

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

THOMAS GRAY

Appellant

No. 1776 EDA 2013

Appeal from the PCRA Order May 24, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0504761-2004

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.:

FILED JULY 09, 2014

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

The PCRA court opinion sets forth the relevant facts and procedural history of this case as follows:

At approximately 2:30 a.m. on April 17, 2004, Jerrold Foushee (Foushee) was shot in the chest. [Appellant] and Kimberly Robinson (Robinson) had had a romantic relationship in the past. In the days leading up to April 17, 2004, [Appellant] had stayed in Robinson's apartment with her. On April 16, 2006, after receiving a ride to and from work from Robinson, [Appellant] went out for the evening. Around 8:00 p.m., Robinson called [Appellant] and asked

¹ 42 Pa.C.S.A. §§ 9541-9546.

*Former Justice specially assigned to the Superior Court.

whether he would watch the child that they had together; [Appellant] declined. Believing that [Appellant] would be gone for the night, at around 10:00 p.m., Robinson called Foushee and invited him to her home to watch a movie. At around 2:00 a.m., Foushee arrived at Robinson's home; the pair ate and then watched television together in Robinson's bedroom. While sitting on the bed near the bedroom window, Robinson heard [Appellant] speaking with another person outside of her house. Shortly thereafter, [Appellant] called Robinson on her phone; she did not pick up. Eventually, the door to the apartment building opened and [Appellant] then knocked on Robinson's door. Again, Robinson did not answer. Using a key that Robinson had not given to him, [Appellant] opened the door to the apartment. At the same moment that [Appellant] entered the apartment, Robinson was lifting herself from her bed and pulling pants on over her pajamas. [Appellant] walked straight to Robinson's bedroom, where he found Foushee seated, fully clothed, on Robinson's bed; [Appellant] began yelling and cursing at Foushee. [Appellant] pulled out a gun and pointed it at Foushee's head. Robinson got between [Appellant] and Foushee and pleaded, "Don't do this. It's not right. Think of your daughter." After [Appellant] brandished his gun, Foushee stayed seated on the bed and told [Appellant], "I don't want any trouble." At no time during this ordeal did Foushee threaten or taunt [Appellant]. Foushee stood up from the bed and, as he walked towards the door, the two men began to fight. Initially, [Appellant] and Foushee grappled with one another in the doorway to the bedroom; as [they] were entangled, they moved into the hallway. During the fight, [Appellant] continued to hold his gun in his hand. While [they] were out of Robinson's sight, she heard a single gunshot and immediately thereafter saw [Appellant] sprint out of the apartment. Robinson called for help; the paramedics came and took Foushee to Einstein Hospital, where he was pronounced dead at 3:50 a.m.

After shooting Foushee and fleeing the apartment, [Appellant] took a freelance taxi to Bridge and Pratt Streets. En route, [Appellant] threw his gun out the window. When [Appellant] arrived at his destination, he called his cousin, a firefighter, who picked him up, urged

him to turn himself in, and drove [Appellant] to his home where detectives were waiting for them.

* * *

On September 7, 2005, following a bench trial before this [c]ourt, [Appellant] was convicted of murder of the third degree (F-1), carrying a firearm without a license (F-3), and possessing instruments of crime (PIC) (M-1). Sentencing was deferred until October 17, 2005, on which date [Appellant] was sentenced to a term of not less than 17 [years'] nor more than 40 [years'] confinement for the third-degree murder conviction. On October 18, 2005, [Appellant] filed post-sentence motions, which were denied by operation of law on February 21, 2006. [Appellant] filed a timely notice of appeal and, on October 29, 2007, the Superior Court affirmed [Appellant's] convictions, but vacated his sentence and remanded the matter for resentencing. On January 30, 2008, [Appellant] filed a Petition for Allowance of Appeal, which our Supreme Court denied on August 22, 2008. On December 2, 2008, this [c]ourt conducted the resentencing hearing ordered by the Superior Court, at which time [Appellant] was sentenced to a cumulative term of not less than 18 [years'] nor more than 40 [years'] confinement, to be followed by 10 years of reporting probation. On December 11, 2008, [Appellant] filed post-sentence motions, which this [c]ourt denied on December 30, 2008. [Appellant] filed a timely notice of appeal and, on June 25, 2010, the Superior Court affirmed [Appellant's] judgments of sentence. [Appellant] filed for *allocatur*, which our Supreme Court denied on May 27, 2011. Accordingly, [Appellant's] judgments of sentence became "final" on August 25, 2011. ...

On July 9, 2012, [Appellant] filed a timely, counseled petition pursuant to the [PCRA]. On December 20, 2012, the Commonwealth filed a Motion to Dismiss, to which [Appellant] responded on February 20, 2013. After considering the pleadings and conducting an independent review, on April 26, 2013, this [c]ourt sent [Appellant] notice pursuant to Pa.R.Crim.P. 907 (907 Notice) of its intent to deny and dismiss his petition. [Appellant] did not respond to this [c]ourt's 907 Notice. On May 24, 2013, this [c]ourt denied and dismissed [Appellant's] petition

consistent with its 907 Notice. On June 18, 2013, [Appellant] filed this timely appeal.

(PCRA Court Opinion, filed on November 27, 2013, at 1-4) (internal citations and footnotes omitted). On June 21, 2013, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant timely complied.

Appellant raises the following issues for our review:

WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO ACQUIRE AVAILABLE EXPERT TESTIMONY EXPLAINING THE LOCATION OF A FIRED CARTRIDGE CASING (FCC), WHERE THE TRIAL COURT IN APPELLANT'S BENCH TRIAL USED THE LOCATION OF THE FCC TO DISCREDIT THE TESTIMONY OF THE TWO WITNESSES TO THE SHOOTING, WHOSE TESTIMONY SUPPORTED A LESSER DEGREE OF HOMICIDE?

WAS APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO RAISE AND LITIGATE THE TRIAL COURT'S APPLICATION OF THE PRESUMPTION THAT MALICE MAY BE INFERRED BECAUSE THE VICTIM WAS SHOT IN A VITAL BODY PART, WHERE THE SHOOTING TOOK PLACE DURING A STRUGGLE AND THERE WAS NO EVIDENCE THAT THE WOUND LOCATION WAS THE PRODUCT OF CHOICE, THUS RENDERING THE "VITAL BODY PART" PRESUMPTION IRRATIONAL AND [ITS] APPLICATION A VIOLATION OF DUE PROCESS OF LAW?

(Appellant's Brief at 2-3).

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error.

Commonwealth v. Conway, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the

findings of the PCRA court if the record contains any support for those findings. **Commonwealth v. Boyd**, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). We give no such deference, however, to the court's legal conclusions. **Commonwealth v. Ford**, 44 A.3d 1190, 1194 (Pa.Super. 2012). Further, a petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact, the petitioner is not entitled to PCRA relief, and no purpose would be served by any further proceedings. **Commonwealth v. Wah**, 42 A.3d 335, 338 (Pa.Super. 2012).

The law presumes counsel has rendered effective assistance. **Commonwealth v. Williams**, 597 Pa. 109, 950 A.2d 294 (2008). When asserting a claim of ineffective assistance of counsel, the petitioner is required to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his 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. **Commonwealth v. Kimball**, 555 Pa. 299, 724 A.2d 326 (1999). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. **Williams, supra**.

"The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis

for the assertion of ineffectiveness is of arguable merit....” **Commonwealth v. Pierce**, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994). “Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim.” **Commonwealth v. Poplawski**, 852 A.2d 323, 327 (Pa.Super. 2004).

Once this threshold is met we apply the ‘reasonable basis’ test to determine whether counsel’s chosen course was designed to effectuate his client’s interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel’s assistance is deemed effective.

Pierce, supra at 524, 645 A.2d at 194-95 (internal citations omitted).

Prejudice is established when [an appellant] demonstrates that counsel’s chosen course of action had an adverse effect on the outcome of the proceedings. The [appellant] must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In [**Kimball, supra**], we held that a “criminal [appellant] alleging prejudice must show that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Commonwealth v. Chambers, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002) (some internal citations and quotation marks omitted).

In his first issue, Appellant argues trial counsel was ineffective for failing to call an expert forensic witness to support Appellant’s trial testimony regarding his version of the facts. Appellant alleges a forensic expert would have provided an explanation as to the discrepancy between where the fired cartridge casing (“FCC”) was found, and where Appellant testified the shooting occurred. Appellant contends his inability to reconcile this

discrepancy at trial was the sole basis for the trial court's interpretation of Ms. Robinson's testimony and the trial court's rejection of Appellant's version of events. Appellant claims that, had a forensic expert testified as to the plausibility of Appellant's location at the time of the shooting, the trial court would have interpreted Ms. Robinson's testimony in a way that supported Appellant's version of events. Appellant asserts a reasonable attorney would have called an expert forensic witness to rebut the Commonwealth's evidence and to reestablish Appellant's credibility. Appellant maintains trial counsel's ineffectiveness prejudiced Appellant because the trial court would have convicted him of manslaughter rather than third degree murder if a forensic expert had testified in a manner consistent with Appellant's version of the facts. Appellant concludes trial counsel's ineffectiveness compels this Court to vacate and remand for a hearing on Appellant's ineffectiveness claim regarding trial counsel. We disagree.

"In order to prevail on a claim of ineffectiveness for failing to call a witness, a defendant must prove, in addition to meeting the three [ineffectiveness] requirements, that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew 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 witness's testimony was so prejudicial as to have denied him a fair trial." ***Commonwealth v. Walls,***

993 A.2d 289, 302 (Pa.Super. 2010) (quoting ***Commonwealth v. Wright***, 599 Pa. 270, 331, 961 A.2d 119, 155 (2008)).

Instantly, Appellant failed to demonstrate that a forensic expert existed and was available to testify for Appellant at trial in the manner Appellant suggests. ***See id.*** Additionally, nothing in the record reveals trial counsel was aware of Appellant's desire to call a forensic expert witness at trial. ***See id.*** Likewise, Appellant failed to demonstrate that the absence of a forensic expert's testimony was so prejudicial as to deny Appellant a fair trial. ***See id.*** Thus, Appellant's claim of trial counsel's ineffectiveness lacks arguable merit. ***See Kimball, supra; Pierce, supra.***

Furthermore, the PCRA court determined Appellant's ineffectiveness of trial counsel claim fails to demonstrate prejudice:

[Appellant] failed to show a "reasonable probability" that the result of the proceeding would have been different if trial counsel had proffered expert testimony about the location of the altercation between [Appellant] and Foushee. It is immaterial whether this altercation took place inside the bedroom, where the shell casing was ultimately found, or in the hallway outside of the bedroom as [Appellant] testified, as the location of the altercation bears little upon [Appellant's] state of mind when Foushee was shot. The Commonwealth presented substantial evidence that this killing was not accidental and that [Appellant] possessed malice when he shot Foushee. The Commonwealth demonstrated that [Appellant] entered Robinson's home without having been invited, using a key that he had obtained without Robinson's knowledge or permission. [Appellant] then approached Foushee and aggressively threatened him. [Appellant] pulled out a gun and pointed it at Foushee's head. Robinson got between [Appellant] and Foushee and pleaded that [Appellant] desist. Even though [Appellant] brandished his gun,

Foushee stayed seated on the bed and told [Appellant] he did not want trouble.

During the altercation that ensued, [Appellant] pressed the muzzle of the gun against Foushee's chest, pulled the trigger, and then fled. [Appellant's] decisions to fire his gun while flush against Foushee's body and to immediately run from the apartment thereafter amount to persuasive evidence that [Appellant] intended to kill Foushee. **See Commonwealth v. Hanford**, 937 A.2d 1094, 1097 (Pa.Super. 2007) (noting that a factfinder may infer consciousness of guilt from an attempt to flee). Had trial counsel presented evidence that [Appellant] fired his gun while in the hallway outside of the bedroom, it would not have altered the fact that [Appellant] knew he had gravely injured Foushee when he ran from Robinson's apartment and disposed of the murder weapon. In light of the significant evidence that [Appellant] intended to shoot and kill Foushee, counsel's failure to present a "forensic explanation" about the location of the altercation did not prejudice [Appellant]. ...

(PCRA Court Opinion at 7-8). The record supports the PCRA court's decision; therefore, we have no reason to disturb it. Accordingly, Appellant's claim of trial counsel's ineffectiveness does not merit relief.

In his second issue, Appellant argues appellate counsel was ineffective because he failed to challenge, on direct appeal, the presumption of malice inherent in applying deadly force to a vital body part. Appellant claims the location of the single gunshot wound on the victim's body was not Appellant's choice; it was the result of a struggle with the victim. Appellant contends the court's presumption of malice was not a rational inference from the evidence or legally permissible. Appellant maintains appellate counsel's failure to challenge the presumption of malice on direct appeal constituted

ineffective assistance of counsel. Appellant concludes this Court should vacate and remand for a hearing on Appellant's ineffectiveness claim regarding appellate counsel. We disagree.

"[T]o succeed on an allegation of...counsel's ineffectiveness...a post-conviction petitioner must, at a minimum, present argumentation relative to each layer of ineffective assistance, on all three prongs of the ineffectiveness standard...." **Commonwealth v. D'Amato**, 579 Pa. 490, 500, 856 A.2d 806, 812 (2004) (internal citations omitted). "[A] petitioner does not preserve a...claim of ineffectiveness merely by focusing his attention on whether...counsel was ineffective. Rather, the petitioner must also present argument as to how the second and third prongs of the **Pierce** test are met with regard to the...claim." **Commonwealth v. Santiago**, 579 Pa. 46, 69, 855 A.2d 682, 696 (2004). "[A]n undeveloped argument, which fails to meaningfully discuss and apply the standard governing the review of ineffectiveness claims, simply does not satisfy [the petitioner's] burden of establishing that he is entitled to any relief." **Commonwealth v. Bracey**, 568 Pa. 264, 273 n.4, 795 A.2d 935, 940 n.4 (2001).

In the present case, Appellant's PCRA petition baldly asserts appellate counsel's ineffectiveness. Significantly, Appellant did not attempt to apply in his PCRA petition the proper standard to his claim of appellate counsel's ineffectiveness. Now on appeal, Appellant raises the same general assertions of appellate counsel's ineffectiveness. The cursory analysis set

forth in Appellant's brief does not adequately analyze his claim of appellate counsel's ineffectiveness under the second and third prongs of the applicable three-prong standard. **See *Santiago, supra*; *D'Amato, supra***. Thus, Appellant waived his claim concerning appellate counsel's ineffectiveness.

Moreover, even if properly preserved, the underlying claim regarding appellate counsel's ineffectiveness would lack merit. The PCRA court's opinion properly addresses and disposes of Appellant's claim regarding appellate counsel's ineffectiveness as follows:

Presuming malice from the facts elicited at trial would violate the Due Process Clause if the inference of malice "is not one that reason and common sense justify in light of the proven facts." ***Francis v. Franklin***, 471 U.S. 307, 314-15 (1985). In the context of "permissive inferences," the protections offered by our Commonwealth's Constitution mirror that which is provided by the United States Constitution. ***Commonwealth v. Hall***, 830 A.2d 537, 548-49 (Pa. 2003). The test articulated by the United States Supreme Court and endorsed by our Supreme Court is that a valid due process concern is raised only "if, under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference." ***Id.*** at 546, citing ***Ulster County v. Allen*** 442 U.S. 140, 157 (1979).

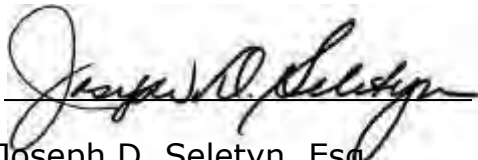
[Appellant's] claim lacks arguable merit as due process was plainly satisfied. There was a "rational connection" between the proven facts—that the muzzle of [Appellant's] gun was pressed directly against the victim's chest when fired and that [Appellant] fled the scene immediately after the killing—and the ultimate fact presumed—that [Appellant] possessed malice when he pulled the trigger. Given the "rational connection" between the proven facts and the ultimate fact presumed, there was no due process concern to be raised. Appellate counsel cannot be deemed ineffective for not having raised a meritless claim.

Commonwealth v. Sepulveda, 55 A.3d 1108, 1118 (Pa. 2012). Accordingly, [Appellant's] claim fails.

(PCRA Court Opinion at 8-9). Accordingly, we affirm the order dismissing Appellant's PCRA petition.

Order affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH

:

CP-51-CR-0504761-2004

v.

Superior Court No.
1776 EDA 2013

CP-51-CR-0504761-2004 Comm. v. Gray, Thomas
Opinion

THOMAS GRAY



Sarmina, J.
November 27, 2013

FILED

NOV 27 2013

Criminal Appeals Unit
First Judicial District of PA

OPINION

PROCEDURAL HISTORY

On September 7, 2005, following a bench trial¹ before this Court, Thomas Gray (petitioner) was convicted of murder of the third degree (F-1), carrying a firearm without a license (F-3), and possessing instruments of crime (PIC) (M-1).² Sentencing was deferred until October 17, 2005, on which date petitioner was sentenced to a term of not less than 17 years nor more than 40 years confinement for the third-degree murder conviction.³ On October 18, 2005, petitioner filed post-sentence motions, which were denied by operation of law on February 21, 2006.

Petitioner filed a timely notice of appeal and, on October 29, 2007, the Superior Court affirmed petitioner's convictions, but vacated his sentence and remanded the matter for resentencing.⁴ On January 30, 2008, petitioner filed a Petition for Allowance of Appeal, which our

¹ Petitioner was represented at trial by Brian McMonagle, Esquire.

² 18 Pa.C.S. §§ 2502(c), 6106, and 907(a), respectively. This Court granted a motion for judgment of acquittal as to murder of the first degree, and found petitioner not guilty of burglary.

³ As to the conviction for carrying a firearm without a license, petitioner received a consecutive sentence of not less than one year nor more than five years confinement. As to the conviction for PIC, petitioner received a concurrent sentence of not less than nine months nor more than five years confinement.

⁴ The Superior Court found that this Court had unintentionally sentenced petitioner within the aggravated range while (FN cont'd...)

Supreme Court denied on August 22, 2008.⁵ On December 2, 2008, this Court conducted the resentencing hearing ordered by the Superior Court,⁶ at which time petitioner was sentenced to a cumulative term of not less than 18 years nor more than 40 years confinement, to be followed by 10 years of reporting probation.⁷

On December 11, 2008, petitioner filed post-sentence motions, which this Court denied on December 30, 2008. Petitioner filed a timely notice of appeal and, on June 25, 2010, the Superior Court affirmed petitioner's judgments of sentence.⁸ Petitioner filed for *allocatur*, which our Supreme Court denied on May 27, 2011.⁹ Accordingly, petitioner's judgments of sentence became "final" on August 25, 2011. See 42 Pa.C.S. § 9545(b)(3) ("[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.").

(FN cont'd...)

noting on the record that the sentence was within the standard range. The Superior Court stated that "the trial court will have all the sentencing options originally available to it and will be able to provide an appropriate explanation if the trial court determines that a sentence outside the guidelines is warranted." Commonwealth v. Gray, No. 868 EDA 2006, slip op., at *17 (Pa.Super. Oct. 29, 2007) (memorandum opinion). As noted below in FN 6, this determination by the Superior Court was erroneous.

⁵ Commonwealth v. Gray, No. 61 EAL 2008, slip op. (Pa. Aug. 22, 2008) (memorandum opinion).

⁶ At the outset of the resentencing hearing, petitioner's counsel and the Commonwealth agreed that the original sentence *was* within the standard range of the Pennsylvania Sentencing Guidelines (Guidelines). Notes of Testimony (N.T.) 12/2/2008 at 4-6, 11. The applicable Guidelines were the Fifth Edition, promulgated on June 13, 1997. When a sentence is within the standard range, it is presumed that the Court consulted the guidelines (as mandated by the sentencing code) by virtue of the sentence being within these statutorily suggested parameters. Commonwealth v. Adams, 694 A.2d 353, 354 (Pa.Super. 1997).

⁷ As to the conviction for third-degree murder, petitioner was sentenced to a term of not less than 17 years nor more than 35 years confinement, followed by five years of reporting probation. As to the conviction for carrying a firearm without a license, petitioner was sentenced to a consecutive term of not less than one year nor more than five years confinement. As to the conviction for PIC, petitioner was sentenced to a consecutive term of five years of reporting probation.

⁸ Commonwealth v. Gray, 373 EDA 2009, slip op. (Pa.Super. June 25, 2010) (memorandum opinion).

⁹ Commonwealth v. Gray, 410 EAL 2010, slip op. (Pa. May 27, 2011) (memorandum opinion).

On July 9, 2012, petitioner filed a timely, counseled¹⁰ petition pursuant to the Post-Conviction Relief Act (PCRA).¹¹ On December 20, 2012, the Commonwealth filed a Motion to Dismiss, to which petitioner responded on February 20, 2013. After considering the pleadings and conducting an independent review, on April 26, 2013, this Court sent petitioner notice pursuant to Pa.R.Crim.P. 907 (907 Notice) of its intent to deny and dismiss his petition. Petitioner did not respond to this Court's 907 Notice. On May 24, 2013, this Court denied and dismissed petitioner's petition consistent with its 907 Notice. On June 18, 2013, petitioner filed this timely appeal.

FACTS

At approximately 2:30 a.m. on April 17, 2004, Jerrold Foushee (Foushee) was shot in the chest. Notes of Testimony (N.T.) 9/6/2005 at 31-33. Petitioner and Kimberly Robinson (Robinson) had had a romantic relationship in the past. N.T. 9/7/2005 at 4. In the days leading up to April 17, 2004, petitioner had stayed in Robinson's apartment with her. *Id.* at 157-158.

On April 16, 2006, after receiving a ride to and from work from Robinson, petitioner went out for the evening. *Id.* at 22-23. Around 8:00 p.m., Robinson called petitioner and asked whether he would watch the child that they had together; petitioner declined. *Id.* at 23-24. Believing that petitioner would be gone for the night, at around 10:00 p.m., Robinson called Foushee and invited him to her home to watch a movie. *Id.* at 25. At around 2:00 a.m., Foushee arrived at Robinson's home; the pair ate and then watched television together in Robinson's bedroom. *Id.* at 26-28.

While sitting on the bed near the bedroom window, Robinson heard petitioner speaking with another person outside of her house. N.T. 9/7/2005 at 31. Shortly thereafter, petitioner called Robinson on her phone; she did not pick up. *Id.* at 35-36. Eventually, the door to the apartment building opened and petitioner then knocked on Robinson's door. Again, Robinson did not answer.

¹⁰ Michael Wiseman, Esquire, represents petitioner in his collateral attack.

¹¹ 42 Pa.C.S. §§ 9541-9546.

Id. at 36-38. Using a key that Robinson had not given to him, petitioner opened the door to the apartment. Id. at 39. At the same moment that petitioner entered the apartment, Robinson was lifting herself from her bed and pulling pants on over her pajamas. Id. at 90-91.

Petitioner walked straight to Robinson's bedroom, where he found Foushee seated, fully clothed, on Robinson's bed; petitioner began yelling and cursing at Foushee. Id. at 171-72. Petitioner pulled out a gun and pointed it at Foushee's head. N.T. 9/7/2005 at 172. Robinson got between petitioner and Foushee and pleaded, "Don't do this. It's not right. Think of your daughter." Id. at 174. After petitioner brandished his gun, Foushee stayed seated on the bed and told petitioner, "I don't want any trouble." Id. at 46-47. At no time during this ordeal did Foushee threaten or taunt petitioner. Id. at 214.

Foushee stood up from the bed and, as he walked towards the door, the two men began to fight. Id. at 51-52. Initially, petitioner and Foushee grappled with one another in the doorway to the bedroom; as the pair were entangled, they moved into the hallway. Id. at 53. During the fight, petitioner continued to hold his gun in his hand. N.T. 9/7/2005 at 54. While the pair were out of Robinson's sight, she heard a single gunshot and immediately thereafter saw petitioner sprint out of the apartment. Id. at 56-57. Robinson called for help; the paramedics came and took Foushee to Einstein Hospital, where he was pronounced dead at 3:50 a.m.¹² Id. at 61-62, 89.

After shooting Foushee and fleeing the apartment, petitioner took a freelance taxi to Bridge and Pratt Streets. En route, petitioner threw his gun out the window. When petitioner arrived at his destination, he called his cousin, a firefighter, who picked him up, urged him to turn himself in, and drove petitioner to his home where detectives were waiting for them. Id. at 178-180.

¹² Assistant Medical Examiner Dr. Bennett Preston later determined that Foushee died as a result of internal bleeding caused by a gunshot wound that punctured vital organs. N.T. 9/7/2005 at 124, 127. Dr. Preston also determined, from burnt fibers on Foushee's clothing, that the bullet was fired from a gun in direct contact with Foushee's body. Id. at 121-123.

LEGAL ANALYSIS

In order to be eligible for PCRA relief, petitioner must prove, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the following circumstances:

- (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (v) Deleted.
- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S. § 9543.

In his Concise Statement of Errors Complained of on Appeal filed Pursuant to Pa.R.A.P. 1925(b) (1925(b) Statement), petitioner contends that, as to both of his claims, he should have been granted an evidentiary hearing. A hearing is required where a PCRA petition raises an issue of material fact. Pa.R.Crim.P. 908(a)(2). No issue of material facts exists where the petitioner's claim would fail even if his proffer is believed. Commonwealth v. Ligons, 971 A.2d 1125, 1146 (Pa. 2009). As discussed in Part 1, *infra*, petitioner's first claim of trial counsel's ineffectiveness fails because he failed to demonstrate prejudice. Even if all facts are viewed in petitioner's favor, his claim fails, and, thus, no evidentiary hearing was warranted. As discussed in Part 2, *infra*, petitioner's second claim of

appellate counsel's ineffectiveness fails because there is a rational connection between the facts proved at trial and the inference permitted. No additional fact-finding at an evidentiary hearing would have altered this analysis. Petitioner's request for an evidentiary hearing was properly denied.

This Court will address petitioner's claims *seriatim*.

1. Trial counsel was ineffective for failing to present the testimony of a forensic expert who could have explained that the location of the shell casing recovered from the scene of the crime was consistent with petitioner's testimony.

Petitioner argues that if trial counsel had provided a "forensic explanation,"¹³ demonstrating that the shooting took place in the hallway *outside* of Robinson's bedroom, as petitioner testified at trial, the fact-finder (this Court) would have accepted petitioner's account and thus would have reached a different verdict.¹⁴ In its 907 Notice, this Court explained that petitioner failed to prove that he was prejudiced by the absence of a "forensic explanation." Petitioner contends that this Court "incorrectly applied the prejudice standard governing claims of ineffective assistance of counsel."

In order to obtain relief based on a claim of ineffective assistance of counsel, a petitioner must establish:

(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

¹³ Petitioner attached a report from a forensics expert, R. Robert Tressel, to his Amended Petition. Mr. Tressel reviewed the evidence in this case and stated that "the location in which the casing was ultimately found by the police does not necessarily indicate that is the actual location of where it landed, as casings can bounce and roll and often times are kicked about inadvertently." Nonetheless, Mr. Tressel still concluded that "it is far more likely than not, that the casing traveled to the foot of the bed from the struggle in the hallway."

¹⁴ Additionally, petitioner contends that the absence of a "forensic explanation" prejudiced petitioner at sentencing. He argues that a "forensic explanation" corroborating his version of events would have been reason for this Court to believe that petitioner told the truth when he testified. Petitioner argues that, if the Court believed that petitioner told the truth when he testified, his sentence would have been more lenient. As petitioner's sentence was based on the crime that he committed – not on his testimony at trial – this claim is plainly without merit.

Commonwealth v. Barndt, 74 A.3d 185, 192 (Pa.Super. 2013), *citing* Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987).

Trial counsel is presumed to have been effective; petitioner bears the burden to prove each of the aforementioned three factors by a preponderance of the evidence. *Id.*, *citing* Commonwealth v. Rathfon, 899 A.2d 365, 369 (Pa.Super. 2006).

Petitioner failed to show a “reasonable probability that the result of the proceeding would have been different” if trial counsel had proffered expert testimony about the location of the altercation between petitioner and Foushee. It is immaterial whether this altercation took place inside the bedroom, where the shell casing was ultimately found, or in the hallway outside of the bedroom as petitioner testified, as the location of the altercation bears little upon petitioner’s state of mind when Foushee was shot. The Commonwealth presented substantial evidence that this killing was not accidental and that petitioner possessed malice when he shot Foushee.

The Commonwealth demonstrated that petitioner entered Robinson’s home without having been invited, using a key that he had obtained without Robinson’s knowledge or permission. Petitioner then approached Foushee and aggressively threatened him. Petitioner pulled out a gun and pointed it at Foushee’s head. Robinson got between petitioner and Foushee and pleaded that he desist. Even though petitioner brandished his gun, Foushee stayed seated on the bed and told petitioner he did not want trouble.

During the altercation that ensued, petitioner pressed the muzzle of the gun against Foushee’s chest, pulled the trigger, and then fled. Petitioner’s decisions to fire his gun while flush against Foushee’s body and to immediately run from the apartment thereafter amount to persuasive evidence that petitioner intended to kill Foushee. *See* Commonwealth v. Hanford, 937 A.2d 1094, 1097 (Pa.Super. 2007) (noting that a factfinder may infer consciousness of guilt from an attempt to flee). Had trial counsel presented evidence that petitioner fired his gun while in the hallway outside

of the bedroom, it would not have altered the fact that petitioner knew he had gravely injured Foushee when he ran from Robinson's apartment and disposed of the murder weapon. In light of the significant evidence that petitioner intended to shoot and kill Foushee, counsel's failure to present a "forensic explanation" about the location of the altercation did not prejudice petitioner. This claim fails.

2. Appellate counsel was ineffective for failing to raise this Court's "misapplication" of the presumption that malice may be inferred from the use of a deadly weapon on a vital part of the body.

Petitioner claims that appellate counsel was ineffective for failing to raise this Court's "misapplication" of the presumption that malice may be inferred from the use of a deadly weapon on a vital part of the body, as petitioner contends that the application of that presumption constituted a deprivation of due process. Petitioner's claim fails as it lacks arguable merit.¹⁵

Presuming malice from the facts elicited at trial would violate the Due Process Clause if the inference of malice "is not one that reason and common sense justify in light of the proven facts." Francis v. Franklin, 471 U.S. 307, 314-15 (1985). In the context of "permissive inferences," the protections offered by our Commonwealth's Constitution mirror that which is provided by the United States Constitution. Commonwealth v. Hall, 830 A.2d 537, 548-49 (Pa. 2003). The test articulated by the United States Supreme Court and endorsed by our Supreme Court is that a valid due process concern is raised only "if, under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference." Id. at 546, *citing* Ulster County v. Allen, 442 U.S. 140, 157 (1979).

¹⁵ In its Motion to Dismiss, the Commonwealth argued that this claim was "previously litigated" and that this Court need not address the merits of the instant claim. A claim has been "previously litigated" when "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). The "relevant statutory inquiry is the term 'issue.'" Commonwealth v. Collins, 888 A.2d 564, 570 (Pa. 2005). "[I]ssue' refers to the discrete legal ground that was forwarded on direct appeal and would have entitled the defendant to relief." Id. The "discrete legal grounds" forwarded on direct appeal concerned the sufficiency of the evidence as to third-degree murder. On the other hand, the "discrete" legal ground" forwarded in the instant claim centers on whether petitioner was deprived of due process. Thus, the instant claim has not been previously litigated.

Petitioner's claim lacks arguable merit as due process was plainly satisfied. There was a "rational connection" between the proven facts – that the muzzle of petitioner's gun was pressed directly against the victim's chest when fired and that petitioner fled the scene immediately after the killing – and the ultimate fact presumed – that petitioner possessed malice when he pulled the trigger. Given the "rational connection" between the proven facts and the ultimate fact presumed, there was no due process concern to be raised. Appellate counsel cannot be deemed ineffective for not having raised a meritless claim. Commonwealth v. Sepulveda, 55 A.3d 1108, 1118 (Pa. 2012). Accordingly, petitioner's claim fails.

For the foregoing reasons, petitioner is not entitled to any relief under the PCRA.

BY THE COURT:


M. TERESA SARMINA J.