NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. AKANINYENE EFIONG AKAN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 523 WDA 2015

Appeal from the PCRA Order March 4, 2015
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0001844-2011

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN, and OTT, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED FEBRUARY 1, 2016**

Appellant, Akaninyene Efiong Akan, appeals *pro se* from the March 4, 2015 order that denied his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. We affirm.

The PCRA court set forth the factual history of this matter as follows:

> By way of a brief review, the evidence presented at trial established that in the evening hours of September 11, 2011, University of Pittsburgh student [K.B.] left her off-campus house at 3381 Parkview Avenue in the Oakland section of the City of Pittsburgh to attend a party for the University's lacrosse team. When she returned to her house, she chatted with a friend on Facebook and fell asleep in her clothes with her laptop open. At approximately 5 a.m., she was awakened by the sound of footsteps on the stairs. She saw a man in the hallway, whom she described as short, approximately 5'7" to 5'8", muscular build, wearing dark clothing and a ski cap, and later identified as [Appellant]. [Appellant] came into her room, shut and locked her door and closed her laptop. One of [K.B.'s] housemates, [K.K.], heard the footsteps as well and called out to [K.B.] By this time,

[Appellant] had put his arms around her neck, indicated that he had a knife and hydrochloric acid and threatened to kill her if she didn't do as he said. [K.B.] replied to [K.K.] that she was fine and had just gone downstairs to get a glass of water. [K.K.] accepted this and went back into her room and went to sleep.

Over the next two hours, [Appellant] forced [K.B.] to perform oral sex on him and raped her vaginally and anally multiple times. Throughout the attack, [K.B.] heard several ripping sounds, which she determined were condom wrappers. When she resisted his sexual assaults [Appellant] continually threatened to kill or hurt her if she didn't comply. At approximately 7 a.m., [Appellant] asked what she wanted and [K.B.] said she wanted to go to sleep. [Appellant] again threatened her, saying he would come back and kill her and her family. He spit in her mouth to indicate that what happened was a pact between them, and then left the house. [K.B.] remained in her bed, crying and unable to move, for some time. When she heard [K.K.] in the bathroom, she went and told her what had happened. Against [K.K.'s] advice, [K.B.] showered, and then the girls and their third housemate, [L.S.] went to [K.K.'s] parent's [sic] house, where [K.B.] called her parents and the police. As they left the house [where the rape occurred], they noticed the living room window was open, when it had been closed the previous evening.

Approximately one week later, University of Pittsburgh Police stopped [Appellant] on Bates Street in Oakland as a suspicious person. Pittsburgh Police Detective Rufus Jones was called to the scene and engaged [Appellant] in conversation. During this conversation, [Appellant] asked for, and was given, a cigarette. [Appellant] smoked the cigarette and dropped it on the ground before leaving his encounter with the police. Detective Jones bagged the cigarette and reported the incident to his commanding officer. Several weeks later, Detective Jones was asked to turn the cigarette over to Detective Boss, which he did. DNA testing on saliva taken from the cigarette matched a saliva sample found on the panties [K.B.] wore during the rapes. Eventually, [Appellant's] fingerprints were matched to latent prints taken from the open window at [K.B.'s] house. It was later discovered that [Appellant] had accompanied [K.K.] home from a bar the previous evening, but [K.K.] was incoherently drunk and [K.B] made [Appellant] leave. Friends of the girls, [J.A.] and [N.F.], were present when [Appellant] entered the house with

> [K.K], and both said that [Appellant] did not touch the window at any time.

PCRA Opinion, 7/20/15, at 2-4.

> [Appellant] was charged with Burglary,[1] Rape,[2] Involuntary Deviate Sexual Intercourse (IDSI),[3] Sexual Assault,[4] Indecent Assault,[5] Terroristic Threats,[6] Unlawful Restraint[7] and Simple Assault.[8] Following a jury trial held before this Court, [Appellant] was convicted of all charges. On June 26, 2012, he appeared before this Court and was sentenced to four (4) consecutive terms of imprisonment of eight (8) to twenty (20) years, for an aggregate sentence of 32 to [8]0 years. Timely Post-Sentence Motions were filed and were denied by this Court on July 11, 2012. The judgment of sentence was affirmed by the Superior Court on November 25, 2013 and [Appellant's] subsequent Petition for Allowance of Appeal was denied on May 30, 2014.
>
> [1] 18 Pa.C.S.A. §3502(c)(1)
> [2] 18 Pa.C.S.A. §3121(a)(1)-2 counts
> [3] 18 Pa.C.S.A. §3123(a)(1)-4 counts
> [4] 18 Pa.C.S.A. §3124.1
> [5] 18 Pa.C.S.A. §3126(a)(1)
> [6] 18 Pa.C.S.A. §2706(a)(1)
> [7] 18 Pa.C.S.A. §2902(a)
> [8] 18 Pa.C.S.A. §2701(a)(3)
>
> No further action was taken until October 17, 2014, when [Appellant] filed a pro se Post Conviction Relief Act Petition. Counsel was appointed to represent [Appellant], but later filed a Turner[1] "no-merit" letter and petitioned to withdraw from the representation. After giving notice of its intent to do so, this Court dismissed the Petition without a hearing. This timely appeal followed.

PCRA Opinion, 7/20/15, at 1-2.

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[1] ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) ("***Turner/Finley***") set forth the requirements that must be met for counsel to withdraw from representation on collateral review.

On appeal, Appellant raises four issues:

> 1. Whether PCRA counsel was ineffective for failing to argue trial counsel's ineffectiveness since trial counsel was ineffective for failing to request mistrial due to the prosecutor's fabricated (made up) narative [sic] of the allegations to the court and the jury during his opening statements and closing arguments?
>
> 2. Whether PCRA counsel was ineffective for failing to argue trial counsel's ineffectiveness since trial counsel was ineffective for failing to raise a timely objection to the Trial Court's violation of Pa.R.Crim.P. 644?
>
> 3. Whether PCRA counsel was ineffective for failing to argue trial counsel's ineffectiveness since trial counsel was ineffective for failing to seek suppression of Appellant's biological /DNA sample that was seized in violation of the Fourth Amendment to the U.S. Constitution?
>
> 4. Whether the PCRA Court erred by permitting the appointed PCRA counsel to withdraw based on a Turner/Finley "NO MERIT" Letter that failed to address all the actual claims raised in the pro se filed PCRA Petition?

Appellant's Brief at 4.

When reviewing the propriety of an order denying PCRA relief, we consider the record "in the light most favorable to the prevailing party at the PCRA level." ***Commonwealth v. Stultz***, 114 A.3d 865, 872 (Pa. Super. 2015) (quoting ***Commonwealth v. Henkel***, 90 A.3d 16, 20 (Pa. Super. 2014) (*en banc*)). This Court is limited to determining whether the evidence of record supports the conclusions of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Rykard***, 55 A.3d 1177, 1183 (Pa. Super. 2012). We grant great deference to the PCRA court's findings that are supported in the record and will not disturb them unless they have no

support in the certified record. ***Commonwealth v. Rigg***, 84 A.3d 1080, 1084 (Pa. Super. 2014). Moreover, we point out that "[t]here 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) (quoting ***Commonwealth v. Barbosa***, 819 A.2d 81 (Pa. Super. 2003)).

In the case at bar, we have reviewed the record, the briefs of the parties, and the applicable legal authority, and we discern no abuse of discretion or error of law in this matter. The PCRA court addressed each of Appellant's issues and found them meritless, and we agree with the PCRA court in all but one respect. It appears that the jury should have been permitted to take notes pursuant to Pa.R.Crim.P. 644 because the trial was expected to last more than two days. However, as argued by the Commonwealth, Appellant has failed to demonstrate that the jury's verdict was inconsistent with the victim's testimony. The Commonwealth's Brief at 36. Thus, because Appellant has not established that the jurors' preclusion from taking notes resulted in any prejudice, trial counsel cannot be found ineffective, and, therefore, PCRA counsel cannot be deemed ineffective for

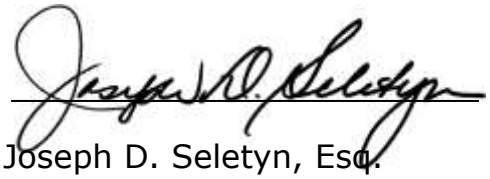
failing to advance that meritless claim. ***Commonwealth v. Treiber***, 121 A.3d 435, 445 (Pa. 2015). Accordingly, we affirm the March 4, 2015 order.[2]

Order affirmed.

P.J.E. Ford Elliott joins the Memorandum.

Judge Ott Concurs in the Result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016

[2] The parties are hereby directed to attach a copy of this memorandum and the PCRA court's July 20, 2015 opinion in the event of further proceedings in this matter.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

AKANINYENE EFIONG AKAN,

Defendant.

CRIMINAL DIVISION

CC: 2011-1844

SUPERIOR COURT
No. 523WDA2015

OPINION

Filed By:
Hon. Donna Jo McDaniel

Copies mailed to:

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Dated: 07-20-2015

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

COMMONWEALTH OF PENNSYLVANIA

v. CC: 201101844

AKANINYENE AKAN,

Defendant

OPINION

The Defendant has appealed from this Court's Order of March 4, 2015, which dismissed his pro se Post Conviction Relief Act Petition without a hearing. A review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, this Court's Order should be affirmed.

The Defendant was charged with Burglary,[1] Rape,[2] Involuntary Deviate Sexual Intercourse (IDSI),[3] Sexual Assault,[4] Indecent Assault,[5] Terroristic Threats,[6] Unlawful Restraint[7] and Simple Assault.[8] Following a jury trial held before this Court, the Defendant was convicted of all charges. On June 26, 2012, he appeared before this Court and was sentenced to four (4) consecutive terms of imprisonment of eight (8) to twenty (20) years, for an aggregate sentence of 32 to 60 years. Timely Post-Sentence Motions were filed and were denied by this Court on July

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11, 2012. The judgment of sentence was affirmed by the Superior Court on November 25, 2013 and the Defendant's subsequent Petition for Allowance of Appeal was denied on May 30, 2014.

No further action was taken until October 17, 2014, when the Defendant filed a pro se Post Conviction Relief Act Petition. Counsel was appointed to represent the Defendant, but later filed a Turner "no-merit" letter and petitioned to withdraw from the representation. After giving notice of its intent to do so, this Court dismissed the Petition without a hearing. This timely appeal followed.

By way of a brief review, the evidence presented at trial established that in the evening hours of September 11, 2011, University of Pittsburgh student Kelsey Barclay left her off-campus house at 3381 Parkview Avenue in the Oakland section of the City of Pittsburgh to attend a party for the University's lacrosse team. When she returned to her house, she chatted with a friend on Facebook and fell asleep in her clothes with her laptop open. At approximately 5 a.m., she was awakened by the sound of footsteps on the stairs. She saw a man in the hallway, whom she described as short, approximately 5'7" to 5'8", muscular build, wearing dark clothing and a ski cap, and later identified as the Defendant. The Defendant came into her room, shut and locked her door and closed her laptop. One of Kelsey's housemates, Kiersten Kohler, heard the footsteps as well and called out to Kelsey. By this time, the Defendant had put his arms around her neck, indicated that he had a knife and hydrochloric acid and threatened to kill her if she didn't do as he said. Kelsey replied to Kiersten that she was fine and had just gone downstairs to get a glass of water. Kiersten accepted this and went back into her room and went to sleep.

Over the next two hours, the Defendant forced Kelsey to perform oral sex on him and raped her vaginally and anally multiple times. Throughout the attack, Kelsey heard several ripping sounds, which she determined were condom wrappers. When she resisted his sexual

assaults, the Defendant continually threatened to kill or hurt her if she didn't comply. At approximately 7 a.m., the Defendant asked what she wanted and Kelsey said she wanted to go to sleep. The Defendant again threatened her, saying he would come back and kill her and her family. He spit in her mouth to indicate that what happened was a pact between them, and then left the house. Kelsey remained in her bed, crying and unable to move, for some time. When she heard Kiersten in the bathroom, she went and told her what had happened. Against Kiersten's advice, Kelsey showered, and then the girls and their third housemate, Lindsay Schultz went to Kiersten's parent's house, where Kelsey called her parents and the police.. As they left the house, they noticed the living room window was open, when it had been closed the previous evening.

Approximately one week later, University of Pittsburgh Police stopped the Defendant on Bates Street in Oakland as a suspicious person. Pittsburgh Police Detective Rufus Jones was called to the scene and engaged the Defendant in conversation. During this conversation, the Defendant asked for, and was given, a cigarette. The Defendant smoked the cigarette and dropped it on the ground before leaving his encounter with the police. Detective Jones bagged the cigarette and reported the incident to his commanding officer. Several weeks later, Detective Jones was asked to turn the cigarette over to Detective Boss, which he did. DNA testing on saliva taken from the cigarette matched a saliva sample found on the panties Kelsey Barclay wore during the rapes. Eventually, the Defendant's fingerprints were matched to latent prints taken from the open window at Kelsey Barclay's house. It was later discovered that the Defendant had accompanied Kelsey's housemate, Kiersten, home from a bar the previous evening, but Kiersten was incoherently drunk and Kelsey made the Defendant leave. Friends of

the girls, Jason Alter and Nick Fardo, were present when the Defendant entered the house with Kiersten, and both said that the Defendant did not touch the window at any time.

On appeal, the Defendant has raised 15 claims of error[9] in the denial of his PCRA Petition. This Court has combined and re-ordered them as necessary for ease of review, as follows:

1. Denial of PCRA Petition/Turner Letter

Initially, the Defendant argues that this Court erred in allowing his appointed counsel to withdraw after filing a Turner "no-merit" letter, in failing to appoint another attorney for him and in dismissing . However, as discussed more fully below, the claims raised by the Defendant in his pro se PCRA Petition were utterly meritless and so this Court was well within its discretion in both permitting counsel to withdraw from the representation and in dismissing the Petition.

With regard to the Defendant's request for a different attorney, this Court was again well within its discretion in not appointing a second attorney. The Defendant is not entitled to attorney after attorney after attorney until he finds one who believes his claims have merit and who will file an Amended Petition. Attorney Coffey is very experienced and is well-versed in criminal law in general and in post-conviction matters in particular. This Court is satisfied that Mr. Coffey thoroughly evaluated all potential claims of error and gave the Defendant his best representation. The Defendant was not entitled to a second appointed counsel and so this Court did not err in failing to make the appointment. This claim is meritless.

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[9] Reference is made to the oft-cited quote from Judge Aldisert: "With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court, it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors...When I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that this is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness." Aldisert, The Appellate Bar: Professional Competence and Professional Responsibility – a View from the Jaundiced Eye of One Appellate Judge, 11 Cap.U.L.Rev. 445, 458 (1982).

Ineffective Assistance of Counsel

Next, the Defendant has raised a number of claims directed to errors made at the trial level. All are properly layered in terms of the ineffective assistance of counsel.

In order to establish a claim for the ineffective assistance of counsel, "a PCRA Petitioner must demonstrate, by a preponderance of the evidence, that: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) there is a reasonable probability that the result of the proceedings would have been different absent such error." Commonwealth v. Gibson, 19 A.3d 512, 525-26 (Pa. 2011). "The law presumes that counsel was not ineffective, and the appellant bears the burden of proving otherwise...[I]f the issue underlying the charge of ineffectiveness is not of arguable merit, counsel will not be deemed ineffective for failing to pursue a meritless issue... Also, if the prejudice prong of the ineffectiveness standard is not met, 'the claim may be dismissed on that basis alone and [there is no] need [to] determine whether the [arguable merit] and [client's interests] prongs have been met.'" Commonwealth v. Khalil, 806 A.2d 415, 421-2 (Pa.Super. 2002).

a. Suppression of Biological/DNA Sample

The Defendant now argues that trial counsel should have sought suppression of his "biological/DNA sample" because it was "seized without a warrant as the result of a pretext stop, investigative detention, and search of Appellant's person on September 17, 2010, and, was stored by Pittsburgh Police until October 4, 2010 without any articulable reasonable basis."

It is clear to this Court that the Defendant is not sure on what basis he wishes to challenge the seizure of the cigarette butt and so has simply strung together all of the "keywords" relating to search and seizure in hopes that something would stick. Rather, the record reflects that the seizure of the cigarette butt was proper.

Our courts have held that "contacts between the police and citizenry fall within three general classifications: The first [level of interaction] is a 'mere encounter' (or request for information) which need not be supported by any level of suspicion but carries no official compulsion to stop or respond. The second, an 'investigative detention', must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally, an arrest or 'custodial detention' must be supported by probable cause." Commonwealth v. Goldsborough, 31 A.3d 299, 305 (Pa.Super. 2011).

"'To determine if an interaction rises to the level of an investigative detention, i.e. a Terry stop, the court must examine all the circumstances and determine whether police action would have made a reasonable person believe he was not free to go and was subject to the officer's orders.'" Commonwealth v. Guzman, 44 A.3d 688, 693 (Pa.Super. 2012), citing Commonwealth v. Jones, 874 A.2d 108, 116 (Pa.Super. 2005). "'In evaluating the circumstances, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained... No single factor should control this determination, and courts must examine the totality of the circumstances when reaching a conclusion as to whether a seizure occurred.'" Guzman, supra, citing Commonwealth v. Strickler, 757 A.2d 884, 890 (Pa. 2000).

During the direct examination of Police Officer Rufus Jones, the following occurred:

Q. (Mr. Robinowitz): And I'm going to direct your attention to September 17, 2010, around 2:40 in the morning. What area of the city were you in at that particular time?

A. (Officer Jones): Oakland.

Q. And did you have occasion to encounter somebody at that particular time?

A. Yes, I did. The Defendant on Bates Street...

...Q. And again, where did this occur?

A. I think the address was 3612 Bates Street in Oakland.

Q. When you say 3612 Bates Street, was that at a house?

A. I look around for the address closest to me and try and do things that way, and I want to say that was the address that I looked at that was close to us.

Q. Where was the Defendant when you first saw him?

A. He was on the street.

Q. And did you have any conversation with him?

A. Yes, actually, I did. I had a pretty good conversation with him. He was – Pitt Police were there, I was talking with him. He had a 2010 Audi. Actually, it was a very nice car, I had a long conversation with him about the car. He worked for Westinghouse. Nice gentleman. I talked to him for quite a while.

Q. Let me ask you this. The Defendant ask for anything while you were speaking to him?

A. He did. He asked for a cigarette. I told him I didn't smoke. Never have. One of the Pitt officers did smoke and gave him a cigarette.

Q. And what did the Defendant do once he was given a cigarette?

A. He smoked a cigarette, we talked about his car, where he worked, and then when he was done smoking he threw the cigarette butt down.

Q. And when he threw the cigarette butt down, what did you do?

A. We stood, waited. He was eventually released and recovered the cigarette.

(T.T. Vol. I, p. 247-8).

In Commonwealth v. Riley, 715 A.2d 1131 (Pa.Super. 1998), our Superior Court addressed seizure of items discarded during a mere encounter with police. It held that when a person abandons an item during a mere encounter with police, "he has no standing to contest the

search and seizure of items which he has voluntarily abandoned" and the later admission of such evidence is proper. Commonwealth v. Riley, 715 A.2d 1131, 1134 (Pa.Super. 1998). Here, the Defendant had a conversation about his car with Officer Jones and then departed. He was free at all times and he was not subjected to a bodily search or investigative detention. As a result, the cigarette butt left by the Defendant was "not the result of unlawful police coercion" and was properly admitted at trial. Because the evidence was not subject to suppression, counsel cannot be considered ineffective for failing to pursue it. This claim is meritless.

b. Note Taking by Jurors

Next, the Defendant alleges that this Court erred in not allowing the jurors to take notes and that counsel was ineffective for failing to object to this. Again, this claim is meritless.

Note-taking by jurors is controlled by Rule 644[10] of the Pennsylvania Rules of Criminal Procedure. It states, in relevant part:

> ***Rule 644. Note Taking by Jurors***
>
> *(A) When a jury trial is expected to last for more than two days, jurors shall be permitted to take notes during the trial for their use during deliberations. When the trial is expected to last two days or less, the judge may permit the jurors to take notes.*

Pa.R.Crim.Pro. 644.

As the Rule indicates, note-taking is by permission of the Court and is not mandatory. Nevertheless, this was not a case where the testimony was so complex or the exhibits so numerous as to necessitate note-taking. The jurors were clearly able to distinguish the evidence and evaluate each charge separately, as proven by their lack of questions and quickly returned verdict. The record clearly supports this Court's decision that note-taking was not necessary

[10] The Defendant cites to Pa.R.Crim.Pro. 223.2 as his justification for allowing the jurors to take notes. However, Rule 223 pertains to "Administering Oath to Stenographer" and there is no Rule 223.2. The correct citation is Rule 644.

here, and this Court did not err in not letting the jurors take notes. Therefore, as above, counsel was not ineffective in failing to object. This claim must fail.

c. Request for Nominal Bail

Next, the Defendant argues that counsel was ineffective for failing to request his release on nominal bail, "thereby impairing [his] ability to locate and convince the alibi and character witnesses that counsel claimed he was unable to locate or convince to testify" (Defendant's Concise Statement of Matters Complained of on Appeal, p. 3). A careful review of the Concise Statement reveals that this issue is actually a claim for counsel's failure to call various witnesses, captioned as a bail claim in an attempt to avoid the procedural requirements for a witness claim which have not been met.

With regard to the failure to call witnesses, "trial counsel will not be deemed ineffective for failing to call a witness to testify unless the PCRA Petition demonstrates: (1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial." Commonwealth v. Brown, 18 A.3d 1147, 1160-61 (Pa.Super. 2011). "Ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense." Commonwealth v. O'Bidos, 849 A.2d 243, 249 (Pa.Super. 2004).

Here, the Defendant has not provided any of the required information; he merely asserts that there were "alibi and character witnesses" whom counsel did not call. This is not sufficient. As the Defendant has failed entirely to satisfy the requirements for an ineffectiveness claim for failing to call a witness, this claim is meritless.

d. Right to Testify

Next, the Defendant argues that counsel was ineffective in "promising the jury that Appellant would testify and then hindering Appellant's testimony by offering advise [sic] that vitiates a knowing and intelligent decision by Appellant to waive his right to testify." Again, this claim is meritless.

In his opening statement, defense counsel indicated that the Defendant would testify:

> MR. GERSON: Now, as the Judge has indicated to you, Mr. Akan does not have to testify. He's clothed in the presumption of innocence. But you know what? He is going to testify. And he's going to testify credibly. He's going to tell you exactly what happened on the night of September 10. He's going to tell you that he had nothing to do with the assault of Kelsey Barclay. He is going to testify credibly and I am confident when you hear all of the evidence in this case, that there is only one conclusion you can all reach, and that is that this man is an innocent man, he is not a monster.

(T.T. Vol. I, p. 47).

However, at the close of the evidence, Mr. Gerson indicated that the Defendant would not be testifying and this Court conducted a colloquy with the Defendant outside the presence of the jury:

> THE COURT: Mr. Akan, will you state your name for the record.
>
> THE DEFENDANT: My name is Akaninyene Efiong Akan.
>
> THE COURT: And I understand through Mr. Gerson that you do not wish to take the stand and testify in your own behalf. Is that correct?
>
> THE DEFENDANT: That is correct, Your Honor.
>
> THE COURT: Do you understand that you have an absolute right to take the stand and testify in your own behalf?
>
> THE DEFENDANT: Yes, I do
>
> THE COURT: And do you understand that you also have the right to present character witnesses if you wish?

THE DEFENDANT: Yes, I do.

THE COURT: And has anybody forced you in any way or promised you anything in order to prevent you from testifying?

THE DEFENDANT: I haven't been promised or forced, no.

THE COURT: I will accept your waiver of the right to testify.

(T.T. Vol. II, p. 234-5).

Then, during its closing charge to the jury, this Court gave a no adverse inference instruction:

> THE COURT: It is entirely up to the defendant in every criminal trial whether or not to testify. He has an absolute right founded on the Constitution to remain silent. You must not draw any adverse inference of guilt or any other adverse inferences against the defendant from the fact that he did not testify.

(T.T. Vol. II, p. 299).

This Court is not privy to the discussions between Mr. Gerson and the Defendant or Mr. Gerson's advice regarding the Defendant's testimony, and the Defendant does not now indicate what that advice was. Therefore, in evaluating this claim, all this Court can do is examine the record, and in particular, its colloquy with the Defendant. In his statements to this Court, the Defendant indicated he was aware of his absolute right to testify and also that he had not been promised anything or forced into not testifying. This Court is bound by the colloquy and, consequently, finds no ineffectiveness with regard to the Defendant's decision not to testify. This claim is also meritless.

e. DNA Testing

The Defendant also argues that trial counsel was ineffective for failing to "introduce the fact that the Commonwealth's purported DNA evidence failed to meet the quality assurance

standards to be admitted into the CODIS National Database and therefore lacked any merit despite being from an accredited lab". However, this claim is belied by the record.

At trial, defense counsel conducted informed and spirited cross-examinations of the Commonwealth's crime lab and DNA expert witnesses. He also presented the expert testimony of Dr. Monte Miller, a forensic scientist consultant. In his testimony, Dr. Miller attacked the DNA testing procedures and results and concluded that contamination at the lab led to a false positive test:

> Q. (Mr. Gerson): What is the significance, if any, of the presence of these three DNA profiles in that substrate control, Item 2D?
>
> A. (Dr. Miller): There's a lot of significance when you take something that's a control. You're hoping that it's completely negative, that there's nothing on it. So you try to cut it from outside of a stain.
>
> On top of that, we tested – or the lab tested multiple places on it and couldn't find any biological fluids.
>
> I'm concerned that it could be from contamination or something else, because it's hard for me to believe that it was a good enough sample to get a DNA profile from and yet the lab was unable to identify any physiological fluids. That's a really big concern.

(T.T. Vol. II, p. 79).

Then, in his closing argument, Mr. Gerson engaged in a lengthy attack on the scientific evidence and argued that the positive DNA test was the product of cross-contamination in the lab. He stated:

> MR. GERSON: Let's talk for a second about this 2B.
>
> 2B was the stain from the interior crotch panel. And Thom Meyers told you that he can only say that Kelsey Barclay was the major contributor. He could not make an identification of extraction of any other person's DNA, including Mr. Akan.
>
> Now, these two areas – there was an overlapping. The cuttings where [sic] taken right next to each other. You would think that 2B, if there's not enough

information to relate to anyone other than Kelsey Barclay, you would have the same basic finding in 2D. They are analogous. They are taken from the same material right next to each other.

The problem with the control cutting is that there are three individuals on the control cutting. At least three. Somehow, despite the overlap, somehow despite the fact that the samples were adjacent to each other when they were taken, somehow we have additional individuals that were not present in the 2B stain but all of a sudden are present in the 2D control cutting.

Now, Mr. Meyers was honest with you. He said – when I asked, he said, You know, I can't tell you what the biological matter was that was the source of the DNA profiles in that control cutting. And he could not tell you how or when those DNA profiles came to be on that control cutting.

So how does it happen? Let me suggest to you it happens through cross-contamination in the lab.

Thom Meyers suggested – and he was freely honest about it – that contamination is a possibility. It's a concern in any lab. And he said it could be a possibility in this case. He didn't think so, but the accreditation of his lab might be riding on whether or not there was in fact contamination.

Mr. Meyers was honest. He acknowledged that there was a peak in his test that represented yet another individual. And then we had Dr. Miller explain that he ran tests or he reviewed the tests by Thom Meyers, and he, Dr. Miller, found at least four or five additional alleges that were not reported.

Dr. Miller was not suggesting anything wrong by Thom Meyers. But what he was saying is that there was evidence of four or five more alleles in that control cutting than were even reported. And there was no evidence controverting that or disputing Dr. Miller's finding.

You have to hold onto this idea that this 2D substrate control is supposed to be a blank control cutting for comparison reasons.

Let me explain to you how the contamination probably occurred.

MR. ROBINOWITZ: I'd object. That's not evidence. No evidence to that effect.

THE COURT: I will sustain it because it is not based on the evidence that is in the case.

MR. GERSON: Let's review the movement of various items that were conducted in serology and DNA analysis in the Crime Lab.

On September 15th, the hospital specimens that were taken during the sexual examination by Laurene Donnelly are sent to the Crime Lab along with the underwear and a buccal swab taken from Ms. Barclay.

On September 29th and 30th, Angela Mitchell conducts serology. This is when she believes she identifies certain fluids. She makes the control cuttings and the various cuttings from the underwear, and she retains six or seven items for Thom Meyers to extract DNA from later in the process.

On September 30th, she places these items into sealed envelopes. And each sealed envelope is placed into a larger sealed envelope.

I have no problem with that. At that point in time the Crime Lab has exclusive custody and control of all of the items.

Now, three weeks later on October 21st, Detective Boss transfers the cigarette that Mr. Akan discarded on September 17th to the lab. IT is on that date that Mr. Akan's DNA is introduced to the lab. Because we know it's on the cigarette.

Now, Thom Meyers on October 29th does the serology on the cigarette. He takes a little cutoff the lip end to test for amylase. He takes another little cut that he creates the substrate control from. And what did Mr. Meyers tell you he did? When he was done with the serology, he put those items into the same envelope that all the other hospital items and items retained by Angela Mitchell, including the substrate control, were in.

And Thom Meyers acknowledged to you that it was at that point for the first time that all of these items and particularly the substrate control 2D and the cigarette cutting with the DNA on it were in close proximity.

When I asked Mr. Meyers if it is possible that contamination could have occurred at that point, he testified that it's possible. He said I don't think so, but it's possible.

Now, let's go further.

On November 1st at 9:29 in the morning, Thom Meyers pulls out all the items in the envelope. They all come out together. He removes everything to do his extractions. He's moving these various samples in and out. He only does it for 30 minutes. Ten o'clock everything is put back in.

But that's the point. Everything – all the items that were conducted in serology plus the cigarette cuts are all in the same bag. They're taken out at the same time. It's computerized. We know that. They're put back in.

And later in the day what happens? Sarah Hochendoner – I'm sorry; I forget her married name. But Ms. Hochendoner at the time then goes back in, and she handles – later in the day she handles all the items again. They are all taken out at the same time, and they are all put back in at the same time.

The next day Anita Kozy testified that she did work on all of the items. That she at least removed them from storage. Talked in terms of she was moving and touching various envelopes. Whether they were sealed or not is for you to decide. But the bottom line is she is moving these same items in and out of the large envelope.

Ladies and gentlemen, we talked about how sensitive this science is. Walter Lorenz said – I said, it's sort of like a powder doughnut, isn't it? You touch something; it transfers. And he said, Well, not quite like that, but something similar to that.

So all that has to happen, ladies and gentlemen, in the contamination process, if you just touch something the wrong way or you don't seal something a hundred percent appropriately, there's a potential for contamination.

On November 3rd, Anita Kozy handles these items again. You'll be able to look at the logs. They are in evidence. You'll be able to watch and see how everybody is moving in and out. And then on November 9th, Thom Meyers again removes everything at the same time, looks at them, does something with them, and puts them all back in.

So how do you get something from nothing?

Angela Mitchell's substrate control is supposed to be – I keep saying it because I want to make sure we understand – it's a blank neutral for comparison purposes. By the end of the case there are alleles from between seven and eight, maybe nine different people on that control cutting.

MR. ROBINOWITZ: I'd object.

THE COURT: Sustained.

MR. GERSON: And we know that there are at least the profiles of three individuals on that control cutting. .

This is like magic – this is an illusion, ladies and gentlemen. This is like when you see a magician and he shows you the hat, and then he puts the handkerchief over the hat, and the next thing you know he pulls out a rabbit; that's what's happening here. Something from nothing.

> The presence of Mr. Akan's DNA profile on that control cutting is a creation of the lab, in the lab and for the lab.
>
> Dr. Miller, who answered every question that Mr. Robinowitz posed to him as directly as possible, told you that in his professional opinion, Mr. Akan's DNA profile on that substrate control was not the result of any testing of biological fluid that was conducted in that lab. What that means I there was contamination.
>
> Huge area of doubt for you. Supposed to be the strongest part of the case. It's real doubt for you to consider.

(T.T. Vol. II, p. 255-61).

By the conclusion of trial, it was abundantly clear to both this Court and the jury that the Defendant was challenging the reliability of the scientific testing and the procedures and possible contamination at the Crime Lab. Defense counsel effectively cross-examined the Commonwealth's witnesses, presented his own expert witness and made a strong argument during his closing. By their verdict, the jury indicated that they did not find the testimony or argument persuasive. Thus, any expert who would have testified regarding the quality assurance standards in the lab would have been merely cumulative and would not have resulted in a different verdict. As such, counsel was not ineffective for failing to present this cumulative testimony. Again, this claim must fail.

f. Fingerprint Evidence

Next, the Defendant argues that counsel was ineffective in failing to "vet the Commonwealth's purported fingerprint evidence prior to the start of his trial, considering the discrepancy between the representation of the purported fingerprint evince in the Criminal Information and the preliminary hearing testimony of the Commonwealth's fingerprint expert." Again, this claim is meritless.

At trial, Detective John Godlewski, a latent fingerprint examiner with the Mobile Crime Unit, testified that five (5) fingerprints were lifted from Ms. Barclay's residence: four (4) from a

window and one (1) from a screen where the assailant entered the residence. (T.T. Vol. I, p. 227). Those prints were later matched to the Defendant:

> Q. (Mr. Robinowitz): Let me ask you this. At some point did you have occasion to compare these prints to the known prints of the Defendant, Akaninyene Akan?
>
> A. (Det. Godlewski): I did.
>
> Q. Can you tell the jury what your findings were?
>
> A. Like I just said, that one was identified as his number one right thumb impression; the lift up here was number two, number three, right index, middle finger impressions; this lift here, number two, right index finger; and the one here on the left thumb impression of Mr. Akan.
>
> Q. Can you tell the jury where those impressions were from in the house?
>
> A. Hard to see on here, but again, little square windows, kind of indicate where the window would be.

(T.T. Vol. I, p. 231).

A careful examination of the defendant's claim of error reveals that he is doing nothing more than arguing that counsel should have reviewed the fingerprint evidence prior to trial. Although he avers "discrepancies" in the fingerprint evidence, he does not specify what those alleged discrepancies were, nor does he indicate how they affected the verdict. Rather, the record reflects that despite the clear-cut fingerprint evidence, defense counsel made an admirable attempt to discredit the evidence on cross-examination and argued its unreliability in his closing argument. It was clear to this Court that defense counsel was adequately prepared regarding the fingerprint evidence and dealt with it competently at trial. As counsel was not ineffective with regard to the fingerprint evidence, this claim must also fail.

g. Sentencing Credit

The Defendant also avers that he did not receive the appropriate amount of sentencing credit for his pretrial confinement. Again, this claim is meritless.

The Defendant was charged with the above crimes on November 30, 2010, however, by that point, he had fled to California. Once he was located, the Defendant contested extradition and so was not returned to the Commonwealth until February 5, 2011. He was unable to make bail and so remained incarcerated pending trial. He was subsequently convicted and was sentenced on June 26, 2012. At sentencing, the Defendant was given credit for 508 days, representing the time between his return to Pennsylvania and his sentencing on June 26, 2012. This Court has re-checked the calculation and confirmed 508 days is the correct value. As the Defendant received credit for every day spent in pretrial incarceration and up to the time of his sentencing, there is no additional credit to award. This claim must fail.

h. Eyewitness Identification Expert

Next, the Defendant argues that trial counsel was ineffective in failing to obtain an expert witness regarding "unreliable eyewitness identification" or to request a jury instruction that "despite the exhaustive proof that the complainant had no basis for an in-court identification of Appellant as her assailant." This claim is meritless.

The Defendant now argues that he was entitled to Suggested Standard Jury Instruction 4.07(b) Identification Testimony – Accuracy in Doubt, referred to as a Kloiber charge, because despite "exhaustive proof" that he was the assailant, "there is no guarantee that the lay jury did not accept the eyewitness identification as valid identification of Appellant as the assailant."

Our case law regarding Kloiber charges is well settled. "Under Kloiber, 'a charge that a witness'[s] identification should be viewed with caution is required where the eyewitness: (1) did

not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past'... Where an eyewitness has had 'protracted and unobstructed views' of the defendant and consistently identified the defendant 'throughout the investigation and trial' there is no need for a Kloiber instruction." Commonwealth v. Ali, 10 A.3d 282, 303 (Pa. 2010), internal citations omitted.

At trial, Ms. Barclay testified as follows:

Q. (Mr. Robinowitz): You say you hear footsteps coming up the stairs. Do you know what time it was?

A. (Ms. Barclay): I really don't know.

Q. And what happens next unusual once you hear these footsteps coming up the stairs?

A. My bedroom looked right out into the hallway where the staircase was and I looked out and I saw a man standing at the top of my stairs.

Q. Okay. Can you see, let me ask you, can you see at the top of the stairs, can you see on the landing?

A. Yes.

Q. Can you actually see the landing from the room?

A. Yes...

...Q. Can you describe what this man looked like?

A. He was a black man, he was about 5-foot – I thought he was about 5-foot-8, he was shorter, and he appeared to be stockier, muscular...

...Q. And when you first saw him did you see, was there anything covering his face?

A. Not right away, no.

Q. And approximately how long was he in the hallway to the best of your memory before, I mean, when you see his face?

A. About 20 seconds.

Q. And the man that you saw in the hallway, do you see him in the courtroom today?

A. Yes.

Q. And can you point him out for the jury?

A. Right over there.

Q. You just describe something he's wearing?

A. He has a red tie and a grey suit on.

Q. And describe something else about him.

A. He's a black male, about the same height as the man I described.

MR. ROBINOWITZ: Ask the record reflect that she's identified the Defendant.

THE COURT: The record will so reflect.

(T.T. Vol. I, pp. 56, 57, 58-9).

Based on the above identification testimony, there was no basis for a Kloiber charge: Kelsey testified that she had a clear view of the Defendant and was able to observe him for 20 seconds. We further know her identification to be correct, insofar as the Defendant's fingerprints and DNA were matched to this crime. There was nothing questionable or uncertain that would have required a Kloiber charge, and so counsel was not ineffective in failing to request it.

Similarly, there was no basis for an expert witness in this regard. There is no viable challenge to the identification of the Defendant as the assailant and so counsel was not ineffective for failing to present expert testimony to this effect. These claims must also fail.

3. Remaining Issues

Finally, the Defendant has raised a number of issues which are so convoluted as to be unintelligible. Insofar as this Court is unable to discern the particular issues to be appealed, these claims have been waived.

In his Concise Statement, the Defendant has raised the following claims:

5. Was PCRA Counsel ineffective for failing to argue trial counsel's ineffectiveness since trial counsel was ineffective for falling to challenge Appellant's unlawful arrest, where the arrest was unlawful because without the proven lies by the Affiant, there were insufficient facts in the Affidavit of Probable Cause to warrant Appellant's arrest?

6. Was PCRA Counsel ineffective for failing to argue trial counsel's ineffectiveness since trial counsel was ineffective for failing to quash the Criminal Information filed by the Commonwealth because it contained a description of the allegations that did not warrant the counts on which Appellant was arraigned and it misinformed the Court of the date of Appellant's arrest?

9. Was PCRA Counsel ineffective for failing to argue trial counsels' ineffectiveness since trial counsel was ineffective for failing to request a mistrial due to multiple instances of prosecutorial misconduct? The misconduct manifest on the trial record is as follows:

(1) During opening statements, the prosecutor presented a fabricated (made up) narative [sic] of the allegations to the court and jury;

(2) During opening statements, the prosecutor presented a fabricated (made up) hear say [sic] claim to the court and jury to suggest that Appellant had been incarcerated for "7 years" prior to the instant allegations;

(3) During Direct-examination [sic] of the complainant, the prosecutor knowingly solicited a perjured narative [sic] of the allegations from the complainant that introduced evidence of rape acts not charged to Appellant and expanded the basis for Appellant's conviction beyond the Criminal Information;

(4) During Closing arguments, the prosecutor presented another fabricated (made up) narative [sic] of the allegations to buttress his false averment that the complainant's testimony was consistent.

14. Was PCRA Counsel ineffective for failing to argue trial counsel's ineffectiveness since trial counsel was ineffective due to the accumulation of prejudice from the instances of trial counsel's deficient representation?

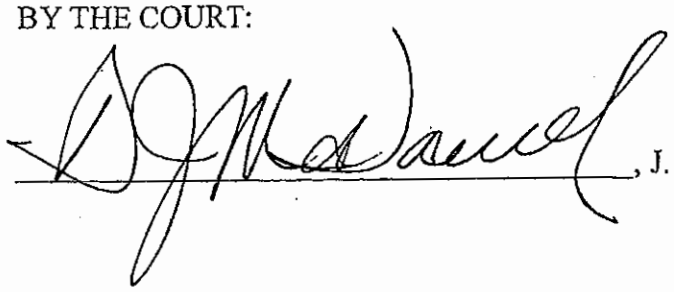
(Concise Statement of Matters Complained of on Appeal, p. 2, 3, 4).

This Court is unable to discern the claims of error to be raised on appeal in the above issues. Although the Defendant repeatedly refers to "fabricated (made up)" testimony and arguments, he does not specify the particular facts or statements which he believes are false, nor does he provide a specific reference or proof of the correct statement. Absent any such guidance,

this Court is unable to review the claims. "When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues. In other words, a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." Commonwealth v. Reeves, 907 A.2d 1, 2 (Pa.Super. 2006), citing Commonwealth v. Dowling, 78 A.2d 683, 686-7 (Pa.Super. 2001). Because this Court is unable to discern addressable claims of error from the above issues, these claims are waived.

Accordingly, for the above reasons of fact and law, this Court's Order of March 24, 2015, which dismissed the Defendant's pro se Post Conviction Relief Act Petition without a hearing, must be affirmed.

BY THE COURT:



, J.

Dated: July 20, 2015