**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>DONALD EARL WILLIAMS, JR.<br><br>Appellant | IN THE SUPERIOR COURT<br>OF PENNSYLVANIA<br><br><br><br><br><br>No. 1476 MDA 2017 |

Appeal from the PCRA Order Entered August 28, 2017
In the Court of Common Pleas of Berks County
Criminal Division at No: CP-06-CR-0004165-2009

BEFORE: STABILE, MURRAY, and MUSMANNO, JJ.

MEMORANDUM BY STABILE, J.: **FILED OCTOBER 10, 2018**

Appellant, Donald Earl Williams, appeals *pro se* from the August 28, 2017 order dismissing his petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541-46. We affirm.

At approximately 11:00 a.m. on June 25, 2009 the victim, Maria Serrano, Appellant's ex-girlfriend, was observed running through her neighborhood partially dressed, screaming, and burning. She told a neighbor that Appellant attacked her with a screwdriver while she was showering. Eventually, he dragged her into the basement of her home, poured gasoline on her, and lit her on fire. The victim gave similar accounts to a responding police officer, a fire marshal, a paramedic, and the 911 operator. She died in the Lehigh Valley Regional Burn Center. The treating doctor testified that she had no chance of surviving, given the nature and extent of her injuries.

On September 18, 2013, at the close of trial, a jury found Appellant guilty of first, second, and third degree murder, aggravated assault, two counts of arson, two counts of rape, two counts of involuntary deviate sexual intercourse, one count of indecent assault, and one count of possessing an instrument of crime.[1] The jury could not reach a decision on whether to impose the death penalty, and so the trial court imposed a sentence of life in prison without parole for murder, and an aggregate consecutive sentence of 22 to 44 years of incarceration. This Court affirmed the judgment of sentence on October 30, 2014. The Supreme Court denied allowance of appeal on June 2, 2015.

Appellant filed this timely first *pro se* PCRA petition on November 23, 2015. Appointed counsel filed a petition to withdraw and no merit letter[2] on June 30, 2017. On August 1, 2017, the PCRA court filed its notice of intent to dismiss the petition without a hearing pursuant to Pa.R.Crim.P. 907. That same day, the PCRA court entered an order granting counsel's petition to withdraw. On August 28, 2017, the trial court entered the order on appeal.

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[1] 18 Pa.C.S.A. §§ 2502(a), (b), and (c), 2702(a)(1), 3301(a)(1)(i-ii), 3121(a)(1-2), 3123(a)(1-2), 3126(a)(2), 907.

[2] ***See Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988).

Appellant presents fourteen questions in three categories: trial counsel's effectiveness, PCRA counsel's effectiveness, and PCRA court procedural errors. We will consider each category in turn.

Our standard of review is well settled:

> In PCRA appeals, our scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party. Because most PCRA appeals involve questions of fact and law, we employ a mixed standard of review. We defer to the PCRA court's factual findings and credibility determinations supported by the record. In contrast, we review the PCRA court's legal conclusions *de novo.*

***Commonwealth v. Reyes-Rodriguez***, 111 A.3d 775, 779 (Pa. Super. 2015) (*en banc*) (internal citations and quotation marks omitted).

Appellant challenges the effectiveness of his trial counsel in various respects.

> It is well-established that counsel is presumed effective, and [a PCRA petitioner] bears the burden of proving ineffectiveness. As the Supreme Court of the United States has stated, counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, and ... the burden to show that counsel's performance was deficient rests squarely on the defendant.
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> To prevail on an IAC 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. A petitioner must prove all three factors of the […] test, or the claim fails. In addition, on appeal, a petitioner must adequately discuss all three factors of the […] test, or the appellate court will reject the claim.

***Id.*** at 779–80 (internal citations and quotation marks omitted)

Appellant first argues counsel was ineffective for failing to conduct a thorough investigation of the cause of the fire that killed the victim. According to Appellant's brief, it is "scientifically possible that the fire of issue was caused by spilled gasoline or vapors therefrom coming in contact with static electricity or the lit cigar which Appellant admitted he was smoking[.]" Appellant's Brief at 4. He cites a single case, ***Commonwealth v. Carthon***, 354 A.2d 557 (Pa. 1976), in which our Supreme Court vacated a judgment of sentence where evidence demonstrated that the fire could have been started accidentally by a lit cigarette. We observe that Appellant fails to discuss any of the three prongs of ineffective assistance, which warrants rejection of his claim under ***Reyes-Rodriguez***.[3] In any event, as the PCRA court noted, the jury was entitled to credit the multiple witnesses who testified to the victim's repeated assertions that Appellant lit her on fire. Appellant, testifying on his own behalf, said he smelled gasoline while he was fighting with his brother, and there was a lit cigar nearby. The jury was entitled to discredit Appellant's testimony. Given the foregoing, we conclude this issue lacks arguable merit.

Next, Appellant claims trial counsel was ineffective for failing to present the testimony of his brother Martin, who would have implicated Appellant's brother Marvin as the perpetrator. To prevail on this claim, Appellant must prove that "(1) the witness existed; (2) the witness was available to testify

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[3] The same is true for every one of Appellant's assertions of ineffective assistance of counsel.

for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness's testimony was so prejudicial as to have denied him a fair trial. ***Commonwealth v. Wright***, 961 A.2d 119, 155 (Pa. 2008). Appellant fails to address any of these prongs. Moreover, it is not clear how Martin Williams' testimony would have helped, given the victim's statement that Appellant assaulted her with a screwdriver, dragged her to the basement, and lit her on fire. Appellant's second claim of ineffective assistance fails.

Next, Appellant argues trial counsel should have moved for a mistrial based on contact between two jurors and the Berks County District Attorney. The contact occurred on a Friday night in a bar. The District Attorney, who was not trying Appellant's case, was familiar with one of the two jurors, who were there together, and spoke briefly with her. The woman did not know he was now the District Attorney. The prosecutor, also present in the bar, alerted the District Attorney that he was speaking to a jury in an ongoing trial, and the conversation ended. They did not discuss this case. The prosecutor notified the trial court, the jurors were interviewed, and both indicated they could be fair and impartial. Appellant's counsel made no motion. N.T. Trial, 9/16/13, at 6-14.

Appellant cites a single case in support of this argument. In ***Commonwealth v. Mosely***, 637 A.2d 246 (Pa. 1993), the *ex parte* contact occurred between a police officer and a juror. The police officer was involved

in the altercation that gave rise to the charges against the defendant, and the prosecution turned largely on the credibility of that officer and one other. ***Id.*** at 249. The officer and the juror engaged in more than a brief contact. ***Id.*** The two conversed long enough that the juror told the officer where he was from, and the officer mentioned that he was a friend of the police chief in the juror's hometown. ***Id.*** Defense counsel moved to disqualify the juror and was permitted to question the juror regarding possible taint. ***Id.*** at 250. "This placed defense counsel in the difficult position of deciding whether to avoid questioning the juror or run the risk of antagonizing a juror who might remain to decide his client's fate." ***Id.*** The Supreme Court concluded the trial court abused its discretion in denying the motion to disqualify the juror.

The instant case bears no similarity to ***Mosely***. Here, the conversation between the jurors and the district attorney was brief and incidental. The district attorney was not personally prosecuting this case and was unaware he was speaking to sitting jurors. The conversation occurred only because the district attorney knew one of the jurors from 25 years prior to the conversation, and it ended as soon as the district attorney was notified of the situation. Appellant has failed to establish any arguable merit to this claim.

Next, Appellant argues that counsel rendered ineffective assistance by introducing evidence of Appellant's prior murder conviction. The record reveals that Appellant revealed this information voluntarily during his own

testimony. Moreover, the information was beyond the scope of, and not responsive to, defense counsel's question. This claim lacks arguable merit.

Next, Appellant argues trial counsel was ineffective for failing to move for a curative instruction and/or mistrial when the prosecutor improperly bolstered the credibility of prosecution witnesses. We are unable to analyze this claim because Appellant has failed to cite any portion of the record where the prosecutor engaged in improper bolstering. Furthermore, Appellant fails to cite any Pennsylvania law in support of his claim. We deem this argument waived. Pa.R.A.P. 2119(b), (c).

Next, Appellant claims trial counsel was ineffective for failing to challenge the constitutionality of Pa.R.E. 804(b)(2), relating to the admissibility of a witness' dying declaration. Presumably Appellant intends to argue that Rule 804(b)(2) violates his right to confrontation as guaranteed by the Sixth Amendment to the United States Constitution, but his argument is woefully underdeveloped. In any event, Appellant's argument misstates the rationale for the Rule:

> The solemnity of an occasion in which the declarant is conscious of the imminence of death justifies giving the dying declaration the same weight as sworn testimony. The reliability accorded a sworn statement springs from the declarant's appreciation of the significance of the oath. In the case of the dying declaration the awareness of impending death provides the assurance of the truthfulness of the utterance.
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> Some authorities which limit the value and weight to be given to dying declarations, point out that the declarant may be influenced by hatred or revenge or similar unworthy motives, but this is equally applicable to any despicable character who takes

> the witness stand. When every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating the most impressive of sanctions.
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> Expressed in other words, when a person is faced with death which he knows is impending and he is about to see his Maker face to face, is he not more likely to tell the truth than is a witness in Court who knows that if he lies he will have a locus penitentiae, an opportunity to repent, confess and be absolved of his sin? For all these reasons, we believe, weighing all the pros and cons, that it is in the best interests of the public that a dying declaration should be considered as the equivalent of testimony given under oath in open Court.

***Commonwealth v. Riggins***, 386 A.2d 520, 522–23 (Pa. 1978). Thus, the rationale for the rule is the awareness of impending death. In some cases, but not all, the declarant may believe he is about to meet his or her "Maker." Furthermore, the United States Supreme Court has recognized that dying declarations have been treated as competent testimony "from time immemorial." ***Mattox v. United States***, 156 U.S. 237, 243-44 (1895). Appellant's claim lacks arguable merit.

Next, Appellant argues trial counsel was ineffective for failing to request individual *voir dire* of each juror after the court learned that several jurors said they hoped to come to a verdict quickly, regardless of the verdict they reached. Presented with this information, defense counsel immediately moved for mistrial. The trial court denied the motion and instructed the jurors that they should not surrender their honest opinions for the sake of reaching a verdict. N.T. Trial, 9/18/13, 258-59. As the PCRA court points out, it would

have been futile to request *voir dire* of each juror after the trial court, presented with the pertinent facts, had already denied a mistrial. Post-verdict polling of the jury confirmed that the verdict was unanimous. N.T. Trial, 9/18/13, at 273-83. This claim lacks arguable merit.

Appellant's next group of issues address PCRA counsel's effectiveness. The docket reflects that Appellant filed a motion for extension of time to respond to the PCRA court's Rule 907 notice on August 21, 2017. That date was the last day of the 20-day response period initiated by the trial court's August 1, 2017 Rule 907 notice. The PCRA court dismissed Appellant's petition on August 28, 2017 without ruling on the request for extension of time. Appellant therefore raises PCRA counsel's effectiveness for the first time on appeal, which results in waiver. Pa.R.A.P. 302(a); ***Commonwealth v. Pitts***, 981 A.2d 875 (Pa. 2009). Were we to reach the merits, we would deny relief. As explained above, Appellant has failed to identify any meritorious issue that PCRA counsel should have raised.

Finally, Appellant argues the PCRA court erred in adopting counsel's ***Turner***/***Finley*** letter in support of its decision to dismiss Appellant's petition. Appellant cites ***Commonwealth v. Williams***, 732 A.2d 1167, 1176 (Pa. 1999), in which our Supreme Court, in a post-conviction review of a death penalty case, did not "condone the wholesale adoption by the post-conviction court of an advocate's brief." ***Williams*** is inapposite, as this is not a capital case and the PCRA court did not adopt counsel's ***Turner***/***Finley*** letter. The

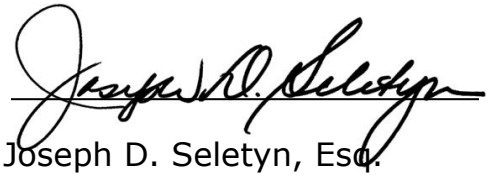
PCRA court filed an opinion in support of its Rule 907 notice and another Pa.R.A.P. 1925 opinion expressing its own detailed review of the case. ***See*** Order And Notice of Intent To Dismiss, 8/1/17, at 1-10; PCRA Court Opinion, 10/30/17, at 1-10.

Appellant also argues that the PCRA court erred in failing to rule on and grant his motion for an extension of time within which to respond to the court's Rule 907 notice. As we have already explained, Appellant has failed to articulate what additional issues he would have raised. Had the PCRA court granted the extension, and had Appellant timely challenged PCRA counsel's effectiveness, Appellant could not obtain relief because he has failed to identify any potentially meritorious issue PCRA counsel could have raised.

For all of the foregoing reasons, we affirm the PCRA court's order.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/2018