NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RICHARD R. RUTH, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 409 EDA 2017

Appeal from the PCRA Order Entered January 23, 2017
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0008015-2011

BEFORE: BENDER, P.J.E., LAZARUS, J., and KUNSELMAN, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED MAY 29, 2018**

Appellant, Richard R. Ruth, appeals from the post-conviction court's January 23, 2017 order denying his first petition under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. After careful review, we affirm.

The PCRA court briefly summarized the facts and procedural history of Appellant's case, which we need not reproduce herein. ***See*** PCRA Court Opinion (PCO), 3/29/17, at 1-2. On appeal, Appellant presents the following four claims of ineffective assistance of his trial counsel:

> Did the [PCRA] [c]ourt err in denying Appellant's [p]etition for [p]ost-[c]onviction [r]elief where it:
>
> a) Found that [t]rial [c]ounsel was not ineffective for failing to call any [c]haracter [w]itnesses to testify [to] Appellant's reputation for truthfulness and honesty and/or his reputation as a peaceful and law abiding person?

b) Found that [t]rial [c]ounsel was not ineffective for calling a [d]efense [w]itness who had previously suffered a conviction for a crimen falsi offense; along with a conviction for the offense of [p]ossession [w]ith the [i]ntent to [d]eliver a [c]ontrolled [s]ubstance, a crime substantially similar to that for which Appellant was being tried?

c) Found that [t]rial [c]ounsel was not ineffective for calling a [d]efense [e]xpert [w]itness, who was wholly unfamiliar with the facts and circumstances of Appellant's case, to refute the Commonwealth's [e]xpert [w]itness?

d) Found that [t]rial [c]ounsel was not ineffective for representing Appellant at [t]rial at a time that he was abusing controlled substances?

Appellant's Brief at 5.

First, "[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 claims that he received ineffective assistance of counsel, 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).

Before examining Appellant's claims, we must address a specific aspect of his case that is unique. As the PCRA court points out, Appellant "raises ineffectiveness claims against [Gregory] Noonan only, despite the active presence of [John L.] Walfish[, Esq.,] as co-counsel." PCO at 4.[1] The court

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[1] The PCRA court assumes that Appellant "wants the focus of his efforts to win post-conviction relief to be on Noonan, in light of the latter's own post-trial legal woes," PCO at 5 n.3, which include Noonan's being "charged in

stresses that, "[t]he records from trial and the PCRA hearing make clear … that [Attorney] Walfish participated extensively, along with Noonan, in preparing the defense and representing [Appellant]." ***Id.*** at 5. Thus, the PCRA court concludes that Appellant "should not be permitted to win post-conviction relief by claiming only one, but not both, of his two attorneys rendered ineffective assistance when the record demonstrates Noonan and [Attorney] Walfish both were actively involved in his defense." ***Id.*** (footnotes omitted). Nevertheless, the court goes on to evaluate Appellant's ineffectiveness claims as essentially subsuming the conduct of both Noonan and Attorney Walfish.

We agree with the court that Appellant should have framed his claims as pertaining to both Noonan and Attorney Walfish; however, we disagree that his failure to do so necessarily defeats his claims. While we are unaware of any case directly addressing this issue, our Supreme Court has indicated that co-counsel, and even mere associates in the same law practice, are not required to raise each other's ineffectiveness, thus suggesting that co-counsel are effectively treated as one attorney for ineffectiveness purposes. ***See Commonwealth v. Moore***, 805 A.2d 1212, 1215 (Pa. 2002) (citing ***Commonwealth v. Fox***, 383 A.2d 199, 200 (Pa. 1978)). Thus, although

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Montgomery County with possession of a controlled substance with the intent to deliver and related offenses," ***id.*** at 2. Noonan was later disbarred. ***See*** Laura McCrystal, *Drug-dealing lawyer gets 5-15 years*, PHILLY.COM, http://www.philly.com/philly/news/20150409_Drug-dealing_lawyer_gets_5-15_years_in_prison.html (last visited May 11, 2018).

Appellant's ineffectiveness claims are directed only at Noonan, we will treat them as encompassing the conduct of Attorney Walfish, as well.

In assessing the merits of Appellant's ineffectiveness claims in this fashion, we have examined the certified record, the briefs of the parties, and the applicable law. Additionally, we have reviewed the thorough and well-crafted opinion of the Honorable Gary S. Silow of the Court of Common Pleas of Montgomery County. We conclude that Judge Silow's extensive, well-reasoned opinion accurately disposes of the issues presented by Appellant, and we discern no error in Judge Silow's decision to reject Appellant's ineffectiveness claims.[2] ***See*** PCO at 4-14. Accordingly, we adopt Judge Silow's opinion as our own and affirm the order denying Appellant's PCRA petition on the grounds set forth therein.

Order affirmed.

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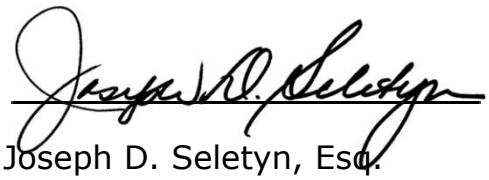
[2] This is especially true where Appellant fails to present any meaningful discussion of the prejudice he suffered from counsel's alleged ineffectiveness. For instance, in Appellant's first issue, his entire prejudice argument consists of the following:

> Finally, it is clear that Appellant suffered prejudice, as a result of Attorney Noonan's error, in failing to call any [c]haracter [w]itnesses on Appellant's behalf[,] as there was at least a reasonable probability of a different outcome at trial, had the jury been instructed on the weight and effect to be given character evidence, pursuant to Pa. SSJI (Crim)3.06.

Appellant's Brief at 20. Appellant reiterates, boilerplate prejudice arguments for each of his other three issues. ***See id.*** at 24, 28, 32.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/29/18

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

COMMONWEALTH OF PENNSYLVANIA	:	No. 8015-11
v.	:	
RICHARD R. RUTH	:	

OPINION

SILOW, J. **MARCH 29, 2017**

Richard R. Ruth ("defendant") appeals from the Order that denied after a hearing his petition under the Post Conviction Relief Act ("PCRA"). For the reasons set forth below, the Order should be affirmed.

I. FACTUAL AND PROCEDURAL HISTORY

Over a nearly two-year period beginning in early 2010, defendant, a then-practicing osteopathic doctor, unlawfully prescribed tens of thousands of pills from his office in Souderton, Montgomery County, acting as a source of Oxycodone, Adderall and other controlled substances for drug-addicted patients. Defendant committed identity theft during this period, as well, by agreeing to write prescriptions in the name of a patient's wife for insurance purposes and engaged in insurance fraud by billing insurance companies for medical care he did not provide. He also dealt in the proceeds of unlawful activity and participated in a corrupt organization with his son/co-defendant, Michael Ruth, who served as his father's office manager.

A jury found defendant guilty on November 22, 2013, of nine counts of prescribing a controlled substance to a drug dependent person, 10 counts of unlawful prescription of a controlled substance by a practitioner, insurance fraud, identity theft, conspiracy to commit insurance fraud and identity theft, corrupt organizations and dealing in unlawful proceeds. Prior to sentencing, one of defendant's attorneys, Gregory Noonan,[1] was charged in Montgomery County with possession of a controlled substance with intent to deliver and related offenses.

Defendant appeared at sentencing with newly retained counsel. This court sentenced defendant to consecutive terms of 5 to 10 years in prison on three of the convictions for unlawful prescription of a controlled substance by a practitioner. The total sentence imposed aggregated to 15 to 30 years in prison. No further penalty was imposed on the remaining convictions.

Defendant filed a post-sentence motion, which this court denied. He appealed and the Pennsylvania Superior Court affirmed his judgment of sentence. *Commonwealth v. Ruth*, No. 2628 EDA 2014, *memorandum* (Pa. Super. Sept. 23, 2015). Defendant did not file a petition for allowance of appeal, making his judgment of sentence final on or about October 23, 2015.

Defendant, through counsel, filed a PCRA petition on September 9, 2016. This court denied the petition after a hearing and defendant appealed to the Superior Court. He subsequently produced a concise statement of errors in accordance with Pennsylvania Rule of Appellate Procedure 1925(b).

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[1] Defendant also was represented by John L. Walfish, Esquire, who was Noonan's partner in the law firm Walfish & Noonan, LLC.

II. ISSUES

Defendant raises the following issues in his concise statement:

1. Did the Trial Court err in denying [defendant's] Petition for Post-Conviction Relief, where it found that Trial Counsel was not ineffective for failing to call any Character Witnesses to testify as [to defendant's] reputation for truthfulness and honesty and/or his reputation as a peaceful and law abiding person?

2. Did the Trial Court err in denying [defendant's] Petition for Post-Conviction Relief, where it found that Trial Counsel was not ineffective for calling a Defense Witness who had previously suffered a conviction for a *crimen falsi* offense; along with a conviction for the offense of Possession With the Intent to Deliver a Controlled Substance, a crime substantially similar to that which [defendant] was being tried?

3. Did the Trial Court err in denying [defendant's] Petition for Post-Conviction Relief, where it found that Trial Counsel was not ineffective for calling a Defense Expert Witness, who was wholly unfamiliar with the facts and circumstances of [defendant's] case, to refute the Commonwealth's Expert Witness?

4. Did the Trial Court err in denying [defendant's] Petition for Post-Conviction Relief, where it found that Trial Counsel was not ineffective for representing [defendant] at Trial at a time when [trial counsel] was abusing controlled substances?

III. PCRA STANDARD

A defendant seeking PCRA relief on the basis of alleged counsel ineffectiveness:

> must plead and prove the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. Counsel's actions will not be found to have lacked a reasonable basis unless the petitioner establishes that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. Prejudice means

> that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different. The law presumes counsel was effective.

Commonwealth v. Miner, 44 A.3d 684, 687 (Pa. Super. 2012) (citing *Commonwealth v. Cox*, 983 A.2d 666, 678 (Pa. 2009).

IV. DISCUSSION

1. Defendant failed to demonstrate an entitlement to relief on his character evidence claim.

Defendant contends this court erred when it denied his claim related to Noonan's failure to call character witnesses on his behalf. This claim fails.

Where a PCRA claim is grounded in alleged trial counsel ineffectiveness for failing to call character witnesses, the defendant must demonstrate: "(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." *Miner*, 44 A.3d at 687 (citing *Commonwealth v. Clark*, 961 A.2d 80, 90 (2008)).

Instantly, defendant complains that Noonan rendered ineffective assistance because he did not call character witnesses to testify about his reputation for truthfulness and honesty and being a peaceful and law-abiding person. It bears mentioning at the outset that defendant curiously raises ineffectiveness claims against Noonan only, despite the active presence of Walfish as co-counsel. Defendant makes no allegations of ineffectiveness against Walfish and, notably, chose not to call him as a witness at the PCRA

hearing.[2] The records from trial and the PCRA hearing make clear, however, that Walfish participated extensively, along with Noonan, in preparing the defense and representing defendant. Defendant should not be permitted to win post-conviction relief by claiming only one,[3] but not both, of his two attorneys rendered ineffective assistance when the record demonstrates Noonan and Walfish both were actively involved in his defense.[4]

In the event defendant is permitted on appeal to continue challenging the effectiveness of only one of his two co-counsel, his claim that Noonan

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[2] The Commonwealth presented Walfish as a witness at the hearing.

[3] Defendant, no doubt, wants the focus of his efforts to win post-conviction relief to be on Noonan, in light of the latter's own post-trial legal woes. In order to do so, however, he has taken the position that Noonan somehow oversaw the conduct of his co-counsel and, thus, any and all alleged ineffectiveness flowed from him. The records from the trial and the PCRA hearing demonstrate otherwise. Both Noonan and Walfish prepared and tried the case on defendant's behalf. Indeed, Walfish testified credibly at the PCRA hearing that he prepared the case to such an extent that he could have tried it by himself. (N.T., 1/19/17, pp. 85-86)

[4] Defendant may attempt to argue, as he did in connection with his post-sentence motion, that *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990), provides support for the proposition that the ineffective assistance of "lead counsel" is not cured by the presence of co-counsel. *Hoffman*, of course, is not controlling decisional law in this Commonwealth. *See, e.g., Commonwealth v. Lambert*, 765 A.2d 306, 315 n. 4 (Pa. Super. 2000) ("Absent a United States Supreme Court pronouncement, decisions of federal courts are not binding on state courts....") (citations omitted). Moreover, while witnesses at the PCRA hearing referred to Noonan as "lead counsel," this court made the factual determination that the designation stemmed from Richard Ruth first retaining him as a result of their prior attorney-client dealings. This court further found, however, that both Noonan and Walfish were involved in defense preparation and the trial. As such, defendant's reliance on *Hoffman* is misplaced because, there, the "lead attorney" represented two defendants in a joint murder trial and used co-counsel to assist him with examining a few witnesses. The records from the trial and the PCRA hearing amply demonstrate that was not the case here.

rendered ineffective assistance because he did not call character witnesses is meritless. Defendant identified no potential character witnesses in his PCRA petition and presented no such witnesses at the PCRA hearing. He failed, therefore, to carry his burden of showing that character witnesses existed, that they were available and willing to testify at trial and that trial counsel knew or should have known about them. Further, Walfish testified credibly at the PCRA hearing that defendant was not able to identify any potential character witnesses. (N.T., 1/19/17, p. 77) Noonan, therefore, cannot be deemed ineffective for failing to call unidentified character witnesses.

Defendant, nevertheless, seemed to suggest at the PCRA hearing that because his trial counsel called some former patients to testify as fact witnesses about their positive experiences with him as their treating physician, they also may have been able to testify as character witnesses. Defendant did not call any of those patient-witnesses at the PCRA hearing to demonstrate they were qualified to testify about his reputation among associates or in the community. *See Commonwealth v. Fletcher*, 861 A.2d 898, 915 (Pa. 2004) (stating that character evidence must be based on reputation among associates or within a particular community). Moreover, Walfish testified credibly that *he* met with the patient-witnesses prior to trial and concluded none knew of defendant other than through personal interactions with him. (N.T., 1/19/17, pp. 91-92)

Finally, while this court is aware that character evidence alone may be sufficient to justify an acquittal, the overwhelming evidence presented by the

Commonwealth demonstrated beyond a reasonable doubt that defendant engaged in a drug distribution scheme that preyed upon his patients. He, therefore, cannot show prejudice from alleged counsel ineffectiveness.

2. Defendant is not entitled to relief on his claim based on trial counsel calling a witness with a criminal record.

Defendant next contends this court erred by finding Noonan did not render ineffective assistance by calling a defense witness, Brian Ehret, who had a prior *crimen falsi* conviction and a conviction for possession with intent to deliver a controlled substance. This claim, which again highlights the irregularity of defendant attacking the representation of only one of his two co-counsel, warrants no relief.

Our Supreme Court has explained that when a defendant challenges his counsel's strategy, courts do not:

> question whether there were other more logical courses of action which counsel could have pursued; rather, [courts] must examine whether counsel's decisions had any reasonable basis. [A court] will conclude that counsel's chosen strategy lacked a reasonable basis only if [the defendant] proves that an alternative not chosen offered a potential for success substantially greater than the course actually pursued....

Commonwealth v. Chmiel, 30 A.3d 1111, 1144 (Pa. 2011).

At trial, *Walfish* conducted the direct examination of Ehret as a defense witness. (N.T., 11/21/13, p. 112) Ehret testified on direct examination to his positive experiences with defendant, who had been his physician since 1999. *Id.* at 113-116. The following exchange occurred on cross-examination:

Q. Sir, you indicated that you are still experiencing some pain issues?

A. Yes.

Q. And you are not getting prescriptions from him anymore, right?

A. (Shakes head from side to side.)

Q. So - -

A. Just miserable.

Q. What is it - - I understand you have some current charges?

A. Uh-huh.

Q. What kind of substance was involved with that?

A. I was smoking marijuana to help alleviate the pain.

Q. And during the period of time in question, it looks like you had a delivery charge; is that correct?

A. A delivery charge?

Q. From Harrisburg,?

A. Do you want to repeat that?

Q. You have a delivery charge for a violation of the Controlled Substance Act where you pled guilty for, it looks like, 3 to 23 consecutive probation. What I'm looking at is what substance was involved with that.

A. It was marijuana.

Q. Not pills, though?

A. No, sir. It should say that in the record.

Q. This is just your rap sheet. And, sir, you have had crimen falsi, meaning theft[] convictions, right?

A. Excuse me?

Q. A theft conviction?

A. In 1989.

Q. Let me clarify. It looks like 1990, right?

A. Yeah. A year. I was a year off.

Q. Now, in terms of the substances, when Dr. Ruth was prescribing you the Vicodin, did that alleviate some of the pain you were experiencing?

A. Yes. And it didn't turn me into a zombie so I could work.

Q. Okay. But you seemed to be going to some other substances to alleviate the pain. Is that because you - -

A. Yeah, the marijuana.

Q. - - needed it?

A. The marijuana helped my pain. It relaxed you. It is illegal, but it works.

Id. at 116-118.

At the PCRA hearing, Noonan testified that he was not aware of Ehret's criminal history prior to trial, but did not know whether Walfish had been. (N.T., 1/19/17, p. 57) Walfish testified credibly that he conducted pre-trial interviews of the patient-witnesses. (N.T., 1/19/17, p. 91) Defendant presented no credible evidence that Noonan oversaw Walfish's efforts in that regard or that Noonan was solely responsible for Ehret being called as a

defense witness. Moreover, defendant did not inquire of Walfish at the PCRA hearing whether Walfish knew of Ehret's criminal history prior to calling him as a witness. Again, while it is obvious why defendant has chosen to make Noonan the focus of his petition, he was represented by two attorneys who had active roles in his defense. He should not be permitted to win post-conviction relief in a vacuum.

In addition to failing to assert a meritorious claim, defendant also failed to establish a lack of a reasonable basis for calling Ehret. Noonan testified credibly at the PCRA hearing that:

> You know, we did everything calculated - - I mean, there was a reason why we did everything. We had issues just in - - for example, in getting a witness. We had one of the witnesses that you objected to because they had a record. Well, we - - there was a reason why we had that person testify. We needed to have somebody testify. And there were issues, there were problems. You know, there weren't took many friendly faces in the patient community that we could have testify.... We went with who we could.

Id. at 56. As such, not only did defendant fail to demonstrate that Noonan provided ineffective assistance with regard to Ehret being called as a witness, he also did not prove the absence of a reasonable basis for calling him.

The record, furthermore, demonstrates a lack of prejudice. Defendant cannot plausibly argue that the outcome of his trial would have been different had Ehret not testified. The Commonwealth presented overwhelming evidence of defendant's guilt in the form of testimony from former patients and their family members who suffered as a result of his criminal conduct. This claim, thus, fails because Walfish interviewed and conducted the direct examination

of Ehret, a reasonable strategic basis existed for calling the witness and defendant cannot demonstrate any prejudice from the presentation of the witness at trial.

3. Defendant is not entitled to relief on his expert witness claim.

Defendant also asserts that this court erred in finding Noonan did not render ineffective assistance by calling an expert witness who was not familiar with the facts and circumstances of defendant's case. This issue warrants no relief.

At trial, Walfish presented Bruce Whitman, D.O., on behalf of defendant as an expert in the fields of osteopathic medicine and emergency room medicine. (N.T., 11/22/13, p. 8) The expert testified on direct examination about the practice of osteopathic medicine, osteopathic manipulative treatment and pain management. *Id.* at 9-18. On cross-examination, Dr. Whitman acknowledged that the report he prepared did not indicate that he had reviewed defendant's patient files. *Id.* at 19. He stated, however, that his testimony was based on his training and experience in working with different specialties and how they practice. *Id.*

Defendant assails Noonan for calling an expert witness who was unfamiliar with the specific facts and circumstances of defendant's case. Defendant did not present any evidence at the PCRA hearing, however, to support a finding that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued," *Chmiel, supra*, or that

the outcome of the trial would have been different had Walfish provided the expert with specific facts about the case.

Noonan, conversely, testified credibly about the strategic reasons for presenting Dr. Whitman as an expert witness. (N.T., 1/19/17, pp. 69-71) Noonan further acknowledged that had the defense expert been asked to review the specific facts of the case, he would have been exposed to cross-examination about the volume of pills defendant had prescribed and his opinion about defendant's practice. *Id.* at 70-71. Defendant, therefore, failed to demonstrate the lack of a reasonable basis for calling Dr. Whitman.

Moreover, defendant did not demonstrate how having an expert familiar with the specifics of his practice would have changed the outcome of the trial. He presented no expert testimony at the PCRA hearing. Walfish, though, testified credibly that the defense had hoped to present other physicians known to defendant to testify as to the acceptability of his medical practices, but defendant ultimately indicated that none of those physicians would be available to testify. (N.T., 1/19/17, pp. 76-78)

4. Defendant is not entitled to relief on his claim that Noonan was abusing controlled substances at the time of trial.

Defendant contends this court erred in failing to find Noonan ineffective for allegedly abusing controlled substances at the time of trial. This claim, raised for the first time at the PCRA hearing, warrants no relief.

As an initial matter, defendant's allegation that Noonan was abusing controlled substances while representing him at trial is found nowhere in the

PCRA petition. The only claim asserted in the PCRA petition with regard to Noonan's involvement with controlled substances is:

> [F]ailing to act as a zealous advocate at Trial, due to the inherent conflict of interest that arose between Petitioner/Defendant and Trial Counsel, as a result of Trial Counsel's commission of the offense of Possession With the Intent to Deliver a Controlled Substance, while he was representing Petitioner/Defendant at trial for a substantially similar offense.

"Petition for Relief Pursuant to the Pennsylvania Post Conviction Relief Act, 42 Pa. C.S.A. § 9541, et seq.," ¶ 14(e) (Sept. 9, 2016).[5] Defendant neither requested nor received permission to amend his PCRA petition to include a claim, raised for the first time at the hearing, that Noonan was abusing controlled substances while representing him at trial. As such, this claim is waived for failure to seek and obtain permission to add it to the PCRA petition prior to the hearing. *See Commonwealth v. Porter*, 35 A.3d 4, 12 (Pa. 2012) (stating that amendment of a PRCA petition is permitted only by direction or leave of the court).

Even had defendant properly asserted this claim, he did not carry his burden of proof. Noonan testified unequivocally and credibly at the PCRA hearing that he was not abusing controlled substances at the time of defendant's trial. (N.T., 1/19/17, p. 69) Walfish testified credibly that, while the length and stress of the trial may have had an effect on Noonan, he had no reason to believe Noonan was abusing controlled substances at the time of

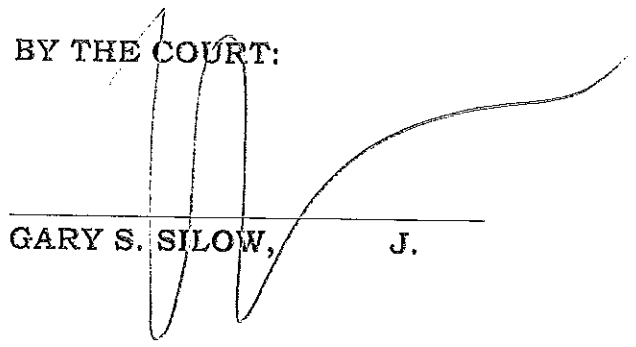
[5] Defendant did not present any evidence at the hearing to support the conflict of interest claim he did assert in the PCRA petition.

trial. *Id.* at 88-89. Even defendant, who has the greatest stake in the outcome of his PCRA petition, could not testify with any particularity in support of this claim.[6] *Id.* at 12. As such, the allegation that Noonan was abusing controlled substances at the time of trial, raised improperly for the first time at the PCRA hearing, fails for lack of supporting by credible evidence.[7]

V. CONCLUSION

Based upon the foregoing, the Order denying defendant's PCRA petition should be affirmed.

BY THE COURT:



GARY S. SILOW, J.

Sent on 2/3/17
to the following:
Clerk of Courts (original)
DDA Robert M. Falin
Francis Genovese, Esquire

Judicial Secretary

[6] Co-defendant Michael Ruth and his trial counsel, Vincent A. Cirillo, IV, also testified at the PCRA hearing. The former did not offer convincing testimony on this issue, *Id.* at 27, and this court did not credit the latter's testimony.

[7] Even had defendant presented credible evidence on this issue, which he did not, the claim would still fail for lack of prejudice. Defendant was represented by two attorneys, he has not challenged Walfish's effectiveness and the Commonwealth presented overwhelming evidence of his guilt.