advice. Finally, at the PCRA hearing, Appellant told this Court that he was innocent. Id. at 23.

The Commonwealth presented the testimony of Mr. McMahon. The credible testimony of Mr. McMahon revealed that he is a seasoned criminal attorney with 22 years of criminal defense experience. Id. at 38. Mr. McMahon was contacted by Appellant shortly after his arrest. Id. at 40. Mr. McMahon immediately met with Appellant at the Montgomery County Correctional Facility on March 17, 2009, where he was being held on $250,000 bail. Id. at 41.

Mr. McMahon testified that this first meeting was extremely crucial because that meeting was the basis of how this case was handled. Id. at 41 - 42. Mr. McMahon knew at that meeting that Appellant was facing a homicide by vehicle charge in a horrific case in which a married man of three children died as a result of the accident. Id. at 42. He reviewed the criminal complaint with Appellant and the 21-page affidavit of probable cause. Id. Mr. McMahon unequivocally testified that at no time did Appellant have any disputes with the facts as set forth in the affidavit of probable cause and he did not maintain that he was innocent, and that Appellant's proclamation in his PCRA petition that he was innocent is blatantly false. Id. at 43, 60.

The most memorable part of the initial meeting to Mr. McMahon was how desperate Appellant was to get out of jail, and how the conversation between them turned on being able to get Appellant's bail lowered. Id. at 42 - 43. Per Appellant's request, Mr. McMahon discussed with the First Assistant District Attorney the possibility of lowering the bail in return for Appellant's cooperation. Id. at 43, 46. Mr. McMahon was successful in doing so.

On March 19, 2009 a proffer agreement was signed by Appellant. At that proffer meeting it was clearly discussed that part of Appellant's cooperation would require him to plead guilty. Id. at 44. Appellant was fully aware as of that date, that any cooperation benefit he would receive was premised on a guilty plea. Id. After Appellant signed the proffer agreement, it was arranged for him to be interviewed by the investigating detective the following day. Id.

On March 20, 2009, Appellant did in fact provide detectives with a 16-page statement with Mr. McMahon present. Id. at 45. At that meeting and in his statement, Appellant clearly admitted his criminal conduct, when he admitted that in return for a cash payment, he would put inspection stickers, not only on the vehicle involved in the fatal accident, but also on many other vehicles, when he had in fact not inspected the vehicle(s). Id. Based on Appellant's cooperation, his bail was reduced from $250,000 to $50,000. Id. Appellant was able to post this bail and was able to get out of jail, until he was sentenced, many months later. Id.

Mr. McMahon testified at the PCRA hearing, that Appellant understood what was taking place at the March 20, 2009 meeting, and that he was right there with Appellant to answer any questions that he had along the way. Id. at 46. In fact, Mr. McMahon recalled and emphasized that he and Appellant took breaks during the statement to answer Appellant's questions. Id. at 47. Mr. McMahon also recalled that at times Appellant was not truthful with the detective, until he was confronted with some of the Commonwealth's evidence, such as the inspection and log books. Id. Eventually the lengthy statement was completed. Id.

At the PCRA hearing, Mr. McMahon rejected Appellant's assertion that he was concerned about pre-trial publicity and that he told Appellant he could make this go away. Id. at 48. Mr. McMahon emphatically rejected Appellant's testimony in that regard. Id. Rather, Mr. McMahon testified that although there was some pretrial publicity, as a defense attorney he was more

concerned with the overwhelming evidence that the Commonwealth had against Appellant. Id. For instance, Mr. McMahon knew that Appellant would not be able to mount a defense of mistake or accident, in that the Commonwealth had the inspection books which documented a course of conduct that Appellant regularly sold inspection stickers for vehicles he did not actually inspect, including the vehicle involved in the fatal accident. Id. at 49. Additionally, the Commonwealth had evidence that the tractor trailer's entire brake system failed. Id. Further, the affidavit of probable cause had an expert opinion and a damaging statement from one of Appellant's employees. Id. at 68. Mr. McMahon believed this to be very strong evidence and under his analysis, Appellant was the direct cause of the fatal accident. Id. at 49. Mr. McMahon believed that this case was a loser if it had gone to trial. Id. at 49, 51 - 52. Mr. McMahon opined that the only viable defense that could have been mounted at trial is the legal argument of causation. Id. at 52.

Mr. McMahon testified that he made Appellant aware of the option of going to trial, but that as of the time Appellant executed the proffer agreement a few days after his arrest, Appellant understood that he would be pleading guilty in order to get any kind of benefit from his cooperation. Id. at 50. Nevertheless, prior to Appellant's guilty plea on July 6, 2009, Mr. McMahon reviewed with Appellant guilty plea colloquy and the rights he was giving up by pleading guilty. Id. at 50, 63. Mr. McMahon opined that at that time Appellant knew that the course of cooperation and his guilty plea was the best course of action and best option, rather than going to trial. Id. at 51. Had Appellant gone

to trial and been convicted he could have received a lengthy prison sentence, rather than the 90-days of work release that he was ultimately sentenced to. Id. at 52.

On May 29, 2012, the Order presently on appeal was issued, denying Appellant PCRA petition and making a finding that Mr. McMahon's testimony was credible and that Appellant's testimony was inconsistent and inaccurate.

ISSUES

I. Whether trial counsel was ineffective in failing to investigate and/or present witnesses at the trial court level.

II. Whether trial counsel was ineffective in failing to adequately investigate and prepare for Appellant's sentencing by failing to interview or present character witnesses.

III. Whether the PCRA Court's determination that the testimony of Mr. McMahon was accurate and worthy of belief and that the testimony of Appellant was inconsistent and inaccurate is supported by the record.

IV. Whether trial counsel was ineffective, when he received and reviewed discovery.

V. Whether trial counsel's strategy was reasonable.

VI. Whether this Court properly prohibited Appellant from presenting a witness at the PCRA hearing, when he did not comply with 42 Pa.C.S.A. §9545(d)(1).

DISCUSSION

Standard of Review

Our appellate court's standard of review of an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Commonwealth

v. Kimbrough, 938 A.2d 447, 450 (Pa.Super. 2007). In evaluating a PCRA court's decision, the scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level. Commonwealth v. Colavita, 993 A.2d 874, 886 (Pa. 2010). It is an appellant's burden to persuade the appellate court that the PCRA court erred and that relief is due. Commonwealth v. Bennett, 19 A.3d 541, 543 (Pa.Super.2011).

Eligibility Under the PCRA

To prevail on a petition for PCRA relief, a petitioner must plead and prove, by a preponderance of the evidence, that his or her conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2). These circumstances include a constitutional violation or ineffectiveness of counsel, either of which "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)(i) and (ii). In addition, a petitioner must show that the claims of error have not been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). An issue has been waived "if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state post[-]conviction proceeding." 42 Pa.C.S. § 9544(b). An issue has been previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(2); see Commonwealth v. Spotz, 47 A.3d 63, 75 -76 (Pa. 2012)

Ineffectiveness of Counsel Standard

With respect to claims of ineffective assistance of counsel, we begin with the presumption that counsel is effective. Spotz, 47 A.3d 63, 76 (Pa. 2012). To prevail on a claim of ineffectiveness, a petitioner must plead and prove, by a preponderance of the evidence, that (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her 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. Id. (citing Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987)). With regard to the second, i.e., the "reasonable basis" prong, it will be concluded that counsel's chosen strategy lacked a reasonable basis only if the petitioner proves that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." Id. (quoting Commonwealth v. Williams, 587 Pa. 304, 899 A.2d 1060, 1064 (2006)). To establish the third, i.e., the prejudice prong, the petitioner must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. Id.

"Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea." Commonwealth v. Moser, 921 A.2d 526, 531 (Pa.Super.2007) (quoting Commonwealth v. Hickman, 799 A.2d 136, 141 (Pa.Super.2002)). "Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether

counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. Moreover, "[t]he law does not require that [the defendant] be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [his] decision to plead guilty be knowingly, voluntarily and intelligently made." Moser, supra at 528-29 (quoting Commonwealth v. Yager, 685 A.2d 1000, 1004 (Pa.Super. 1996) (*en banc*).

I. Trial counsel was not ineffective in failing to investigate and/or present witnesses at the trial court level.

On appeal, it is Appellant's contention that the PCRA Court erred in ruling that trial counsel was not ineffective for failing to investigate and/or present witnesses at the trial court level.

In the particular context of the alleged failure to call witnesses, counsel will not be deemed ineffective unless the PCRA petitioner demonstrates: (1) the witness existed; (2) the witness was available; (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 was so prejudicial to petitioner to have denied him or her a fair trial. Commonwealth v. Miner, 44 A.3d 684, 687 -688 (Pa.Super. 2012).

Here, Appellant failed to properly plead and prove his ineffectiveness claim. Appellant did not comport with the requirements of 42 Pa.C.S.A. 9545(d)(1), by not attaching a certification of the alleged eyewitness to the accident to his PCRA petition. Rather, he attempted to present the witness at the PCRA hearing. The Commonwealth objected to this improper procedure,

and this Court sustained the objection. (PCRA Hearing 5/25/12 pp. 35 - 36). Accordingly, Appellant did not sustain his burden of proof.

Additionally, Mr. McMahon had a reasonable strategic basis in not presenting the eye witness at trial, when Appellant decided within days after his arrest that he would cooperate with the investigation and plead guilty. Appellant was arrested on March 17, 2009, he signed the proffer agreement on March 19, 2009 and by March 20, 2009, Appellant provided the detective with a statement admitting to his criminal liability. Based upon this cooperation and the expectation of a guilty plea, the Commonwealth's agreed to lowering Appellant's bail, to not make a recommendation as to Appellant's sentence to the sentencing court and to fully apprise the sentencing court as to Appellant's cooperation. Mr. McMahon considered this the best possible strategy to employ and the best possible outcome that Appellant could hope for considering the overwhelming evidence of guilt and of the maximum exposure to jail time that Appellant was facing. In fact, Mr. McMahon's strategy successfully secured a 90-day work release sentence, when Appellant's maximum exposure was approximately 15 to 20 years if convicted on all charges. (PCRA Hearing 5/25/12 p. 39). Accordingly, Mr. McMahon had a reasonable strategic basis in failing to present the alleged eye witness at trial.

II. Trial counsel was not ineffective in failing to adequately investigate and prepare for Appellant's sentencing by failing to interview or present character witnesses.

Second, Appellant contends that this Court erred in determining that trial counsel did not render ineffective assistance by failing to adequately

prepare for Appellant's sentencing by failing to interview or present character witnesses.

In this case, the only evidence adduced at the PCRA hearing in regard to character witnesses at sentencing was Appellant's testimony on redirect examination that there were two witnesses that attended his sentencing, but they were not called to testify. (PCRA Hearing 5/25/12 pp. 32 - 33). Appellant adduced no evidence at the hearing as to the identity of these alleged witnesses or of their proposed testimony. Appellant did not even comport with the requirements of 42 Pa.C.S.A. § 9545(d)(1); therefore, there was no offer of proof in the PCRA petition itself as to the identity of these witnesses or of their proposed testimony. As there was not even an offer of proof, let alone actual evidence, Appellant did not satisfy his burden of proof, and this claim should be rejected.

III. The PCRA Court's determination that the testimony of Mr. McMahon was accurate and worthy of belief and that the testimony of Appellant was inconsistent and inaccurate is supported by the record.

Third, Appellant contends that this Court's determination that the testimony of Mr. McMahon was accurate and worthy of belief and that his testimony was inconsistent and inaccurate is not supported by the record.

It is well settled that PCRA courts make credibility determinations. "A PCRA courts credibility findings are to be accorded great deference where the record supports the PCRA courts credibility determinations, such determinations are binding on a reviewing court." Commonwealth v. Dennis, 17 A.3d 297, 305 (Pa.2011) (citations omitted). "[I]t is axiomatic that appellate

courts must defer to the credibility determinations of the trial court as fact finder, as the trial judge observes the witnesses' demeanor first-hand." Commonwealth v. O'Bryon, 820 A.2d 1287, 1290 (Pa.Super. 2003). In this case, this Court had the opportunity to observe the testimony of both Appellant and Mr. McMahon. This Court considered the facts, the substance of the testimony, the demeanor of each witness and the motives of each witness to be truthful and untruthful, and it was this Court's determination that Appellant was untruthful and that his testimony was not worthy of belief, and that Mr. McMahon's testimony was credible.

IV. Trial counsel was not ineffective, when he received and reviewed discovery.

Fourth, Appellant claims that this Court erred in determining that trial counsel did not render ineffective assistance by failing to fully review and present the discovery at the trial court level with him. Appellant complains that counsel was ineffective in failing to provide him, at his specific request, with a copy of discovery rendering his guilty plea involuntary and unknowing.

At the PCRA hearing, Mr. McMahon testified that he received and certainly reviewed the discovery. (PCRA Hearing 5/25/12 p. 71). Mr. McMahon opined that none of the information he learned through discovery changed his opinion that cooperating with the Commonwealth, along with a guilty plea, was the best course of action with the best possible outcome given the tragic facts of this case. Id. at 72. Initially, despite Appellant testimony to the contrary, Mr. McMahon credibly testified that he reviewed the criminal complaint and

affidavit of probable cause with Appellant at his initial meeting, and Appellant knew of all the charges that were pending against him and the factual basis for those charges, which Appellant did not disagree with. Id. at 9, 11 - 13, 43. Mr. McMahon specifically explained all of the charges, and the difference between a felony and misdemeanor. Id. at 85. Additionally, the affidavit of probable cause was a detailed 16-page document that not only contained a summary of the evidence, but also contained references to a damaging statement from one of Appellant's employees and an expert opinion also damaging to Appellant. Finally, Mr. McMahon stated that Appellant reviewed a large part of the discovery. In fact, Mr. McMahon was sitting right next to Appellant as he reviewed the logbooks with detectives at the proffer meeting. Id. at 70 - 71.

At the PCRA hearing and on appeal, Appellant believes that Mr. McMahon was ineffective in not turning over all of the discovery to him for Appellant to review. However, Appellant has not cited to any case law requiring an attorney to turn over discovery to the defendant for the defendant to review; accordingly, Mr. McMahon was under no obligation to do so and he can not be found to be ineffective on those grounds. Appellant was fully aware of the crimes he was charged with and the evidence that the Commonwealth had to support those charges.

V. Trial counsel's strategy was reasonable.

Fifth, Appellant argues that this Court erred in determining that the actual strategy chosen by trial counsel was one which a reasonable attorney would have pursued in light of the other alternatives available.

"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. Colavita, 606 Pa. 1, 993 A.2d 874, 887 (2010) (quoting Commonwealth v. Howard, 553 Pa. 266, 719 A.2d 233, 237 (1998)). "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. A claim of ineffectiveness generally cannot succeed "through comparing, in hindsight, the trial strategy employed with alternatives not pursued." Commonwealth v. Miller, 572 Pa. 623, 819 A.2d 504, 517 (2002).

At the PCRA hearing, Mr. McMahon explained that the strategy to have Appellant cooperate with the investigation and to plead guilty was formed early on in his representation of Appellant. His strategy took into account the overwhelming amount of evidence that the Commonwealth had against Appellant and that Appellant was facing a significant state sentence. Mr. McMahon knew that with this amount of evidence against Appellant, Appellant did not have many options in terms of a defense. In fact, Mr. McMahon believed that the only defense available would be the legal argument of causation. It was Appellant's only option in regard to a defense and based upon his 22 years of criminal defense work it was not a good defense. Mr. McMahon knew that he could not argue that Appellant's failure to inspect the tractor trailer was a mistake or an accident because there was significant evidence of a regular

course of conduct that Appellant routinely sold inspection stickers without inspecting vehicles. Appellant never represented to Mr. McMahon that he was innocent of the charges; rather Appellant did not disagree with the facts as laid out in the criminal complaint and the affidavit of probable cause, when Mr. McMahon reviewed those with Appellant immediately after his arrest. With the benefit of Mr. McMahon's representation, Appellant secured a favorable sentence, namely a term of 90 days' imprisonment, plus fines and costs. Accordingly, Mr. McMahon had a reasonable basis in advising Appellant to cooperate with the investigation and to plead guilty.

VI. This Court properly prohibited Appellant from presenting a witness at the PCRA hearing, when he did not comply with 42 Pa.C.S.A. 9545(d)(1).

In Appellant's last claim on appeal, Appellant claims that this Court erred in failing to allow him to present a witness at the PCRA hearing and/or by not allowing or ordering that the PCRA petition be amended in accordance with Pennsylvania Rule of Criminal Procedure 905.

Section 9545 of the Post-Conviction Relief Act states:

> **(d) Evidentiary hearing.--**
>
> (1) Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

42 Pa.C.S.A. § 9545(d)(1).

In this case, there is no disagreement that Appellant's petition did not comply with the requirements of §9545(d)(1). In fact, the PCRA petition only made a passing mention of "various persons that had witnessed the accident..." See, PCRA petition ¶8. There is no mention of a specific witness, let alone a signed certification with all of the information required under subsection (d)(1) of this rule. It was only at the PCRA hearing that PCRA counsel first made this Court aware that he intended to call an alleged eyewitness to testify. (PCRA Hearing 5/25/12 p. 34). At that point the Commonwealth objected to this witness, arguing that based upon PCRA counsel's failure to comply with subsection (d)(1), the witness should be prohibited from testifying. Id. at 35. In response, PCRA counsel emphasized that he substantially complied with the rule because he has brought the witness in to testify in court which would allow the Commonwealth an opportunity to cross-examine the witness. Id. This Court disagreed with PCRA counsel and prohibited the witness's testimony. Id. at 36. There was no effort to comply with §9545(d)(1), and there was no "substantial" compliance with §9545(d)(1) which would have provided notice of a proposed witness and which would have allowed this Court to overlook a minor infraction of the rule.

Additionally, because there was only a passing reference to an eyewitness in the PCRA petition, and no notice of Appellant's intent of presenting such a witness to testify until the moment PCRA counsel intended to call this witness at the PCRA hearing, this Court could not have directed Appellant to amend his PCRA petition pursuant to Pa.R.Crim.P. 905 prior to the

hearing. Finally, PCRA counsel never requested that he be granted leave to amend the PCRA petition in order to comply with §9545(d)(1). Accordingly, this Court properly prohibited the alleged eyewitness's testimony at the PCRA hearing.

CONCLUSION

Based on the forgoing analysis, the Order dated May 29, 2012, dismissing Appellant's PCRA petition should be affirmed.

BY THE COURT:

WILLIAM R. CARPENTER J.
COURT OF COMMON PLEAS
MONTGOMERY COUNTY
PENNSYLVANIA
38TH JUDICIAL DISTRICT

Copies sent on September 5, 2012
By Interoffice Mail to:
Court Administration
By First Class Mail to:
Nino Tinari, Esquire