NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TYRONE SLOWE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1529 EDA 2011

Appeal from the PCRA Order Entered May 16, 2011
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0002955-2008

BEFORE: BENDER, P.J.E., SHOGAN, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J.E.: **FILED JUNE 24, 2014**

Appellant, Tyrone Slowe, appeals *pro se* from the court's May 16, 2011 order denying his petition for post conviction relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. For the following reasons, we affirm.

Appellant was charged on May 8, 2008, with two counts of murder and persons not to possess a firearm, based on evidence that he and two accomplices shot and killed victims Tyrone Nelson and Jimmy Armstrong on April 16, 2008. On February 18, 2009, Appellant entered a negotiated *nolo contendere* plea to those charges. Pursuant to the plea agreement, the court sentenced Appellant to an aggregate term of 17 to 34 years'

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* Former Justice specially assigned to the Superior Court.

incarceration. He filed a direct appeal to this Court, solely arguing that his plea was not knowing, intelligent, and voluntary. On March 3, 2010, we affirmed Appellant's judgment of sentence, and our Supreme Court subsequently denied his petition for permission to appeal. ***Commonwealth v. Slowe***, 996 A.2d 556 (Pa. Super. 2010) (unpublished memorandum), *appeal denied*, 8 A.3d 344 (Pa. 2010).

On December 22, 2010, Appellant filed a *pro se* PCRA petition. The court appointed Henry DiBenedetto Forrest, Esq., to represent Appellant. On April 18, 2011, Attorney Forrest filed with the PCRA court a petition to withdraw as counsel and "no-merit" letter in accordance with ***Commonwealth v. Turner***, 544 A.2d 213 (Pa. Super. 1998), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). On April 19, 2011, the PCRA court issued a Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition.

On May 12, 2011, Appellant "sent the [court] a letter accusing [Attorney] Forrest of ineffective assistance." PCRA Court Opinion, 9/9/11, at 8. The PCRA court accepted Appellant's letter as a response to its Rule 907 notice and incorporated it into the record pursuant to Pa.R.A.P. 1926,

despite its facial untimeliness,[1] and Appellant's failure to properly file it with the Office of Judicial Support of Delaware County (OJSDC). ***See id.***

On May 16, 2011, the PCRA court issued an order dismissing Appellant's petition and granting Attorney Forrest's petition to withdraw. Appellant filed a timely *pro se* notice of appeal, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On September 13, 2011, this Court received a detailed Rule 1925(a) opinion from the PCRA court.

Appellant filed a *pro se* brief with this Court on November 21, 2011, presenting the following three issues for our review:

> a) Did the PCRA court error [*sic*] in dismissing the Appellants [*sic*] motion for post-conviction collateral relief without an evidentiary hearing and argument, without allowing Appellant [the] opportunity to fix, cure and amend his petition pursuant to [Pa.R.Crim.P.] 905[,] specifically rejecting petitioners [*sic*] witnesses/Commonwealth witnesses [*sic*] recantation affidavits/evidence without a hearing, thus leaving meritorious issues unresolved[?]
>
> b) Did the PCRA court error [*sic*] when it accepted appointed PCRA counsels [*sic*] ***Finley*** letter and allowed counsel to withdraw when counsel failed to comply completely with the requirements of ***Turner/Finley***, in that counsel failed to contact Appellant concerning any of his issues and those issues [Appellant] wished to have amended, [] counsel failed to support his assertions with law and fact, [] counsel failed to investigate the credibility of witnesses [*sic*] recantation evidence [and]

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[1] In accordance with Rule 907, the court's April 19, 2011 notice of its intent to dismiss Appellant's petition directed Appellant to file any response within 20 days, or by May 9, 2011.

> totally disregarded Appellants [*sic*] letters detailing Appellants [*sic*] desire and wishes for counsel to amend his petition[?]
>
> c) Did the [PCRA] court error [*sic*] in failing to conduct a personal or independent review of each issue Appellant raised in his petition, and those issues Appellant wished raised [*sic*] in his amended petition[?]

Appellant's Brief at 4 (unnecessary capitalization omitted).

On February 21, 2012, Appellant filed with this Court a *pro se* "Application for Relief," asking us to compel the OJSDC to provide him with, *inter alia*, nine "court documents" he was seeking. Application for Relief, 2/21/12, at 2. On March 20, 2012, this Court issued a *per curiam* order granting Appellant's "Application for Relief" and directing the PCRA court "to provide [] Appellant, either directly or via prior counsel, with copies of any requested record documents that are relevant and necessary to this appeal." Superior Court Order, 3/20/12.

On June 6, 2012, this Court received a letter from the PCRA court indicating that the OJSDC had transmitted all record filings to Appellant, and that Appellant's prior attorneys, including Attorney Forrest, had sent Appellant all documents in their possession.[2] Nevertheless, Appellant has continued to file *pro se* petitions with this Court insisting that he has not

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[2] Attached to the PCRA court's June 6, 2012 letter to this Court was a letter from Douglas Smith, Esq., stating that he had transmitted all documents in his possession to Appellant's PCRA counsel, Attorney Forrest. ***See*** PCRA Court's Letter, 6/6/12, at "Exhibit B." Additionally, the PCRA court also attached a letter from Attorney Forrest listing the documents he had transmitted to Appellant. ***See id.*** at "Exhibit C."

received all of the documents that he requested, apparently believing that such documents are still in the possession of the PCRA court, OJSDC, or prior counsel. Specifically, we have received the following *pro se* filings from Appellant:

1) May 17, 2012 "Application for Relief"

2) June 14, 2012 "Application for Stay Proceedings"

3) June 14, 2012 "Second Application for Relief"

4) December 21, 2012 "Motion Requesting Further Stay of Proceedings"

Based on the PCRA court's June 6, 2012 letter informing us that all record documents have been transmitted to Appellant, we deny each of the above-listed petitions for relief and/or stays of the appellate proceedings.

However, we have one additional *pro se* motion to address. On May 13, 2013, Appellant filed an "Application to File Supplemental Brief," alleging that in response to this Court's March 20, 2012 order, he received "numerous statements" from witnesses to the shooting "that were not originally [in his possession] at the time he submitted his *pro se* petition[,] [Rule] 1925[(b)] statement[,] and [appellate] [b]rief." Application to File Supplemental Brief, 5/13/13, at 2. Appellant averred that these witnesses' statements supported his claims of trial and PCRA counsels' ineffectiveness. Accordingly, he asked that this Court permit him to file a supplemental brief discussing this 'new evidence.' Appellant also asked this Court to remand his case and direct the PCRA court to permit him to amend his PCRA petition asserting novel claims stemming from this new evidence.

On June 5, 2013, this Court issued a *per curiam* order granting Appellant's request to file a supplemental brief. In that brief, filed on June 19, 2013, Appellant raises the following three issues for our review:

> A. Whether PCRA counsel [was] ineffective for failing to conduct a thorough examination of the record and [for] failing to raise issues of trial counsel's ineffectiveness for failure to investigate all eyewitnesses to the crime, thus leaving meritorious issues unresolved?
>
> B. Whether PCRA counsel was ineffective for failing to raise [the] issue of trial counsel's ineffectiveness for failing to seek suppression of [a] highly suggestive identification of Appellant, and constitutionally infirm incriminating evidence thereby leaving Appellant subject to irreparable misidentification?
>
> C. Whether PCRA counsel was ineffective for failing to raise direct appeal counsel's ineffectiveness for failing to raise all issues concerning the voluntariness of the plea, most notably, the trial court's participation and suggesting that Appellant take the plea?

Appellant's Supplemental Brief at vi.

In addition, this Court's June 5, 2013 order deferred to the merits panel the decision on Appellant's request that we remand his case and allow him to amend his PCRA petition. For the reasons that follow, we now deny Appellant's petition to remand.

The first two issues presented in Appellant's supplemental brief were not raised in his PCRA petition; thus, this Court may not consider them on appeal.[3] ***See Commonwealth v. Knighten***, 742 A.2d 679, 683 (Pa. Super.

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[3] The third issue raised in Appellant's supplemental brief does not stem from the "new evidence" he ostensibly discovered during the pendency of this
(Footnote Continued Next Page)

1999) ("If an issue is not raised in the first instance in a PCRA Petition, we cannot consider it on appeal.") (citing ***Commonwealth v. Wallace***, 724 A.2d 916, 921 n.5)). Moreover, in ***Commonwealth v. Lark***, 746 A.2d 585 (Pa. 2000), our Supreme Court

> held that this precise type of new claim, alleged in a remand motion before [the] Court during the pendency of a PCRA appeal, must be filed as a second PCRA petition, which may not be filed until [the appellate court] completes its review of the pending PCRA matter. [***Id.***] at 587-88. Permitting a PCRA petitioner to append new claims to the appeal already on review would wrongly subvert the time limitation and serial petition restrictions of the PCRA. ***Id.***

Commonwealth v. Bond, 819 A.2d 33, 52 (Pa. 2002). Pursuant to ***Lark,*** we cannot assess the novel claims asserted in Appellant's supplemental brief, which ostensibly stem from the "new evidence" he discovered during the pendency of this appeal. Appellant must file a second *pro se* PCRA petition within 60 days of the date on which this memorandum decision is filed and raise those claims before the PCRA court.[4] Accordingly, we deny his petition to remand.

(Footnote Continued) ———————————

appeal, and that claim of PCRA counsel's ineffectiveness was not asserted in Appellant's Rule 1925(b) statement. Thus, it is waived for our review. ***See*** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.").

[4] Appellant will also be required to plead and prove the applicability of an exception to the PCRA's one-year timeliness requirement. ***See*** 42 Pa.C.S. § 9545(b)(1)(i)-(iii).

We now move on to address the merits of the issues presented in Appellant's original brief. While Appellant presents three issues in his Statement of the Questions Involved (reproduced *supra*), we ascertain at least 12 different claims and sub-claims in the Argument portion of his brief, including the following:

> (1) Whether the PCRA court erred by dismissing Appellant's petition without a hearing to assess the credibility of the recantation testimony of Bridgett Slowe and Quiana Colbert? Appellant's Brief at 11.
>
> (2) Whether the PCRA court erroneously deprived Appellant of the opportunity to amend his PCRA petition pursuant to Pa.R.Crim.P. 905? ***Id.*** at 11, 12-13.
>
> (3) Whether the PCRA court's Rule 907 notice failed to provide sufficiently specific reasons "to enable [PCRA] counsel to reasonably evaluate the potential for amendment of the petition[?]" ***Id.*** at 12.
>
> (4) Was PCRA counsel ineffective for failing to file an amended petition on Appellant's behalf? ***Id.*** at 15.
>
> (5) Did the PCRA court err in dismissing Appellant's petition "on the basis of [PCRA] counsel's no-merit letter," which was inadequate? ***Id.*** at 14-15.
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> (6) Was PCRA counsel ineffective for failing to communicate with Appellant? ***Id.*** at 15.
>
> (7) Was trial counsel ineffective for allowing Appellant to enter a plea of *nolo contendere* where counsel knew:
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> (a) about the recantations of Ms. Slowe and Ms. Colbert;
>
> (b) that Commonwealth witness Manbir Singh could not identify Appellant as the shooter;
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> (c) that DNA evidence on the murder weapon indicated that Appellant was not the shooter;

> (d) that Commonwealth witness Eulicious Johnson had a motive to lie and inculpate Appellant?
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> ***Id.*** at 15-16.
>
> (8) Did the trial court err by accepting Appellant's *nolo contendere* plea where Appellant continued to assert his innocence during the plea proceeding? ***Id.*** at 16.
>
> (9) Did the PCRA court err by failing to conduct its own independent review of the record and the issues raised in Appellant's PCRA petition before granting PCRA counsel's petition to withdraw and dismissing Appellant's petition? ***Id.*** at 17.

For ease of disposition, we will address Appellant's issues in a different order than that in which they are presented.

Initially, Appellant's issues (3), (7)(b), and (7)(d), were not asserted in his Rule 1925(b) statement and, thus, they are waived. ***See*** Pa.R.A.P. 1925(b)(4)(vii). Additionally, Appellant's sixth issue is waived because he has failed to provide a coherent analysis. Specifically, in support of his claim that his PCRA counsel was ineffective for failing to communicate with him, Appellant provides the following argument:

> Appellant would argue that Postconviction [*sic*] court erred in dismissing postconviction [*sic*] petition on the basis of appointed counsel's no-merit[] letter, which cryptically stated that issues were frivolous and without merit "after a review of the entire record and upon completion of my investigation" and which failed to explain that which was reviewed and investigated, where letter indicated that counsel reviewed specific notes of testimony but review revealed that the issues were previously litigated. However, the letter lacked Appellant [*sic*] Amended issues. Thus, contrary to counsel [*sic*] claiming in his ***Finley/Turner*** no merit letter, than [*sic*] he communicated with this Appellant. This simply isn't true. … Counsel never communicated this concern with Appellant. Thus, if this was [*sic*] true, the question would still be asked. Why didn't counsel

> amend Appellants [*sic*] petition to include the meritorious issues Appellant wanted raised.

Appellant's Brief at 15 (citations omitted). Appellant's argument is too confusing to allow us to meaningful review this claim; thus, it is waived. ***See Commonwealth v. Antidormi***, 84 A.3d 736, 754 (Pa. Super. 2014) (finding issue waived for lack of development where the appellant failed to cite to any legal authority and did not develop any cogent argument) (citations omitted).

Appellant's argument in support of his ninth issue is also scant. It encompasses the following three sentences:

> Appellant further argues that the PCRA court failed to conduct it's [*sic*] own independent review of the issues and record, as it must, before it can similarely [*sic*] dismiss a PCRA petition. ***Com***[***monwealth***] ***v. Mosteller***, 633 A.2d 615 … (Pa. Super. 1993). Nowhere, in the courts [*sic*] opinion can it be said that the court provided proof that it conducted an independent review. The failure to do so constitute[s] error and the case must be remanded and an attorney appointed to represent [] Appellant.

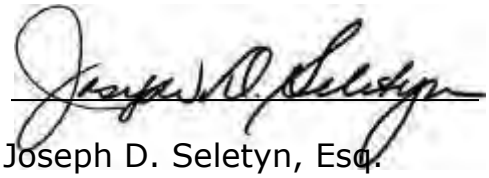
Appellant's Brief at 17 (citation omitted). Appellant's brief discussion is unconvincing. While ***Mosteller*** reiterates the requirement that a PCRA court must conduct its own independent review of the record prior to permitting counsel to withdraw, the detailed opinion of the PCRA court in this case is sufficient "proof" that it undertook that assessment. ***See Mosteller***, 633 A.2d at 617.

In regard to Appellant's remaining issues (*i.e.* numbers (1), (2), (4), (5), (7)(a), (7)(c), and (8), above), we conclude that the thorough opinion

of the Honorable Patricia Jenkins, who presided over Appellant's plea and sentencing proceedings, as well as his current PCRA petition,[5] accurately disposes of these claims. Accordingly, we adopt her well-reasoned assessment of those issues as our own, and affirm the order denying Appellant's petition.[6]

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014

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[5] Judge Jenkins formerly sat on the bench of the Court of Common Pleas of Delaware County, but is currently serving as a judge on this Court.

[6] To reiterate, we **deny** Appellant's May 17, 2012 "Application for Relief," his June 14, 2012 "Application for Stay Proceedings," his June 14, 2012 "Second Application for Relief," and his December 21, 2012 "Motion Requesting Further Stay of Proceedings." We also **deny** Appellant's May 13, 2013 "Application to File Supplemental Brief" to the extent Appellant requests that we remand his case for further proceedings.

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

COMMONWEALTH OF PENNSYLVANIA	:	NOS. 2955-08, 4878-08
	:	
	:	Appealed to Superior Court at
v.	:	1529 EDA 2011
	:	
TYRONE SLOWE,	:	
Defendant	:	

ORIGINAL

John F. X. Reilly, Esquire, Attorney for Commonwealth of Pennsylvania

Tyrone Slowe, *pro se*

OPINION

JENKINS, J. **FILED:** September 9, 2011

On December 22, 2010, Tyrone Slowe filed a timely PCRA petition claiming that he pled *nolo contendere* to third degree murder due to ineffective assistance of counsel. On May 16, 2011, the Court denied his petition without a hearing. Slowe filed a timely notice of appeal 25 days later. Because none of Slowe's arguments on appeal warrant relief, the Court recommends that its order denying Slowe's PCRA petition be affirmed.

I. Factual and Procedural History

Slowe murdered Tyrone Nelson and Jimmy Armstrong in Upper Darby on April 16, 2008. On February 18, 2009, he entered a *nolo* plea to two counts of third degree murder at No. 2955-08 and pled guilty to possession of a firearm by a former convict at No. 4878-08[1]. The affidavit of probable cause attached to the criminal complaint, which

[1] The first portion of the *nolo contendere* hearing took place in the morning of February 18th ("NCH I"), and the second part took place later that day ("NCH II").

the parties agreed was accurate,[2] alleged as follows: numerous witnesses heard 4-5 gun shots and observed three black males fleeing the scene on foot. Eulicious Johnson, Slowe's mother's boyfriend, reported seeing Slowe that night with Marquis Johnson and an unidentified man and also saw Slowe carrying a semi-automatic handgun during the previous month. Slowe, said Eulicious Johnson, had recently been arrested in Pottstown for narcotics violations and was committing robberies to pay for an attorney. Upper Darby police confirmed that Pottstown police had arrested Slowe for drug-related offenses.

The affidavit continues that on May 3, 2008, Slowe admitted to his mother that he "killed them motherfuckers." On May 4, 2008, while in custody for unrelated charges, Slowe identified Maurice Smith as the male whom Eulicious Johnson saw with Slowe on the evening of the shooting. Smith admitted to police that he drove around Philadelphia with Slowe for six hours that evening. On May 6, 2008, Slowe claimed in a custodial statement that he remained in the car while Smith and two unidentified men left the car and engaged in a gunfight. Smith and the other men returned to the car, and they drove downtown. On May 8, 2008, Slowe claimed in another custodial statement that he walked with Smith and Marquis Johnson down the street until Smith told him to wait at an intersection. Smith and Johnson continued to walk down the street, and Slowe heard Smith yell "yo, what's up." There were four gun shots, and Slowe, Smith and Johnson fled the scene.

[2] The parties stipulated that the affidavit of probable cause, autopsy reports, and Slowe's custodial statements to police formed the factual basis for his plea of *nolo contendere* on February 18, 2009. NCH I, pp. 4-5.

The Court scheduled a jury trial to begin on February 19, 2009. On February 18, 2009, Don Fredericks, an investigator hired by defense counsel, Mary E. Welch, wrote a letter[3] describing the following contacts with Slowe and other potential witnesses:

1. On February 5, 2009, Fredericks met with Slowe's mother, Bridgett Slowe, Slowe's sister, Quiana Colbert, and other members of Slowe's family to discuss the upcoming trial;

2. On February 13, 2009, Fredericks spoke with Slowe's mother with regard to interviewing Slowe's girlfriend about testifying as an alibi witness;

3. On February 15, 2009, Fredericks telephoned Slowe's mother, who arranged a three-way telephone call with Slowe in prison. Several times during this call, a recording advised all persons on the line (including Slowe) that the call was being recorded. Despite these warnings, Slowe blurted out incriminating remarks during the conversation that demonstrated his presence at the crime scene, to wit, (a) he was being convicted or forced to plead to something where he was (only) a lookout, (b) the gun that was thrown into the sewer did not have his prints or DNA, (c) DNA testing would show that his fellow perpetrators held the weapon, and (d) the gun was only fired once, and that shot went into the lady neighbor's house's window.[4]

Slowe filed a motion to suppress his two custodial statements to police officers following his arrest. The Court denied the motion to suppress after an evidentiary hearing. On February 18, 2009, one day before trial, faced with the prospect of a

[3] Mr. Fredericks' letter is in the official record as an exhibit to a petition for funding that Ms. Welch filed with the Court shortly after Slowe's *nolo* hearing.

[4] In addition, during a face-to-face meeting with Mr. Fredericks and Ms. Welch on February 17, 2009, Slowe stated that when he got out of prison, he would make sure that Eulicious Johnson was murdered for his involvement in this case. This statement probably is privileged and inadmissible under 42 Pa.C.S. § 5916.

mandatory life sentence for first degree murder, Slowe opted to plead *nolo contendere* to two counts of third degree murder.

There actually were two *nolo* hearings on February 18th. At the beginning of the first hearing, Slowe offered to plead to the firearms charge alone, but the Commonwealth demanded both a *nolo* plea to third degree murder and a guilty plea to the firearms charge. NCH I, p. 7. When Slowe expressed his desire to plead not guilty, the Court responded that jury selection would begin the next day and trial would proceed the following week. NCH I, pp. 7-8.

Slowe attempted without success to obtain a continuance by arguing that he was trying to obtain DNA evidence to disprove the statements the Commonwealth intended to use against him. He accused defense counsel of failing to compel this evidence. NCH I, pp. 9-10. Defense counsel advised that test results showed that Slowe's DNA was not on the murder weapon, but she did not have the power to compel DNA samples from other people to identify whose DNA was on the weapon. NCH I, pp. 11-12. The Court noted that the DNA results were in Slowe's favor. NCH I, p. 12. Slowe protested that he was forced to make false custodial statements, and that DNA testing of other persons (presumably Smith and Johnson) would support his claim of innocence. NCH I, pp. 12-13. The Court answered that defense counsel could not compel others to provide DNA samples, and that the Commonwealth could compel such samples but chose not to do so. NCH I, pp. 13-14.

Slowe complained that his attorney was not representing him with sufficient zeal, that he needed more time to investigate his case, and that there were "plenty of people"

willing to testify on his behalf. NCH I, pp. 14-15. Defense counsel answered that the witnesses that Slowe named were not cooperating. NCH I, pp. 15-17.

The Court advised that Slowe had not said anything necessitating a continuance or a change in counsel. NCH I, pp. 18, 25-26. Slowe contended that he only found out the day before that trial was about to begin. This was nonsense; the record demonstrated that he knew for quite some time when trial would start. NCH I, pp. 23-24. The Court warned Slowe that he faced a mandatory life sentence if he proceeded to trial and was found guilty of first degree murder. NCH I, pp. 27-28. The Court reminded him that the Commonwealth was offering 15-30 years imprisonment for third degree murder and a consecutive sentence of 2-4 years for his weapons violation. NCH I, pp. 28-29.

Slowe said he was not ready to enter a plea, so the Court recessed his case to give him time to review the offer with defense counsel. NCH I, pp. 29-30.

Later that day, after consulting with counsel and family members, Slowe accepted the offer. He stated that he understood its terms and the consequences if he proceeded to trial and was found guilty. NCH II, pp. 4-5. He testified under oath that (a) he reviewed and initialed each paragraph of a written *nolo contendere* plea statement with defense counsel; (b) his minimum sentence was 17 years; (c) his maximum sentence was 34 years; (d) the State Parole Board would determine when he would leave prison after his minimum term; (e) he had a right to trial by jury selected from Delaware County citizens; (f) the jury would have to unanimously find him guilty beyond a reasonable doubt; and (g) the Court had already ruled on his discovery and suppression motions. NCH II, pp. 6-13. The *nolo contendere* plea statement that Slowe signed and initialed stated, *inter alia*, that he had a right to a trial by jury; he was presumed innocent of all charges until found

guilty, and the Court was not bound by the terms of the *nolo* agreement until it accepted his plea. *Nolo Contendere* Statement, ¶¶ 6, 7, 24.

The Court recited the elements of each charge and noted that Slowe was pleading *nolo contendere* instead of guilty. NCH II, pp. 13-15. Slowe testified that he understood the firearms and third degree murder charges and did not contest them. NCH II, pp. 15-21. Slowe signed the informations charging these crimes, and defense counsel stipulated that the evidence described in the informations provided a sufficient factual basis for the charges. NCH II, pp. 19-21. The Court accepted Slowe's *nolo* plea as knowing, voluntary and intelligent and imposed sentence of 15-30 years for third degree murder and a consecutive 2-4 year sentence for the firearms charge. NCH II, pp. 21, 23.

After entering his plea – when he knew he was safe from a life sentence -- Slowe indulged in bravado: "You've got the wrong dude, you all. Find the real killers. Call the cops. Tell them to solve the case for real."[5] NCH II, p. 29.

On Tuesday, March 3, 2009, Slowe filed timely post-sentence motions requesting leave to withdraw his *nolo* plea to the third degree murder charges.[6] On April 16, 2009, the Court denied Slowe's post-sentence motions. On May 14, 2009, he filed a timely appeal to the Superior Court at 1451 EDA 2009 challenging the order denying his post-sentence motions. He asserted on direct appeal that his *nolo* plea to the third degree murder counts was not knowing, voluntary or intelligent, given his denial of guilt

[5] Notwithstanding his bluster, Slowe's decision to eliminate the threat of a life sentence brings to mind Dr. Johnson's famous remark that even criminals can make wise decisions when their lives depend on it: "Depend on it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."

[6] The tenth day after sentencing was Saturday, February 28, 2009, lengthening the original deadline for filing post-sentence motions from February 28th to Monday, March 2, 2009. The Court was closed on March 2nd due to a snowstorm, extending the deadline to Tuesday, March 3rd.

throughout the plea hearing. The Court refuted this claim in a detailed opinion dated September 16, 2009.

Ms. Welch withdrew her appearance, and Douglas Smith, Esquire represented Slowe in his direct appeal. On March 3, 2010, the Superior Court entered an unpublished decision affirming this Court's order denying Slowe's post-sentence motions. The Superior Court reasoned that Slowe entered his plea knowingly, voluntarily and intelligently after "the trial court conducted an oral colloquy to ensure that he understood the nature of the charges, his rights and the effect of his pleas." *Commonwealth v. Slowe*, No. 1451 EDA 2009, p. 7. The Superior Court rejected Slowe's argument that there was an insufficient factual basis for his third degree murder plea:

> First and foremost, merely because the plea hearing was separated by a mid-day recess does not mean that the record information from the morning session is somehow disregarded or rendered moot. As required, we examine the totality of the circumstances surrounding the pleas. In the morning session of the plea hearing, the Commonwealth offered into the record the affidavit of probable cause which supported the criminal charges, two autopsy reports and three custodial statements given by [Slowe] to police. N.T., I, 2/18/09, at 4-5. [Slowe] stipulated to the factual bases at that point. *Id.* at 5. While [Slowe] did not plead immediately, he cannot complain that he was not made aware of the factual bases for the underlying charges. Moreover, during the afternoon session of the plea hearing, [Slowe] again stipulated that the affidavit of probable cause, the autopsy reports, and his custodial statements to police constituted a sufficient factual basis for his pleas. N.T. II, 2/18/09, at 21. He also signed the criminal informations acknowledging the crimes as charged. We conclude that the foregoing was sufficient to show that [Slowe] was properly apprised of the facts underlying the criminal charges to which he ultimately pled.

Commonwealth v. Slowe, *supra*, pp. 7-8.

Finally, the Superior Court refuted Slowe's attempt to withdraw his pleas by proclaiming actual innocence. Citing *North Carolina v. Alford*, 400 U.S. 25 (1970), the Superior Court observed that a defendant could believe that he was innocent yet knowingly, voluntarily and intelligently enter a plea of *nolo contendere* after evaluating

the possible outcomes of trial and the range of sentences which the Court could impose after trial and conviction. *Id.*, p. 9. In this case, said the Superior Court, this Court "did not abuse its discretion in denying [Slowe's] motion to withdraw his plea...[F]aced with the possibility of a life sentence, even if [Slowe] believed he was innocent, it was his decision to enter *nolo contendere* pleas in order to receive a lesser sentence...[Therefore,] the pleas were entered into knowingly, intelligently and voluntarily." *Id.*, pp. 9-10.

On April 5, 2010, Slowe filed a timely petition for allowance of appeal in the Supreme Court,[7] but the Supreme Court denied the petition on September 16, 2010.

On December 22, 2010, Slowe filed a timely PCRA petition *pro se*. The Court appointed Henry DiBenedetto Forrest, Esquire to represent Slowe. On April 18, 2011, Mr. Forrest filed a detailed letter requesting leave to withdraw as Slowe's counsel because Slowe's petition was meritless and there were no other issues warranting relief. On April 19, 2011, the Court entered a notice of intent to dismiss Slowe's petition in twenty days without a hearing ("Notice of Intent").

On May 12, 2011, Slowe sent the undersigned a letter accusing Mr. Forrest of ineffective assistance. The Court will incorporate Slowe's letter into the record pursuant to Pa.R.A.P. 1926 and treat it as Slowe's objection to the Notice of Intent.

On May 16, 2011, the Court dismissed Slowe's petition and permitted Mr. Forrest to withdraw his appearance. On June 10, 2011, Slowe filed a timely appeal to the Pennsylvania Superior Court. Two weeks later, Slowe filed a timely concise statement of matters complained of on appeal ("Concise Statement").

[7] The thirtieth day after March 3, 2010 fell on Good Friday, April 2, 2010. Therefore, Slowe's deadline for appealing to the Supreme Court was Monday, April 5, 2010.

II. Discussion

A. Slowe's arguments that his *nolo* plea to third degree murder was not knowing, voluntary, or intelligent are either previously litigated or waived under 42 Pa.C.S. § 9544.

Issues 4, 5, 6 and 10 of Slowe's Concise Statement contend that his *nolo contendere* plea to third degree murder was not knowing, voluntary or intelligent. For the sake of convenience, the Court will address these issues out of numerical sequence.

Issue 4 contends that the Court erred in accepting Slowe's "guilty"[8] plea because it knew that (a) DNA testing exonerated him, (b) he had a viable defense, and (c) he stated during the plea hearings that he was innocent and that others had committed the crime.

An issue is "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). Whether an issue was previously litigated turns on whether "[the issue] constitutes a discrete legal ground or merely an alternative theory in support of the same underlying issue that was raised on direct appeal." *Commonwealth v. Small*, 602 Pa. 425, 980 A.2d 549, 569 (2009) (*citing Commonwealth v. Gwynn,* 596 Pa. 398, 943 A.2d 940, 944-45 (2008)).

Issue 4 is "previously litigated," since it is the same argument that Slowe raised, and lost, on direct appeal. On direct appeal, he asserted in the Superior Court that his *nolo* plea for third degree murder was not knowing, voluntary or intelligent because he was innocent and denied his guilt during the plea hearing. The Superior Court was the "highest appellate court in which [Slowe] could have had review as a matter of right." 42

[8] Slowe entered a *nolo* plea, not a guilty plea. His error in nomenclature does not affect the Court's analysis.

Pa.C.S. § 9544(a)(2). The Superior Court held that even if Slowe believed he was innocent, his *nolo* plea was knowing, voluntary and intelligent, because it allowed him to avoid the life sentence he automatically would have received for a first degree murder conviction. *Commonwealth v. Slowe*, No. 1451 EDA 2009, pp. 9-10. In essence, Issue 4 states that Slowe could not have entered a knowing, voluntary and intelligent plea because he had a meritorious defense and proclaimed his innocence during plea hearings -- the same argument that he made on direct appeal. Since Slowe lost this argument on direct appeal, § 9544(a)(2) prohibits him from raising it again during PCRA proceedings.

Assuming that Issue 4 was not previously litigated, it is devoid of substance. The evidence referred to by the Commonwealth during the *nolo* hearing – the affidavit of probable cause underlying the criminal charges, two autopsy reports and three custodial statements given by Slowe to police -- demolish his claim of actual innocence. Additional evidence against Slowe surfaced after his *nolo* hearing, namely his incriminating remarks to Mr. Fredericks describing his presence at the murder scene and his participation as a lookout. If Slowe went on trial today, this additional evidence would be admitted[9] and would further cement the Commonwealth's case against Slowe for first degree murder.

In **Issue 6,** Slowe argues that this Court "coerc[ed]" him into pleading *nolo* by "advising" and "participating" in the plea bargaining process. This issue is barred as previously litigated. Courts construe the "previously litigated" doctrine to mean that

[9]Despite Mr. Fredericks' status as an agent of Slowe's trial counsel, the attorney-client privilege would not apply, since the telephone call between Slowe and Mr. Fredericks was in the presence of third persons (prison officials) who openly and repeatedly informed Slowe that they were recording the conversation. *Nationwide Ins. Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. 2007) (*citing Loutzenhiser v. Doddo*, 436 Pa. 512, 518–19, 260 A.2d 745, 748 (1970); *Joe v. Prison Health Services, Inc.*, 782 A.2d 24, 31 (Pa. Cmwlth. 2001)) (client can waive protection afforded by attorney-client privilege by disclosing the communication at issue to third party).

when a petitioner raises an issue on direct appeal, he must raise *all* available arguments in support of that issue. He cannot make one point in support of an issue on direct appeal and hold another point in reserve for PCRA proceedings. *Commonwealth v. Fisher*, 572 Pa. 105, 813 A.2d 761, 772 (2002) (petitioner cannot obtain post-conviction review of claims previously litigated by presenting new theories of relief to support previously litigated claims); *Commonwealth v. Burkett*, 5 A.3d 1260, 1270 (Pa. Super. 2010) (*citing Commonwealth v. Hutchins,* 760 A.2d 50 (Pa. Super. 2000)) ("the fact that a petitioner presents a new argument or advances a new theory in support of a previously litigated issue will not circumvent the previous litigation bar"). On direct appeal, Slowe argued that his plea was not knowing, voluntary, or intelligent due to his alleged innocence. In PCRA proceedings, however, he argues that his plea was involuntary for a new reason: the Court's alleged "coercion" of his plea. This is a transparent attempt to "advance[] a new theory in support of a previously litigated issue," *Burkett*, *supra*, the very tactic prohibited under "previously litigated" caselaw.

Alternatively, Issue 6 is waived. The PCRA deems an issue waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. § 9544(b). When Slowe argued on direct appeal that his *nolo* plea was not knowing, voluntary or intelligent, he could have claimed at that juncture that this Court coerced him into pleading *nolo contendere* by wrongfully participating in the plea proceedings. By failing to raise that issue on direct appeal, he waived it. *Commonwealth v. Cam Ly*, 602 Pa. 268, 980 A.2d 61, 98 (2009) (defendant, a Vietnamese national, waived PCRA claim under

Vienna Convention on Consular Relations, where he failed to raise this claim at any prior stage in the proceedings).

Assuming that Issue 6 survives the "previously litigated" and waiver hurdles, there is no evidence that the Court "coerced" Slowe into a *nolo* plea. On the contrary, Slowe admitted under oath that nobody forced him to enter his plea. NCH II, pp. 9, 12. Far from twisting Slowe's arm, the Court granted a recess during *nolo* hearings to permit him to consult with family members and counsel. Slowe's plea was not the product of compulsion; he did it because he knew that the Commonwealth had a strong case and that he would receive a life sentence if a jury found him guilty of first degree murder. These circumstances simply are not equivalent to coercion. *Commonwealth v. Lewis*, 791 A.2d 1227, 1234-35 (Pa. Super. 2002) (*nolo* plea to murder not coerced, where accused entered plea to avoid "grim alternative" of life sentence if he was convicted at trial).

In **Issue 5,** Slowe argues that this Court erred "in relying on two totally inconsistent statements allegedly made by [Slowe] to determine a viable factual basis [and failed] to determine which of the two was consistent with the evidence." Presumably, the two statements to which Slowe refers are his two custodial statements to police. In so many words, Slowe argues that

(a) the custodial statements are contradictory; therefore,

(b) no factual basis existed for his *nolo* plea; therefore

(c) his plea was not knowing, voluntary or intelligent.

This argument tracks the Comment to Pa.R.Crim.P. 590, which provides that a plea cannot be knowing and voluntary unless a factual basis exists for the plea.

Once again, this argument is barred as "previously litigated". On direct appeal, he insisted that his plea was not knowing, voluntary or intelligent due to his actual innocence. In Issue 5, however, he claims that his plea was not knowing, voluntary or intelligent because there was no factual basis for his plea – another attempt to "advance[] a new theory in support of a previously litigated issue." *Burkett, supra*, 5 A.3d at 1270.

In the alternative, Slowe waived Issue 5, since he could have argued on direct appeal that the two allegedly inconsistent statements demonstrated the lack of a factual basis for his plea but failed to do so. 42 Pa.C.S. § 9544(b); *Cam Ly, supra.*

Furthermore, Slowe waived Issue 5 by failing to raise it in his PCRA petition. His petition makes no allegation that inconsistencies in his custodial statements undermine the factual basis for his *nolo* plea. *Commonwealth v. Carson*, 590 Pa. 501, 913 A.2d 220, 283 (2006) (failure to raise issue in PCRA petition constitutes waiver of that issue); *Commonwealth v. Berry*, 877 A.2d 479, 485 (Pa. Super. 2005) (same).

Slowe argues in **Issue 10** that the Court accepted Slowe's plea despite hearing "facts immediately following the guilty plea that if proven would establish his innocence." This issue is previously litigated and waived – previously litigated because the Superior Court rejected Slowe's argument of actual innocence on direct appeal, waived because Slowe's PCRA petition and Concise Statement fail to identify the "facts immediately following the guilty plea" that prove his innocence.

B. Slowe's claims of ineffective assistance of counsel do not entitle him to relief.

Issues 7, 8 and 9 in Slowe's Concise Statement allege ineffective assistance of counsel. The Court will address these issues out of numerical sequence.

Issue 8 argues that PCRA counsel, Mr. Forrest, was ineffective for failing to allege ineffectiveness of trial counsel, Ms. Welch, for "coercing" Slowe to plead "guilty"

> when there was no factual basis for the plea, particularly, where DNA evidence was known to preclude [Slowe] from the murders, along with Commonwealth witnesses who recanted prior statements made against [Slowe]. And for failing to prepare for trial, including interviewing witnesses known to counsel, and failing to have suppress[ed] a shotgun found and charged against defendant in his murder case, when a revolver was said to have been used to kill the victims. And advocating for the Commonwealth.

When, as here, a petitioner appeals from the dismissal of his PCRA petition without a hearing, he may challenge the effectiveness of PCRA counsel on appeal if he files timely objections to PCRA counsel's effectiveness upon receipt of counsel's "no merit" letter and the Court's notice of intent to dismiss the PCRA petition without a hearing. *Burkett, supra*, 5 A.3d at 1272-73 (*citing Commonwealth v. Pitts,* 603 Pa. 1, 981 A.2d 875 (2009)). Here, Slowe filed timely objections to Mr. Forrest's effectiveness within days after receiving Mr. Forrest's no-merit letter and the Court's Notice of Intent. Therefore, Slowe has the right to challenge Mr. Forrest's effectiveness in this appeal.

To prove ineffective assistance of counsel, Slowe must demonstrate by a preponderance of the evidence "(1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Kimball,* 555 Pa. 299, 724 A.2d 326, 333 (1999); *see also* 42 Pa.C.S. § 9543(a). The failure to satisfy any of these prongs will cause the entire claim to fail. *Commonwealth v. Bridges,* 584 Pa. 589, 886 A.2d 1127, 1131 (2005).

Issue 8 attacks Ms. Welch's performance in multiple ways, but none of the attacks make sense. Slowe first argues that Ms. Welch should have proceeded to trial and demonstrated the absence of Slowe's DNA on the murder weapon, but she chose improperly to "coerce" Slowe into accepting a plea. This lacks arguable merit. As noted above, Slowe stated under oath that nobody coerced him into pleading *nolo contendere.* Moreover, Slowe knew about the absence of his DNA on the weapon because both Ms. Welch and the Court stated during the *nolo* hearing that the DNA results were in his favor. Nevertheless, Slowe elected to plead *nolo*; the reason is he knew there was powerful non-DNA evidence that might result in a first degree murder conviction and an automatic sentence of life imprisonment. Simply put, Slowe did not plead *nolo* due to coercion or Ms. Welch's failure to take advantage of the lack of DNA evidence. He pled because he knew it would be foolhardy to go to trial.

Next, Slowe claims that Ms. Welch should have proceeded to trial so that his mother and sister could testify that their prior statements to the police inculpating Slowe were untrue. To elaborate, shortly after the murders, Slowe's mother and sister gave statements to the police implicating Slowe. Prior to trial, they advised Mr. Fredericks that they wanted to testify that the police coerced them into accusing Slowe of murder. One year after Slowe's plea, they executed affidavits in which they recanted their prior statements to the police and averred that Slowe was home in bed on the night of the murders. Slowe attached these affidavits to his PCRA petition.

Slowe's argument lacks arguable merit. On the day of the *nolo* hearings, Slowe and Ms. Welch knew that his mother and sister were willing to testify that their prior statements to police were untrue. Nevertheless, Slowe pled *nolo* because he knew that

entering a plea was far more sensible than going to trial and risking a life sentence. His *nolo* plea had *nothing* to do with Ms. Welch's supposed failure to give proper weight to his mother's and sister's claims of police coercion.

Furthermore, Slowe suffered no prejudice (the third prong of the ineffective assistance test) by electing not to present his mother's and sister's testimony. The Commonwealth would have destroyed their credibility by presenting their prior statements to police and demonstrating their motive to recant these statements. Instead of helping Slowe's cause, their testimony would have strengthened the Commonwealth's case and increased the likelihood of a first degree murder conviction.

Slowe also faults Ms. Welch for "failing to prepare for trial, including interviewing witnesses." He has waived this issue by failing in his PCRA petition to identify the witnesses that Ms. Welch failed to interview. *Carson, Berry, supra.* He also waived this issue in his Concise Statement by failing to identify these witnesses or explain how Ms. Welch failed to prepare. An appellant's concise statement must properly specify the error to be addressed on appeal. *Commonwealth v. Dowling,* 778 A.2d 683 (Pa. Super. 2001). The concise statement must be "specific enough for the trial court to identify and address the issue [an appellant] wishe[s] to raise on appeal." *Commonwealth v. Reeves,* 907 A.2d 1, 2 (Pa. Super. 2006), *appeal denied,* 591 Pa. 712, 919 A.2d 956 (2007). "[A][c]oncise [s]tatement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no [c]oncise [s]tatement at all." *Id.* The court's review and legal analysis can be fatally impaired when the court has to guess at the issues raised. *Id.* If a concise statement is too vague, the court may find waiver. *Id.* Slowe's Concise Statement forces the Court to guess which witnesses Ms. Welch

failed to interview or how she failed to prepare, a task the Court need not perform under *Dowling* and *Reeves*.

Finally, Slowe waived his argument that Ms. Welch failed to have a shotgun suppressed from evidence, since he failed to raise this issue in his PCRA petition. *Carson, Berry, supra.*

Issue 7 faults PCRA counsel for filing a no-merit letter and moving to withdraw instead of "fix[ing], cur[ing] and/or amend[ing]" Slowe's PCRA petition. This argument is an empty vessel. PCRA counsel's letter persuasively states his reasons for finding no merit in Slowe's claims. There is nothing he could have done to "fix, cure or amend" Slowe's petition.

Issue 9 claims that PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to request a continuance to prepare further for trial. This argument is too vague to entitle Slowe to relief, since he fails to identify what advantage trial counsel would have gained from further preparation or investigation. Review of the record demonstrates that no further preparation was necessary. The Court gave Slowe the opportunity on February 18th to explain why a continuance was necessary but concluded that his excuses lacked merit. NCH I, pp. 9-18. Moreover, his attorney did not request a continuance and was ready to proceed to trial the next day. Slowe required no further continuances in order to obtain all the tools necessary to enter a knowing, voluntary and intelligent plea. February 18th was the proper day for him to decide which plea to enter, and the only realistic choice he had under the circumstances was to plead *nolo contendere*.

III. Slowe's miscellaneous claims (Issues 1, 2 and 3) have no merit.

Issue 1 maintains that the Court erred in denying Slowe's PCRA petition without an evidentiary hearing in which his mother and sister would have recanted their prior statements. For the reasons provided above, the testimony of Slowe's mother and sister would have done him no good and probably would have strengthened the Commonwealth's already formidable case. Nor did any other issue warrant an evidentiary hearing.

Slowe also accuses the Court of depriving him of the opportunity to amend his petition. Not so: the Court sent Slowe its notice of intent to dismiss the PCRA petition without a hearing to give Slowe the opportunity to file objections to dismissal. Slowe in fact filed objections, but none had merit. The Court did not deprive Slowe of any procedural rights.

Issue 2 is a long-winded complaint that the Court should not have accepted PCRA counsel's no-merit letter or allowed him to withdraw. PCRA counsel clearly was entitled to file a no-merit letter and withdraw, since he determined that Slowe's petition lacked merit after thorough review of Slowe's arguments and the rest of the record.

Issue 3 complains that the Court improperly rejected his request during his *nolo* hearing for new trial counsel. According to Slowe, he would have elected to proceed to trial with new counsel but was forced to plead *nolo contendere* due to his lack of confidence in Ms. Welch. Nonsense: the record shows that Slowe pled *nolo* not because of dissatisfaction with Ms. Welch but to avoid a likely conviction for first degree murder and automatic life sentence.

IV. Conclusion

Tyrone Slowe, a disgruntled murderer, insists that he was railroaded into pleading *nolo contendere* and would have us believe that he would be a free man today if his attorney had the courage to proceed to trial and the diligence to prepare his defense.

The Court sees matters differently. It is saving Slowe from himself. If it awarded him a trial, the jury will almost certainly convict him of first degree murder and relegate him to a jail cell for as long as he draws breath. Luckily for Slowe, his PCRA petition has no merit, so he will not get the chance to commit legal suicide. Frustrating though this might be for Slowe today, it likely will pay dividends down the road, for if he behaves himself in prison and attempts to rehabilitate himself, the Parole Board might release him on his minimum parole date, while he is still young enough to live a long, healthy and productive life as a free man.

The Court recommends that its order denying Slowe's PCRA petition be affirmed.

BY THE COURT:

JENKINS, J.