NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ISSAC NARANJO, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 273 EDA 2012

Appeal from the PCRA Order December 2, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0212551-2002

BEFORE: STEVENS, P.J., BOWES, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: **FILED MAY 23, 2013**

Issac Naranjo[1] appeals *pro se* from the order entered December 2, 2011, dismissing his first counseled PCRA petition after counsel filed a ***Turner/Finley***[2] no-merit letter. After considerable review, we affirm in part, reverse in part, vacate Appellant's judgment of sentence, and remand for re-sentencing.

A jury convicted Appellant of attempted murder, aggravated assault, burglary, possession of an instrument of crime ("PIC"), terroristic threats,

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* Former Justice specially assigned to the Superior Court.

[1] The record reflects that Appellant is referred to as both Isaac and Issac. During his previous direct appeal, we utilized the first name "Isaac."

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

criminal trespass, recklessly endangering another person (REAP), simple assault, and contempt of court.[3] The convictions stemmed from Appellant's brutal attack on his former girlfriend with a box cutter. The assault occurred after she had successfully obtained a protection from abuse order. On May 8, 2003, the court sentenced Appellant to twenty to forty years incarceration for attempted murder and consecutive terms of imprisonment of ten to twenty years for burglary and two and one-half to five years each for his PIC and terroristic threats convictions. No further sentence was imposed on the remaining convictions. Appellant's aggregate sentence was thirty-five to seventy years imprisonment.

Appellant filed a *pro se* notice of appeal and was appointed counsel. Counsel discontinued the direct appeal on June 10, 2003, but Appellant received reinstatement of his direct appeal rights via a timely PCRA petition. This Court affirmed Appellant's judgment of sentence on October 19, 2005. ***Commonwealth v. Naranjo***, 889 A.2d 116 (Pa.Super. 2005) (unpublished memorandum). On May 8, 2006, Appellant filed another PCRA petition seeking reinstatement of his right to file a petition for allowance of appeal *nunc pro tunc*. The court appointed counsel, who filed an amended petition

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[3] We note that the trial court originally failed to instruct the jury on recklessly endangering another person, simple assault, and contempt of court. However, after the jury viewed the verdict slip it returned with questions pertaining to those counts. Accordingly, the court instructed the jury as to those charges.

on December 13, 2006. The court ultimately reinstated Appellant's ability to seek discretionary review from our Supreme Court. The Pennsylvania Supreme Court subsequently denied Appellant's petition for allowance of appeal on May 20, 2008. ***Commonwealth v. Naranjo***, 953 A.2d 541 (Pa. 2008).

Appellant filed the underlying *pro se* PCRA petition on August 21, 2008 and a *pro se* memorandum on August 25, 2008. The court appointed counsel on December 30, 2008. Counsel filed a ***Turner/Finley*** no-merit letter on September 20, 2011, almost three years after her appointment. Appellant filed a *pro se* response and the court issued a notice of intent to dismiss before dismissing Appellant's petition on December 2, 2011. However, the PCRA court omitted from its Pa.R.Crim.P. 907 notice and its final order any express language permitting counsel to withdraw. This failure on the part of the PCRA court, in conjunction with Pa.R.Crim.P. 576, resulted in unnecessary confusion. Pa.R.Crim.P. 576, provides:

> (4) In any case in which a defendant is represented by an attorney, if the defendant submits for filing a written motion, notice, or document that has not been signed by the defendant's attorney, the clerk of courts shall accept it for filing, time stamp it with the date of receipt and make a docket entry reflecting the date of receipt, and place the document in the criminal case file. A copy of the time stamped document shall be forwarded to the defendant's attorney and the attorney for the Commonwealth within 10 days of receipt.
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> (5) If a defendant submits a document *pro se* to a judge without filing it with the clerk of courts, and the document requests some form of cognizable legal relief, the judge promptly shall

> forward the document to the clerk of courts for filing and processing in accordance with this rule.

Hence, when an attorney is still considered counsel-of-record, the clerk of courts will ordinarily forward *pro se* documents to counsel. The comment to the rule also reflects that *pro se* filings do not necessarily trigger a deadline or require a response.[4] This flows from the precept that *pro se* documents that require merits review, *i.e.*, motions, Pa.R.A.P. 1925(b) statements, petitions, briefs, etc., are generally treated as legal nullities when they are filed by a defendant represented by counsel. ***Commonwealth v. Nischan***, 928 A.2d 349, 355 (Pa.Super. 2007) (*pro se* post-sentence motion a nullity); ***Commonwealth v. Ali***, 10 A.3d 282 (Pa. 2010) (*pro se* 1925(b) statement a nullity).

However, we recognize that in ***Commonwealth v. Pitts***, 981 A.2d 875 (Pa. 2009), our Supreme Court endorsed allowing petitioners to submit a *pro se* response to a notice of intent to dismiss where counsel files a ***Turner/Finley*** no-merit letter even though counsel has not been permitted to withdraw. Thus, where counsel is attempting to withdraw, traditional hybrid representation problems do not arise. Nonetheless, unlike ***Pitts***, counsel was not expressly permitted to withdraw and ***Turner/Finley*** counsel entered an appearance before this Court. That appearance was only

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[4] While the PCRA is generally considered civil in nature, ***Commonwealth v. Haag***, 809 A.2d 271, 284 (Pa. 2005), it is expressly governed by rules of criminal procedure. ***See*** Pa.R.Crim.P. 900-910.

withdrawn after a belated order entered by the PCRA court allowed her to withdraw.

Due to counsel's filing of a ***Turner/Finley*** no-merit letter and the court's failure to expressly indicate that counsel was no longer required to represent Appellant, Appellant simultaneously filed a *pro se* notice of appeal and Pa.R.A.P. 1925(b) statement on December 19, 2011. In similar situations, we have declined to treat the *pro se* notice of appeal as a nullity. ***See Commonwealth v. Robinson***, 970 A.2d 455 (Pa.Super. 2009); ***Commonwealth v. Brown***, 836 A.2d 997 (Pa.Super. 2003); ***Commonwealth v. Librizzi***, 810 A.2d 692 (Pa.Super. 2002).

Ultimately, the PCRA court directed Appellant to file a concise statement of errors complained of on appeal on February 2, 2011. The court order did not track Pa.R.A.P. 1925(b) and did not order Appellant to serve a copy of the statement on the court. Proof of service for the order indicates that both Appellant and the Defender's Association, who did not represent Appellant, were served by first-class mail. Appellant did not mail his *pro se* statement until apparently March 20, 2011, and it was not docketed until April 4, 2011. Again, however, counsel had not officially withdrawn from this case and Appellant avers that he did not timely receive the order requiring the statement. In addition, it is apparent that Appellant attempted to file two separate Pa.R.A.P. 1925(b) statements before the April 4, 2011

statement. One of those statements was filed before the court entered its Pa.R.A.P. 1925(b) order and the other statement was not docketed.

We are cognizant that the two earlier Pa.R.A.P. 1925(b) statements raised over 100 issues, do not qualify as concise, and would not have preserved the numerous issues set forth therein that could be waived. Nonetheless, Appellant did seek permission *nunc pro tunc* to file a more concise amended Pa.R.A.P. 1925(b) statement on July 25, 2012 and August 7, 2012, prior to the PCRA court authoring its opinion on September 4, 2012, in which it found all of Appellant's issues waived.[5] The PCRA court *sub silentio* denied these requests.

Appellant raises the following two interrelated issues in his brief relative to the PCRA court's finding of waiver.

> 1. Whether the PCRA court erred and/or abused its discretion by deeming waived all of Appellant's PCRA claims for failure to file a timely 1925(b) statement?
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> 2. Whether the Superior Court should remand this case for the nunc pro tunc filing of, and PCRA court's decision addressing Appellant's Rule 1925(b) statement?

Appellant's brief at 4.[6]

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[5] This Court entered an order in July of 2012 directing the PCRA court to transmit the record, which was due on February 12, 2012, to this Court. Since the PCRA court had not completed its Pa.R.A.P. 1925(a) opinion, it did not transmit the record to this Court until September 6, 2012.

[6] The Commonwealth failed to timely submit its brief in this matter. Accordingly, we decline to consider its patently untimely brief, ***see***
(Footnote Continued Next Page)

In addition, Appellant has attached to his brief an additional brief that fully complies with our procedural rules and addresses the merits of his underlying issues. As we agree with Appellant that the PCRA court created the procedural irregularities in this matter by not allowing counsel to withdraw until April 25, 2012, we decline to find waiver and will address the merits of the issues Appellant presented in his March 20, 2012 concise statement.[7]

We add that Appellant raised two pure legality of sentence claims, *i.e.*, claims that his sentence exceeded the lawful maximum, which can be raised *sua sponte* by a court if the PCRA petition was timely filed. ***See Commonwealth v. Fahy***, 734 A.2d 213, 223 (Pa. 1999); ***Commonwealth v. Rivera***, (Pa.Super. 2010) (*sua sponte* raising an issue it considered a legality of sentence claim and affording PCRA relief); ***Commonwealth v. Springer***, 961 A.2d 1262, 1264 n.3 (Pa.Super. 2008); ***Commonwealth v. Jones***, 932 A.2d 179 (Pa.Super. 2007); ***Commonwealth v. Berry***, 877 A.2d 479, 482 (Pa.Super. 2005) (legality of sentence claims are unwaivable and may be addressed if timely PCRA petition was filed); ***Commonwealth***

(Footnote Continued)

Commonwealth v. Beasley, 741 A.2d 1258, 1261 n.8 (Pa. 1999), and remind it of its duty to comply with the briefing schedule set by this Court.

[7] We decline to remand for the filing of a Pa.R.A.P. 1925(a) opinion due to the delay already caused by the PCRA court and because it is unnecessary for our resolution of the issues. Further, we note that Appellant submitted a motion to file his Exhibit F brief as his amended brief, and we grant that motion.

v. Staples, 471 A.2d 847, 849 (Pa.Super. 1984) (court during PCHA appeal opined that legality of sentence issue cannot be waived); ***see also Commonwealth v. Brown***, 872 A.2d 1139 (Pa. 2005) (issues that cannot be waived are not subject to PCRA waiver provision).

The substantive issues Appellant presents are:

> 1[.] Whether the PCRA court erred and or abused its discretion in permitting PCRA counsel to withdraw [from] representation and by dismissing without a hearing Petitioner's PCRA petition, where several claims of arguable merit including those identified below are readily apparent in the record but PCRA counsel did not amend the petition, instead opting to file a "***Finley*** letter," where:
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> > All prior counsel are ineffective by failing to properly raise and litigate in the lower court, at trial, on direct appeals, and in a PCRA petition the claims that:
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> (A) Illegal sentences were imposed in violation of ***Apprendi v. New Jersey***, where the court impose[d] a 20-40 year sentence on attempted murder without the required jury finding that serious bodily injury was inflicted.
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> (B) Illegal sentences were imposed in violation of 18 Pa.C.S.A. § 906 and well-established law prohibiting convictions and imposition of sentence for two inchoate crimes, namely possession of instrument of crime and attempted murder – which further merge for sentencing purposes.
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> (C) The court committed reversible error by giving inadequate jury instructions on the offenses of aggravated assault, attempted murder, and recklessly endangering another person.
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> (D) All prior counsel are ineffective by failing to adequately investigate, develop, and present an alibi defense and by failing to seek proper instructions directing jurors not to infer guilt based upon Appellant's failure to prove his alibi.

(E) The trial court committed reversible error by refusing to give any type of alibi instructions after Appellant presented his own alibi testimony to jurors.

(F) All counsel were ineffective by failing to raise a violation of Appellant's prompt trial rights pursuant to Rule 600.

(G) All counsel are ineffective by failing to object to and raise on appeal the Commonwealth's violation of Rule 564, governing amendments of indictments, where the prosecutor without leave added an attempted murder charge not listed in the criminal complaint.

(H) The trial court committed fraud when [it] charge[d] the Defendant with attempted murder on its own motion.

(I) The trial judge committed reversible error in the agg. assault charge.

Exhibit F to Appellant's brief at 4.

In reviewing a PCRA court's decision, we are guided by the following well-established precepts.

> We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. ***Commonwealth v. Burkett***, 5 A.3d 1260, 1267 (Pa.Super. 2010). This review is limited to the findings of the PCRA court and the evidence of record. ***Id***. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. ***Id***. This Court may affirm a PCRA court's decision on any grounds if the record supports it. ***Id***. Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa.Super. 2011). However, we afford no such deference to its legal conclusions. ***Commonwealth v. Paddy***, 609 Pa. 272, 15 A.3d 431, 442 (2011); ***Commonwealth v. Reaves***, 592 Pa. 134, 923 A.2d 1119, 1124 (2007). Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary. ***Commonwealth v. Colavita***, 606 Pa. 1, 993 A.2d 874, 886 (2010).

Commonwealth v. Rykard, 55 A.3d 1177, 1183 (Pa.Super. 2012).

Appellant's initial contention is that his sentence for attempted murder exceeded the statutory maximum. This issue presents a traditional legality of sentence claim and need not be set forth under the ineffectiveness rubric. ***Jones***, ***supra***. Specifically, Appellant alleges that his sentence of twenty to forty years incarceration for attempted murder is illegal because the jury did not determine that he caused serious bodily injury to the victim. According to Appellant, the trial court did not define serious bodily injury for the jury and thus it could not have determined that he caused serious bodily injury to the victim. In addition, Appellant avers that since the original criminal complaint did not charge him with attempted murder, the Commonwealth violated ***Apprendi v. New Jersey***, 530 U.S. 466 (2000).

At the time of Appellant's conviction, the relevant statute read:[8]

> **(c) Attempt, solicitation and conspiracy to commit murder or murder of an unborn child.—**Notwithstanding section 1103(1) (relating to sentence of imprisonment for felony), a person who has been convicted of attempt, solicitation or conspiracy to commit murder or murder of an unborn child where serious bodily injury results may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years. Where serious bodily injury does not result, the person may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 20 years.

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[8] 18 Pa.C.S. § 1102(c) has been amended since Appellant's conviction. The amendments are not relevant herein.

Since a finding of serious bodily injury increases the maximum sentence, it is an element of the offense and must be proved beyond a reasonable doubt. ***See Commonwealth v. Johnson***, 910 A.2d 60 (Pa.Super. 2006).

While the initial criminal complaint did not reference attempted murder, the criminal information, which is the ordinary charging document in Pennsylvania and is treated as the equivalent of an indictment, ***see*** Pa.R.Crim.P. 566, indicates that he was charged with attempted murder causing serious bodily injury. The criminal information reads in relevant part:

> The District Attorney of Philadelphia by this information charges that on or about 11/18/01 in Philadelphia, Issac Naranjo
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> 1. Attempted to kill another human being intentionally and with malice
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> 2. While engaged in the perpetration of a felony, attempted to kill another human being with malice, or was an accomplice in the attempted malicious killing of another human being
>
> 3. Attempted to kill another human being with malice
>
> 4. And serious bodily injury resulted

Criminal Information, 3/1/02.

Accordingly, Appellant was charged in the information with attempted murder resulting in serious bodily injury and put on notice that the Commonwealth sought to prove serious bodily injury. However, the trial judge did not inform the jury that Appellant was charged with attempted murder causing serious bodily injury nor did the court instruct the jury that

serious bodily injury was an element of the attempted murder charge. Furthermore, the trial court failed to define serious bodily injury in its instructions for either attempted murder or aggravated assault. Therefore, we are constrained to agree that the jury was never asked to determine whether Appellant caused serious bodily injury as to the attempted murder charge.

In ***Johnson***, ***supra***, this Court held that a defendant convicted of attempted murder and aggravated assault was sentenced illegally where the jury did not determine that serious bodily injury occurred relative to the attempted murder charge. The trial court therein concluded that serious bodily injury was proven because the jury convicted the defendant of aggravated assault causing serious bodily injury. The ***Johnson*** Court found that the jury's consideration of serious bodily injury for the aggravated assault count was not relevant to the attempted murder conviction. Relying on ***Apprendi***, it ruled that to sentence a defendant to a maximum term of incarceration of forty years for attempted murder, the jury must determine that the Commonwealth proved serious bodily injury as it specifically pertained to the attempted murder charge.

Instantly, as in ***Johnson***, "the jury was never presented with, nor rendered a decision on, the question of whether a serious bodily injury resulted from the attempted murder." ***Johnson***, ***supra*** at 67 (footnote omitted). Due to both the trial court and the Commonwealth's failure to

ensure that the jury was informed that it must determine serious bodily injury as to the attempted murder charge, Appellant's sentence is illegal. Accordingly, we remand for re-sentencing.[9]

Appellant's next issue also presents a legality of sentence claim. Appellant alleges that his convictions for PIC and attempted murder merged because they are both inchoate crimes. In support of his position, Appellant relies on 18 Pa.C.S. § 906 and ***Commonwealth v. Ford***, 461 A.2d 1281 (Pa.Super. 1983). In ***Ford***, this Court held, based on the then-existing version of 18 Pa.C.S. § 906, that a defendant cannot be sentenced for both PIC and attempted murder where those two inchoate crimes have the same criminal objective.

The statute at issue in ***Ford***, broadly stated, "A person may not be convicted of more than one offense defined by this chapter for conduct designed to commit or to culminate in the commission of the same crime." ***Ford***, ***supra*** at 1289 (citing 18 Pa.C.S. § 906). However, the version of 18 Pa.C.S. § 906 that governed when Appellant was convicted read, "A person may not be convicted of more than one of the inchoate crimes of criminal attempt, criminal solicitation or criminal conspiracy for conduct designed to commit or to culminate in the commission of the same crime." 18 Pa.C.S.

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[9] We are aware that ***Commonwealth v. Johnson***, 910 A.2d 60 (Pa.Super. 2006), was decided after Appellant's trial. However, ***Johnson*** did not announce any new principles of law and merely relied on ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), which was decided prior to Appellant's trial.

§ 906 (Dec. 11, P.L. 1517, No. 164, § 1). In a plurality decision with no judges dissenting, our Supreme Court concluded that consecutive sentences for attempted murder and PIC did not violate merger or double jeopardy. ***Commonwealth v. Burkhardt***, 586 A.2d 385 (Pa. 1991) (plurality). In light of the plain textual difference between the versions of 18 Pa.C.S. § 906, Appellant's claim that PIC merges with attempted murder fails. Phrased differently, Appellant's PIC conviction is not the inchoate crime of attempt, solicitation, or conspiracy.

Insofar as Appellant makes boilerplate arguments relative to not being charged in his criminal complaint with attempted murder and that his criminal trespass, PIC, and simple assault charges were dismissed at a preliminary hearing and not properly reinstated, those issues were not included in his March 20, 2011 concise statement and he has not adequately developed them under the ineffectiveness rubric.

"To properly plead ineffective assistance of counsel, a petitioner must plead and prove: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." ***Burkett***, ***supra*** at 1272 (citations omitted). Where "a petitioner fails to plead or meet any elements of the above-cited test, his claim must fail." ***Id***.

Appellant contends that the trespass, PIC, and simple assault charges were dismissed for lack of evidence at case number MC: 0111-5522, on

February 15, 2002. However, on that same date, at MC: 0111-5521, following a preliminary hearing, each of these charges were bound over for court. Further, the Commonwealth amended the charges at MC: 0111-5521, at the preliminary hearing, to include the attempted murder charge. The Commonwealth is not required to proceed on duplicative complaints, ***see*** Pa.R.Crim.P. 505(B), nor can Appellant now complain of the lack of *prima facie* evidence introduced at his preliminary hearing. ***See Commonwealth v. Jones***, 929 A.3d 205, 209 (Pa. 2007); ***Commonwealth v. McCullough***, 461 A.2d 1229, 1231 (Pa. 1983).

Appellant also cannot establish prejudice from any purported inaction on the part of counsel at the preliminary hearing. In ***Commonwealth v. Lyons***, 568 A.2d 1266 (Pa.Super. 1989), this Court addressed an ineffectiveness claim relative to counsel's failure to object to the filing of an information without a preliminary hearing. Although we framed the discussion by referencing the truth-determining process language of the PCRA statute, which subsequently was held to be an articulation of the ***Strickland*** prejudice standard, ***see Commonwealth ex. rel. Dadario v. Goldberg***, 773 A.2d 126 (Pa. 2001), the ***Lyons*** Court did focus on a prejudice analysis. The ***Lyons*** Court noted that once a defendant is tried and convicted it is clear that *prima facie* evidence was introduced and therefore the defendant cannot establish prejudice.

We add that this Court in ***Commonwealth v. Lassen***, 659 A.2d 999 (Pa.Super. 1995), citing ***Lyons***, held that a claim regarding counsel's effectiveness at a preliminary hearing was not cognizable under the PCRA. The ***Lyons*** Court did not use the term cognizability and the remaining cases that the ***Lassen*** Court relied upon have been abrogated by ***Dadario***. Nonetheless, a PCRA petitioner simply cannot challenge an alleged defective criminal complaint or preliminary hearing procedure after his conviction since no constitutional prejudice can manifest itself. ***See also Commonwealth v. Krall***, 304 A.3d 488, 490-491 (Pa. 1973).

The third issue Appellant raises is that the court's jury instructions for aggravated assault, attempted murder, and REAP were improper. The jury instruction issue would be waived insofar as it could have been raised at trial. 42 Pa.C.S. § 9544(b). However, since Appellant premised all of his issues under the ambit of ineffective assistance of counsel, we may address the claims within that context. Of course, the ineffectiveness claim still must have been raised in Appellant's petition. Although Appellant's *pro se* petition and memorandum in support contain numerous allegations of ineffective assistance of counsel, he did not challenge trial counsel's failure to object to the jury instructions. Thus, the issues are waived. ***Commonwealth v. Wallace***, 724 A.2d 916 (Pa. 1999). Also, Appellant did not allege PCRA counsel's ineffectiveness for failing to present these specific arguments until after filing the notice of appeal in this matter. Therefore, any allegation

regarding PCRA counsel's stewardship is waived. ***Commonwealth v. Ford***, 44 A.3d 1190 (Pa.Super. 2012).

In his next claim, Appellant contends that all prior counsel were ineffective by failing to adequately investigate, develop, and present an alibi defense and by failing to seek a jury instruction that the jury could not infer guilt based upon Appellant's failure to prove his alibi. In a related issue, he avers that, since he testified as to an alibi, the trial court erred in declining to provide an alibi instruction.

Where the claim pertains to counsel's alleged failure in calling a witness, the petitioner must prove: (i) the witness existed; (ii) the witness was available to testify; (iii) counsel knew of, or should have known of, the existence of the witness; (iv) the witness was willing to testify; and (v) the absence of the testimony was so prejudicial as to have denied the defendant a fair trial. ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1143 (Pa. 2011); ***Commonwealth v. Cox***, 983 A.2d 666, 692 (Pa. 2009). The failure to interview or investigate a witness, however, is distinct from the failure to call a witness. ***Commonwealth v. Dennis***, 950 A.2d 945, 960 (Pa. 2008) (discussing ***Commonwealth v. Mabie***, 369 A.2d 369 (Pa. 1976); ***Commonwealth v. Perry***, 644 A.2d 705 (Pa. 1994)). Of course, a petitioner is still required to establish actual prejudice. ***Id***.

Appellant begins by asserting that counsel was ineffective for neglecting to file a notice of alibi. He highlights that he testified as to his

alibi and argues that, had counsel filed a notice of alibi, he would have been entitled to an alibi jury instruction. Additionally, he points out that trial counsel stated on the record that he was aware of at least one alibi witness, Alberto Cruz. Since the trial court declined to give an alibi instruction because the Commonwealth was not provided with a timely notice of the alibi, Appellant maintains that he suffered prejudice.

Appellant continues that counsel was ineffective in neglecting to request an alibi jury instruction. According to Appellant, his sole defense was an alibi and counsel should have sought an instruction that the failure to prove an alibi is not evidence of guilt. In addition, Appellant submits that counsel was ineffective in not objecting to the prosecutor's closing argument regarding his defense.

The prosecutor in her summation argued that Appellant for the first time was claiming to have been in Lancaster, Pennsylvania, and urged the jury to consider why this information was only being brought forward on the second day of trial. Appellant contends that the prosecutor knew that he did not suddenly change his story and "went far beyond simply explaining why the Commonwealth was not prepared to rebut Defendant's alibi defense." Appellant's Exhibit F, at 26.

Appellant also asserts that trial counsel did not adequately investigate Appellant's alibi. In direct contradiction to trial counsel's on-the-record statements, Appellant claims that Alberto Cruz was available and willing to

testify. In support of this position, he points to a document purportedly signed by Mr. Cruz indicating that he was willing to testify. Appellant proffers that, because counsel knew Alberto Cruz's name and phone number, he should have interviewed him. Relying on cases involving the failure to interview a witness, Appellant contends that trial counsel did not interview nor did he send an investigator to interview Mr. Cruz, nor serve him with a subpoena.

We begin by noting that the record, viewed in a light most favorable to the Commonwealth, refutes Appellant's claim that Mr. Cruz was available to testify. First, trial counsel, by Appellant's own admission, expressly stated that he was unable to locate the witness. Indeed, trial counsel asked the court to inform the jury that Appellant provided names of alibi witness, but they could not be located. Further, ***Turner/Finley*** counsel averred in her no-merit letter that she wrote to Mr. Cruz and another alleged alibi witness at their last known addresses and neither of them could be found. Appellant simply cannot establish that these witnesses were available to testify at the time of trial or even for purposes of a PCRA hearing. Since trial counsel could not find the alibi witnesses, he cannot be ineffective for not filing a notice of alibi as to those witnesses.[10] To the extent Appellant maintains

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[10] At the time of Appellant's trial, an alibi notice was governed by Pa.R.Crim.P. 573; it is now set forth under Pa.R.Crim.P. 567. A defendant could still testify under either rule as to an alibi despite not providing a
(Footnote Continued Next Page)

that trial counsel should have interviewed Mr. Cruz, an attorney cannot interview a person who does not wish to be found or who cannot be located.

Second, we discern no prosecutorial misconduct. A prosecutor is permitted to argue the lack of credibility of a purported alibi. Instantly, the prosecutor accurately noted that Appellant spoke to police after the incident and did not provide an alibi. She highlighted the change in story and noted that Appellant did not provide a notice of alibi. Appellant also cannot establish actual prejudice relative to counsel's decision not to request an alibi jury instruction since both the victim and her neighbor conclusively identified Appellant as the assailant.

Appellant's next claim, that trial counsel was ineffective for not filing a Rule 600 motion, is waived because he did not raise it in his petition, ***see Wallace***, ***supra***, nor did he allege PCRA counsel's ineffectiveness for declining to present this issue until after he filed his notice of appeal. ***See Ford***, 44 A.3d 1190. Thus, he is not entitled to relief.

Appellant also alleges that counsel was ineffective in failing to object to the Commonwealth's purported violation of Pa.R.Crim.P. 564, which controls amendments to criminal informations. Since Appellant entirely misconstrues the record in this matter, the issue cannot succeed. Appellant fails to understand the distinction between a criminal complaint and a

(Footnote Continued) ———————————

notice of alibi. Trial counsel stated that he was not required to file the notice because he was only presenting the testimony of Appellant.

criminal information, which are two separate and distinct documents governed by separate rules. ***Compare*** Pa.R.Crim.P. 504 with Pa.R.Crim.P. 560. According to Appellant, the Commonwealth amended his criminal information to include attempted murder. This claim is baseless. As discussed previously, the charge of attempted murder was added at Appellant's preliminary hearing, not via an amendment to the information. The addition of the attempted murder count occurred well before the filing of Appellant's criminal information. Since Appellant was aware of the charge of attempted murder at his preliminary hearing, he had ample notice of the offense. Furthermore, the criminal complaint articulated that Appellant

> unlawfully broke into the residence of the complainant, Kirenia Garcia, his girlfriend and in violation of a valid protection from abuse order chased the complainant into her neighbor's home where he attempted to cause and or did cause intentionally, knowingly, recklessly serious bodily injury to the complainant by cutting her face with an unknown object thereby causing bodily injury requiring over 100 stiches to close her wounds.

Criminal Compliant, 11/27/01. The complaint then referenced burglary, aggravated assault, simple assault, PIC, stalking, criminal trespass, contempt, REAP, and terrorist threats. A criminal complaint need not specify or cite to the statute allegedly violated, but must only advise the defendant of the nature of the offense charged.

Even assuming that Appellant's factual predicate was not grossly inaccurate, he would not be able to establish actual prejudice since this Court has construed the terms "additional or different offense" in Rule 564

as applying to offenses that are premised on additional facts and different elements. ***Commonwealth v. Roser***, 914 A.2d 447 (Pa.Super. 2006); ***see also Commonwealth v. Davalos***, 779 A.2d 1190, 1194 (Pa.Super. 2001) (discussing Rule 564's predecessor, Rule 229). Thus, the addition of a criminal charge, in an information, based on identical facts to the charges already advanced, does not automatically violate the rule. ***Roser***, ***supra***; ***Commonwealth v. Picchianti***, 600 A.2d 597 (Pa.Super. 1991). It is settled that,

> In reviewing a grant to amend an information, the Court will look to whether the appellant was fully apprised of the factual scenario which supports the charges against him. Where the crimes specified in the original information involved the same basic elements and arose out of the same factual situation as the crime added by the amendment, the appellant is deemed to have been placed on notice regarding his alleged criminal conduct and no prejudice to defendant results.

Commonwealth v. Sinclair, 897 A.2d 1218, 1222 (Pa.Super. 2006) (citation omitted). Only where "the amended provision alleges a different set of events, or the elements or defenses to the amended crime are materially different from the elements or defenses to the crime originally charged, such that the defendant would be prejudiced by the change," ***id***. at 1221, is the amendment prohibited.

Additionally,

> our Supreme Court has stated that following an amendment, relief is warranted only when the variance between the original and the new charges prejudices an appellant by, for example, rendering defenses which might have been raised against the original charges ineffective with respect to the substituted

> charges. ***Commonwealth v. Brown***, 556 Pa. 131, 135, 727 A.2d 541, 543 (1999). Factors that we must consider in determining whether a defendant was prejudiced by an amendment include: (1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during a preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation. ***Commonwealth v. Grekis***, 411 Pa.Super. 513, 601 A.2d 1284, 1292 (1992).

Id. at 1223.

Instantly, the attempted murder did not arise from different facts from those in the criminal complaint. Furthermore, the factual background of the charge was developed at the preliminary hearing and could not have altered Appellant's trial strategy or defense. Accordingly, Appellant is entitled to no relief. For identical reasons, Appellant's claim that the trial judge committed fraud by adding the attempted murder charge to the information on its own initiative is entirely devoid of merit. Lastly, Appellant's final issue is merely duplicative of issue C and fails for the same reasons outlined above.

Order affirmed in part, reversed in part, and judgment of sentence vacated. Appellant's motion entitled Declaration for Entry of Default is granted to the extent that we decline to review the Commonwealth's untimely brief. Appellant's motion for leave to file an amended brief is also granted. Case remanded for re-sentencing. Jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: 5/23/2013