NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DANIEL DOUGHERTY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2674 EDA 2012

Appeal from the PCRA Order of September 6, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0705371-1999

BEFORE: DONOHUE, MUNDY AND OLSON, JJ.

MEMORANDUM BY OLSON, J.: **FILED DECEMBER 30, 2013**

Appellant, Daniel Dougherty, appeals from an order entered on September 6, 2012 that denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. Among other things, Appellant's petition alleged that trial counsel was ineffective in failing to retain either a consulting or testifying expert on fire science. Although the PCRA court agreed that Appellant's claim possessed arguable merit and that trial counsel's strategy was unreasonable, the court denied relief on grounds that counsel's performance did not prejudice Appellant. After careful review, we conclude that counsel's deficient performance undermined confidence in the outcome of Appellant's trial and that there was a reasonable probability that counsel's actions adversely affected the disposition of this case. Hence, we conclude that Appellant suffered

prejudice because of counsel's actions. We therefore vacate the PCRA court's September 6, 2012 order and remand with instructions directing the PCRA court to order a new trial.

The PCRA court summarized the factual background and procedural history in this matter as follows:

> On August 24, 1985, a fire engulfed [Appellant's] home at 929½ Carver Street in Philadelphia. [Appellant] escaped, but his two sons John and Daniel, ages 3 and 4 respectively, died in the fire. [Appellant] claimed to be sleeping on the first floor couch while his children were sleeping in their second-floor bedroom. On September 23, 1985, Lt. John J. Quinn (Lt. Quinn), Assistant Fire Marshal for the Philadelphia Fire Department, concluded that the cause of the fire was arson. Lt. Quinn's conclusion was based on his review of the scene the morning of the fire. Based on his investigation at the scene, Lt. Quinn concluded that the fire consisted of three (3) separate points of origin…[that] were set with the direct, intentional application of an open flame. Lt. Quinn testified that three areas in the home were tested for accelerants; the results were negative. The three areas tested were not the areas Lt. Quinn alleged to be the points of origin.
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> Fourteen years later, [Appellant] was arrested. At [Appellant's] trial, the Commonwealth's case consisted of the following evidence: At 11:30 pm on August 24, 1985, [Appellant] and a friend were at a local tavern when Kathleen McGovern, his then live-in girlfriend, entered the bar.[1] Enraged, she publically confronted [Appellant]. McGovern testified that [Appellant] was supposed to be at an Alcoholics Anonymous meeting that night, not at the bar where she found him. Inside the bar, McGovern became irate and told [Appellant] to "get the f*** home with his kids because [she] was leaving him." McGovern returned to their home and packed her belongings. McGovern left with both of [Appellant's] children asleep in their second-floor bedroom. When McGovern left, the two Dougherty boys were with their

[1] Around the time of the fire, Kathleen McGovern's last name was Schuler.

teenage babysitter, Dianne Carpenter. By 1:30 a.m., [Appellant] still had not arrived home, and Carpenter, tired of waiting for him to arrive, left for her own home next door to [Appellant's] residence.

On [Appellant's] way home from the bar, he stopped by the home of his estranged wife, Kathleen Dipple — the mother of [Appellant's] two children. [Appellant] told Dipple that McGovern had kicked him out of their home and pleaded with Dipple to accompany [Appellant] to the home so that she could take custody of their two sons. Upon arriving at the home, [Appellant] found a note from Carpenter stating that McGovern had left him and that [Appellant] should not try to find her. The note from Carpenter also stated that McGovern was demanding [Appellant] to leave her house. [Appellant] showed Dipple the note [and] asked Dipple to stay with him that night. Dipple declined [Appellant's] advances and requested that [he] bring the children downstairs. Instead, [Appellant] continu[ed to ask] Dipple to go upstairs to retrieve the children. Fearing that [Appellant] would try to "come on" to her, Dipple refused.

Around 4:00 a.m., the police responded to reports of a fire at the home. By the time the officers arrived at the scene, the house was fully consumed by flames, and [Appellant] was standing bare-chested outside the house. When the police who responded to the fire asked [Appellant] his name, [Appellant] said, "My name is mud. I should die for what I did." The two children were later found dead in their bedroom. The medical examiner concluded that the children died from smoke inhalation and carbon monoxide poisoning and that they may have been burned by the fire while they were still alive.

The police questioned [Appellant] further. [Appellant] stated that after Dipple left the home, he fell asleep on the couch. When [he] awoke, he saw the curtains on fire by the couch. [Appellant] also told the police that his first reaction was to run outside. [Appellant] claimed that, upon exiting the home, he unsuccessfully tried to extinguish the fire and rescue his sons, once by taking the garden hose from a neighbor's home in an effort to extinguish the inferno and then by taking the neighbor's ladder in order to climb through a window into another second floor bedroom. At trial, [Appellant] testified that his rescue attempts were more heroic than he had initially told the police. He testified that he tried to enter the blaze through two separate

> doors and that he was forced out by the intensity of the heat and flames.
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> Lt. Quinn [] testified as an arson expert for the Commonwealth. Lt. Quinn testified, to a reasonable degree of scientific certainty, that the fire was of incendiary origin [and] that it was intentionally set. In arriving at this conclusion, Lt. Quinn relied on the fact that the fire had three separate points of origin — a love seat, a sofa, and an area underneath the dining room table. According to Lt. Quinn, the person who started the fire would in all likelihood have been the only person who could have had enough time to escape the burning home without injury. Notably, [A]ppellant had not suffered any burns, nor did his body bear any mark of exposure to smoke or fire. Lt. Quinn also testified that had [Appellant] tried to re-enter the building to save his children as he testified at trial, he would have had burns or soot, at a minimum, all over his body, thus making [Appellant's] claim of heroism incredible.
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> Two inmates who were incarcerated with [Appellant] testified at trial. Both testified regarding admissions [Appellant] had made to them about murdering his two sons. The first was Daniel Allen, [Appellant's] cellmate, who testified that [Appellant], depressed, weeping, and mournful, confessed that "he murdered his kids" in the fire because "he was jealous of his girlfriend or his wife." The second inmate was Robert Amoroso, who also shared a cell with [Appellant]. Amoroso testified that on one occasion, he heard [Appellant] crying and when he asked [Appellant] what was wrong, [Appellant] answered, "I burned my two babies up." Amoroso also testified that [Appellant] was angry that he had not killed the real focus of his rage, his wife, because at the time, she was intimately involved with another man while he "was paying all the bills and she wasn't taking care of the kids."
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> On October 5, 2000, the jury convicted [Appellant] of two counts of first-degree murder and one count of arson.[2] [He was

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[2] A person is guilty of first-degree murder where the Commonwealth proves that (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill. 18 Pa.C.S.A. § 2502(d); ***Commonwealth v. Spotz***, 759 A.2d 1280, *(Footnote Continued Next Page)*

> sentenced to death.] On direct appeal, the Pennsylvania Supreme Court affirmed [Appellant's] judgment of sentence on October 20, 2004. ***Commonwealth v. Dougherty***, 860 A.2d 31 (Pa. 2004). [Appellant's] petition for *certiorari* was denied by the United States Supreme Court on October 3, 2005. ***Dougherty v. Pennsylvania***, 546 U.S. 835, (2005). [Appellant] initially filed a *pro se* petition for relief under the [PCRA on November 16, 2005]. On November [2]3, 200[5], [Appellant's] current counsel entered their appearances and [,on November 13, 2006, PCRA counsel] filed an amended petition. On April 2, 2009, the Honorable Renee Cardwell Hughes dismissed the PCRA petition as meritless. [Appellant] appealed. On April 28, 2011, the Pennsylvania Supreme Court remanded the matter for appointment of a new PCRA judge to "prepare a fully developed opinion on all the parties' claims" [and to "hold an evidentiary hearing or grant any other relief deemed necessary."] ***Commonwealth v. Dougherty***, 18 A.3d 1095[] (Pa. 2011) (*per curiam*). On June 13, 2011, this matter was transferred to [a new PCRA judge. Thereafter, by order entered February 7, 2012 pursuant to an agreement between the parties, Appellant's death sentence was vacated and a new sentence of life imprisonment was imposed.] On March 8 and 9, 2012, th[e PCRA] court conducted an evidentiary hearing on [Appellant's] claim of ineffective-assistance-of-counsel [predicated on counsel's failure to retain a consulting or testifying expert on fire science.] In support of his claim, [Appellant] presented the testimony of two experts in fire investigation. On June 13, 2012, th[e PCRA] court heard oral arguments on [Appellant's]

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1283 (Pa. 2000). An intentional killing is a killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing. 18 Pa.C.S.A. § 2502(d). Moreover, the Crimes Code provides that a person who commits arson endangering persons is guilty of first-degree murder "if the fire or explosion causes the death of any person and was set with the purpose of causing the death of another person." 18 Pa.C.S.A. § 3301(a)(2). To prove the underlying arson in a murder prosecution, the Commonwealth must establish that (1) there was a fire of incendiary origin; (2) the accused deliberately caused the fire; and (3) the fire was the cause of death. ***Commonwealth v. Pierce***, 645 A.2d 189, 194 (Pa. 1994). As in all criminal prosecutions, the Commonwealth bears the burden of establishing all the elements of the offense beyond a reasonable doubt. ***Commonwealth v. Bridges***, 757 A.2d 859, 864 (Pa. 2000).

> ineffective-assistance-of-counsel claim [and, on September 6, 2012, the court denied collateral relief.]

PCRA Court Opinion, 9/11/12, at 2-7 (footnotes in original; record citations omitted).[3]

In his brief, Appellant asks us to review the following issues:

> In denying [Appellant's] claim of ineffective assistance of counsel, did the PCRA court err in finding that [Appellant] suffered no prejudice, particularly given its finding that the performance of [Appellant's] trial counsel was deficient for not consulting with or presenting a fire expert?
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> Did the PCRA court err in not finding trial counsel ineffective in his preparation for and conduct of the trial?
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> Was trial counsel ineffective for abandoning the claim that the Commonwealth's 14-year delay in prosecuting [Appellant] violated the Fourteenth Amendment?
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> Did the Commonwealth's use of materially false and scientifically unreliable testimony as its sole evidence of arson and, thus, capital murder, violate [Appellant's] due process rights?
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> Did [Appellant] establish that he is actually innocent?
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> Did the Commonwealth's fourteen-year delay in prosecuting [Appellant] violate his due process rights when the delay prejudiced [Appellant] and the only additional evidence the Commonwealth relied on to arrest [Appellant] was a false statement from [Appellant's] disgruntled, estranged wife that the prosecution knew to be unreliable?

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[3] Counsel for Appellant has certified pursuant to Pa.R.A.P. 2111(a)(11) that the PCRA court did not order the filing of a concise statement of errors complained of on appeal under Pa.R.A.P. 1925(b). ***See*** Appellant's Brief at Ex. C.

> Did the Commonwealth fail to disclose material, exculpatory evidence that would have impeached the testimony of its testifying witnesses in violation of Mr. Dougherty's due process rights?
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> Is [Appellant] entitled to relief from his conviction as a result of the cumulative prejudicial effect of the errors in his case?
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> Did the PCRA court err in limiting the evidentiary hearing to the issue of the trial counsel's ineffectiveness for failing to consult with or present a fire expert?

Appellant's Brief at 2-3.

In his PCRA petition and on appeal, Appellant advances several claims in support of his request for collateral relief. In our discretion, however, we shall confine our discussion and analysis to Appellant's claim that trial counsel was ineffective because he failed to retain either a consulting or testifying expert in fire science. We do so for several reasons. First, the trial court restricted the scope of Appellant's evidentiary hearing to this issue; hence, this issue is more fully developed within the record than Appellant's other claims. In addition, based upon the submissions of the parties before this Court and the PCRA court, this claim constitutes the central premise of Appellant's prayer for post-conviction relief. Lastly, in light of our conclusion that the trial court erred in finding that Appellant was not prejudiced by trial counsel's failure to retain either a consulting or testifying fire expert, we believe that further discussion of Appellant's alternate claims is unnecessary.

Our standard of review of a PCRA court's denial of petition for relief is well-settled. We review an order of the PCRA court to determine whether the record supports the findings of the PCRA court and whether its rulings are free from legal error. ***Commonwealth v. Fiore***, 780 A.2d 704, 710 (Pa. Super. 2001), *appeal dismissed*, 813 A.2d 1080 (Pa. 2003). To be eligible for PCRA relief, a petitioner must plead and prove, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the reasons set forth in 42 Pa.C.S.A. § 9543(a)(2). Ineffective assistance of trial counsel is a cognizable ground for relief under the PCRA. ***See*** 42 Pa.C.S.A. § 9543(a)(2)(ii).

"In order to obtain relief under the PCRA premised upon a claim that counsel was ineffective, a petitioner must establish beyond a preponderance of the evidence that counsel's ineffectiveness 'so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.'" ***Commonwealth v. Payne***, 794 A.2d 902, 905 (Pa. Super. 2002), *quoting* 42 Pa.C.S.A. § 9543(a)(2)(ii). When considering such a claim, courts presume that counsel was effective, and place upon the petitioner the burden of proving otherwise. ***Id.*** at 906. To succeed on a claim that counsel was ineffective, Appellant must demonstrate that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) counsel's ineffectiveness prejudiced him. ***Commonwealth v. Allen***, 833 A.2d 800, 802 (Pa. Super. 2003).

Appellant argues that trial counsel's failure to retain either a consulting or testifying expert in fire science left counsel unprepared against Lt. Quinn's testimony, which comprised the most compelling evidence of Appellant's guilt. To evaluate the merits of Appellant's ineffectiveness claim, we initially review the PCRA testimony introduced through Appellant's experts in fire science, which the PCRA court has aptly summarized.

> At the PCRA hearing, [Appellant] presented two experts who had surveyed the evidence at trial, the transcripts of the testimony at trial, and the forensic report of Lt. Quinn. The first expert was John Joseph Lentini.[4] Lentini testified that[,] at the time of [Appellant's trial in 2000,] multiple treatises in the field of forensic fire investigation explained the phenomena of flashover and full-room involvement. Consistent with his testimony, Lentini stated that when flashover and full-room involvement are present, determining points of origin of a fire is nearly impossible, and in the circumstances of this case, definitively could not be done. Lentini stated that when flashover and full-room involvement exist, the methods used to determine a point of origin become unreliable because what could look like a point of origin actually may not be. Lentini concluded by stating that

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[4] In 1973, Lentini graduated with his Bachelor's Degree in natural sciences. Lentini has also taken numerous post graduate courses at the University of Akron and Georgia State University in the fields of chemistry and criminal investigation. Lentini works as a fire investigator and fire consultant. Lentini worked for the Georgia State Crime Laboratory doing chemical analysis of fire debris. Lentini has also attended numerous seminars and symposia given by various organizations such as the FBI, various state Fire Marshals' Offices, the International Association of Arson Investigators, and the National Fire Protection Association (NFPA). Lentini holds three certifications relating to fire investigation. Lentini was also a member of the NFPA panel which formulated [NFPA] 921 in 1992. NFPA 921 is titled the Guide for Fire and Explosion Investigations. This national standard was created to [guide state fire marshals' investigative activities] and to debunk some of the myths that forensic fire investigation had been relying on prior to its inception.

> [the evidence did not support Lt. Quinn's conclusions regarding the points of origin]. Lentini also stated that because the points of origin could not be determined based on the remnants of the house, the conclusion that the fire was of incendiary origin was not supported by the evidence. Lentini could not state where the points of origin were, how many there were, or if the fire was of incendiary or accidental origin. Lentini's conclusion was that no points of origin could be reliably determined and, thus, the cause of the fire should have been classified as undetermined – a classification encompassing [fires of] both accidental and incendiary origins. Lentini acknowledged that Lt. Quinn ruled out accidental causes such as a gas explosion, an electrical fire from the outlets and appliances in the living room and careless smoking, but stated that he felt that Lt. Quinn was only going through the motions because Lt. Quinn had already concluded that the fire had three points of origin and was, therefore, of incendiary origin.
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> The second expert proffered by [Appellant] was Dr. Angelo Pisani.[5] Dr. Pisani confirmed that, based on his review of the evidence, the home was subject to flashover and full-room involvement. In almost all respects, Dr. Pisani agreed with the testimony given by Lentini. Dr. Pisani stated that pinpointing points of origin when flashover and full-room involvement are present is nearly impossible. Most importantly, Dr. Pisani stated that the state of forensic fire investigation in 1985 was based on invalid principles and myths. Dr. Pisani also testified that the state of documentation by fire investigators in 1985 was poor relative to 2000 and beyond and that Lt. Quinn's conclusions regarding excluding other accidental causes, although not clearly

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[5] Dr. Angelo Pisani is a criminal justice professor at St. John's University. He has been employed at St. John's University for roughly 21 years. Dr. Pisani teaches courses relating to arson and fire investigation. Since 1992, Dr. Pisani also has been working as a consultant for litigants who need answers on fire analysis and fire investigation when the cause of origin is undetermined. Dr. Pisani has a Bachelor's Degree in American Studies, a Master's Degree in Criminal Justice, a Master's Degree in Philosophy, and a Ph.D. in Criminal Justice. He is also certified with the National Association of Fire Investigators as a Certified Fire & Explosion Investigator. In 1978, Dr. Pisani worked as a fire marshal in New York before he was appointed as a coordinator for the New York City Arson Strike Force in the Mayor's Office.

> and properly documented, was the standard in 1985. By the time of trial in 2000, Dr. Pisani testified that the standards and knowledge base for forensic fire investigation had undergone a significant transformation due, in part, to the standard set out by NFPA 921. Dr. Pisani testified that had he testified in 2000 based on an investigation conducted in 1985, he would have applied the theories accepted in 2000 by the forensic fire investigation community.

Trial Court Opinion, 9/11/12, at 24-26 (footnotes in original; record citations omitted). The PCRA court described the combined import of the testimony offered by Appellant's experts in the following manner:

> [Appellant's experts opined that the evidence at the crime scene indicated flashover and full-room involvement, which occur during compartment fires.][6] These experts presented the

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[6] A compartment fire is a fire which is contained by a building. The behavior exhibited by a compartment fire is much different than a fire that proceeds through open space. In a compartment fire, heat will rise until it is obstructed, usually by the ceiling. Hence, the constant rising of heat cannot be maintained indefinitely.

When a compartment fire is present, the heat from the fire source rises until it reaches the ceiling. This is due to convection – the concept whereby lighter, hotter gases rise above colder, denser gases. When the heat reaches the ceiling, the heat collects, thereby creating a layer of smoke and heat at the ceiling. As the fire continues to burn, the layer present at the ceiling becomes thicker and hotter and thereby causes the heat to radiate downward to other areas in the compartment. When the collection of heat reaches somewhere in the range of 1100 to 1200 degrees Fahrenheit, the spontaneous combustion of other items or areas in the room begins. This entire dynamic is termed flashover.

Full-room involvement occurs when the fire in the room has consumed all the available oxygen. Because the oxygen is limited, the heat will be present but there will be no flames. The fire spreads to areas outside the window, *i.e.*, to get more air, or to other fuel sources, *e.g.* chairs, tables, *etc.* to get more oxygen. In essence, when full-room involvement occurs, it becomes difficult, if not impossible, to determine where the initial point of

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> [PCRA] court with treatises, both available at the time of the investigation and fourteen years later at trial, which describe the theories of flashover and full-room involvement. These experts reviewed the available evidence from the scene of the fire and determined that the exhibited charring throughout the home [showed] that flashover and full-room involvement took place in [Appellant's] home. These same experts reviewed the trial [transcripts] and affirmatively concluded that the theories of flashover and full-room involvement were never part of trial counsel's cross-examination of Lt. Quinn. The experts both concluded that when flashover and full-room involvement occur, it is nearly impossible to determine the point(s) of origin, let alone if multiple points of origin existed. Consistent with their conclusions, the experts never postulated as to the origin of the fire. Their testimony simply stated that the methodology of Lt. Quinn was flawed against the weight of forensic fire science at the time and, as a result, Lt. Quinn's conclusions were incorrect and unsupported by the evidence. The experts do not say that the fire was or was not the result of an incendiary cause. They also do not state that the fire was or was not accidental. What they conclude is that the fire could have been either and that the origin should have been classified as undetermined. According to both experts based on their knowledge, experience, the available literature at the time of the investigation and the trial, and the evidence they reviewed in this case, it was impossible for a forensic fire expert to come to a definite conclusion as to the origin of the fire.

***Id*.** at 14-15 (footnotes in original; record citations omitted).

Based upon the testimony of Appellant's experts, the PCRA court concluded that Appellant met his burden in establishing that his fire expert

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origin was because several areas that were not the point of origin could burn hotter and faster based on the confined heat and the fire seeking out more oxygen and fuel. This spontaneous combustion creates a false indication of a plume, a sign that is indicative of a point of origin.

claim possessed arguable merit and that counsel's actions did not constitute a reasonable trial strategy. ***Id.*** at 26. The court reasoned:

> Had trial counsel relied on more than his tangential experiences with fire investigation,[7] he would have been able effectively to challenge the science that, as trial counsel stated in his affidavit prior to his death, was "the most significant item of evidence in the possession of the Commonwealth." Although effective and skilled cross-examination is one quiver in the arsenal of a competent attorney, that skill does not replace the need to understand or investigate aspects of a client's case. Aside from conceding that this one piece of evidence was crucial to the whole case, trial counsel also showed in various other aspects that he was deficient in conducting an investigation for witnesses or ever talking to the fire investigator prior to the day of trial. [Trial counsel's affidavit stated that counsel's investigation was limited to reviewing materials obtained through discovery and interviewing Appellant, Appellant's family, and certain acquaintances, but never interviewing any of the Commonwealth's witnesses.] Had trial counsel presented the evidence that was [admitted] at the PCRA hearing or simply become sufficiently versed in the science that was the fulcrum of the whole case against his client, he would have been able to challenge the conclusions that were the lynchpin to [the] charges against [Appellant]. "Winging it" cannot be deemed a reasonable trial strategy. Given these circumstances, the importance of one piece of evidence to the slew of charges that the Commonwealth was waging, and the fourteen-year gap

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[7] Trial counsel stated in his affidavit that his father had been a fire investigator several years back and that he thought that he did not need to retain an expert. Compensation for retaining an expert may have also been a factor because trial counsel had taken on this case *pro bono*. Although the costs were to be covered by [Appellant's] family, trial counsel had only received three hundred dollars. Based on his *father's experiences* as a fire marshal *years before the fire started* and trial counsel's concern about his costs not being covered, trial counsel felt that what he had learned years earlier while his father was a fire investigator would be enough to test Lt. Quinn's testimony.

> between the fire and the trial,[8] the only reasonable strategy would have been, at a minimum, to become adequately versed in the science, or at a maximum, commission a testifying expert.

***Id*.** at 26-27 (footnotes in original; record citations omitted).

Based upon our own independent review of the certified record, in conjunction with the submissions of the parties and the PCRA court's opinion, we conclude that the court's determinations find support in the record and are free of legal error.[9] Accordingly, we affirm these rulings and

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[8] Given that fourteen years had passed, counsel should have determined whether the science which formed the basis of Lt. Quinn's opinions in 1985 was subject to new theories which had been developed in the forensic fire community. Regardless, the lack of investigation into the science precluded trial counsel from ever understanding whether the science was accurate, the main claim asserted by [Appellant]. Because fourteen years had passed, reliability of the evidence itself or the science underlying it should have been important in addressing the arson charge.

[9] Despite the PCRA court's findings, the Commonwealth argues that we should affirm the denial of collateral relief because Appellant has not met his burden of establishing that trial counsel's strategy was unreasonable. The Commonwealth cites two reasons for its assertion. First, the Commonwealth contends that trial counsel's affidavit constituted hearsay and, thus, Appellant failed to produce admissible evidence that counsel failed to seek or consult a fire expert. Commonwealth's Brief at 14. In addition, the Commonwealth maintains that, in light of Lt. Quinn's 35 years of experience as a fire investigator and his participation as an expert in many cases, it is not unreasonable for counsel to have concluded that it would have been futile to attempt to discredit Lt. Quinn. ***Id*.** at 16.

We reject the Commonwealth's contentions. Appellant's experts reviewed the trial transcripts and testified that the theories of flashover and full-room involvement were never part of trial counsel's cross-examination of Lt. Quinn. We may infer from this testimony that counsel was either unaware of, or deliberately chose not to pursue, these exculpatory themes. In either case, in view of the fact that defense counsel's role is to serve as a zealous

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turn now to the PCRA court's conclusion that Appellant was not prejudiced by trial counsel's deficient stewardship in failing to retain either a consulting or testifying fire expert.

Prejudice is established where a petitioner shows that there is a reasonable probability that, but for counsel's substandard performance, the result of the criminal proceeding would have been different. ***Commonwealth v. Kimball***, 724 A.2d 326, 333 (Pa. 1999). If such a showing is made, then no reliable adjudication of guilt or innocence has taken place. ***Id.*** Prejudice is demonstrated if an evaluation of the evidence placed before the jury undermines confidence in the outcome of the trial. ***Id.***

We are persuaded that, if counsel had retained either a consulting or testifying fire expert, he could have mounted a convincing challenge to the substance of the charges arrayed against his client. As the PCRA court noted, the scientific evidence proffered by Lt. Quinn was "the fulcrum of the whole case" against Appellant, and Lt. Quinn's conclusions "were the lynchpin" to the charges against Appellant. Trial Court Opinion, 9/11/12, at 27. In a capital case such as the present matter at the time of trial, mounting a meaningful challenge to the scientific component of the

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advocate for his client, especially in a capital case, we conclude that counsel's omission was not reasonably calculated to advance his client's interests, regardless of whether his inaction resulted from a conscious choice or a negligent failure to make appropriate inquiry.

Commonwealth's case should have been the top priority of any competent defense lawyer. Through informed cross-examination or, alternatively, presentation of a fire expert, counsel could have demonstrated to the jury that Lt. Quinn overlooked the effects of flashover and full-room involvement in a compartment fire. Such testimony would tend to show that Lt. Quinn incorrectly identified multiple points of origin for the fire, that his conclusions lacked scientific underpinning, and that his opinions conflicted with principles of forensic fire investigation that were widely accepted at the time of trial. This, in turn, would have provided counsel with an evidentiary foundation from which to assert that the fire had a single point of origin and that the cause of the fire was accidental or, at best, undeterminable. Counsel also could have argued that the Commonwealth failed to meet its burden of showing that the fire was intentionally ignited and that Appellant was an arsonist. As Appellant's brief points out, "[t]rial counsel's failure to elicit [expert fire testimony] deprived [Appellant] of the opportunity to discredit entirely the testimony that was the sole basis for concluding that the fire was arson." Appellant's Brief at 27. If the jury had received the testimony offered by Appellant's experts at the PCRA hearing and, as a result, had become convinced that Lt. Quinn's testimony was scientifically unreliable, then the jury would have had reasonable doubt about Appellant's guilt and would have been compelled to acquit him. Under these circumstances, our assessment of the evidence introduced at Appellant's trial undermines our

confidence in the outcome of that proceeding and reveals that no reliable adjudication of guilt or innocence took place. Thus, the trial court erred in concluding that Appellant failed to establish prejudice.

The positions advanced by the PCRA court and the Commonwealth do not alter our conclusion. The PCRA court posited that, notwithstanding the testimony offered by Appellant's experts at the PCRA hearing, the *corpus delicti* still would have been established and the jury, therefore, would have heard evidence of Appellant's confessions. For these reasons, the PCRA court concluded that there was no reasonable probability that the result of Appellant's trial would have been different and, hence, Appellant was not prejudiced by counsel's omission. ***See*** Trial Court Opinion, 9/11/12, at 32-33. As the PCRA court explained:

> Contrary to the direct line arguments proffered by the Commonwealth and [Appellant's PCRA] counsel, Lt. Quinn's methodology did not just encompass deducing arson *solely* from the fact that he concluded that there were three points of origin. Lt. Quinn concluded arson from the fact that he observed three points of origin *and* by eliminating other accidental causes such as a natural gas explosion, an electrical fire, and careless smoking. By eliminating accidental causes and concluding that three points of origin existed in the home, Lt. Quinn concluded that the fire was the product of arson. Viewing the testimony offered by [Appellant] at the PCRA evidentiary hearing along with the evidence admitted at trial, the [PCRA] court believes that the *corpus delicti* still would have been established. Even if [Appellant's] experts would have testified at trial, their testimony would have only challenged Lt. Quinn's conclusion regarding whether three points of origin existed and the credibility of Lt. Quinn's report based upon insufficient documentation. Nothing in the testimony by [Appellant's] two experts challenges the fact that Lt. Quinn ruled out causes from other non-human sources. [Thus], Lt. Quinn was able to establish the *corpus delicti* for the

> crime through two various avenues – concluding that three points of origin existed in the home and that there was an absence of evidence of accidental causes. It bears mentioning again that the *corpus delicti* of arson need not be proved beyond a reasonable doubt. All that needs to be shown is that some act of human intervention, either accidental or intentional, was the source of the fire. The fact that Lt. Quinn found three points of origin and found no evidence of accidental sources, even if tested by the two PCRA experts, would still have been sufficient for the [PCRA] court to conclude that the fire was the product of human intervention, whether accidental or criminal. [Appellant's] two experts would have challenged the credibility of Lt. Quinn's conclusions, but they would not have prevented the *corpus delicti* of arson from being proved. Viewing the remaining evidence such as [Appellant's] statements on the night of the fire; his inconsistent testimony at trial; the testimony of his own experts and Lt. Quinn that [Appellant's] trial testimony regarding his acts of heroism was not credible; his being the only adult in the house when the fire erupted; and statements [Appellant] made to two cellmates in prison admitting to killing his children, the [PCRA] court finds that [Appellant] was not prejudiced by trial counsel's inaction because there does not exist a reasonable probability that the result would have been different. To the contrary, [the PCRA] court firmly believes that [Appellant] would have been convicted notwithstanding the two experts [Appellant] has proffered.

Id.

The Commonwealth offers similar arguments in defense of the PCRA court's conclusion that Appellant failed to demonstrate prejudice. The Commonwealth notes that Lt. Quinn's testimony was sufficient to show that the fire was intentionally set. Commonwealth's Brief at 15-17. Lt. Quinn testified that the fire had been ignited in three separate locations. Moreover, he eliminated the possibility of accidental ignition. Lt. Quinn examined electrical outlets, the gas meter, a fuse box, the basement heater, and a kerosene container and found that the fire was not caused by gas

fumes, electricity, or careless smoking. Lt. Quinn opined that the individual who set the fire had time to escape safely and noted that Appellant was uninjured on the night in question. The Commonwealth also points out that Appellant offered no evidence that Lt. Quinn was unfamiliar with the concept of flashover and that Appellant's experts did not disprove Lt. Quinn's conclusions. Finally, the Commonwealth maintains that evidence of Appellant's admissions showed motive and was not unworthy of belief.

These contentions do not overcome our conclusion that Appellant has demonstrated a reasonable probability that the outcome of his trial may have been different if counsel had retained either a consulting or testifying fire expert. Indeed, our decision is not substantially affected by considerations of whether the Commonwealth established the *corpus delicti* for arson and whether, in turn, the trial court properly admitted testimony regarding Appellant's alleged confessions. We assume, for present purposes, that the Commonwealth met its burden in this regard and that such testimony was correctly placed before the jury at Appellant's trial. ***See Commonwealth v. Cockfield***, 350 A.2d 833, 836 (Pa. 1976) (in prosecution for murder by arson, Commonwealth meets its burden of establishing *corpus delicti* for purpose of introducing defendant's extrajudicial statements when it establishes that death resulted from fire of incendiary origin; Commonwealth need not affirmatively exclude possibility of accident or suicide when proving *corpus delicti* and evidence of

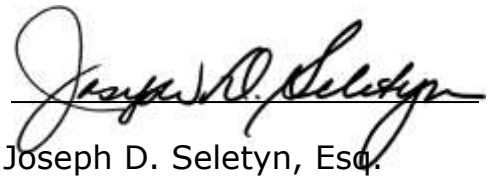
defendant's statements may be introduced if it is shown that fire causing the death resulted from human intervention even though proof is consistent with both accidental and criminal conduct). Notwithstanding the propriety of the trial court's *corpus delicti* determination, however, in order to secure a conviction for first degree murder based upon arson, the Commonwealth must demonstrate, beyond a reasonable doubt, that: (1) there was a fire of incendiary origin; (2) the accused deliberately caused the fire; and (3) the fire was the cause of death. ***Commonwealth v. Treiber***, 874 A.2d 26, 30 (Pa. 2005); ***Pierce***, 645 A.2d at 194. It is with regard to this higher, second standard – relating to Appellant's **conviction** as opposed to application of the *corpus delicti* rule – that the introduction of expert testimony at Appellant's PCRA hearing has shaken our confidence in the result of Appellant's trial.

As even the PCRA court recognized, the issue of whether the August 24, 1985 fire was caused by arson was **the** bedrock inquiry at Appellant's trial and Lt. Quinn's testimony supplied the scientific support for the Commonwealth's contention that the fire was intentionally started and that Appellant was the individual who ignited it. ***See supra*.** In failing to acquaint himself with the relevant forensic principles or, alternatively, to present an expert in fire science, Appellant's counsel essentially allowed the Commonwealth to prove the most critical elements of its case without meaningful challenge by the defense. Moreover, if trial counsel had

undertaken an informed cross-examination of Lt. Quinn, and/or presented testimony from an expert in fire science, there is a reasonable possibility that such efforts would have had the spillover effect of causing the jury to view testimony regarding Appellant's admissions through a more skeptical lens or, at least, view such testimony as expressions of Appellant's moral regret or remorse, and not inculpatory declarations of his legal guilt. Counsel's omission is made worse by the fact that, at the time of trial, the Commonwealth was seeking the death penalty upon conviction. We therefore have little difficulty in concluding, under the circumstances of this case, that counsel's subpar performance severely undermined the truth-gathering function of the adversarial process and resulted in prejudice to Appellant. Accordingly, we hold that Appellant is entitled to post-conviction relief based upon his claim that counsel provided ineffective assistance in failing to retain an expert in fire science. We therefore vacate the PCRA court's order that denied collateral relief and remand with instructions that Appellant be afforded a new trial.

Order vacated and case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/30/2013