NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
EARL HASSAN,	:	No. 2988 EDA 2012
Appellant	:	

Appeal from the PCRA Order, September 28, 2012,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0107461-2002

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND OTT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED APRIL 15, 2014**

Appellant appeals the order dismissing his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Finding no error, we will affirm the order below.

On March 7, 2003, a jury found appellant guilty of attempted murder and related charges arising from an armed robbery committed on September 23, 2001, near the intersection of Carlisle and Cambridge Streets in Philadelphia. The victim was shot numerous times when he attempted to wrest the gun from appellant.

On September 26, 2003, appellant was sentenced to an aggregate term of 16 to 32 years' imprisonment. On January 18, 2005, this court affirmed the judgment of sentence, and on November 17, 2005, our supreme court denied appeal. ***Commonwealth v. Hasson***, 872 A.2d 1271

(Pa.Super. 2005) (unpublished memorandum), ***appeal denied***, 585 Pa. 695, 889 A.2d 87 (2005).

On March 8, 2006, appellant timely filed the instant PCRA petition ***pro se***. Although counsel was initially appointed, on April 27, 2009, counsel filed a "no-merit" brief and petition to withdraw pursuant to ***Turner-Finley*** practice. ***See Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (***en banc***).

Subsequently, appellant provided counsel with the affidavit of Roy Young, which stated that Young was a witness to the crime and that appellant did not commit it. On June 17, 2009, counsel filed an amended PCRA petition raising the Roy Young claim. On March 2, 2010, an evidentiary hearing was held, and testimony from Roy Young was taken.

Appellant subsequently decided he wanted to proceed ***pro se***. On May 6, 2010, the court conducted a ***Grazier*** hearing,[1] and thereafter, appellant was permitted to proceed ***pro se***. On August 22, 2012, the PCRA court entered an order giving appellant notice, pursuant to Pa.R.Crim.P., Rule 907, 42 Pa.C.S.A., of its intention to dismiss his petition without further hearing. As noted, the court entered an order dismissing appellant's petition on September 28, 2012, and this timely appeal followed.

On appeal, appellant raises the following issues:

[1] ***Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998).

(I) Did the lower Court err in judgement in violation of the Appellant's due process rights to equal protection, when it dismissed the Appellant's entire PCRA action, when a PCRA evidentiary hearing was held on March 2, 2010 and never finished?

(II) Did the lower Court err in dismissing Appellant's amended PCRA petition without a hearing insofar as the Petition contained facts, if poven [sic], that would have entitled him to relief?

(III) Trial Counsel rendered ineffective assistance of counsel, in violation of Appellant's State and Federal Constitutional rights to due process, and the effective assistance of counsel, and to his great prejudice by:

A. Neglecting to object and seek a demurrer of the Commonwealth's case, although prosecution knowingly defrauded the court and jury by placing a white police officer on the stand to testify that he directly received the statement "Earl shot me", at the scene, from Starr, although the white officer was not at the scene to speak to the victim. This mistaken or malevolent testimony then infected the position of three key witnesses for the Commonwealth, denying the Appellant a fair trial;

B. Providing unprofessional and unreasonable performance of his minimum abdication [sic] to investigate the facts at all levels, (preliminary, pre-trial, trial, and post-trial);

C. Neglecting to challenge the affidavit of probable cause for

arrest warrant, as it contains deliberate and willful falsehood and omitted facts;

D. Failing to precisely and immediately object and seek a mistrial for the evisceration of the Appellant's guaranteed constitutional due process right to a fair trial, have a meaningful defense, and to confront his accuser, when the prosecution brought into evidence by ambush a police white paper (6353) that was complete hearsay only to usurp the defense strategy unfairly;

E. Failing to object to the court error in judgement in reversing his mid-trial ruling to exclude the 6353 police white paper, do [sic] to last minute exposure, as trial by ambush, thus eviscerating any resemblance of 14th and 6th Amendment protections (due process, fair trial, effective assistance of counsel);

F. Failing to object and immediately seek a mistrial for the improper admission of the hearsay testimony of the victim's godmother in which violated Appellant's constitutional right to confront witnesses against him and move for the production of said witness during trial;

G. Did PCRA Counsel (David S. Rudenstein) render ineffective assistance of counsel in not raising all the above issues before the PCRA court in violation of new Supreme Court law announced in Martinez V. Ryans [sic].

Appellant's brief at i-ii.

Our standard of review for an order denying post-conviction relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Franklin***, 990 A.2d 795, 797 (Pa.Super. 2010). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

Moreover, as most of appellant's issues on appeal are stated in terms of ineffective assistance of counsel, we also note that appellant is required to make the following showing in order to succeed with such a claim: (1) that the underlying 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. Rivera***, 10 A.3d 1276, 1279 (Pa.Super. 2010). The failure to satisfy any prong of this test will cause the entire claim to fail. ***Commonwealth v. Daniels***, 947 A.2d 795, 798 (Pa.Super. 2008). Finally, counsel is presumed to be effective, and appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa.Super. 2003).

In his first two issues, appellant contends that the PCRA court erred in not conducting an evidentiary hearing. We disagree.

> [T]he right to an evidentiary hearing on a post-conviction petition is not absolute. ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa.Super.2001). It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. ***Id.*** It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing. ***Commonwealth v. Hardcastle***, 549 Pa. 450, 454, 701 A.2d 541, 542-543 (1997).

Commonwealth v. Wah, 42 A.3d 335, 338 (Pa.Super. 2012), quoting ***Commonwealth v. Turetsky***, 925 A.2d 876, 882 (Pa.Super. 2007), ***appeal denied***, 596 Pa. 707, 940 A.2d 365 (2007).

We first note that the PCRA court did conduct an evidentiary hearing as to the Roy Young claim. Appellant apparently believes that his remaining issues require an evidentiary hearing also. We disagree. All of appellant's remaining issues pertain to instances of ineffective assistance by trial counsel. Where the issue concerns ineffective assistance of counsel, an evidentiary hearing is usually necessary only to determine if counsel's failure to act was an oversight or some kind of tactical decision. The other two prongs of the test for ineffectiveness, underlying merit of the claim and prejudice to the defendant, can usually be determined from the record. Because an appellant must prove all three prongs, the failure to prove a single prong results in a finding of no ineffectiveness. Thus, an evidentiary

hearing need not be held where it can be determined from the record that the underlying claim has no merit or that there has been no prejudice to appellant. That is the situation here and we find no error in failing to hold an additional evidentiary hearing.

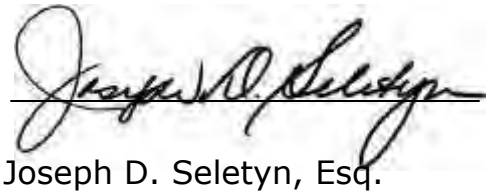
Finally, we find that appellant's remaining issues need no further discussion by us. After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the PCRA court, it is our determination that there is no merit to the remaining questions raised on appeal. The PCRA court's comprehensive, 19-page opinion, filed on April 23, 2013, thoroughly discusses and properly disposes of the remaining questions presented.[2] We will adopt it as our own and affirm on those bases.

Accordingly, having found no error below, we will affirm the order of the PCRA court.

Order affirmed.

[2] We note that the PCRA court's opinion incorrectly states that when assessing ineffective assistance of counsel under the PCRA, there is an additional requirement that the court determine whether the ineffective assistance so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. (PCRA court's opinion at 3, citing 42 Pa.C.S.A. § 9543(a)(2)(ii).) That notion was dispelled when the supreme court declined to follow the plurality opinion in ***Commonweatlh v. Buehl***, 540 Pa. 493, 658 A.2d 771 (1995). ***See Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326 (1999).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0107461-2002**
vs.	:	
EARL HASSAN	:	**SUPERIOR COURT NO. 2988 EDA 2012**

OPINION

GEROFF, J. **APRIL 23, 2013**

Petitioner, Earl Hassan, has filed an appeal of this court's order denying his petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §9541 *et seq.*

I. PROCEDURAL HISTORY

On March 7, 2003, after a jury trial before the Honorable John J. Chiovero, the Petitioner was found guilty of attempted murder, aggravated assault, carrying a firearm without a license, and possession of an instrument of crime. Petitioner was sentenced to an aggregate term of sixteen (16) to thirty-two (32) years of imprisonment.

Petitioner filed a direct appeal to the Superior Court. On January 18, 2005, the Superior Court affirmed the judgment of sentence. On November 17, 2005, the Supreme Court denied *allocatur*.

On March 8, 2006, the Petitioner filed a *pro se* petition under the Post Conviction Relief Act (PCRA) 42 Pa.C.S.A. §9545(b). Jay Gottlieb, Esquire, was appointed as counsel on behalf of Petitioner. Citing irreconcilable differences, Attorney Gottlieb was permitted to withdraw as counsel and Elayne C. Bryn, Esquire was appointed. Again dissatisfied with counsel, Petitioner petitioned for Attorney Bryn's removal. Attorney Bryn was permitted to withdraw as counsel and David C. Rudenstein, Esquire was appointed as counsel. Following an examination of the case, Attorney Rudenstein filed a *Finley* letter indicating that the issues raised by Petitioner were without merit and that there were no additional issues which could be raised in a counseled Amended Petition. Petitioner filed objections to the *Finley* letter. After receiving further information, Attorney Rudenstein filed an Amended Petition on June 17, 2009 based on an affidavit prepared by Roy Young who claimed to have witnessed the crime for which Petitioner stands convicted. A *Grazier* hearing was held following Petitioner's repeated requests to represent himself. At Petitioner's request, on September 20, 2010, Attorney Rudenstein was appointed as back-up counsel. On March 2, 2010, an evidentiary hearing regarding Mr. Young's affidavit was held. Attorney Rudenstein was subsequently released as back-up counsel, and Petitioner was permitted to proceed *pro se*. After conducting a review of the record, this court dismissed the petition on September 28, 2012.[1] Petitioner filed a timely Notice of Appeal.

II. STANDARD OF REVIEW

In determining whether counsel rendered ineffective assistance, the court must

[1] This includes Petitioner's original PCRA petition and all Amended Petitions.

use a three-pronged test. First, the court must ascertain whether the issue underlying the claim has arguable merit. This requirement is based upon the principle that counsel will not be found ineffective for failing to pursue a frivolous claim or strategy. Second, if the petitioner's claim does have arguable merit, the court must determine whether the course chosen by counsel had some reasonable basis designed to serve the best interest of the petitioner. Finally, if a review of the record reveals that counsel was ineffective, the court must determine whether the petitioner has demonstrated that counsel's ineffectiveness worked to his prejudice. Commonwealth v. Breisch, 719 A.2d 352 (Pa. Super. 1998); Commonwealth v. Pendola, 416 Pa. Super. 568, 611 A.2d 761 (1992), *appeal denied*, 629 A.2d 1378 (Pa. 1993). Failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. Commonwealth v. Hudson, 820 A.2d 720, 726 (Pa. Super. 2003).

In order to establish prejudice, a petitioner must show that counsel's ineffectiveness was of such magnitude that the verdict essentially would have been different absent counsel's alleged ineffectiveness. Commonwealth v. Howard, 538 Pa. 86, 645 A.2d 1300, 1308 (1994). *See also* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In the context of a PCRA claim, petitioner must not only establish ineffective assistance of counsel, he must also plead and prove that counsel's stewardship so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. *See* 42 Pa.C.S.A. §9543 (a)(2)(ii); Commonwealth v. Buehl, 540 Pa. 493, 658 A.2d 771 (1995); Commonwealth v. Rowe, 411 Pa. Super. 363, 601 A.2d 833 (1992).

Counsel is never ineffective for failing to make a frivolous objection or motion. Commonwealth v. Groff, 356 Pa. Super. 477, 514 A.2d 1382, 1386 (1986), *appeal denied*, 531 A.2d 428 (Pa. 1987); Commonwealth v. Davis, 313 Pa. Super. 355, 459 A.2d 1267, 1271 (1983). Similarly, counsel is never ineffective for failing to raise a frivolous issue in post-verdict motions or on appeal. Commonwealth v. Thuy, 424 Pa. Super. 482, 623 A.2d 327, 355 (1993); Commonwealth v. Tanner, 410 Pa. Super. 398, 600 A.2d 201, 206 (1991).

The law presumes that trial counsel was effective. Commonwealth v. Quier, 366 Pa. Super. 275, 531 A.2d 8, 9 (1987); Commonwealth v. Norris, 305 Pa. Super. 206, 451 A.2d 494, 496 (1982). Therefore, when a claim of ineffective assistance of counsel is made, it is the petitioner's burden to prove such ineffectiveness; that burden does not shift. Commonwealth v. Cross, 535 Pa. 38, 634 A.2d 173, 175 (1993), *cert. denied*, 115 S.Ct. 109, 130 L.Ed.2d 56 (Pa. 1994); Commonwealth v. Marchesano, 519 Pa. 1, 544 A.2d 1333, 1335-36 (1988); Commonwealth v. Tavares, 382 Pa. Super. 317, 555 A.2d 199, 210 (1989), *appeal denied*, 571 A.2d 382 (Pa. 1989).

III. DISCUSSION

1. Fraud Upon the Court and Jury

Petitioner alleges that trial counsel was ineffective for allowing the Commonwealth to perpetrate a fraud upon the court and the jury. According to Petitioner, the prosecutor knowingly defrauded the court and jury by placing a white police officer (Police Officer Stephen Gantz) on the stand to testify that he directly received the statement "Earl shot me," from the victim Lamont Starr at the crime scene,

in place of a black police officer (Police Officer Eric Grant) when Officer Gantz was not present on the scene at the same time as the victim.[2] At trial, Officer Gantz testified that he spoke to the victim at the scene and that the victim told him that a guy named Earl had shot him. (N.T. 3/6/03, p. 95). Officer Grant testified that he observed Officer Gantz speaking to the victim and that Officer Gantz told him that the victim said that Earl had shot him. (N.T. 3/6/03, p. 185).

Petitioner argues that the CAD (Computer Aided Dispatch) report supports his allegations of fraud. According to Petitioner, the CAD report disproves Officer Gantz's testimony that he was the first officer to arrive at the scene and that he spoke to the victim. Contrary to the Petitioner's assertion, the CAD report actually reveals what time an officer was requested to go to a scene, not what time each officer arrived or in what order. Nor does it definitely state who, if anyone, spoke to the victim.

Nevertheless, even assuming that Petitioner is correct and that the victim did not directly tell Officer Gantz that Earl had shot him, it is harmless, as the victim corroborated what Officer Gantz said. The victim testified, "I recall one of the officers asked him (sic), do I know, do I know who shot me? And I told him, Earl shot me." (N.T. 3/6/03, p. 35). This claim is without merit, and counsel is never ineffective for failing to make a frivolous objection or motion. Commonwealth v. Groff, *supra.*

2. ***Failure to Call Witnesses and Failure to Conduct an Adequate and Sufficient Investigation***

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[2] Petitioner argues that Officer Gantz could not have spoken to the victim at the scene because Officer Daniel Moll and his partner had already transported him to the hospital when Officer Gantz arrived at the scene. Petitioner bases this argument on the CAD report. However, the CAD report does not mention Officer Moll by name, nor does it indicate how the victim was transported to the hospital. *See* Exhibit "A", September 25, 2010 Amended Petition.

Petitioner argues that trial counsel was ineffective for failing to prepare for trial in a professional and reasonable fashion. Specifically, Petitioner claims that trial counsel failed to make proper use of the CAD report, failed to call the police radio dispatchers as witnesses at trial, and failed to file a motion to suppress the victim's statement and identification of Petitioner from the hospital. This claim is without merit.

Petitioner argues that trial counsel was ineffective for failing to make proper use of the CAD report. According to Petitioner, if counsel had done a thorough investigation and used the CAD report, he would have been able to show that the victim gave Officer Grant a description of his assailant (black male, approximately 5'8", light complexion, bald head) which was immediately given to police dispatch and which did not match Petitioner. Petitioner argues that the CAD report was "insurmountable" and is "tantamount to a statement of impending death." *See* Amended Petition, dated September 25, 2010, p. 13. As part of this argument, Petitioner claims that counsel was ineffective for failing to call the radio room police dispatchers to testify regarding the information they received from the scene, specifically, the information from Office Grant.

To prove that counsel was ineffective for failing to investigate or call a witness, a petitioner must show how the testimony of the witness would have been beneficial under the circumstances of the case. Commonwealth v. Auker, 545 Pa. 521, 548, 681 A.2d 1305, 1319 (1996). In addition, a defendant must demonstrate that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness' testimony was so prejudicial as to

have denied the defendant a fair trial. Commonwealth v. Henry, 550 Pa. 346, 706 A.2d 313, 329 (1997). Failure to call a witness is not *per se* ineffective assistance of counsel, for such a decision generally involves a matter of trial strategy. Commonwealth v. Auker, *supra.*; Commonwealth v. Davis, 381 Pa. Super. 483, 554 A.2d 104 (1989). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland v. Washington, 466 U.S. 668, 690-91, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The failure to call a possible witness will not be equated with a conclusion of ineffectiveness absent some positive demonstration that the testimony would have been helpful to the defense. Commonwealth v. Davis, 381 Pa. Super. at 496, 554 A.2d at 111 *citing* Commonwealth v. Bulard, 305 Pa. Super. 502, 451 A.2d 760 (1982).

A petitioner must establish prejudice by demonstrating that he was denied a fair trial because of the absence of the testimony of the proposed witness. Commonwealth v. Nock, 414 Pa. Super. 326, 606 A.2d 1380 (Pa. Super. 1992). Further, ineffectiveness for failing to call a witness will not be found where a petitioner fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense. Commonwealth v. Davis, 381 Pa. Super. 483, 554 A.2d 104 (Pa. Super. 1989), *allocatur denied*, 524 Pa. 617, 571 A.2d 380 (1989). *See* Commonwealth v. Lassen, 442 Pa. Super. 298, 659 A.2d 999, 1012 (1995) (providing that affidavit showing witness' willingness and ability to cooperate must be present for relief to be granted).

Here, Petitioner posits unsubstantiated conclusions regarding the CAD report. The CAD report is not the smoking gun Petitioner claims it to be. As stated above, the CAD report does not indicate which officer arrived at the scene first (it shows only when

an officer was dispatched/enroute to the scene), the identity of anyone to whom any officer spoke, what the officer found upon arrival at the scene, or who gave Officer Grant a description of the assailant. *See* Amended Petition Exhibit "A," dated September 25, 2010. Petitioner's claim that trial counsel was ineffective for his supposed failure to prepare for trial by using the CAD report is meritless.

Additionally, Petitioner's claim that counsel was ineffective for failing to call the radio dispatchers regarding the CAD report is also meritless. Any statement from the police radio dispatchers regarding information they received from an officer on the scene would have been hearsay. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801 (c). The rule against hearsay is a rule of exclusion, i.e., hearsay is generally not admissible because a hearsay statement lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence. Commonwealth v. Smith, 545 Pa. 487, 496 A.2d 1166 (Pa. 1996).

Here, Petitioner argues, "The CAD and dispatcher's testimony validate themselves above the testimonial evidence and facts of this case." *See* Amended Petition, dated September 25, 2010, p. 18. However, neither the dispatchers nor the officers who relayed the information to them witnessed the shooting. The proposed evidence is clearly inadmissible hearsay, as the description given to the radio dispatchers was a repetition of what some other unidentified person told police. Moreover, the physical description of the assailant contained in the CAD report was presented to the jury through the victim on cross-examination. (N.T. 3/6/03, PP. 82-83). Even though the contents of the CAD report were inadmissible, the information which Petitioner claims should have been

presented from the report was presented to the jury through the victim. Petitioner was not prejudiced by counsel's failure to call the radio dispatchers to testify regarding the physical description of the alleged assailant.

Petitioner's third claim - that trial counsel was ineffective for failing to file a motion to suppress the victim's statement to police that "Earl" was the shooter as well as the victim's identification of Petitioner from a photo array shown to him by detectives while he was "heavily sedated" at the hospital - must also fail. *See* Amended Petition, dated September 25, 2010, pp. 18-19.

In Commonwealth v. O'Bryant, 320 Pa. Super. 231, 467 A.2d 14 (Pa. Super. 1983), the Superior Court reasoned that the purpose of a suppression order regarding exclusion of identification evidence is to prevent improper police action. Where a defendant does not show that improper police conduct resulted in a suggestive identification, suppression is not warranted. In the case *sub judice*, Petitioner has failed to demonstrate that police conduct resulted in an impermissibly *suggestive* identification. [emphasis added] Petitioner does not assert that the photographic array was improper or that the detective in some manner suggested to the victim that Petitioner was the shooter. As in O'Bryant, Petitioner's position relates to the condition of the victim at the time he made the identification. Petitioner's arguments about the circumstances in which the victim made his identification go to the weight of the evidence and not its admissibility. *See* Commonwealth v. Washington, 592 Pa. 698, 927 A.2d 586, 602 (Pa. 2007). Neither the identification procedure in this case nor the circumstances under which the identification was made suggested to the victim that Petitioner was the individual who shot him. *See* Commonwealth v. Doa, 381 Pa. Super. 181, 553 A.2d 416, 425 (Pa. Super.

1989). Moreover, even assuming that the photographic array identification was sufficiently suggestive to be unreliable, the victim testified at a preliminary hearing and identified Petitioner. Thus any possible error would be harmless since cumulative proper evidence of a prior identification is admissible.

Petitioner offers no case law to support his assertion that the victim's identification of Petitioner as the shooter should be suppressed. The victim knew Petitioner, he had interacted with him in the past (Petitioner was a friend of the victim's godmother). On the day of the shooting, the victim and the Petitioner had shaken hands, exchanged greetings, and engaged in a brief conversation. (N.T. 3/6/03, pp. 11-14). Counsel is never ineffective for failing to make a frivolous objection or motion. Commonwealth v. Bryant, 855 A.2d 726, 742 (Pa. 2004); Commonwealth v. Groff, 356 Pa. Super. 477, 514 A.2d 1382, 1386 (1986), *appeal denied*, 531 A.2d 428 (Pa. 1987). Trial counsel was not ineffective for failing to file a motion to suppress.

3. *Failure to Challenge the Affidavit of Probable Cause*

Petitioner argues trial counsel was ineffective for failing to "... challenge the affidavit of probable cause for arrest warrant, as it contained deliberate and willful falsehood and omitted facts." *See* Amended Petition, dated September 25, 2010, p. 20. Petitioner bases this challenge upon the alleged illegality of his arrest. According to Petitioner, the victim did not identify him as his assailant and that it was the victim's godmother "who created a face for the shooter due to the victim's lack of cognizance and lucidity." *See* Amended Petition, dated September 25, 2010, p. 21. Additionally, Petitioner argues that the photo array shown to the victim at 5:30 p.m. was not printed

until thirty-five minutes later. Therefore, Petitioner argues, Detective Kopaczewski deliberately and willfully misstated facts on the affidavit of probable cause. *See* Amended Petition, September 25, 2010, p. 22. This claim is completely without merit.

In United States v. Crews, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980), the United States Supreme Court ruled that an illegal arrest, without more, has never been viewed as a bar to a subsequent prosecution nor as a defense to a valid conviction. A person is not a suppressible fruit and any illegality of detention cannot deprive the government of the opportunity to prove guilt through the introduction of evidence wholly untainted by the police misconduct. Id. The Pennsylvania Supreme Court has also held that an appellant cannot seek the suppression of his very person. Commonwealth v. Krall, 452 Pa. 215, 304 A.2d 488 (1973). *See also* Commonwealth v. Standen, 450 Pa. Super. 292, 296-298 (Pa. Super. Ct. 1996); Commonwealth v. Verdekal, 351 Pa. Super. 412, , 506 A.2d 415, 419-420 (1986).

Here, there are no material misstatements contained in the affidavit of probable cause for arrest prepared by Detective Kopaczewski. Both the victim and Detective Kopaczewski testified that the victim picked Petitioner's photograph from the photo array. (N.T. 3/6/03, pp. 37-39, 139). As for the victim's godmother, the victim testified that he knew "Earl" through his friend, Michael Washington, whose mother is the victim's godmother. (N.T. 3/6/03, p. 12, 35, 43). There is no evidence to suggest that the victim's godmother made any identification of Petitioner as the shooter. Additionally, the affidavit does not state that the photo array was shown to the victim on September 24, 2001, at exactly 5:30 p.m., but at approximately 5:30 p.m. The difference between 6:05 p.m. (when Petitioner argues that the photo array was printed) and 5:30 p.m. (when the

victim was allegedly shown the photo array) is so minimal that it is of no consequence. Moreover, the police did not recover any evidence or take any statement from Petitioner as a result of his arrest. Petitioner's arrest itself cannot be suppressed. *See* United States v. Crews, *infra.*

Insofar as Petitioner challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. As previously stated, an illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). The exclusionary principle of Wong Sun v. United States, 371 U.S. 471 (1963) and Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) delimits what proof the Government may offer against the accused at trial, thereby closing the courtroom door to evidence secured by official lawlessness. Petitioner is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct. Contrary to Petitioner's argument, there are no materially false statements made in the affidavit of probable cause to arrest, and counsel cannot be found to be ineffective for failing to file a frivolous motion.

4. Testimony Regarding "White Paper"

Petitioner raises numerous claims regarding an internal police document known as white paper which was referred to by two police witnesses at trial. Petitioner argues that trial counsel was ineffective for failing to object and seek a mistrial regarding the

admission of evidence about the white paper, as well as failing to object to what Petitioner has characterized as the trial court's "reversal" of its ruling regarding the white paper.[3] *See* Amended Petition dated December 15, 2010, p. 1 and Amended Petition dated July 18, 2011, p. 4.

Despite Petitioner's argument to the contrary, the issue of the "white paper" was previously litigated and is without merit. To be eligible for relief under the PCRA, a petitioner must establish that the allegation of error has not been previously litigated. 42 Pa.C.S.A. § 9543 (a)(3). "The purpose of the PCRA is not to provide defendants with a means of relitigating the merits of issues long since decided on direct appeal." Commonwealth v. Buehl, 540 Pa. 493, 500, 658 A.2d 771, 775 (1995). An issue has been previously litigated if the highest appellate court in which the petitioner could have had review has ruled on the merits of the issue. 42 Pa.C.S. § 9544 (a)(2). When the Superior Court has thoroughly discussed a petitioner's claims in an opinion affirming judgment of sentence, the issues have been finally determined and are not subject to further review in a post-conviction proceeding. Commonwealth v. Bond, 630 A.2d 1281, 1282 (Pa. Super. 1993). Neither may a petitioner obtain post-conviction relief to relitigate a previously litigated claim under the guise of counsel's ineffectiveness by presenting new theories of relief to support previously litigated claims. Commonwealth v. Christi, 540 Pa. 192, 202, 656 A.2d 877, 881 (1995).

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[3] The record belies Petitioner's claims. Trial counsel did object to the use of and any reference to the white paper. The trial court sustained most of counsel's objections, but did allow Detective Sweeney (who prepared the white paper), to explain what the white paper was; he was not permitted to tell the jury what the white paper said with regard to Petitioner. (N.T. 3/6/03, pp. 166-167). Only when the detective attempted to explain how detectives use and distribute the white paper did the court overrule the objection. (N.T. 3/6/03, p. 149).

Here, the Superior Court rejected the above claim and on January 18, 2005 affirmed Petitioner's conviction.[4] *See* Commonwealth v. Earl Hasson, 872 A.2d 1271 (Pa. Super. 2005). Petitioner's argument thus runs afoul of the Post Conviction Relief Act, which prohibits review of issues previously litigated. 42 Pa.C.S. § 9543(a)(3). Petitioner may not obtain post-conviction review of claims previously litigated by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims. Commonwealth v. Bracey, 568 Pa. 264, 272, 795 A.2d 935, 939 (2001). For Petitioner, no relief is due.

Even though Petitioner raised this claim on direct appeal, Petitioner argues that counsel was ineffective for failing to request a mistrial, object to, or move to strike the use of the white paper as a due process violation. According to Petitioner, the admission of the white paper usurped defense counsel's opening statement after counsel assured the jury that no evidence existed other than the testimony of the victim. Petitioner argues that this not only shows trial counsel's ineffectiveness, but also amounted to trial court error and an abuse of discretion, because the court did not order suppression of the

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[4] The Superior Court found that there was no abuse of discretion in allowing the testimony about the white paper. Furthermore, the Court found that not only had a claim of a violation of due process been waived regarding the white paper, but even if it had not been waived, they would not have granted Petitioner relief. The court stated:

> Hasson complains that the identification of "Earl" as the assailant came from an individual named Beverly Johnson who was not produced as a witness at trial. While it is true that Ms. Johnson did not testify at trial, it is important to note that Detective Sweeney, the witness who testified about Ms. Johnson, stated that Ms. Johnson did not witness the shooting; that the address she gave for herself turned out to be false; and that she was obviously under the influence of alcohol when he interviewed her. N.T. Trial, 3/6/03, at 170-71. Further, to the extent any brief reference to Starr's own statement identifying "Earl" at the scene of the shooting was hearsay, it was cumulative to other testimony that was properly admitted. Therefore, we would not find any prejudice to Hasson in relation to testimony concerning the white paper.

See Commonwealth v. Earl Hasson, Memorandum Opinion, January 18, 2005, pp. 3-4, n.3.

evidence or a mistrial. *See Notice of Objection to Intent to Dismiss Pursuant to Rule 907* dated September 13, 2012, pp. 7-9 and *Motion for Leave to Add Supplemental Claims to Petitioner's Pro-Se Amended PCRA Filing Pursuant to Rule 905*, dated December 12, 2010. Petitioner's reliance on Commonwealth v. Montgomery, 533 Pa. 491; 626 A.2d 109 (1993) is misplaced.

In Montgomery, the appellant was convicted of attempted rape, terroristic threats and indecent assault. Prior to trial, a blanket found in a bedroom was sent to the crime lab to be analyzed for the presence of semen. The results were negative, and the appellant was given a copy of the report. In his opening statement to the jury, counsel for appellant referred to the nonexistence of corroborating evidence and cited the lack of evidence of semen on the blanket. On the first day of trial, the district attorney had further tests performed on the blanket during the lunch recess. A dried stain which had not been tested was found. A test conducted at that time revealed the presence of seminal fluid. After the lunch recess, the prosecutor informed the court and appellant's counsel of the results of the latest tests. Appellant requested suppression of the evidence, but the request was denied. Appellant then requested a mistrial, which the trial court also denied. Appellant's conviction was affirmed by the Superior Court.

On appeal the Pennsylvania Supreme Court held that the trial court abused its discretion in not granting a mistrial. Referring to defense counsel's opening statement to the jury, the Court noted that such statement is the first opportunity for a jury to hear from a defendant through his advocate. The court held that while trial counsel's statement of facts is not evidence, his sincerity, competency and credibility are before the jury and the jury's estimation of counsel's reliability affects the jury's ability to believe the defense.

Id. at 499, 626 A.2d at 113. "Therefore, any event outside of the control of defense counsel or the defendant which jeopardizes counsel's truthfulness and integrity may well affect the defendant's defense and credibility." Id. The Supreme Court concluded that the introduction of the results of the second test of the blanket compromised defense counsel's credibility because it showed his initial statement to the jury to be inaccurate. The court determined that a remand for a new trial was appropriate. Id. at 499-500, 626 A.2d at 113-14.

In the instant case, despite Petitioner's vigorous argument to the contrary, the testimony from Detective Sweeney regarding the white paper did not jeopardize trial counsel's truthfulness and integrity, nor did it affect the defense and counsel's credibility. In his opening statement, trial counsel stated that there was no physical evidence that connected Petitioner to the shooting: no DNA, no gun, only the victim, Lamont Starr. (N.T. 3/5/03, p. 24). Unlike the blanket in Montgomery, the white paper was not evidence in the sense that it came from the crime scene; it was simply a bare bones record created by law enforcement sketching out what an officer believed to be relevant to the investigation.

Petitioner's claim also fails under a due process analysis. The Due Process Clause of the 14th Amendment to the United States Constitution requires the prosecution to disclose exculpatory evidence to the defense. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The obligation to disclose under Brady includes impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

While it is true that the prosecution has an obligation to disclose potential

impeachment evidence, the "discovery of any written recording of an interview conducted of a Commonwealth witness by the prosecution is compelled when the interview notes are extensive and constitute a substantially complete recording of the interview conducted of the witness." Commonwealth v. Alston, 2004 PA Super 471, 864 A.2d 539, 547 (Pa. Super. 2004). It is also true that statements made by a witness prior to trial are subject to disclosure only when they are signed, adopted or otherwise shown to be substantially verbatim statements of that witness. Commonwealth v. Brinkley, 505 Pa. 442, 480 A.2d 980, 984 (Pa. 1984). The distinction between a report which is a verbatim, signed, or adopted recordation of a witness' statement and an imprecise summary of what another person understood him to say has been recognized in both federal and state cases. Commonwealth v. Cain, 471 Pa. 140, 369 A.2d 1234, 1240 (Pa. 1977). The rationale behind this distinction is that it is unfair to allow the defense to use statements to impeach a witness which cannot fairly be said to be the witness' own rather than the product of the investigator's selection, interpretation, and recollection. Id. at 1241.

At trial, Detective James Kopaczewski explained that a white paper is an internal police document summarizing a particular crime and is distributed to higher ranking police officials to inform them of notable incidents and to maintain statistics. (N.T. 3/6/03, 167, 180). The white paper was not read, signed or adopted by anyone. It would be illogical to label as inculpatory evidence the single page of notes which were not the basis of a later recordation and which were not a verbatim statement signed and/or adopted by any witness. Therefore, the Commonwealth did not commit a Brady violation when it failed to discover the white paper in the detective's file prior to trial,[5] and the

[5] On the first day of trial, the prosecutor reviewed a police file which was brought by one of the detectives. At that time, the prosecutor discovered a document known as a "white paper" in the detective's

Petitioner is properly denied relief on this PCRA claim.

5. *Statement of Beverly Johnson*

Petitioner argues that trial counsel was ineffective for failing to object and request a mistrial as a result of the admission of hearsay testimony of the victim's godmother, Beverly Johnson. *See* Addendum to Supplemental Memorandum of Law dated November 25, 2011, pp. 5-6. According to Petitioner, it was the victim's godmother, not the victim, who identified Petitioner as the shooter. This claim must also fail.

Here, the victim's godmother did not testify. The only references to the victim's godmother were made when the victim testified that his godmother knew Petitioner (N.T. 3/6/03, p. 42) and during Detective Kopaczewski's testimony when he stated that after speaking with the victim, he spoke to the victim's godmother.[6] (N.T. 3/6/03, p. 136). At no time were the statements of the godmother placed before the jury. Trial counsel cannot be ineffective for failing to make a frivolous objection or motion.

6. *Cumulative Effect of the Above Errors*

Petitioner's final allegation of ineffectiveness is that PCRA counsel, David Rudenstein, Esquire was ineffective for failing to raise the above issues of ineffectiveness of trial and appellate counsel. As discussed above, those issues are without merit, and

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file. Upon discovering the white paper, the prosecutor copied the document and provided it to defense counsel. (N.T. 3/6/03, pp. 149-152).

[6] Detective Kopaczewski testified that as a result of information he received after speaking to the victim's godmother [after he spoke to the victim], he was able to determine the identity of "Earl," who the victim had told him who was responsible for the shooting. (N.T. 3/6/03, p. 136).

counsel is not ineffective for failing to raise meritless claims. *See Commonwealth v. Thuy*, 623 A.2d at 335. Moreover, Attorney Rudenstein cannot be deemed ineffective for failing to raise the above-listed claims, as Petitioner, in the midst of the very same PCRA petition in which Attorney Rudenstein was appointed, raised the issues he claims Attorney Rudenstein should have raised. Petitioner cannot be prejudiced by non-existent errors and, therefore, no relief is due on this issue.

IV. CONCLUSION

Petitioner has failed to demonstrate any basis for relief. In the absence of any meritorious challenge that can be found in the reviewable record, Petitioner has failed to articulate his allegations in accordance with the requisites of a claim predicated upon counsel's ineffectiveness. No relief is due.

For the foregoing reasons, Petitioner's petition for post-conviction collateral relief was properly dismissed.

BY THE COURT,

STEVEN R. GEROFF, J.