NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DARNELL WILLIAMS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2007 EDA 2015

Appeal from the PCRA Order May 29, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No: CP-51-CR-0008302-2009

BEFORE: FORD ELLIOTT, P.J.E., STABILE, and STRASSBURGER, * JJ.

MEMORANDUM BY STABILE, J.: **FILED DECEMBER 22, 2016**

Appellant, Darnell Williams, appeals from the May 29, 2015 order entered in the Court of Common Pleas of Philadelphia County ("PCRA court") denying relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46. Appellant's sole issue on appeal is whether the PCRA court erred in denying the PCRA petition without a hearing. Upon review, we affirm.

The PCRA court summarized the procedural background of this matter in its Pa.R.A.P. 1925(a) opinion, which we incorporate herein by reference. PCRA Court Opinion, 11/4/15, at 1-2. Briefly, after a jury trial that occurred fom June 8 through June 17, 2010, Appellant was found guilty of first-degree murder, violations of the uniform firearms act ("VUFA"), and

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* Retired Senior Judge assigned to the Superior Court.

possession of an instrument of crime ("PIC"). Appellant was sentenced to life without the possibility of parole on the murder charge, and sentenced concurrently to terms of two and one-half years for VUFA and PIC.

After the PCRA Court granted a previous PCRA petition to reinstate Appellant's direct appellate rights, this Court affirmed his convictions on direct appeal on April 17, 2012. ***See Commonwealth v. Williams***, No. 1312 EDA 2011, unpublished memorandum at 1 (Pa. Super. filed April 17, 2012).

Appellant filed the instant PCRA petition on October 25, 2013. The PCRA court issued a 907(1) Notice on June 18, 2014, and dismissed the petition without a hearing on May 29, 2015. Appellant filed a timely notice of appeal on June 29, 2015.

Appellant raises a sole issue on appeal. "Did the Honorable PCRA [c]ourt err when it dismissed [Appellant's] [c]ounseled [p]etition for PCRA relief without a [h]earing and all where [Appellant] properly pled and would have been able to prove that he was entitled to relief if only had he been granted a hearing[.]" Appellant's Brief at 3.

"There is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." ***Commonwealth v. Jones***, 942 A.2d 903, 906 (Pa. Super. 2008) (citing ***Commonwealth v. Barbosa***, 819 A.2d 81 (Pa. Super. 2003)). An ineffective assistance of counsel claim "must meet all three prongs of the

test for ineffectiveness, if the court can determine without an evidentiary hearing that one of the prongs cannot be met, then no purpose would be advanced by holding an evidentiary hearing." ***Jones***, 942 A.2d at 906. All of the underlying PCRA claims in the instant matter, save one,[1] are allegations of ineffective assistance of counsel.

A PCRA petitioner is entitled to relief if he pleads and proves that prior counsel rendered ineffective assistance of counsel. 42 Pa.C.S.A. § 9543(a)(2)(ii). "To prevail on an [ineffectiveness] claim, a PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for acting or failing to act; and (3) the petitioner suffered resulting prejudice." ***Commonwealth v. Reyes-Rodriguez***, 111 A.3d 775, 780 (Pa. Super. 2015) (*en banc*). A petitioner must adequately discuss and prove all three factors of the '***Pierce***[2] test,' or the claim fails. ***Id.***

In the matter *sub judice*, Appellant raises a number of claims of ineffective assistance of counsel. Appellant claims that trial counsel was ineffective for 1) failing to request discovery of 115 images, 2) failing to adequately cross examine Omar O'Neal, Rodney King, Roland Carter, Bayshine Jones, and Roger King regarding inconsistencies in their

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[1] One of Appellant's underlying claim is an alleged ***Brady*** violation; however, Appellant fails to discuss this in his brief.

[2] ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987).

statements, 3) failing to adequately cross-examine Detective Cahill, 4) failing to file a motion to suppress the out of court identification of Appellant, and 5) failing to pursue the issue of whether Jamal Simmons was the real shooter. In his brief, Appellant fails to discuss whether trial counsel had a reasonable basis for making any of these decisions or how these decisions prejudiced Appellant; therefore, Appellant's claims fail.

Even if Appellant had properly addressed his ineffectiveness claims, we would find that the PCRA court's opinion of November 4, 2015, properly determined that each of Appellant's claims did not have arguable merit and/or did not result in prejudice to the Appellant. ***See*** PCRA Court Opinion, 11/4/15, at 9-20. We would therefore affirm the PCRA court on those bases. We note in as much as the PCRA court discusses whether counsel had a reasonable basis for acting or failing to act, we disagree that the PCRA court could determine this part of the ***Pierce*** test because it did not conduct a hearing to establish counsel's basis for each of Appellant's ineffectiveness claims. ***See Reyes-Rodriguez***, 111 A.3d at 783-84. Nonetheless, while an appellant may need a hearing to explore the validity of counsel's trial strategy pursuant to this second prong, such a hearing will be rendered superfluous if the court can determine from the record that there has been no prejudice to the appellant, ***Jones***, 942 A.2d at 907, or the claim lacks arguable merit. ***Reyes-Rodriguez***, 111 A.3d at 784.

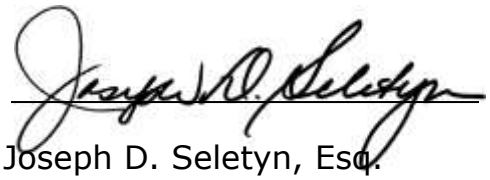
We direct that a copy of the PCRA court's November 4, 2015 opinion be attached to any future filings in this case.

Order affirmed.

President Judge Emeritus Ford Elliott joins this memorandum.

Judge Strassburger concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2016

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

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0008302-2009**
vs.	:	
DARNELL WILLIAMS	:	**SUPERIOR COURT NO. 2007 EDA 2015**

OPINION

GEROFF, J. **NOVEMBER 4, 2015**

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

I. PROCEDURAL HISTORY

From June 8, 2010 to June 17, 2010, a jury trial was held before this court. On June 17, 2010, the petitioner was found guilty of Murder in the First Degree, violations of the Uniform Firearms Act, and Possession of Instruments of Crime. The petitioner was sentenced to life imprisonment without parole for the murder conviction, to be served concurrently with two and a half to five year sentences for the remaining convictions. The petitioner was represented at Trial by Attorney Steven F. O'Meara.

On August 27, 2010, Attorney O'Meara filed post-sentence motions on the petitioner's

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behalf. On September 20, 2010, post-sentence motions were denied. The petitioner requested that Attorney O'Meara file an appeal. On September 20, 2010, however, Attorney O'Meara was permitted to withdraw as counsel. No appeal was filed, and the petitioner's rights lapsed. The petitioner filed a *nunc pro tunc* motion to reinstate his appellate rights; this motion was denied.

On April 1, 2011, Attorney Scott DiClaudio entered his appearance on behalf of petitioner. On April 8, 2011, Attorney DiClaudio filed a petition through the PCRA Act to reinstate the petitioner's appellate rights. On April 15, 2011, the petitioner's rights were reinstated *nunc pro tunc*.

On May 11, 2011, the petitioner filed a Notice of Appeal, docketed with the Superior Court at 1312 EDA 2011. On April 17, 2012, the Superior Court denied the appeal and affirmed the findings of the trial court. On April 17, 2012, judgment became final; and the last day to timely file a PCRA petition would have been April 17, 2013.

On October 25, 2013, the petitioner filed a counseled PCRA petition. On April 3, 2014, the Commonwealth responded with a motion to dismiss. On June 18, 2014, this Court sent the petitioner a Rule 907 Notice, informing him that the petition was to be dismissed for lack of merit.

On July 18, 2014, this Court received a handwritten request from the petitioner to file a response to the Rule 907 Notice.

On June 29, 2015, the petitioner filed the instant appeal from this court's dismissal of his PCRA petition, by and through Attorney Lee Mandell.

II. STANDARD OF REVIEW

A. Elements of an Ineffective Assistance of Counsel Claim

To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) that counsel's actions lacked an objective reasonable basis; and (3) that actual prejudice resulted from counsel's act or failure to act. Commonwealth v. Stewart, 2013 PA Super 317, 84 A.3d 701, 706-07 (Pa. Super. Ct. 2013) *appeal denied*, 93 A.3d 463 (Pa. 2014); Commonwealth v. Chmiel, 612 Pa. 333, 30 A.3d 1111, 1127 (2011). Where the petitioner "fails to plead or meet any elements of the above-cited test, his claim must fail." Id. *quoting* Commonwealth v. Burkett, 5 A.3d 1260, 1272 (Pa. Super.2010).

A claim has arguable merit where the factual averments, if accurate, could establish cause for relief. *See* Commonwealth v. Jones, 583 Pa. 130, 876 A.2d 380, 385 (2005) ("If a petitioner raises allegations, which, even if accepted as true, do not establish the underlying claim ..., he or she will have failed to establish the arguable merit prong related to the claim.") Whether the "facts rise to the level of arguable merit is a legal determination." Commonwealth v. Saranchak, 581 Pa. 490, 866 A.2d 292, 304 n. 14 (2005).

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 the ineffective assistance. 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).

B. Burden of Proof

To prevail on an ineffective assistance of counsel claim, petitioner must overcome a "strong presumption that counsel's representation was within the wide range of reasonable professional assistance." Harrington v. Richter, 562 U.S. 86, , 103 (2011); *see also* 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).

C. Timeliness

The Post Conviction Relief Act requires that a post-conviction petition be filed within one year of the date the judgment becomes final. A judgment becomes final at the conclusion of direct review, including time to seek discretionary review before the Pennsylvania Supreme Court and the United States Supreme Court. The one-year limitation is exempted if a petitioner bases his claim upon governmental interference with the appellate process, exculpatory evidence which was previously unknown to the petitioner and could not have been ascertained by the exercise of due diligence, or a constitutional right recognized after the one-year limitation if that constitutional right is held to apply retroactively. Any petition invoking an exception to the one-year limitation must be filed within sixty days of the date the claim could be presented. 42 Pa.C.S. § 9545 (b).

The Pennsylvania Supreme Court has ruled that Pennsylvania courts have no jurisdiction to hear untimely Post Conviction Relief Act petitions. Commonwealth v. Hall, 565 Pa. 92, 95, 771 A.2d 1232, 1234 (2001).

> This court has made clear that the time limitations pursuant to the amendments to the PCRA are jurisdictional . . . Jurisdictional time limits go to a court's right or competency to adjudicate a controversy. These limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits.

Commonwealth v. Fahy, 558 Pa. 313, 328-29, 737 A.2d 214, 222 (1999). Where the Post Conviction Relief Act petition is untimely, a petitioner must plead and prove that a one-year filing exception applies.

D. Addressing claims on the merits

Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests. Commonwealth v. Howard, 553 Pa. 266, 719 A.2d 233, 237 (1998). Nor can a claim of ineffective assistance generally succeed through comparing, by hindsight, the trial strategy employed with alternatives nor pursued. Id. A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. Id.

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).

III. DISCUSSION

As a threshold matter as set forth *infra*, this court finds that the appeal, though untimely, satisfies the requirements of the governmental-interference exception. Therefore, the petition may be addressed on the merits.

The petitioner alleges several grounds for ineffective assistance of counsel, specifically: (1) counsel's failure to request discovery of 115 images shown to Roland Kimble prior to his identification of the petitioner; (2) counsel's failure to request a line-up; (3) counsel's failure to file a motion to suppress the out-of-court identifications made by Roland Kimble and Katina Carter; (4) counsel's failure adequately to cross-examine Commonwealth witnesses; and (5) counsel's failure to request a jury instruction on voluntary manslaughter.

Individually and together, these claims lack arguable merit, counsel possessed a reasonable basis for every action, and the petitioner did not suffer prejudice. Therefore, the PCRA petition must be dismissed.

Timeliness of the Petition

As a threshold matter, we must address the timeliness of the petition. Although it was not filed within one year of final judgment, we find that the governmental-interference exception applies, and this Court will address the petition on the merits.

The PCRA Act provides that a petition must be filed within one year of the date a judgment becomes final. 42 Pa.C.S. § 9545(b)(1). 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. 42 Pa.C.S. § 9545(b)(3). This limitation is jurisdictional in nature. Commonwealth v. Peterkin, 554 Pa. 547,

722 A.2d 638 (1998). *See also* Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214, 222 (1999) (Jurisdictional time limits go to a court's right or competency to adjudicate a controversy). Jurisdictional time limitations are not subject to equitable exceptions and a court has no authority to extend them except as the statute permits. Fahy at 222.

However, there are three exceptions that allow for review of an untimely PCRA petition: (1) petitioner's inability to raise a claim because of governmental interference; (2) the discovery of previously unknown facts or evidence that would have supported a claim; and (3) a newly-recognized constitutional right. 42 Pa.C.S. § 9545(b)(11)(i)-(iii). To invoke an exception, the petitioner must plead it explicitly and satisfy the burden of proof. Commonwealth v. Beasley, 741 A.2d 1258, 559 Pa. 604 (1999); *see also* Commonwealth v. Jones, 54 A.3d 14, 617 Pa. 587 (2012). Any exceptions must be pled within sixty days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).

In the instant case, the petitioner claims that he meets the governmental-interference exception because he alleges that the prison withheld his mail and that as a result he did not receive notice that his appeal to the Superior Court had been denied until the one-year expiration date had passed. He avers that he filed the instant petition within 60 days of making this discovery.

First, this Court must address whether the petitioner satisfied the burden of proof. It is concerning that the petitioner failed to offer any evidence of governmental interference beyond mere allegation. However, this Court finds it even more troublesome that, in response to a court order, counsel for the prison stated that the relevant mail log was lost. Although this missing record does not affirmatively establish governmental interference as a matter of fact, it strongly supports the petitioner's allegations. Furthermore, requiring the petitioner to produce specific

evidence of withheld mail would be akin to requiring him to prove a negative, and in so doing, elevate the burden of proof to such an unattainable level as to sap the governmental interference exception of any vitality. Finally, if the prison did in fact withhold mail from the petitioner and then destroy or otherwise withhold the evidence of their wrongdoing, dismissing the petition for untimeliness would constitute a gross miscarriage of justice. As such, this Court holds the petitioner has pled sufficient facts to qualify for the governmental-interference exception.

The Commonwealth next argues that "the threshold question is whether defendant acted with due diligence in waiting nearly one and a half years from the time his direct appeal was decided before ascertaining the status of his case." Commonwealth Brief at 6. The Commonwealth cites to Commonwealth v. Bennett, 593 Pa. 382, 920 A.2d 1264 (2007)(granting *nunc pro tunc* appeal where Bennett had written to the PCRA court and the Superior Court inquiring about the status of his appeal, but did not learn that the appeal had been dismissed until two months after the fact when the Superior Court sent him a letter).

Nevertheless, the petitioner's exercise of due diligence, or lack therof, is a red herring and not outcome dispositive. A close reading of Bennett reveals that the case was decided under the new-facts exception, which applies where;

> "The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence."

42 Pa.C.S. § 9545(b)(ii). In the instant case, however, the petitioner pled under the governmental- interference exception, which states;

> "The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States."

42 Pa.C.S. § 9545(b)(i). In Bennett, the exercise of due diligence was clearly a dispositive factor

because it is an essential element of the new-facts exception. In stark contrast, the plain text of the governmental-interference exception does not require any action or awareness on the part of the petitioner, let alone the exercise of due diligence. As such, due diligence is irrelevant in determining whether the exception applies.

Whereas we have determined that the Petitioner has pled sufficient facts to establish that his failure timely to raise this claim was the result of interference by government officials, this Court finds the instant petition timely under Section 9545(b)(i). We now address the petition on the merits.

Failure to request discovery of 115 images

The petitioner's first claim alleges counsel was ineffective for failing to request discovery of the 115 images viewed by Roland Kimble and further alleges a Brady violation by the Commonwealth. *PCRA Petition*, ¶¶. 39-55. The petition alleges the following:

> On June 24, 2009, Roland Kimble testified at a preliminary hearing that he viewed 115 images in the photo imaging machine at homicide on April 20, 2008 . . . Mr. Kimble testified that he identified a male that evening on April 20, 2008 that looked similar to the male he saw run by him through the breezeway after he heard gunshots. . . [Mr. Kimble again testified to the same at trial on June 10, 2010] . . . At trial Mr. O'Meara unsuccessfully attempted to cross-examine the assigned homicide detective about the 115 photos that were viewed by Mr. Kimble. This attempt was futile since the detective was able to testify that Mr. Kimble never "identified" anyone in the photos. Without the photos available to him to confront the detective this line of cross examination was ineffective and useless.

PCRA Petition, ¶¶ 48-51. For this issue, the facts are as follows:

The relevant facts are as follows: Detective John Cahill took a statement from Roland Kimble, the decedent's uncle, a few hours after the shooting.[1] Detective Cahill had Mr. Kimble

[1] Roland Kimble did not witness the shooting in this case. However, shortly after hearing gunshots, he did witness the petitioner walk past him, while tucking a gun into his waistband

view approximately 115 photographs in a photo imagery computer, in an attempt to identify the man Mr. Kimble had witnessed with a gun, minutes after the shooting. N.T. 6/11/10, 7-9. Detective Cahill entered parameters to display only individuals between 14 and 16 years of age and between five(5) feet and five (5) feet six (6) inches tall. These parameters were based on Mr. Kimble's description of the suspect. N.T. 6/11/10, 9, 11. Although Mr. Kimble stated that one photograph looked similar to the man he saw earlier that night, when asked by Detective Cahill if this "similar photograph" was the shooter, Mr. Kimble replied that it was not. N.TN.T. 6/11/10, 10, 16-18. Detective Cahill testified that the photographs were not saved on the machine, since Mr. Kimble did not identify any photograph as that of the shooter. N.T. 6/11/10, 16-18. At trial, Mr. Kimble re-affirmed his statements to Detective Cahill by testifying that he did not make any positive identification of the shooter from these 115 photographs. N.T. 6/10/10, 85-86.

Later, Mr. Kimble was shown a photo array, and he immediately identified the petitioner's photo. N.T. 6/10/10, 90, 125. Moreover, Detective Cahill testified that petitioner's photo could not have been included in the 115 photographs viewed by Mr. Kimble because the petitioner was 20 years old at the time of the shooting. N.T. 6/11/10, 11

a. Counsel's failure to request images

First, the petitioner alleges ineffective assistance of counsel because Mr. O'Meara failed to request the photo which was identified by Mr. Kimble on April 20, 2008, as well as the 115 photos that Mr. Kimble initially viewed. Petitioner further alleges that there is no rationally

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and talking on a cell phone. N.T. 6/10/10, 71-73. Mr. Kimble stated that the petitioner looked directly at him from a distance of approximately 10 feet, and that he had a few seconds to observe the petitioner's face. N.T. 6/10/10, 72-73, 88. Mr. Kimble identified the petitioner as the perpetrator on 7/3/2008, after viewing an array of eight photographs. N.T. 6/10/10, 92-93. Mr. Kimble identified the petitioner at trial as the man he witnessed on the night of the shooting and as the same man he identified on 7/3/2008. N.T. 6/10/10, 92-93.

tactical reason for Mr. O'Meara to have failed to request the results of the identification which was made by Mr. Kimble on April 20, 2008 and that this evidence could have been used to impeach Mr. Kimble's identification of Mr. Williams at trial in light of the fact that Mr. Kimble had only a few seconds to observe the face of the male who ran by him. *PCRA Petition*, ¶¶ 52-54

This claim lacks arguable merit because the factual averments fail to establish any cause for relief. Here, the petitioner avers that the 115 photos could have been used to impeach Mr. Kimble's identification of the petitioner at trial in light of the fact that Mr. Kimble only had a few seconds to observe the petitioner's face at the scene of the crime. *PCRA Petition*, ¶ 54. This claim is without arguable merit because Mr. Kimble did not make an identification from the 115 photos, and the detective testified that the petitioner's photo could not have been among them because of the search parameters. The petitioner has failed to show how the actual photos would have been helpful, let alone outcome-dispositive, where prior testimony established that (1) Mr. Kimble did not make any identifications from the photos in question, (2) Mr. Kimble had identified the petitioner from an eight photograph array on 7/3/2008 and again at trial, and (3) the petitioner had bragged to Katina Carter, a relative of the victim, that "I'm going to do your brother like I did Jim[2]". N.T. 6/10/10, 188. The presence of irrelevant photographs would not have created any likelihood that the jury would have discredited Mr. Kimble's or Ms. Carter's inculpating testimony. Furthermore, trial counsel extensively questioned Detective Cahill on cross-examination regarding the 115 photos. (N.T., 6/11/10, 14-20). For the same reasons, the petitioner fails to demonstrate prejudice as well.

Furthermore, the claim also fails because counsel possessed an objective reasonable basis for his actions. Generally, where matters of strategy and tactics are concerned, counsel's

[2] Presumably referring to James Edward Corry, the victim in this case.

assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests. Commonwealth v. Howard, 553 Pa. 266, 719 A.2d 233, 237 (1998). Because it is difficult to see how the 115 photos would have been helpful and because counsel could reasonably have determined that pursuing such a frivolous matter could have harmed his credibility with the jury and drawn even more attention to Mr. Kimble's identification, counsel had an objective reasonable basis for his actions.

b. Disposition of Brady issue

The petitioner alleges that the Commonwealth had a duty to preserve the 115 photos which were viewed and to disclose them in discovery along with the result of the identification that was made by Mr. Kimble. *PCRA Petition*, ¶¶ 53.

To establish a Brady violation a defendant must show (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material to the issues at trial. Commonwealth v. Santiago, 654 A.2d 1062, 1069 (Pa. Super. 1994). Evidence is not to be considered exculpatory merely because a petitioner alleges that it is exculpatory. Commonwealth v. Lambert, 884 A.2d 848 (Pa. 2005). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Santiago, 654 A.2d at 1069; *see also* Commonwealth v. Burkett, 5 A.3d 1260, 1268 (Pa. Super. 2010)("[T]he mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense.")

The prosecution is not required to deliver its entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. Santiago, 654 A.2d at 1069. Similarly, the prosecution is not required to disclose to the

defense every fruitless lead followed by investigators of a crime. Id.

As a threshold matter, Detective Cahill testified that he did not save the 115 photos on the computer after Mr. Kimble did not make an identification. Thus the prosecution could not have suppressed evidence which no longer existed.

For the same reasons that the petitioner failed to demonstrate materiality and prejudice in his ineffectiveness claim, he fails to demonstrate a Brady violation. The petitioner does not identify anything favorable or exculpatory about the 115 photos from which Mr. Kimble did *not* make an identification. The petitioner further fails to demonstrate a reasonable probability that, but for this evidence, the result of the proceeding would have been different. Rather, these photos are a textbook example of the type of "fruitless leads" which need not be disclosed under Brady.

Failure to request a line-up

The petitioner's next claim alleges that counsel was ineffective for failing to request a lineup. *PCRA Petition*, ¶¶ 56-60. Although the petitioner admits that trial counsel's failure to request a pre-trial lineup "is not ineffective assistance of counsel per se," he claims that it nonetheless shows that trial counsel was ineffective for lack of preparation and strategic forethought. *PCRA Petition*, ¶ 60. The petitioner alleges that a pre-trial lineup should have been requested since Mr. Kimble was "standing on a dark porch," "only saw the male's face for a few seconds," and "this male was a stranger to Mr. Kimble." *PCRA Petition*, ¶ 59.

Trial counsel's choice not to have a pre-trial lineup had an objective reasonable basis and was well within the exercise of professional judgment. It is reasonable to conclude that if Mr. Kimble identified the petitioner as the shooter for the second time, it could have been fatal to defending the petitioner's alleged innocence based on mistaken identification. As such, trial

counsel's decision to forgo a line-up, relying instead upon rigorous cross-examination at trial, was well within the bounds of reasonable trial strategy. For the same reasons, this claim also fails on the merits. *See* Commonwealth v. Howard, 553 Pa. 266, 719 A.2d 233, 237 (1998)(counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests.).

Finally, the petitioner's claim of prejudice fails because it relies on speculation. The petitioner has not made an offer of proof demonstrating a reasonable likelihood that Mr. Kimble would have failed to identify the petitioner at a pre-trial lineup. Instead, the petitioner relies solely on speculation that Mr. Kimble *may* not have identified the petitioner had the line-up occurred. Additionally, the petitioner has not shown how impeaching Mr. Kimble's identification would have resulted in the substantial likelihood of a different outcome at trial, and the claim of prejudice fails.

Failure to file a motion to suppress out-of-court identifications

The petitioner's next claim alleges that trial counsel was ineffective for failing to file a motion to suppress the out-of-court identifications of the petitioner by Mr. Kimble and Ms. Carter. *PCRA Petition,* ¶¶ 61-65. Although the petitioner admits that trial counsel did argue a *motion in limine* to suppress these same out-of-court identifications, he alleges counsel was ineffective for failing to file a motion where he could have had a hearing with witnesses to testify in his favor. *PCRA Petition*, ¶ 63. The petitioner further alleges that he was unable to challenge the legality and admissibility of these out-of-court identifications and that as a result he was deprived of the right to due process. *PCRA Petition*, ¶ 65.

First, the claim lacks arguable merit because the petitioner failed to prove that having a

suppression hearing would have created a reasonable probability of changing the outcome. He does not offer any specific legal theory or authority in support of this claim; nor has he offered the names of witnesses that trial counsel should have called at a suppression hearing, or how such testimony would have impacted the court's rulings. Most importantly, the petitioner has failed to proffer any facts explaining why trial counsel's *motion in limine* was deficient. Therefore, this court can only conclude that the results of a suppression hearing following a formal suppression motion would not have differed from those of the *motion in limine* trial counsel actually made.

Next, trial counsel's decision not to file a suppression motion in the wake of a previous unsuccessful *motion in limine* has an objective reasonable basis. The law is settled that counsel's strategy lacks a reasonable basis only if appellant proves that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. Commonwealth v. Davido, 106 A.3d 611. Because the petitioner has not established that a suppression motion would have had a substantially greater potential for success, it must be presumed as a matter of law that counsel had a reasonable basis for not having filed the motion.

Similarly, the petitioner has failed to proffer any evidence establishing prejudice; thus the prejudice requirement is not satisfied. *See* Commonwealth v. Jones, 811 A.2d 994, 1003 (Pa. 2002)(affirming dismissal of PCRA petition without a hearing, noting that ineffective assistance of counsel claims are not self-proving, and undeveloped claims are insufficient to prove an entitlement to relief.).

Beyond the petitioner's failure to plead sufficient facts, it is clear from the record that counsel's decision not to file a suppression motion does not constitute ineffective assistance of counsel. As a matter of law, counsel cannot be deemed ineffective for failing to file a motion to

suppress where no legal basis exists to file the motion. Commonwealth v. Franklin, 990 A.2d 795 (Pa. Super. 2010). In the instant case, the relevant suppression issues were disposed of by way of counsel's previous *motion in limine*. Even conceding *arguendo* that a suppression hearing with witness testimony *may* have impacted the evidentiary ruling itself, the petitioner does not articulate any additional *legal basis* to justify filing a motion. Thus the claim fails as a matter of law.

Failure adequately to cross-examine prosecution witnesses

The petitioner's next claim alleges that trial counsel was ineffective because he failed adequately to cross-examine prosecution witnesses regarding inconsistencies, bias and credibility. *PCRA Petition*, ¶¶ 66-68. Specifically, the petition alleges that the efforts at cross-examinations of Omar O'Neal, Roger King, Roland Carter, Bayshine Jones, Rodney King, Roland Kimble, Katine Carter, and Detective John Cahill were all deficient. *PCRA Petition*, ¶¶67-68.

Concerning the cross-examination of Omar O'Neal, Roger King, Roland Carter, Bayshine Jones, Rodney King, Katine Carter, and Detective John Cahill, the Petitioner's claims are unsubstantiated and without merit. It is petitioner's burden to plead and prove that had trial counsel proceeded differently, a substantial likelihood of a different outcome existed. *See* Commonwealth v. Jones, 811 A.2d 994, 1003 (Pa. 2002)(affirming dismissal of PCRA petition without a hearing, noting that ineffective assistance of counsel claims are not self-proving, and undeveloped claims are insufficient to prove an entitlement to relief.); *See Also* Commonwealth v. miner, 44 A.3d 684 (Pa.Super. 2012). Here, the Petitioner has failed to cite any specific examples of counsel's alleged failings, any information he believes counsel could have obtained,

or how such information would likely have changed the outcome. Therefore, these undeveloped claims must fail. To the contrary, the record shows that trial counsel actively sought to undermine the credibility and testimony of all Commonwealth witnesses.

The petitioner's only specific allegation of deficient cross-examination relates to trial counsel's failure to question Commonwealth witness Roland Kimble about whether he could have seen Jamal Simmons instead of the petitioner on the night of the shooting, since Mr. Simmons allegedly had a motive to shoot the decedent. *PCRA Petition,* ¶ 81.

This claim lacks arguable merit. A review of the record indicates that trial counsel extensively cross-examined Mr. Kimble by addressing: (1) that the decedent was his nephew (N.T., 6/10/2010, p. 101); (2) Mr. Kimble's previous inconsistent statements (pp. 106-108, 114-116); (3) the circumstances surrounding Mr. Kimble's identification; and (4) Mr. Kimble's bias and credibility regarding discussions with his niece, Katina Carter (pp. 127-129). Although trial counsel did not question Mr. Kimble about Jamal Simmons, he nevertheless elicited testimony about Jamal Simmons through his cross-examination of Roland Carter (N.T., 6/10/2010, pp. 34-35), Katina Carter (N.T., 6/10/2010, p. 199), Rodney King (N.T., 6/10/2010, pp. 99, 107-108), and Roger King (N.T., 6/11/2010, pp. 128-129). Furthermore, trial counsel did argue, at closing, that Jamal Simmons was the murderer in this case. N.T., 6/15/2010, 49-51, 55.

Additionally, trial counsel had an objectively reasonable basis for not questioning Mr. Kimble about Jamal Simmons. The defense clearly pursued a strategy of mistaken identification, both through cross-examination of four Commonwealth witnesses about Jamal Simmons and through closing argument alleging that Jamal Simmons was the murderer. Because trial counsel needed only to raise a reasonable doubt in the minds of the jury, such testimony and argument would be sufficient to establish the possibility of a reasonable doubt, and any testimony by Mr.

Kimble that he *could* have seen Jamal Simmons would have been duplicative and unnecessary. To the contrary, had Mr. Kimble reaffirmed his identification of the petitioner on cross-examination and testified affirmatively that he did *not* see Jamal Simmons, the defense of mistaken identity would have become untenable. For these reasons, it was eminently reasonable and sensible of counsel to argue mistaken identification in a subtle manner which did not risk eliciting Mr. Kimble's potentially devastating testimony. For these reasons, the claim also lacks substance.

Failure to request jury instruction on voluntary manslaughter

The petitioner's final claim alleges that trial counsel was ineffective for failing to request a jury instruction on voluntary manslaughter. *PCRA Petition*, ¶ 69-72. The petitioner alleges that such an instruction was warranted because, "There was ample evidence on the record of a tumultuous and violent relationship between the decedent and Mr. Williams in the days leading up to the murder which was the Commonwealth's theory of motive in this case". Id. at ¶ 72.

This claim fails as a matter of law because there was insufficient evidence to warrant a jury instruction on voluntary manslaughter, and because such an instruction would be inconsistent with the defense theory of the case.

a. Insufficient evidence to warrant a jury instruction on voluntary manslaughter

A trial court may only instruct on an offense where "the offense has been made an issue in the case and where the trial evidence reasonably would support such a verdict." Commonwealth v. Browdie, 543 Pa. 337, 671 A.2d 668, 674 (1996). *See* Commonwealth v. Carter, 502 Pa. 433, 466 A.2d 1328 (1983)(Trial court may charge on voluntary manslaughter only where evidence exists to support such a verdict.) Where the evidence does not support the

charge, trial counsel is not ineffective for failing to make a futile request. Commonwealth v. Williams, 537 Pa. 1, 640 A.2d 1251 (1994).

A person is guilty of "heat-of-passion" voluntary manslaughter "if at the time of the killing he acted under a sudden and intense passion resulting from serious provocation by the victim." Commonwealth v. Browdie, 671 A.2d at 671 (Pa. 1996), citing 18 Pa.C.S. § 2503(a); Commonwealth v. Walker, 656 A.2d 90, 95 (1995), *cert denied*, 516 U.S. 854 (1995). Heat of passion includes emotions such as anger, rage, sudden resentment or terror, which renders the mind incapable of reason. Id. at 671. "The ultimate test for adequate provocation remains whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was incapable of cool reflection." Commonwealth v. Thornton, 494 Pa. 260, 431 A.2d 248, 252 (1981); Miller, 605 Pa. 1.

In the petitioner's case, the evidence does not support a charge of voluntary manslaughter. Specifically, the petitioner's vague allegation of a "tumultuous and violent relationship between the decedent and [himself] in the days leading up to the murder" does not establish a "sudden" passion resulting from serious provocation, nor does it address the opportunity for a cooling-down period. *Compare* Commonwealth v. Miller, 987 A.2d 638, 650 (Pa. 2009)(Rejecting Miller's claim that he murdered his wife in the heat of passion because of her "apparent infidelity and flirtatiousness," noting that Miller "was well aware of his wife's proclivities prior to the day of the killing.")

Had defense counsel requested a charge of voluntary manslaughter at trial, it would have been denied. Because counsel cannot be held ineffective for failing to make a futile request, per Williams, 537 Pa. 1, this claim of ineffectiveness fails as a matter of law.

B. Voluntary manslaughter charge inconsistent with theory of defense

The law is settled that trial counsel will not be held to be ineffective for failing to request a jury instruction on voluntary manslaughter where such a charge is contrary to the defense theory of the case. *See* Commonwealth v. Ort, 581 A.2d 230 (Pa. Super. 1990)(Trial counsel was not ineffective for failing to request instructions on voluntary manslaughter in murder trial for death of person killed in arson-connected fire, where the theory of defense was that defendant did not set the fire); Commonwealth v. Anderson, 501 Pa. 275, 461 A.2d 208 (1983)(Voluntary manslaughter charge would have been inconsistent with "innocent bystander" defense).

In petitioner's case, it is clear from the record that counsel's strategy was to claim mistaken identification and accuse Jamal Simmons of the murder. This strategy is clearly inconsistent with a charge of voluntary manslaughter; therefore, trial counsel was not ineffective for failing to request a jury instruction on voluntary manslaughter.

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

STEVEN R. GEROFF, J.