NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. EDWARD TYRONE DIXON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1136 WDA 2016

Appeal from the PCRA Order Entered July 13, 2016
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0016980-2008

BEFORE: BENDER, P.J.E., DUBOW, J., and PLATT, J.*

MEMORANDUM BY BENDER, P.J.E.: FILED DECEMBER 08, 2017

Appellant, Edward Tyrone Dixon, appeals from the post-conviction court's July 13, 2016 order denying his petition filed under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. On appeal, Appellant raises two claims of ineffective assistance of counsel (IAC). After careful review, we affirm.

The PCRA court set forth the following summary of the facts underlying Appellant's convictions, as follows:

> On November 8, 2008, Michael Ross was the owner and operator of a business known as CC&M Fashions located on Hodgki[s]s Street in the Northside Section of the City of Pittsburgh. Ross sold t-shirts and other sports-related wearing apparel from the store; however, because his father and grandfather who had previously operated the store were robbed

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* Retired Senior Judge assigned to the Superior Court.

… on several occasions, Ross rarely kept more than sixty dollars on the premises and he also had a thirty-eight-caliber revolver in his desk drawer. Ross opened his store sometime between 11:30 a.m. and 12:00 p.m. and shortly thereafter, Ross'[s] father came to the store and assisted him and was working in the back of the store, storing additional items that Ross had for sale.

Earlier on November 8, 2008, Ross had attempted to call his girlfriend, Christine Johnson. They had made numerous phone calls to each other; however, they had not been able to reach each other. At approximately 1:00 p.m., Ross and Johnson were finally able to reach each other on the telephone and were talking for several moments when she heard someone come into the store. Apparently[,] Ross believed that he had disconnected the phone connection but he had not and Johnson was able to hear what was going on in the store. Johnson heard Ross say to someone who had come into to the store, "Take your hoodie off" and also heard the individual who came into the store say, "Give me your money[."] She then disconnected this conversation and called 911 to report a robbery that was taking place at Ross'[s] business.

Fred Ross, who was working in the back of the store, knew that his son was on the phone and decided to deal with the inventory in the storage area. While he was working in the back of the store, he heard Michael Ross yell to him, "Dad, it's on[."] Fred Ross then came to the front of the store and partially obscured by several racks of clothing saw two young, black males come into the store, both of whom were dressed in black and had what appeared to be black masks on. Both of the men that Fred Ross saw were armed and one of the two was yelling at Michael Ross to "Give up the money[."] The two intruders were focused on Michael Ross and not Fred Ross and he was able to run out the front door and across the street to a Kuhn's Market where he had hoped to find a Pittsburgh Police Officer or security guard to assist him in the prevention of this robbery. Once he was outside of the store he heard several gunshots and turned to see the two intruders leaving the store and heading down toward Ingram Street. Fred Ross went into the store and saw Michael Ross lying on the floor and realized that there was nothing he could do for him.

Victoria Zuback, (hereinafter referred to as "Zuback"), was walking her dog along Ingram Street when she heard a series of gun shots [sic]. Shortly after hearing those gunshots, she heard

the sound of footsteps approaching her and when she turned to look, she saw two individuals dressed in black, with black masks on. The first individual went to a large SUV that was parked in front of a house and [she] saw that individual go to the rear of the vehicle, open the left rear door and appear to put something in the back, close the door and then get into the driver's seat. Shortly thereafter she heard another individual heading toward the SUV and saw that individual get into the front passenger seat and then saw the vehicle leave the scene.

Jamal El-[Amin], (hereinafter referred to as "El-[Amin]"), was in his bedroom on the second floor of his home in Ingram Street and was about to change his clothes so he could go out and rake the leaves. When he was looking out his bedroom window, he noticed a large SUV parked in front of his house, which was parked in the wrong direction. El-[Amin] went to his son's bedroom to get a better look at the vehicle and in looking out his son's bedroom window, he saw an individual all dressed in black reach the SUV, go to the back rear, open up the rear door and attempt to dispose of something. He then saw that individual get into the driver's seat. He also saw that there was someone else in the passenger seat and although he did not have a full view of them he was able to determine that there was someone there because he saw his legs. El-[Amin] went down the stairs but by the time he got down the stairs, the SUV was gone. When he observed the driver of the SUV, he noticed that his hair was messed up[,] like it had been braided and combed out and processed to relax it. El-[Amin] then went out to rake his leaves and while he was doing this chore, he was approached by homicide detectives who were investigating the shooting at CC&M [Fashions] and [El-Amin] told them what he had seen. When the homicide detectives asked him whether he could identify the van and the driver if he saw them again, he told them yes.

The killing of Michael Ross occurred … at approximately 1:15 p.m. At approximately 1:30 p.m., Pittsburgh homicide detectives received a phone call from the Mercy Hospital emergency room stating that they had a shooting victim in their emergency room that was being treated. Detectives were dispatched to Mercy Hospital to investigate that shooting and determined that individual who had been shot was Darnell and that he was currently in surgery for his gunshot wound. These homicide detectives also saw [Appellant] in the emergency room. These detectives also noted a Chevrolet Yukon SUV with

> the driver's side and passenger side doors open and noticed that there was blood on the passenger seat area of that Yukon. They asked [Appellant] if he was the owner of the vehicle and he said that he was[,] and they received consent [to look inside the vehicle. Upon doing so, the detectives observed blood and vomit in the front passenger seat.]
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> ...
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> Homicide detectives at the CC&M [Fashions] shooting and at Mercy Hospital were continuing to provide each other with information on what they believed to be two different shootings when it was suggested that El-[Amin] be brought to Mercy Hospital to see if he might be able to identify the SUV and driver. El-[Amin] was driven to Mercy Hospital and when he saw [Appellant], he immediately identified him as the driver of the SUV that was parked in the emergency area of Mercy Hospital. Detective Robert Provident of the Pittsburgh Homicide Unit initially interviewed [Appellant] at the emergency room at Mercy Hospital and [Appellant] told him that his uncle had been shot in Swissvale and that he drove him to the nearest hospital that he knew. At the time that Detective Provident interviewed [Appellant], he did not know that [Appellant] had been identified by El-[Amin] as the driver of the SUV seen in connection with the CC&M [Fashions] shooting. Detective Provident transported [Appellant] to the Homicide Division Headquarters so that he could be interviewed as a material witness. At the Homicide Headquarters, Detective Provident obtained biographical information about [Appellant] and also obtained written consent forms to search his car and his house and [Appellant] was given his Miranda[1] warnings, both verbally and in writing and signed the Miranda rights form.[2]

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[1] See Miranda v. Arizona, 384 U.S. 436 (1966).

[2] The PCRA court summarized what was found during the search of Appellant's SUV, as follows:

> In the rear of the vehicle, [police officers] found two black t-shirts tied up in a manner so as to permit them to be used as masks and they also found several white sports t-shirts. During the course of the inspection of the vehicle, it was noticed that

(Footnote Continued Next Page)

> In his initial version of what transpired, [Appellant] maintained that he was at home with his girlfriend when he received a phone call from his uncle asking for him to pick him up near McKeesport. [Appellant] was traveling [on] the Parkway East when he exited on the Edgewood Exit and as he approached Braddock Avenue, saw his uncle[, Darnell,] crouched down on the side of the road. He stopped his vehicle and his uncle got in and told him that he had been shot and then he turned around and headed toward Mercy Hospital. After a break, Detective Provident continued his interview and [Appellant] said he was at Darnell's home in the Woods Run Section of the City of Pittsburgh, which is located on the Northside area of Pittsburgh. Eventually[,] he gave his uncle a ride to a Shell gas station located at Hodgki[s]s Street and Ingram when he received a phone call from his uncle to pick him up at the gas station and that his uncle was shot and to take him to the hospital.
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> Detective Provident took another break and then resumed his interview with [Appellant] but this time, prior to asking [Appellant] any questions, he advised him that there were potential witnesses who would identify him as being associated with the shooting that occurred at the CC&M Fashion[s]. [Appellant] then told Detective Provident of his involvement in the shooting at CC&M Fashions. He stated that he had parked the SUV approximately one block from the store and before he got out of the vehicle, Darnell told him to put a black t-shirt on as a mask to cover up his face. Darnell went into the store first and had two guns and was pointing them at the clerk when [Appellant] came into the store. Darnell then told him to get the clerk from behind the counter and to get some shirts. He then took one of the two revolvers from his uncle and ordered the clerk from behind the counter. While he was making these demands, Darnell was demanding that Michael Ross give him the money. While [Darnell] held a gun on Michael Ross[, Appellant]

(Footnote Continued) ————————————————

> the interior panel in the rear on the driver's side was loose and when that was removed a twenty-two caliber semi-automatic handgun was found.

PCRA Court Opinion (PCO), 1/10/17, at 6.

heard Fred Ross in the back room and then saw him run past both of them and out the door. Michael Ross came from behind the counter and a physical encounter then began between Michael Ross and Darnell, with both of these individuals firing their weapons at each other. [Appellant] fired three shots into the floor in an attempt to scare Michael Ross and then ran out of the store. As he ran out of the store, he then handed his gun off to his uncle. When he was running down the street toward the SUV, he heard at least three or four more shots. As he got to the SUV his uncle joined him and they threw the shirts that his uncle had taken from the store, along with a gun in the back of the truck. [Appellant] got into the driver's seat and Darnell got into the passenger seat and told [Appellant] that he had been shot and [asked that Appellant] take him to a hospital[,] … but not to a hospital on the Northside. As they were driving down Marshall Avenue, Darnell lowered the passenger window and threw out a handgun. [Appellant] then drove from the Northside to Mercy Hospital located in the Uptown Section of the City of Pittsburgh. As they concluded their interview with him, Detective Provident asked [Appellant] if he would give a taped statement and he agreed to do so.

On November 11, 2008, Detective James Magee went to Mercy Hospital, seeking to interview Darnell. Detective Magee was directed to Darnell's attending physician and asked him whether or not Darnell was in any condition to be interviewed and was informed that he could be interviewed. Detective Magee then met Darnell in his hospital room and then told him the reason that he was there to interview him was about the circumstances of which he was shot on November 8, 2008. Darnell told him that he had met with two detectives the day before and they advised him that he was probably going to be charged with criminal homicide. Detective Magee told him that he was probably correct and then advised him of his Miranda rights. Darnell told Detective Magee that although he recalled going to CC&M Fashions, he did not recall where they parked the car. He remembered going into the store and then Michael Ross came from behind the counter with a gun in his hand and then he heard [a lot] of people yelling at which time he ran out of the store back to the area where they had left the car. While running to the SUV, he had difficulty breathing and he realized he had been shot and [he] told [Appellant] to drive him to a hospital. After ten or fifteen minutes it became apparent that Darnell was

> experiencing some pain and the interview ceased. Darnell was discharged later that day from the hospital.
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> During the ongoing investigation in the CC&M Fashion[s] shooting a thirty-two-caliber handgun was recovered from Marshall Avenue at the Route 65 Interchange. A review of the gun ownership records indicated that Fred Ross owned that firearm.

PCO at 6-8.

Following a jury trial in January of 2011, Appellant was convicted of second-degree murder, robbery, possessing a firearm without a license, and criminal conspiracy.[3] He was sentenced on April 27, 2011, to a mandatory term of life incarceration, without the possibility of parole, for his murder conviction, as well as a consecutive term of 10 to 20 years' incarceration for his robbery offense. On direct appeal to this Court, we affirmed Appellant's convictions, but vacated his sentence for robbery. See Commonwealth v. Dixon, No. 851 WDA 2011, unpublished memorandum at 7-8 (Pa. Super. filed July 23, 2013) (hereinafter, "Dixon I"). Our Supreme Court denied Appellant's subsequent petition for allowance of appeal. Commonwealth v. Dixon, 83 A.3d 414 (Pa. 2014).

On December 30, 2014, Appellant (through privately-retained counsel) filed a PCRA petition. Due to changes in his representation, which culminated in the appointment of his current counsel, Appellant did not file an amended PCRA petition until November 18, 2015. On May 23, 2016, the

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[3] 18 Pa.C.S. §§ 2502(b), 3701, 6106, and 903, respectively.

PCRA court held an evidentiary hearing. On July 13, 2016, the court entered an order denying Appellant's petition. He filed a timely notice of appeal, and he also timely complied with the court's order to file a Pa.R.A.P. 1925(b) statement. The PCRA court filed a Rule 1925(a) opinion on January 10, 2017.

Herein, Appellant presents the following three issues for our review:

> I. Did the [PCRA] court abuse its discretion in dismissing the PCRA petition where the petition was timely filed; [Appellant] is serving a term of imprisonment pursuant to the instant convictions; he is eligible for relief based on violations of his constitutional rights; and his claims have not been previously litigated or waived?
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> II. Did the [PCRA] court abuse its discretion in dismissing the PCRA petition where petitioner established that trial counsel was ineffective for failing to pursue and preserve the claim that [Appellant's] confession and consent to search his vehicle were the fruit of an illegal arrest because the police lacked probable cause at the time they handcuffed him and transported him from the hospital to the homicide office, where he was shackled to the floor in a small windowless room to be interrogated?
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> III. Did the [PCRA] court abuse its discretion in dismissing the PCRA petition where petitioner established that trial counsel was ineffective for failing to pursue and preserve the claim that [Appellant] did not voluntarily consent to the search of his vehicle insofar as it was given under coercive circumstances?

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

We begin by noting that, "[t]his Court's standard of review from the grant or denial of post-conviction relief is limited to examining whether the lower court's determination is supported by the evidence of record and whether it is free of legal error." Commonwealth v. Morales, 701 A.2d

516, 520 (Pa. 1997) (citing Commonwealth v. Travaglia, 661 A.2d 352, 356 n.4 (Pa. 1995)). Where, as here, a petitioner raises IAC claims, our Supreme Court has directed that the following standards apply:

> [A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). "Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." [Commonwealth v.] Colavita, 606 Pa. [1,] 21, 993 A.2d [874,] 886 [(Pa. 2010)] (citing Strickland[v. Washington, 104 S.Ct. 2053 (1984)]). In Pennsylvania, we have refined the Strickland performance and prejudice test into a three-part inquiry. See [Commonwealth v.] Pierce, [515 Pa. 153, 527 A.2d 973 (Pa. 1987)]. Thus, to prove counsel ineffective, the petitioner must show that: (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result. Commonwealth v. Ali, 608 Pa. 71, 86, 10 A.3d 282, 291 (2010). "If a petitioner fails to prove any of these prongs, his claim fails." Commonwealth v. Simpson, [620] Pa. [60, 73], 66 A.3d 253, 260 (2013) (citation omitted). Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. See Ali, supra. Where matters of strategy and tactics are concerned, "[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." Colavita, 606 Pa. at 21, 993 A.2d at 887 (quotation and quotation marks omitted). To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Commonwealth v. King, 618 Pa. 405, 57 A.3d 607, 613 (2012) (quotation, quotation marks, and citation omitted). "'[A] reasonable

> probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.'" Ali, 608 Pa. at 86–87, 10 A.3d at 291 (quoting Commonwealth v. Collins, 598 Pa. 397, 957 A.2d 237, 244 (2008) (citing Strickland, 466 U.S. at 694, 104 S.Ct. 2052)).

Commonwealth v. Spotz, 84 A.3d 294, 311-12 (Pa. 2014).

In Appellant's first issue, he argues that his IAC claims are properly before us, as his petition was timely-filed, and the issues have not been previously litigated or waived. We agree with Appellant and, thus, we proceed to reviewing his next two issues, in which he argues the merits of his IAC claims.

Appellant contends that his trial counsel was ineffective for failing to argue that he was illegally arrested prior to his providing police with consent to search his vehicle, and his confession to the robbery and murder of Michael Ross. Appellant avers that "the police conduct constituted an arrest … as soon as he was placed in the police vehicle [at Mercy Hospital] and brought to the homicide office[,] where he was shackled to the floor in an interrogation room." Appellant's Brief at 23. Appellant provides a detailed discussion of the facts which, according to him, demonstrate that he was arrested. See id. at 22-26. For instance, he stresses that, while he was at the hospital, he was handcuffed and flanked by uniformed officers at various times, including during Mr. El-Amin's identification of him. Appellant also emphasizes that he was handcuffed and placed in the back of a police cruiser to be transported from the hospital to the police department and, once there, he was ostensibly "shackled" to the floor in a small, windowless

interrogation room. Based on these circumstances, Appellant maintains that the police effectively arrested him without probable cause to do so.

Even if we accept Appellant's position that he was effectively arrested at the point at which he was transported from the hospital to the police station, Appellant has not demonstrated that there was no probable cause to support that warrantless arrest. In regard to the lack of probable cause to justify his arrest, Appellant's argument consists of one sentence: "At that point[, i.e., when he was placed in the police vehicle, brought to the police station, and shackled to the floor,] the only information the police had was that Mr. El-[Amin had] identified the SUV, and [Appellant] as the driver of the SUV, [that Mr. El-Amin] had seen [the SUV] parked in front of his house, shortly before the police arrived in the area to investigate a shooting; and Detective Provident had observed blood and vomit on the front passenger seat of the SUV." Id. at 23.

Appellant's cursory argument does not convince us that probable cause was lacking at the point at which he was arrested.

> "Probable cause to arrest exists when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." In re C.C.J., 799 A.2d 116, 121 (Pa. Super. 2002) (quoting Commonwealth v. Gwynn, 555 Pa. 86, 98, 723 A.2d 143, 148 (1998)). "Probable cause justifying a warrantless arrest is determined by the 'totality of the circumstances.'" Id. (quoting Commonwealth v. Myers, 728 A.2d 960, 962 (Pa. Super. 1999)).

> "[P]robable cause does not involve certainties, but rather 'the factual and practical considerations of everyday life on which reasonable and prudent men act.'" Commonwealth v. Wright, 867 A.2d 1265, 1268 (Pa. Super. 2005) (quoting Commonwealth v. Romero, 449 Pa. Super. 194, 673 A.2d 374, 376 (1996)). "It is only the probability and not a prima facie showing of criminal activity that is a standard of probable cause." Commonwealth v. Monaghan, 295 Pa. Super. 450, 441 A.2d 1318 (1982) (citation omitted). See also Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (holding that probable cause means "a fair probability that contraband or evidence of a crime will be found[]"); Commonwealth v. Lindblom, 854 A.2d 604, 607 (Pa. Super. 2004) (reciting that probable cause exists when criminality is one reasonable inference, not necessarily even the most likely inference). To this point on the quanta of evidence necessary to establish probable cause, the United States Supreme Court recently noted that "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [] probable-cause[] decision." Maryland v. Pringle, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) (citations omitted).

Commonwealth v. Dommel, 885 A.2d 998, 1002 (Pa. Super. 2005).

Here, the record demonstrates that the totality of the circumstances known to the officers prior to Appellant's being handcuffed and placed in the back of the police cruiser - at which point he claims he was arrested - were sufficient to demonstrate probable cause to conduct an alleged arrest. Clearly, prior to Appellant's purported arrest, police knew that an armed robbery and homicide had occurred at CC&M Fashions. They knew that the suspects were two black males, that guns had been fired during the course of the robbery, and that the two robbers had fled the scene. See N.T. Trial Vol. I, 1/24-31/11, at 63, 84-86, 93-94. Additionally, Mr. El-Amin had told officers that, shortly before they arrived at the scene of the robbery, an SUV

had been parked outside his home, which was near the CC&M Fashions. Mr. El-Amin described the vehicle and the man that he had seen entering the driver's seat of the SUV, which had also contained a passenger. A short time after the robbery, police officers at the scene received word from officers at Mercy Hospital that Appellant had arrived there in an SUV with his uncle, who had been shot. Appellant and his uncle are both African American men, and the vehicle they had arrived in was similar to the one described by Mr. El-Amin. Accordingly, police brought Mr. El-Amin to the hospital, where he identified the vehicle, and Appellant, as the same vehicle and man who were outside his home close, in time and proximity, to the robbery and murder that had occurred.

We conclude that the totality of these facts provided officers with probable cause that Appellant committed the crimes at CC&M Fashions. Therefore, even if Appellant was effectively arrested at the point at which he was transported from the hospital to the police station, he has failed to demonstrate that that arrest was unlawful. Consequently, his trial counsel was not ineffective for failing to challenge the legality of his alleged arrest.

In Appellant's second IAC claim, he avers that, even if his arrest was lawful, his consent to search his vehicle was involuntary and, thus, his trial counsel should have sought suppression of the fruits of that illegal search. Appellant claims that his consent to search his SUV "was clearly the result of coercive actions and a coercive atmosphere created by the police." Appellant's Brief at 30. In support, Appellant stresses the following facts:

> When [Appellant] arrived at police headquarters, he was searched and then immediately placed in a windowless, 12' [by] 10' interrogation room consisting of only a table and three chairs. At approximately 3:00 p.m., Detectives Provident and Lutton issued Miranda warnings, had him sign the first consent to search form, and began to interrogate [Appellant] about his uncle's shooting.
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> Detective Provident was 6'4" in height, and weighed roughly [2]25 pounds, and Detective Lutton also weighed over 200 pounds. On the other hand, [Appellant] was only 19 years old, and weighed no more than 150 pounds. [Appellant] was not a high school graduate, and he had a menial, unskilled job delivering boxes. Furthermore, throughout the interrogation process, including when he signed the form to search his truck, [Appellant] was without a lawyer, family, or friends to provide support and guidance. In fact, he was highly distraught over the fact that his uncle had been shot.
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> More than four hours after [Appellant] had been placed in the interrogation room, Officer Thomas Leheny and his partner, Detective Hitchings, got [Appellant] to sign a second consent form to search the vehicle that he used to drive his uncle to the hospital. Both of the officers went into the interview room to give [Appellant] the form. Officer Leheny testified that it was standard procedure that a person in the interrogation room be shackled to the floor. According to the officer, [Appellant's] clothing had been removed prior to his being asked for consent to search his vehicle. Officer Leheny estimated that he was in the room with [Appellant] from 8:10 p.m. to 8:25 p.m. or 8:30 p.m., a total of about 20 minutes.

Id. at 32-33.

From these facts, Appellant contends that "there is no question that [he] merely acquiesced in police directives at this time. His free will overborn, he signed the consent forms. Under the totality of these circumstances, [Appellant's] consent was not voluntary." Id. at 34. Appellant maintains that his trial counsel was ineffective for failing to seek

suppression of the evidence recovered from the SUV, based on an assertion that his consent to search that vehicle was coerced.

Appellant's argument is unconvincing. Notably, trial counsel did challenge the voluntariness of the confession that Appellant provided to police just a short time after he gave them his consent to search the SUV. After the suppression court rejected that claim, counsel filed an appeal with this Court, presenting very similar arguments as that raised by Appellant herein. Namely, counsel argued that Appellant's confession was involuntary because,

> he was small compared to the interrogating officers, was not a high school graduate, had an unskilled job, and was without a lawyer, family or friends during the interrogation. [Appellant] further assert[ed] that he did not voluntarily provide the statements because he was isolated from the outside world during the interrogation; he was interrogated for multiple hours in a windowless room; he indicated that he had no meaningful information at the outset of the interrogation; he insisted he was innocent of any wrongdoing; and the officers used deceit and trickery during the interrogation.

Dixon I, No. 851 WDA 2011, unpublished memorandum at 2-3.

In rejecting Appellant's claim that his confession was coerced, we reasoned as follows:

> "The determination of whether a confession is voluntary is a conclusion of law, and as such, is subject to plenary review." Commonwealth v. Roberts, 969 A.2d 594, 599 (Pa. Super. 2009). In evaluating the voluntariness of a confession, this Court looks at the totality of the circumstances to determine whether, because of police conduct, the defendant's "will has been overborne and his capacity for self-determination critically impaired." Id. at 598-99 (citation omitted). "When reviewing voluntariness pursuant to the totality of the circumstances, this

> Court considers the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand coercion." Id. at 599.
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> The trial court has addressed [Appellant's] contention and determined that it is without merit. See Trial Court Opinion, 5/8/12, at 23-25. Indeed, as noted by the trial court, [Appellant], who was almost 20 years old at the time of the interview, was given his Miranda warnings and [he] initialed and signed the pre-interrogation waiver form indicating that he understood his rights and wished to speak to the detectives. N.T., 1/21/10, at 7-9, 14, 42, 48; see also id. at 9 (wherein Detective Robert Provident, the interviewing detective, stated that [Appellant] did not appear to have any difficulty in understanding his rights). During the interview, Detective Provident told [Appellant] that he could stop the interview at any time. Id. at 14. Further, [Appellant], who was not handcuffed, was given bathroom breaks and offered food and drinks. Id. at 15, 27. Finally, the duration of the interview was approximately four hours. Id. at 15, 42, 47. Based upon the totality of the circumstances, we conclude that [Appellant] voluntarily provided the statements to the police and adopt the sound reasoning of the trial court for the purpose of this appeal. See Trial Court Opinion, 5/8/12, at 23-25 [(rejecting Appellant's argument that his statement was involuntary because he was allegedly intoxicated when he provided it; stressing that Detective Provident did not notice any visible signs of intoxication)]; see also Commonwealth v. Perez, 845 A.2d 779, 789 (Pa. 2004) (concluding that appellant voluntarily gave statements to the police where he was read his Miranda rights and indicated that he understood and waived the rights; he was given breaks during the interview; his demeanor did not change throughout the interview; and the interview process took approximately four hours).

Dixon I, No. 851 WDA 2011, unpublished memorandum at 3-5 (footnotes omitted).

Appellant does not discuss our decision in Dixon I, or explain why we should deem involuntary his consent to search his vehicle, despite that the

Dixon I panel concluded that his confession – given under the same circumstances as his consent to search – was voluntary. We recognize that assessing the voluntariness of a consent to search involves slightly different factors than a review of the voluntariness of a confession. See Commonwealth v. Kemp, 961 A.2d 1247, 1261 (Pa. Super. 2008) (concluding that the following factors "are pertinent to a determination of whether consent to search is voluntarily given: 1) the presence or absence of police excesses; 2) whether there was physical contact; 3) whether police directed the citizen's movements; 4) police demeanor and manner of expression; 5) the location of the interdiction; 6) the content of the questions and statements; 7) the existence and character of the initial investigative detention, including its degree of coerciveness; 8) whether the person has been told that he is free to leave; and 9) whether the citizen has been informed that he is not required to consent to the search"). However, Appellant does not specifically discuss how an assessment of these factors demonstrates that his consent was involuntary. Instead, he cites the same facts addressed in Dixon I to argue that the totality of the circumstances were coercive and rendered his consent involuntary. Given Dixon I's rejection of that same argument pertaining to the voluntariness of Appellant's confession, and Appellant's failure to distinguish Dixon I's

holding from his present argument, we conclude that he has not established that his consent to search his vehicle was involuntarily given.[4] Thus, Appellant's trial counsel was not ineffective for failing to raise such a claim prior to trial.[5]

Order affirmed.

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[4] This is especially true where the record demonstrates that Appellant was well aware of his rights regarding the search. Specifically, Appellant completed two consent to search forms, one with Detective Provident shortly after his interview commenced, and the other several hours later with Detective Leheny. See N.T. Suppression Hearing, 1/21/10, at 11; N.T. Trial Vol. I at 487. Detective Provident testified at the suppression hearing that, at the start of Appellant's interview (and prior to his confession), the detective explained Appellant's rights to him regarding the search of the vehicle; specifically, the detective "read the rights off the consent to search form. And then [Appellant] did the same, he stated he understood his rights and he signed it." N.T. Suppression Hearing at 12. Appellant also specifically indicated that his consent was "given voluntarily without any threats or promises of any kind being made to [him]." Id. at 13. Later that day, at approximately 8:20 p.m., Detective Leheny completed a second consent to search form with Appellant. N.T. Trial Vol. I at 486-87, 489. The detective again read the form to Appellant, after which Appellant indicated that he understood the rights outlined in the form, and that he consented to the search of his vehicle. Id. at 487.

[5] On September 20, 2017, Appellant filed with this Court a pro se "Application for Stay," in which he essentially argues, for the first time on appeal, that his current counsel has acted ineffectively, and he asks us to stay his appeal and remand for the appointment of new counsel. We hereby deny Appellant's "Application for Stay." See Commonwealth v. Ford, 44 A.3d 1190, 1201 (Pa. Super. 2012) (holding that "absent recognition of a constitutional right to effective collateral review counsel, claims of PCRA counsel ineffectiveness cannot be raised for the first time after a notice of appeal has been taken from the underlying PCRA matter").

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/8/2017