NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMOMWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSE SILVA	:	
Appellant	:	No. 1976 EDA 2020

Appeal from the PCRA Order Entered October 5, 2020
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0011099-2008

BEFORE: OLSON, J., KING, J., and McCAFFERY, J.

MEMORANDUM BY OLSON, J.: **FILED APRIL 19, 2022**

Appellant, Jose Silva, appeals from the order entered on October 5, 2020, dismissing Appellant first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On direct appeal, the trial court, in its opinion pursuant to Pa.R.A.P. 1925(a), set forth the following factual summary of this case:

> The [victim], age 40 at the time of trial, testified that on June 14, 2008, she drove herself and two acquaintances, Melissa Sheppard and [Appellant,] from her home in Philadelphia to a mutual friend's military deployment party at a nightclub in Trenton, New Jersey. While there, the [group] had three rounds of cosmopolitan cocktails after which [the victim] became very ill and began vomiting. Due to her condition, she had [Appellant] drive them back to her home during which [the victim] continued vomiting. Her companions assisted her to her bedroom and[,] as she thought they were leaving[,] she fell asleep in her bed[. At some point thereafter, the victim] awoke to find [Appellant] sitting on the edge of her bed massaging her feet. She told him it was time for him to go and escorted him downstairs to the front door; he asked for and was given a hug but when he then started to try to

> kiss her she pushed him away and then passed out on the stairs near the front door. The next thing she remembered was waking up on the couch in her basement with [Appellant] on top of her engaging in intercourse, whereupon she pushed him away, put her pants back on and had him leave, making it clear that she never consented to having any sexual contact with him. She went back upstairs, found Sheppard asleep in her guest room, returned to her bedroom and waited for Sheppard to wake up, after which Sheppard drove her to the hospital where she reported the incident to the police. Over the course of the rest of the day[,] and into the night[,] she received numerous text messages from [Appellant] profusely apologizing for the incident; she emailed them to the investigating police officer and the Commonwealth confirmed their receipt from [Appellant's] cell phone by submitting the telephone company records. The Commonwealth then called the police officer who confirmed the victim's report of the rape and her sending him text messages, followed by Sheppard who confirmed attending the gathering and the victim becoming ill and vomiting as they left the nightclub and took her home, and Maureen Hahn, whom the complainant had called and told her about the rape, who knew both her and [Appellant] for a number of years and testified that the complainant never expressed any attraction for [Appellant] and that she never saw them socialize in any way.

Commonwealth v. Silva, 2015 WL 7575344, at *1–2 (Pa. Super. 2015), *citing* Trial Court Opinion, 7/17/2014, at 2–3.

Important to the current appeal, the case was originally tried before a jury but resulted in a mistrial in February 2011. On June 22, 2012, following a bench trial before a different judge, the trial court found Appellant guilty of sexual assault and indecent assault of an unconscious person.[1] The trial court sentenced Appellant to two-and-one-half to five years of imprisonment for sexual assault and a consecutive term of five years of probation for indecent assault of an unconscious person. This Court affirmed Appellant's judgment

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[1] 18 Pa.C.S.A. §§ 3124.1 and 3126(a)(4), respectively.

of sentence on February 9, 2015. ***Id.*** at *4. Appellant did not seek further review with the Pennsylvania Supreme Court.

On January 5, 2016, Appellant filed a timely *pro se* PCRA petition. The PCRA court appointed counsel to represent Appellant. On February 24, 2017, counsel filed an amended PCRA petition on Appellant's behalf alleging various claims of ineffective assistance of counsel. On September 19, 2017, citing ***Commonwealth v. Muniz***, 164 A.3d 1189 (Pa. 2017), Appellant filed a supplemental PCRA petition challenging the retroactive application of sexual offender registration and reporting requirements pursuant to the Sex Offender Registration and Notification Act (SORNA) as a violation of the *ex post facto* doctrine. On October 6, 2017, and October 24, 2017, the PCRA court issued orders directing that Appellant was not required to register under SORNA pending the resolution of his PCRA claims. On April 4, 2018, Appellant filed an amended PCRA petition seeking a stay or injunction of his reporting requirements after the legislature enacted SORNA II and Act 10 of 2018. On May 16, 2018, Appellant filed a motion for injunctive relief to enjoin the Pennsylvania State Police from requiring him to register as a sex offender pursuant to Act 10. On May 30, 2018, the PCRA court granted Appellant's request for injunctive relief. On July 16, 2018, Appellant filed an amended PCRA petition to bar the application of Act 10 and SORNA II and for a preliminary injunction or stay of his sexual offender registration requirements pending the disposition of the Pennsylvania Supreme Court's decision in ***Commonwealth v. Torsilieri***, 2020 WL 3241625 (Pa. 2020). On January

18, 2019, the PCRA court held an evidentiary hearing. On May 23, 2019, the PCRA court denied relief. On June 21, 2019, the PCRA court vacated the order denying relief because it did not dispose of all of Appellant's claims. Following additional argument, the PCRA court denied relief by order entered on October 5, 2020. Appellant filed a motion for reconsideration which the PCRA court denied on October 26, 2020. This timely appeal resulted.[2]

On appeal, Appellant presents the following issues for our review:

1. [Whether the PCRA court erred by denying relief] because the evidence adduced by Appellant established by a preponderance that former defense counsel was ineffective for failing to investigate, develop and present evidence in the form of testimony from Melissa Sheppard describing the circumstances and atmosphere in the bedroom before and at the time she left the room to change into her night clothes, because such evidence would have had a significant impact on the factfinder's credibility determinations and would have been reasonably likely to change the outcome of the second trial, and because there was no reasonable strategy for failing to develop this evidence?

2. [Whether the PCRA court erred by denying relief] because the evidence established by a preponderance that former defense counsel was ineffective for failing to investigate, develop and present evidence in the form of testimony from Melissa Sheppard about the circumstances surrounding her conversation with the complainant during which the complainant claimed that Appellant raped her, when this testimony would have assisted the factfinder in understanding the series of events described at trial and there was no reasonable strategy for failing to develop and present this

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[2] Appellant filed a notice of appeal on October 30, 2020. On January 6, 2021, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied timely on January 26, 2021. On April 27, 2021, the PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a).

evidence which would have been reasonably likely to change the outcome of the second trial?

3. [Whether the PCRA court erred by denying relief] when the evidence adduced by Appellant established by a preponderance that former defense counsel was ineffective for failing to investigate, develop and present evidence at trial regarding both the first and second trips Appellant and the complainant made to the basement and the characteristics of the basement staircase and the lock on the basement door, when such evidence was critical for the factfinder's assessment of the parties' starkly contrasting stories about whether the complainant was conscious during the second trip to the basement and during the sexual activity in the basement, and there was no reasonable strategy for failing to develop and present this evidence which was reasonably likely to alter the outcome of the second trial?

4. [Whether the PCRA court erred by denying relief] when the evidence in the record demonstrates by a preponderance that former defense counsel was ineffective for failing to elicit testimony from Appellant and the complainant about their past social interactions, including the interactions on the social media website "MySpace," when such evidence would have been reasonably likely to impact the factfinder's evaluation of the parties' credibility and the meaning of Appellant's text messages to the complainant, and when there was no reasonable strategy for failing to elicit this testimony, which was presented in the first trial and which would have been reasonably likely to alter the outcome of the second trial?

5. [Whether the PCRA court erred by denying relief] when the record evidence shows by a preponderance that former defense counsel was ineffective for failing to investigate, develop and present evidence as to the complainant's motives to fabricate the allegations against Appellant, which was a central issue in the second trial that was not addressed by defense counsel, and when there was no reasonable strategy for failing to develop and present this evidence which was reasonably likely to impact the factfinder's credibility determinations and change the outcome of the second trial?

6. Did the PCRA [c]ourt err in denying Appellant's motion to stay SORNA's registration requirements pending the outcome of the

> remand of ***Commonwealth v. Torsilieri***, 232 A.2d 567 (Pa. 2020) when Appellant's current supervision on probation is more than adequate to protect the public's interest given the specific facts and circumstances of Appellant's post-release conduct and when the risk of irreparable and serious harm posed to Appellant's reputation by SORNA registration is significant, and when Appellant is likely to prevail on the merits of his PCRA claims challenging the constitutionality of SORNA, and the SORNA challenges are separate and distinct from Appellant's PCRA claims as stated by ***Commonwealth v. Lacombe***, 234 A.2d 602 (Pa. 2020)[?]

Appellant's Brief at 4-5.

Our Supreme Court has stated:

> In reviewing a denial of PCRA relief, [an appellate court] look[s] to whether the lower court's factual determinations are supported by the record and are free of legal error. With respect to the PCRA court's legal conclusions, [an appellate court] appl[ies] a *de novo* standard of review. In reviewing credibility determinations, [an appellate court is] bound by the PCRA court's findings so long as they are supported by the record. The PCRA court's findings and the evidence of record are viewed in the light most favorable to the Commonwealth as the winner before the PCRA court.

Commonwealth v. Hairston, 249 A.3d 1046, 1053 (Pa. 2021) (internal citations omitted).

Appellant's first five claims allege ineffective assistance of trial counsel. Our Supreme Court has determined:

> The principles governing claims of ineffective assistance of counsel are well settled. Counsel is presumed to be effective, and the petitioner bears the burden of proving that counsel's assistance was ineffective by a preponderance of the evidence. To prevail on a claim of ineffective assistance of counsel, the petitioner must plead and prove the following three elements: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) petitioner suffered prejudice as a result of counsel's action or inaction. To establish prejudice, the petitioner must show that there is a reasonable probability that the outcome of the proceedings would have been different

> but for counsel's action or inaction. Because a petitioner's failure to satisfy any of the above-mentioned elements is dispositive of the entire claim, a court need not analyze the elements in any particular order. Failure to satisfy one element is dipositive.

Id. at 1061–1062 (internal citations omitted).

We summarize and analyze Appellant's first five appellate claims as follows. Appellant's first two issues, as presented above, focus on trial counsel's examination of trial witness, Melissa Sheppard. Appellant's Brief at 22-29. Appellant claims that "Sheppard, a key trial witness who was with the complainant and Appellant immediately preceding the sexual activity, provided testimony at the first trial about the parties' interactions which would have both impeached the complainant on key aspects of her testimony and supported [Appellant's] version of events." ***Id.*** at 19. Appellant asserts that "[n]ot only did defense counsel fail to present this evidence at the second trial – [counsel] did not even interview [Sheppard] prior to trial." ***Id.*** In his first issue presented on appeal, Appellant argues that trial counsel was ineffective for failing to elicit testimony from Sheppard that contradicted the victim's version of events leading up to the incident at issue. ***Id.*** at 22-26. More specifically, Appellant posits:

> During the first trial, [Sheppard] testified, in contrast to the complainant, that after receiving [] instructions [on how to lock the front door] from the complainant, when [Sheppard] left the bedroom to change clothes[,] she did not turn off the bedroom light or walk [Appellant] downstairs. Moreover, contrary to the complainant's story that when [Sheppard] left the bedroom she turned off the light and the complainant went to sleep, [Sheppard] testified that at the time she left the bedroom, the complainant was sitting up on her bed and was actively engaged in conversation with [Appellant]. [At the first trial, Sheppard]

> described the atmosphere in the room at the time she left as friendly and casual. This [was] consistent with [Appellant's] testimony that after [Sheppard] left the room, he and the complainant continued to talk with each other.
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> During the second trial[,] defense counsel did not ask [Sheppard] any questions about circumstances in [the] bedroom before she left to change clothes. Instead, [defense counsel] only asked if [Sheppard] had heard any commotion or noise from the basement while she was sleeping in the upstairs [guest] bedroom. Therefore, there was no testimony to corroborate [Appellant's] description of events in the bedroom and controvert the complainant's [version of events].

Id. at 23.

In his second ineffective assistance claim pertaining to counsel's omissions in the examination of Sheppard, Appellant claims that Sheppard testified during the first trial that she was surprised that the victim accused Appellant of rape, but "during the second trial, the Commonwealth's insinuation that [Sheppard] believed that [Appellant] was guilty and the complainant was telling the truth went unchallenged." ***Id.*** at 28. Appellant claims the PCRA court erred by finding that Sheppard's proffered testimony would not be admissible as an opinion regarding the veracity of another witness. ***Id.***

In his third issue presented, Appellant claims that trial counsel was ineffective for failing to present specific evidence about the staircase and a locked door leading to the victim's basement where the assault occurred. Appellant's Brief at 29-34. Appellant claims that counsel was ineffective for failing to elicit testimony from Appellant's sister, Columbia Silva, who was prepared to testify that it was "physically impossible" for Appellant to have

carried an unconscious victim down the narrow staircase with a low ceiling "because of his poor physical condition, his weight of 270 pounds, his asthma, and because there was no clearance in the staircase for a person to be picked up." ***Id.*** at 30. Appellant further asserts that counsel was ineffective for failing to establish, through Appellant, that Appellant and the victim had been to the victim's basement before going to the nightclub. Appellant maintains that such testimony would support his claim that "during the second trip to the basement, the complainant had to unlock the basement door because [Appellant] was not able to do so." ***Id.*** at 31. On this issue, Appellant concludes that "[t]he unelicited evidence about the basement staircase and the basement door lock would have provided significant support for defense counsel's theory that the complainant was conscious during the [second] trip to the basement and during the sexual activity in the basement." ***Id.*** at 34.

In his fourth issue presented, Appellant argues that trial counsel was ineffective for failing to demonstrate, through Appellant, that he and the victim "had a social relationship prior to June 14, 2008, both through interactions on 'MySpace' and in person, at a barbeque hosted by Columbia Silva on Memorial Day." ***Id.*** Appellant maintains that "the gist of this claim is not that evidence of the parties' past social interactions would have definitively answered the question of what happened [on the night in question, r]ather, the evidence of past social (and somewhat flirtatious) interactions would have provided important background for the factfinder by which to evaluate the parties' conflicting accounts of what happened[.]" ***Id.*** at 36-37.

In his fifth issue presented, Appellant contends that trial counsel was ineffective for failing to present evidence regarding "whether the complainant had a motive to fabricate the allegations[.]" ***Id.*** at 39. Appellant suggests that the victim had "a need or desire to get attention from other people." ***Id.*** at 41. He asserts that Columbia Silva was prepared to testify "about an incident when the complainant had asked her to steal syringes from the hospital where she worked so that she (the complainant) could use them to insert her boyfriend's semen into her body so that she could get pregnant" in order to "force her boyfriend to marry her." ***Id.*** As such, Appellant maintains that trial counsel was ineffective for failing to elicit this testimony at trial and, as a result, Appellant was prejudiced. ***Id.*** at 43. We will examine all of Appellant's ineffective assistance of counsel claims together.

Initially, we note that there is no dispute that Appellant, not counsel, chose a bench trial over a jury trial and that this choice was against trial counsel's advice. ***See*** N.T., 1/18/2019, at 12-13 and 61-62. Our Supreme Court has previously determined:

> Because the decision to waive a jury trial is ultimately and solely the defendant's, a defendant must bear the responsibility for that decision.
>
> Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance of counsel only when 1) counsel interferes with his client's freedom to decide to waive a jury trial or 2) appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right. Where an appellant merely claims [] that his decision was a strategic error, and can point to no specific incidents of counsel impropriety, he must bear the responsibility for that decision and cannot shift the blame to counsel.

Commonwealth v. Boyd, 334 A.2d 610, 616–617 (Pa. 1975). Here, Appellant baldly contends that it was a strategic error to waive his right to a trial by jury and points to no specific incidents of counsel impropriety. As such, we reject any suggestion that trial counsel was ineffective regarding the type of proceeding selected. In this case, the trial court colloquied Appellant regarding the decision to waive a jury trial and he alone elected to proceed with the court serving as factfinder. N.T., 6/22/2012, at 5-12.

Moreover, we reject any contention by Appellant that evidence adduced at his first trial before a jury, but omitted at his second trial before the court, explains why his first trial resulted in a deadlock and his second trial resulted in convictions. First, it is sheer speculation as to what evidence at the first trial prompted the jury deadlock. ***See Commonwealth v. Miller***, 35 A.3d 1206, 1213 (Pa. 2012) (holding that appellate courts must "refuse to inquire into or to speculate upon the nature of the jury's deliberations or the rationale behind the jury's decision. Whether the jury's verdict was the result of mistake, compromise, lenity, or any other factor is not a question for [appellate] review"). Thus, we cannot use the differing outcomes of the two proceedings as a criteria by which to assess the persuasive value of the evidence presented at Appellant's first trial but omitted at his second. Moreover, defense counsel testified at the PCRA hearing that he had a different, more tailored approach to presenting the evidence at a bench trial, as opposed to a jury trial. N.T., 1/18/2019, at 62-64. The PCRA court "found counsel's explanation to be cogent and the differing presentation to be a

reasonable tactical and strategic choice." PCRA Court Opinion, 4/27/2021, at 10. We discern no abuse of discretion in rendering that decision.

Furthermore, while Appellant maintains that each of the aforementioned allegations of trial counsel error would have changed the trial court's credibility determinations and the outcome of trial, we disagree and conclude that Appellant was not prejudiced by any alleged actions or inactions of counsel. Appellant acknowledges that "[t]he parties' testimony about this case was completely divergent." Appellant's Brief at 22. Trial counsel confirmed the parties' vastly different factual recollections at the PCRA evidentiary hearing when he testified that the victim and Appellant "had very different stories [] about what happened that night, not only before they got back to the house, where [the] alleged incident occur[red], but before that and during the time in the house." N.T., 1/18/2019, at 10. Trial counsel claimed that the versions of events "couldn't be more polar opposite[.]" ***Id.*** As discussed in detail below, considering the "completely divergent" evidence in this case, Appellant has not proven by a preponderance of evidence that trial counsel was ineffective for failing to elicit the aforementioned proffered evidence.

Upon review of the trial transcript, we note the following. There is no dispute that Appellant, the victim, and Sheppard each had three alcoholic drinks on the night in question. The victim testified that she became "extremely sick." N.T., 6/22/2012, at 17. She testified that she vomited

seven or eight times from the time she left the nightclub until the incident at issue. ***Id.*** at 18-21; 40-41. The victim testified that she vomited in a potted plant at the nightclub, three or four times in the car on the way back to her house, once in her driveway, once in her bathroom, and once in a waste can in her bedroom. ***Id.*** The victim also testified that she had difficulty walking on her own. ***Id.*** at 19-20. Sheppard testified similarly and corroborated the victim's version of events leading up to the incident. ***Id.*** at 58-61. Sheppard also testified that the victim "seemed drunk." ***Id.*** at 58. Appellant, however, testified differently. He claimed that the victim was merely "queasy" and "wasn't feeling up" to driving, but she walked on her own and did not exhibit any signs of intoxication. ***Id.*** at 87-90; 101-104. Both Sheppard and the victim testified that the victim asked Sheppard to show Appellant out of her residence and to lock the door, but that Sheppard did not do so. ***Id.*** at 21-22; 62. The victim then testified that she awoke to a non-consensual foot massage from Appellant; Appellant testified that the victim was awake the entire time, they listened to music and conversed, and the victim consented to the foot massage. ***Id.*** at 22; 91. The victim testified that when she walked Appellant to the front door to see him out, he tried to kiss her against her will. ***Id.*** at 25. Appellant testified that the victim put her arms around him and initiated kissing. ***Id.*** at 92. When asked if Appellant was "putting off [the victim's] advances[,]" Appellant responded, "Absolutely." ***Id.*** at 106. When asked if he was "basically [] testifying that [the victim was] begging [him] to

have sex with her[,]" Appellant responded, "Pretty much." ***Id.*** Next, the victim testified that she lost consciousness near her front door and awoke in her basement to find herself naked from the waist down and Appellant having vaginal sex with her without her consent. ***Id.*** at 26-27. She testified that she "pushed him off and just rolled out from under him and stood up [and] put her pants back on [and] walked up the steps back to the living room, opened the door and said, 'Go home,' and he left." ***Id.*** at 27. In stark contrast, Appellant claimed that the victim directed him into the basement, initiated sexual conduct, and that he stopped while engaged in vaginal intercourse when she asked, "Are we going to have sex now?" ***Id.*** at 92-96. Appellant testified that when he left the house, he and the victim kissed for an additional 10 to 15 minutes at the front door and there was no indication that the victim was angry with him. ***Id.*** at 107-108.

The victim and Sheppard testified that the interactions between Appellant and the victim were "just friendly" and there was no romantic innuendo or contact between them leading up to the incident at issue. ***Id.*** at 15; 45-46; 63. Additionally, there is no dispute that Appellant sent the following text messages to the victim after the event in question:

> Oh my God. I'm so sorry for my actions last night. Seriously punch me in the face. Sorry. I'm the biggest douche ever. Don't worry. I did not complete. I was in you for maybe 30 seconds. I quit when you said[, "]Are we having sex?["] After that I knew you were way too gone to do it. I am not proud of what happened and you have my full permission to beat the crap out of me. If you are getting my messages, at least text me back. You have no idea how much of an asshole I feel like.

N.T., 6/22/2012, at 29-34.

While Appellant asserts that he sent the victim text messages because he was concerned about his girlfriend and his infidelity, in examining a sufficiency of the evidence claim on direct appeal, this Court concluded:

> [] Appellant's [sufficiency of the evidence argument] conveniently ignores the text messages he sent to the victim apologizing for the incident. Those messages corroborate the victim's assertion that Appellant acted without her consent. At trial, Appellant construed those text messages as indicative of his remorse that he cheated on his girlfriend, but the trial court disbelieved Appellant's explanation.

Commonwealth v. Silva, 2015 WL 7575344, at *3 (Pa. Super. 2015) (unpublished memorandum).

Moreover, the PCRA court opined:

> [T]he consistent testimony presented by multiple witnesses [was] that there was no romantic interaction on the night in question. Likewise, the [PCRA] court is unable to credit Appellant's argument that his proffered testimony about a lengthy conversation concerning fidelity and his girlfriend in Columbia would have swayed the factfinder away from the obvious conclusion that Appellant's text messages to the victim were tacit admissions of guilt as to the wrong done to the victim, rather than Appellant's girlfriend.

PCRA Court Opinion, 4/27/2021, at 12 (footnoted omitted); ***see also id.*** at 10 ("Given the totality of the evidence in this case, the [PCRA] court cannot find that the proposed testimony of Melissa Sheppard as to the friendliness of a three-way conversation, and whether the lights were on, was of such magnitude that the outcome of trial would have been affected. In particular, the evidence of Appellant's text messages so strongly favored a finding of guilt, that [the PCRA] court cannot conclude any particular suggested point of

questioning would have overcome the fact-finder's credibility determination."). The record supports the PCRA court's assessment. At trial, Appellant admitted that he sent the victim the aforementioned text messages after the victim accused him of rape. N.T., 6/22/2012, at 111-112.

Moreover, when rendering the verdict, the trial court stated on the record that it "thought most of [Appellant's] testimony was basically ridiculous." ***Id.*** at 127. While Appellant currently claims that his specific allegations of ineffective assistance of counsel would have "tipped the scale [] in the credibility contest[,"] we disagree. ***See*** Appellant's Brief at 20. The trial court deemed the sum of the evidence Appellant presented at trial not credible. And, from our review of the certified record, Appellant has not demonstrated that trial counsel's purported ineffectiveness caused him prejudice. Appellant does not contend that trial counsel failed to elicit evidence tending to refute his culpability. Instead, Appellant alleges that trial counsel failed to elicit certain specific, ancillary details surrounding the night in question, as well as tangential character evidence, to impeach the credibility of the victim and Sheppard. Upon review of the certified record, and considering the diametrically opposed evidence offered by Appellant and the victim, with corroborated facts from Sheppard, Appellant has not proven by a preponderance of the evidence that the outcome of the trial would have been different. Appellant's individual and combined allegations of trial counsel ineffectiveness simply would not have changed the outcome of his trial

considering the overwhelming evidence of guilt as detailed above. As such, we agree with the PCRA court that Appellant is not entitled to relief regarding his first five appellate issues alleging ineffective assistance of counsel.

Finally, in his last issue presented, Appellant claims that "the PCRA [c]ourt erred in denying his motion to stay the sex offender registration requirements imposed on him under SORNA II, because his request for a stay [pending our Supreme Court's decision in ***Torsilieri***, ***supra***] was to prevent an irreparable injury stemming from the application of an unconstitutional statute, and the PCRA [c]ourt misapplied the law in denying this request." Appellant's Brief at 21.

As this Court has explained:

> SORNA was originally enacted on December 20, 2011, effective December 20, 2012. ***See*** Act of Dec. 20, 2011, P.L. 446, No. 111, § 12, effective in one year or Dec. 20, 2012 (Act 11 of 2011). Act 11 was amended on July 5, 2012, also effective December 20, 2012, ***see*** Act of July 5, 2012, P.L. 880, No. 91, effective Dec. 20, 2012 (Act 91 of 2012), and amended on February 21, 2018, effective immediately, known as Act 10 of 2018, ***see*** Act of Feb. 21, 2018, P.L. 27, No. 10, §§ 1-20, effective Feb. 21, 2018 (Act 10 of 2018), and, lastly, reenacted and amended on June 12, 2018, P.L. 140, No. 29, §§ 1-23, effective June 12, 2018 (Act 29 of 2018). Acts 10 and 29 of 2018 are generally referred to collectively as SORNA II. As our Supreme Court recently explained in ***Commonwealth v. Torsilieri***, 232 A.3d 567 (Pa. 2020),
>
> > Act 10 split SORNA, which was previously designated in the Sentencing Code as Subchapter H, into two subchapters. Revised Subchapter H applies to crimes committed on or after December 20, 2012, whereas Subchapter I applies to crimes committed after April 22, 1996, but before December 20, 2012. In essence, Revised Subchapter H retained many of the provisions of SORNA,

> while Subchapter I imposed arguably less onerous requirements on those who committed offenses prior to December 20, 2012, in an attempt to address this Court's conclusion in [***Commonwealth v.***] ***Muniz***[, 164 A.3d 1189 (Pa. 2017)] that application of the original provisions of SORNA to these offenders constituted an *ex post facto* violation.
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> [***Torsilieri***, 232 A.3d at] 580.

Commonwealth v. Mickley, 240 A.3d 957, 958 n.3 (Pa. Super. 2020) (emphasis omitted).

In ***Torsilieri***, the Pennsylvania Supreme Court granted the Commonwealth's petition for allowance of appeal to determine whether the trial court erred by finding that Revised Subchapter H of SORNA was unconstitutional pursuant to the Pennsylvania and United States Constitutions. Our Supreme Court was "unable to conclude based upon the record [] whether [Torsilieri] ha[d] sufficiently undermined the validity of the legislative findings supporting Revised Subchapter H's registration and notification provisions." ***Torsilieri***, 232 A.3d at 585. Ultimately, the ***Torsilieri*** Court concluded:

> the proper remedy is to remand to the trial court to provide both parties an opportunity to develop arguments and present additional evidence and to allow the trial court to weigh that evidence in determining whether [Torsilieri] has refuted the relevant legislative findings supporting the challenged registration and notification provisions of Revised Subchapter H.
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> Accordingly, [our Supreme Court] vacate[d] that portion of the trial court's order declaring the registration requirements of Revised Subchapter H of SORNA unconstitutional and remand[ed] for further proceedings in accordance with [the] opinion.

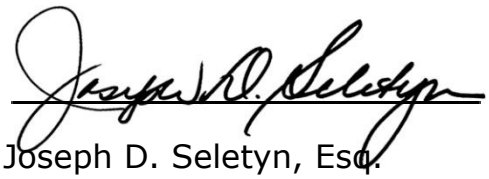
Id. at 596.

Upon review, Appellant is not entitled to relief. Our Supreme Court did not declare SORNA II unconstitutional. Instead, the ***Torsilieri*** Court remanded the case for an evidentiary hearing and for the trial court to weigh the evidence presented therein before rendering a subsequent decision in accordance with the Court's opinion. Here, Appellant states that he is not seeking an evidentiary hearing on the matter. Appellant's Brief at 47. In his appellate brief, he also "acknowledges that he cannot currently succeed on SORNA claims because he waived an evidentiary hearing." ***Id.*** at 45. Rather, Appellant posits that "[h]e merely anticipates that Mr. Torsilieri will eventually succeed on his [SORNA] claims before Pennsylvania's appellate courts" and that "regardless of the outcome in ***Torsileri*** [] the matter is likely and quickly headed back to the Pennsylvania Supreme Court." ***Id.*** at 47. Appellant acknowledges that "[w]ithout a ruling from another court, [] the [PCRA] court's order dismissing his SORNA claims will be affirmed" but requests relief "[i]f the law changes" while this current appeal is pending. ***Id.***; ***see also id.*** at 45 ("[I]f this Court or the Pennsylvania Supreme Court were to hold that either Subchapters H or I violate[s] Pennsylvania's various due process protections as a facial matter, [Appellant] would likely be entitled to reap the benefits of that change in the law."). Based upon our independent review of the current state of the law and Appellant's failure to show that SORNA II was declared unconstitutional, we discern no error by the trial court in denying Appellant's request for a stay of his sexual offender reporting requirements.

Finally, citing our Supreme Court's decision in ***Commonwealth v. Lacombe***, 234 A.3d 692 (Pa. 2020), Appellant recognizes that his "SORNA claims are [] not subject to the PCRA's time constraints and tightened standards of review." Appellant's Brief at 46. As such, should SORNA II be declared unconstitutional in the future, Appellant may seek relief at that juncture. For all of the foregoing reasons, Appellant's final claim is without merit.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/19/2022