NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. AVRON HOLLAND, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2833 EDA 2011

Appeal from the PCRA Order September 23, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1206740-2004, CP-51-CR-1206741-2004

BEFORE: BOWES, ALLEN, and PLATT,* JJ.

MEMORANDUM BY BOWES, J.: Filed: January 11, 2013

Avron Holland appeals from the September 23, 2011 order dismissing his first petition for PCRA relief without a hearing. While this appeal was pending, Appellant filed a motion seeking remand for additional proceedings based upon newly discovered evidence and a motion for default and procedural bar judgment,[1] both of which were deferred to us for disposition. After careful review, we deny the motions and affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] Appellant did not argue the substance of either motion in his appellate brief. While we deny Appellant's request that a default judgment be entered against the Commonwealth for failure to file a timely brief, we did not consider the Commonwealth's untimely brief in reaching our decision.

The PCRA court summarized the evidence underlying Appellant's conviction as follows:

> The evidence elicited at trial revealed that on April 21, 2003, at approximately 11:30 p.m., appellant, Michael Farrell and the decedent, Michael Jones, were standing together talking at 60th and Market Streets in the City and County of Philadelphia. Appellant was standing about ten feet away from them. Farrell heard a gunshot and ducked. He did not see where the shot came from. When Farrell looked up, he saw Jones on the ground with a gunshot wound to the right side of his head. He observed appellant still in the position he had been in before the gunshot. He also observed a small black gun on the ground about a foot in front of appellant. Farrell ran to Jones' car which was parked a short distance away, retrieved Jones' cell phone and dialed 911. Meanwhile, appellant flagged down Gregory Brooks, a "hack" cab driver, and asked him to take Jones to the hospital. On his way back to the corner, Farrell observed appellant and Brooks attempting to place Jones in the back seat of Brooks' 1999 green Honda Accord. Farrell assisted with getting Brooks into the back seat and appellant got into the front passenger seat. Appellant had a white towel in his hand which he placed beneath the passenger seat of Brook[s]'s car. Farrell returned to Jones' car.
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> Brooks and appellant transported Jones to the Misericordia Hospital emergency room. During the ride to the hospital, appellant was bending over the car's seat telling Jones he was going to be alright while he rifled through Jones' pockets. When they arrived at the hospital both men got out and went into the emergency room to get help. The police arrived at approximately the same time, asked appellant and Brooks their names and told them to wait so that they could be interviewed. Appellant gave the false name, Malik Jones, with an address of 44 North Felton Street. Before the police could speak with him, appellant left the hospital. Jones' cell phone was turned over to his father, Michael Jones, Sr. The senior Jones, in response to information he received from one of his son's friends, called appellant from his son's cell phone which had appellant's information already programmed into it, and asked appellant why he had shot his son. Appellant reported that it was an accident; the gun dropped and went off. Appellant called the cell phone several times, attempting to explain what happened.

> Gregory Brook[s]'s independent or "hack" cab, the 1999 green Honda Accord, was impounded and transported to the police crime lab for processing directly from the emergency room area of Misericordia Hospital. Leo Rahill of the Police Crime Scene Unit who processed the vehicle, discovered two firearms concealed beneath the front passenger seat where appellant had been sitting: a semiautomatic .9 millimeter Ruger serial number 310-26514, fully loaded and a INA .38 Special revolver, serial number 059694 and 4 of 5 cartridges and a fired cartridge case still in the cylinder. Brooks testified that he had just cleaned his vehicle and there were no guns in the car prior to this incident. Police Officer Robert Stott of the Firearms Identification Unit received the .9 millimeter semiautomatic and the .38 Special, several pieces of ballistic evidence removed from the body of Jones by the medical examiner who performed the autopsy; a bullet jacket, bullet fragment and lead fragment. Officer Stott concluded that the bullet jacket was fired from the .38 Special confiscated from beneath the seat of Brook[s]'s vehicle. He was unable to determine if the bullet fragment and the lead fragment came from the .38 Special to a degree of scientific certainty. In addition to testing the ballistic evidence, Officer Stott conducted a trigger pull test on each of the firearms to determine how much weight it took to pull the trigger and fire the weapon. He determined that the .38 Special required 4.5 to 5 pounds of pressure in the single mode and 15 to 15.5 pounds of pressure in the double mode.
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> Homicide Detective Gerald Lynch conducted further investigation and interviewed Farrell and Brooks. Based on his investigation, a warrant for appellant's arrest was prepared on May 13, 2003. After numerous attempts to locate appellant to serve the warrant were unsuccessful, the case was turned over to the Homicide Unit's Fugitive Squad. On September 25, 2003, notice was received that appellant was in custody in Easton, Maryland. On October 20, 2004, appellant was extradited from Maryland to Philadelphia to face murder charges. Following a jury trial, appellant was found guilty of first degree murder and sentenced to life imprisonment.

Trial Court Opinion, 2/7/12, at 1-4 (footnotes omitted).

Appellant's post-sentence motions were denied and this Court affirmed the judgment of sentence on June 4, 2007. ***Commonwealth v. Holland***,

931 A.2d 46 (Pa.Super. 2007) (unpublished memorandum). The Supreme Court denied allowance of appeal on December 14, 2007. ***Commonwealth v. Holland***, 938 A.2d 1052 (Pa. 2007). Appellant filed a timely *pro se* PCRA petition on July 23, 2008, and counsel was appointed. On May 26, 2009, Appellant filed a *pro se* motion for change of appointed counsel, alleging therein that counsel refused to communicate with him or assist him in pursuing PCRA relief. Counsel filed an amended petition on January 26, 2010, together with a letter brief in support of the petition. On February 9, 2010, Appellant filed a motion to proceed *pro se* or for change of appointed counsel in which he alleged that counsel refused to pursue the issues that Appellant had asked him to present in the amended petition. He asked that counsel be removed from his case, that a ***Grazier*** hearing be held, and that he be permitted to proceed *pro se*. The court, following a ***Grazier*** hearing on March 8, 2010, granted Appellant's motion to proceed *pro se* and counsel was permitted to withdraw on March 12, 2010.

Appellant filed motions seeking an extension of time to file an amended petition, requesting transcripts and other documents, a private investigator, a ballistics expert, cell phone records, and the appointment of standby counsel. The extension of time was granted and the transcripts and documents were forwarded. The court denied the remainder.

The court issued Rule 907 notice of its intent to dismiss the PCRA on July 11, 2011. Appellant responded first on July 18, 2011 and again on September 16, 2011. By order dated September 23, 2011, Appellant's PCRA

petition was dismissed. Appellant timely filed the within appeal on October 12, 2011, and complied with the court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal.

Appellant presents ten issues for our review.[2] The first five issues seek a new trial or alternatively, an evidentiary hearing for trial counsel's alleged ineffectiveness in 1) admitting Appellant's guilt to shooting the victim, albeit accidentally, in opening and closing statements without consulting with or obtaining Appellant's consent; 2) failing to object or failing to seek a mistrial or curative instruction to sustained objections to prosecutorial misconduct; 3) not conducting cross-examination of the two detectives who relied upon hearsay testimony to show the unavailability of a witness; 4) failing to object to the use of unauthenticated phone records; and 5) failing to preserve Appellant's claim that the verdict was against the weight of the evidence. Three issues involve the alleged ineffectiveness of appellate counsel. Appellant's final two issues allege that the PCRA court erred.

Our scope and standard of review in PCRA matters well settled.

> 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

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[2] Appellant's numbering of the issues in his statement of the questions involved is inconsistent with the numbering and order of the issues in the argument portion of his brief. We will address the issues in the order in which they were argued.

> (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. Ford, 44 A.3d 1190, 1194 (Pa.Super. 2012). Where, as here, there was no hearing on the petition, we must examine each of the issues raised in the petition in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact that warranted a hearing. ***See Commonwealth v. Derrickson***, 923 A.2d 466, 468 (Pa.Super. 2007).

The PCRA court correctly stated that in order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction resulted from one or more of the circumstances listed in 42 Pa.C.S. § 9543(a)(2). Pertinent to this case is subsection "(ii) "Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). In addition, the error cannot have been previously

litigated or waived and the failure to litigate it previously "could not have been the result of any rational, strategic or tactical decision by counsel." 42 Pa.C.S. § 9543 (a)(4).

At issue is both trial and appellate counsel's ineffectiveness. Counsel is presumed to be effective. A petitioner can overcome that presumption only by pleading and proving (1) that the underlying claim has arguable merit; (2) counsel had no reasonable basis for his action; and (3) that he suffered actual prejudice from counsel's act or failure to act. ***Ford***, ***supra*** at 1194; ***see also Commonwealth v. Pierce***, 786 A.2d 203, 213 (Pa. 2001), (adopting the standard for reviewing claims alleging ineffective assistance of counsel devised by the U.S. Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984)).

Appellant alleges first that trial counsel essentially conceded his guilt when he advised the jury in opening statement that Appellant shot the victim but it was an accident. Appellant contends that counsel had a duty under ***Florida v. Nixon***, 543 U.S. 174 (2004), to consult with him and obtain his consent before implementing a strategy that conceded his guilt and that he failed to do so without any reasonable basis. Thus, he was effectively denied the assistance of counsel. The PCRA court found that Appellant's failure to develop this claim was fatal. Trial Court Opinion, 2/7/12, at 7.

We have reviewed the transcript of trial counsel's opening statement and there is no factual support for Appellant's contention that his counsel pled him guilty to involuntary manslaughter. Counsel disputed that his client shot the victim, a longtime friend, impugned the Commonwealth's star witness, explained that his client fled because the victim's family was threatening him, and reminded the jury that Appellant took the victim to the hospital. Counsel promised that "there will be a lack of evidence in this case to convict this man here of any degree of murder, of any degree of murder." N.T. Trial (Jury), 1/4/06, at 48. In his closing argument, trial counsel pointed out inconsistencies in the testimony of Commonwealth witnesses, their motives to fabricate, Appellant's lack of a motive, and suggested that Mike Farrell had more opportunity to kill the victim than Appellant. He characterized the Commonwealth's case as one "based on speculation, rumor, hearsay and conjecture," N.T. Trial, 1/9/06, at 37, and asked the jury to return a verdict of not guilty to first degree murder, third degree murder, and involuntary manslaughter. ***Id***. at 54. Since we find no factual predicate for Appellant's claim that trial counsel pled him guilty to involuntary manslaughter without his consent, it necessarily follows that the underlying claim lacks arguable merit.

Next, Appellant argues the counsel was ineffective for failing to object to the prosecutor's remark in her opening statement that, "You are sharing the room with a killer[,]" N.T. Trial, 1/4/06, at 29, and comment in closing

argument, "Imagine being a member of the victim's family.[3]" N.T. Trial, 1/9/06, at 56. Furthermore, while counsel's objections were sustained and the prosecutor's statements stricken to the effect that family members kill each other all the time and that a verdict of "involuntary manslaughter is a total victory for the defendant," N.T. Trial, 1/9/06, at 78, Appellant asserts that counsel was ineffective because he failed to request a mistrial or curative instruction. He argues that the cumulative effect of these remarks was so prejudicial as to violate his due process rights and there was a reasonable probability that had counsel performed effectively, the outcome of the case could have been different.

The PCRA court found these claims to be fatally underdeveloped and we agree. Appellant failed to analyze his claims under the three-prong ***Strickland/Pierce*** test. Trial Court Opinion, 2/7/12, at 7. Appellant offered no argument as to why some of the comments were objectionable. As to those instances where counsel did object and the objections were sustained, Appellant offered no argument in support of his claim that a mistrial would have been granted. Nor does Appellant's general allegation of prejudice flowing from the cumulative effect of these comments afford relief where, as here, there has been no showing that the claims have arguable

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[3] The entire statement made by the prosecutor was "Imagine being the family and receiving the information from him [Appellant] saying it was an accident, 'Calm down. Calm down. It was an accident.'" N.T. Trial, 1/9/06, at 56.

merit individually. ***Commonwealth v. Washington***, 927 A.2d 586, 617 (Pa. 2007); ***Commonwealth v. Williams***, 896 A.2d 523, 548 (Pa. 2006) ("no number of failed claims may collectively attain merit if they could not do so individually."). Hence, no relief is due on this claim.

Appellant alleges that counsel was ineffective in failing to cross-examine the Commonwealth's witnesses during an evidentiary hearing to determine whether the Commonwealth was diligent in trying to locate Michael Farrell to justify the use of his testimony at the prior trial. He maintains that the detectives' testimony consisted of hearsay and violated the confrontation clause. The PCRA court misapprehended Appellant's argument as one challenging the use of the Farrell's prior recorded testimony rather than the detectives' testimony. Regardless, the court was correct in finding the argument to be "woefully undeveloped" and without merit. Glaringly absent is any proffer of the substance of the cross-examination trial counsel should have conducted of the detectives and any argument as to how it would have changed the outcome. Thus, Appellant has failed to substantiate this bald ineffectiveness claim.

Appellant's charge that counsel was ineffective in failing to object to the Commonwealth's use of unauthenticated hearsay phone records to corroborate the father of the victim's testimony that he admitted culpability in the death of the victim is wholly without merit. Counsel objected to the phone records on both authentication and hearsay grounds. N.T. Trial,

1/9/06, at 17. The objections were overruled. ***Id***. at 19. Thus, we find no reasonable basis for Appellant's claim.

Appellant's last assertion of ineffectiveness of trial counsel involves his alleged failure to preserve the argument that the jury's verdict was against the weight of the evidence in a post-trial motion. He argues that he was prejudiced because this Court found the claim waived on direct appeal. Appellant, however, neglects to substantiate his underlying claim, *i.e*., that the verdict was against the weight of the evidence. The PCRA court correctly stated that Appellant would have to establish that "the verdicts were based upon tenuous and vague evidence such that it shocks one's sense of justice," citing ***Commonwealth v. Murray***, 579 A.2d 111, 113 (Pa.Super. 1991). The court, after thoroughly reviewing and summarizing the evidence, concluded that the weight challenge was meritless and that counsel could not be deemed ineffective for failing to pursue a meritless claim. After a thorough review of the record, we see no basis to disturb that finding.

Next, Appellant asserts three claims of appellate counsel's ineffectiveness. First, he alleges that appellate counsel did not properly frame and develop the issue of the "transferred intent" instruction, and therefore, he was unsuccessful on appeal in asserting this error. The record reveals that this issue arose when the jury submitted two questions to the court during its deliberations. First, the jury asked, "If you intend to kill

someone and you shot the wrong person, then, is this first degree murder?" N.T. Trial, 1/10/06, at 4-5. The following related question was, "If you intend to kill someone and you shot the wrong person, is the intent still here?" ***Id***. After the trial court announced its intention to counsel to give the jury "some version of transferred intent," ***id***., defense counsel objected on the basis that there was no evidence to support such a theory and that such an instruction "basically sandbags the defense." ***Id***. at 7. The court overruled the objection and instructed the jury on transferred intent, cautioning them that the verdict had to be based on the evidence adduced at trial and the reasonable inferences therefrom. On direct appeal, this Court found that the trial court did not abuse its discretion in giving the supplemental instruction. ***Holland***, ***supra***.

The PCRA court concluded, based on this Court's earlier holding, that Appellant's claim had been previously litigated. However, Appellant maintains that the issue presented in his petition is not whether it was an abuse of discretion to give a transferred intent instruction, but whether appellate counsel was ineffective because he did not challenge the content of the instruction given. We find support for Appellant's position in our earlier decision where we specifically noted that Appellant did not challenge the propriety of the instruction itself. ***See Holland***, ***supra*** (slip memorandum at 10 n.5).

However, trial counsel did not object to the correctness of the substance of the charge, and thus, he failed to preserve that argument for appellate review. Since Appellant has not alleged that trial counsel was ineffective in this regard, any ineffectiveness claim premised on appellate counsel's failure to advance this argument on appeal cannot succeed. Furthermore, Appellant fails to highlight any specific portion of the charge that he believes was legally incorrect. We note that the instruction given was very similar to the transferred intent instruction sanctioned in ***Commonwealth v. Thompson***, 739 A.2d 1023 (Pa. 1999).

In addition, the court reminded the jury that the verdict had to be based on the evidence introduced, the facts and inferences found, and could not be based on speculation, guess or sympathy. Thus, contrary to Appellant's assertion, the instruction did not compel the jury to presume a fact not supported by the evidence. Moreover, Appellant's argument that there was no evidence that he even possessed, aimed, or discharged a handgun is nothing more than a thinly veiled attack on the court's decision to instruct the jury on transferred intent, the very claim that this Court rejected on direct appeal.[4] For these reasons, no relief is warranted.

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[4] Contrary to Appellant's representation, there was evidence that Appellant was at the scene with a firearm at the time of the shooting. Bobby Scott testified that earlier that evening, he saw Appellant carrying a small black revolver on 60th Street. N.T. Trial, 1/5/06, at 130. Scott and Michael Farrell testified that Appellant was with them and the decedent at that location at
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Appellant next challenges appellate counsel's effectiveness because he failed to argue that the trial court erred in permitting hearsay testimony from the two detectives at the unavailability hearing to establish the Commonwealth's diligence in trying to locate witness Michael Farrell. Trial counsel twice objected to alleged hearsay, and thus, according to Appellant, properly preserved the issue. Appellant contends that this issue was stronger than the issues actually presented on appeal, if only because it was preserved below while the other issues raised were determined to be waived.

Again, Appellant fails to proffer any argument as to how the three-pronged ineffective assistance test is satisfied. Furthermore, while preserved issues arguably have greater vitality on appeal than those found waived, Appellant's underlying claim must still have merit in order to afford relief. Appellant offers no argument in support of his claim that the alleged hearsay was inadmissible, and accordingly, the PCRA court found this issue to be woefully underdeveloped. We agree.

The purpose of the unavailability hearing, conducted outside the presence of the jury, was to determine whether Michael Farrell was

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the time of the shooting. ***Id***. at 142; N.T. Trial, 1/6/06, at 51. Farrell placed Appellant four to five feet away from the victim, on the victim's right side, the direction from which the shot was fired. ***Id***. at 52. The victim's father testified that Appellant told him that it was an accident, and that the gun discharged when it fell. ***Id***. at 61-62.

unavailable so that the Commonwealth could use his prior recorded testimony. Since this proceeding was only calculated to determine whether the witness's prior testimony was admissible as evidence, the hearsay rule was inapplicable. ***See*** Pa.R.E. 104(a). Thus, appellate counsel cannot be deemed ineffective for failing to pursue an avenue on appeal that Appellant has failed to establish had any arguable merit.

Appellant contends that an evidentiary hearing was required to inquire into appellate counsel's failure to properly develop the sufficiency of the evidence arguments, which resulted in waiver of those claims on appeal. He claims that counsel failed to perform the basic duties required of appellate counsel, *i.e.*, reading the record, researching applicable law, and citing to relevant and persuasive legal authority.

We disagree with the PCRA court's conclusion that this issue was either previously litigated or waived. A Sixth Amendment claim alleging ineffective assistance of counsel raises an issue cognizable under the PCRA even if the claim underlying the ineffectiveness claim has been previously litigated and rejected. ***Commonwealth v. Collins***, 888 A.2d 564, 573 (Pa. 2005). However, assuming *arguendo* that appellate counsel was ineffective in his briefing and development of the sufficiency claims, Appellant's claim does not entitle him to relief because he failed to set forth the substance of the sufficiency arguments that counsel should have made or demonstrate how the evidence was insufficient to support the verdict. Hence, he failed to

satisfy the first prong of the ***Strickland-Pierce*** test: that his underlying claim, that the evidence was insufficient, had arguable merit. Nor does he establish prejudice, *i.e.*, that there is a reasonable probability the outcome of the appeal would have been different had appellate counsel made proper sufficiency arguments. On the record before us, there was no basis for an evidentiary hearing without this preliminary showing.

Appellant challenges the sufficiency of the PCRA court's Rule 907 notice to dismiss his PCRA petition. He avers that the notice did not contain specific findings of fact and conclusions of law for the dismissal.

Pa.R.Crim.P. 907 provides in pertinent part:

> Except as provided in Rule 909 for death penalty cases,
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> (1) the judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue.

Pa.R.Crim.P. 907.

The PCRA court utilized a form entitled, "Notice Pursuant to Pennsylvania Rule of Criminal Procedure 907," to apprise Appellant that it intended to dismiss the petition because the issues raised were without

merit. Appellant filed an objection asserting that the notice was insufficient as it did not include specific findings of fact and conclusions of law. Nonetheless, the court dismissed the petition. It determined, after reviewing "appellant's submissions, the Commonwealth's response and the relevant case law," "that appellant was not entitled to PCRA relief and no purpose would be served by further proceedings." Trial Court Opinion, 2/7/12, at 15.

We agree with Appellant that the boilerplate 907 notice form is not specific. Merely placing an "x" before the option that the issues in the petition are "without merit" does not constitute reasons for the dismissal within the letter and spirit of the rule. ***See Commonwealth v. Rush***, 838 A.2d 651, n.9 (Pa. 2003) (holding that Rule 909(B)(2) requires that a PCRA court provide capital defendants with pre-dismissal notice of its reasons for dismissal and merely stating that the issues are without merit is insufficient). That said, however, after a thorough review of the record we agree with the PCRA court that nothing would be served by further proceedings. Appellant had previously requested and was afforded an opportunity to amend his amended PCRA petition. The petition did not present any credibility or factual issues that warranted an evidentiary hearing and Appellant failed to plead or prove that he was entitled to PCRA relief.

Appellant's final claim is that the PCRA court abused its discretion when it denied his request for funding in order to obtain the services of a ballistics expert and a private investigator. He claims that ballistics evidence was critical to the case and only such an expert could confirm that the Commonwealth's testing on the mutilated bullet fragment was reliable. Additionally, Appellant maintained that he required the services of a private investigator in order to obtain cellular telephone records from Sprint/Nextel presumably to prove that he did not call the victim's father and admit to shooing his son.

Investigators can be appointed by a PCRA court to assist indigent petitioners where it is demonstrate that the assistance was reasonably necessary to the preparation of the case. ***See Commonwealth v. Bridges***, 886 A.2d 1127, 1131 (Pa. 2005). We review the denial of a request for an investigator or an expert for an abuse of discretion. ***Id***. To establish an abuse of discretion, an appellant must make a clear showing as to the content, relevance, and materiality of the potential witness's testimony. ***Commonwealth v. Peterkin***, 513 A.2d 373, 385-86 (Pa. 1986).

Contrary to Appellant's representations, the record does not substantiate his claim that asked the PCRA court to authorize the services of a private investigator to obtain telephone records from the cellular carrier. The PCRA court afforded Appellant a hearing on his requests. Appellant was unable to articulate how or why he needed a private investigator. The court

invited him to research why he required an investigator and to put that information in a petition. Appellant did not do so.

With respect to the ballistics expert, we glean from the record that trial counsel retained a ballistics expert but did not offer his testimony at trial. At the hearing, Appellant could not articulate how another ballistics expert could provide any information relevant to his PCRA claims. The court, unable to ascertain what Appellant hoped to accomplish with such an expert, held Appellant's request in abeyance pending a more specific explanation of why he needed such an expert. No such explanation was forthcoming.

At that same hearing, Appellant asked the court to order Sprint/Nextel to turn over cell phone records for the phone number attributed to him. He stated that they were relevant to whether or not he placed the call to the victim's father. Appellant conceded that the phone records were admitted at trial for this purpose but he complained that it was never substantiated that he owned the phone. N.T. Trial, 3/18/12, at 13. He suggested that counsel failed to object to the records as unauthenticated, a contention that is flatly refuted by the record. N.T. Trial, 1/9/06, at 17. Counsel objected to the admission of the phone records on both authentication and hearsay grounds; the objections were overruled. ***Id***. at 19. The court denied his request for an order compelling the phone carrier to produce those records absent an additional offer of proof. The PCRA court gave Appellant sixty days to file an amended petition with a more specific offer of proof as to why he needed

these experts and documents but Appellant did not avail himself of that opportunity.

Discovery is not generally permitted in PCRA proceedings. Pa.R.Crim.P. 902 (E)(1). The exception to this rule is where, after a showing of exceptional circumstances, leave of court is granted. The PCRA court characterized Appellant's requests as "[b]ald assertions, unaccompanied by any supporting evidence" and concluded that it did not meet the showing of exceptional circumstances under ***Commonwealth v. Cox***, 983 A.2d 666, 692 (Pa. 2009). Trial Court Opinion, 2/7/12, at 14. The PCRA court also found that Appellant "failed not only to identify what information he seeks, he has also failed to demonstrate that the expert and/or the private investigator would provide the desired information and that this information was necessary in support of his PCRA claims." ***Id***. at 13. We agree and find no abuse of discretion on the record before us.

Finally, Appellant's motion for remand based upon purported newly discovered evidence is denied.[5]

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[5] Appellant alleged that on April 26, 2012, he received a copy of the criminal history of Commonwealth witness Michael Farrell and learned that he had several criminal cases pending against him when he testified against Appellant that were subsequently withdrawn. He asserts, without more, that this is newly-discovered evidence that Farrell received leniency on such charges in return for his testimony against Appellant. The record reveals, however, that the Commonwealth advised Appellant at the preliminary hearing of the charges pending against Mr. Farrell. N.T. Trial, 1/6/06, at 31-32. At trial, Farrell was questioned extensively about those open charges
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Motion for remand denied. Motion for default judgment and procedural bar judgment denied. Order affirmed.

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and he denied that he had been made any offers, promises, or deals regarding those cases. ***Id***. at 57. Thus, whether or not Farrell was promised favorable treatment on pending charges for his testimony was information available to and used by Appellant at the time of trial and not newly discovered. Information that these charges were subsequently withdrawn was of record prior to the filing of the within PCRA petition, and hence, Appellant's failure to assert the claim in his petition results in waiver.