**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>CANDELARIO SANCHEZ<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br>No. 340 MDA 2012 |

Appeal from the Order Dated January 13, 2012
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0001621-2006

BEFORE: SHOGAN, J., MUNDY, J., and OTT, J.

MEMORANDUM BY OTT, J. Filed: March 14, 2013

Candelario Sanchez appeals from the order entered on January 13, 2012, denying him relief on his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 et seq. Sanchez, who had been convicted of drug crimes and sentenced to an aggregate term of 25 to 50 years' incarceration, raises five issues in this appeal. (1) Trial counsel was ineffective for failing to properly cross-examine the Commonwealth's expert regarding drug packaging and processing and the PCRA court erred in failing to grant funds to obtain an expert to testify at the PCRA hearing; (2) Trial counsel was ineffective for failing to challenge the legality of the search warrant for 314 Reinecke Place, Sanchez's residence; (3) trial counsel was ineffective for failing to elicit relevant testimony from co-defendant, Santos Ramos-Rodriguez; (4) trial counsel was ineffective for advising Sanchez not

to testify at trial; and (5) trial counsel was ineffective for failing to object to testimony regarding lab test results by someone other than the technician who performed the tests. After a thorough review of the submissions by the parties, relevant law, and the official record, we affirm.

On the first four issues, we affirm on the basis of the Pa.R.A.P. 1925(a) opinion by the Honorable Richard K. Renn. We write separately on the final issue.[1] The parties are directed to attach a copy of the PCRA court opinion in the event of further proceedings.

We recite the factual history from our Court's direct appeal opinion.[2]

> On November 22, December 1, and December 7, 2005, [Sanchez's] co-defendant, Santos B. Ramos-Rodriguez [footnote omitted] ("Santos"), sold five and one-half ounces of cocaine to a confidential informant ("CI") during three controlled buys. On December 14, 2005, [Sanchez] and Santos were arrested while attempting to sell cocaine to the CI; [Sanchez] was present in the vehicle with Santos when the delivery was to occur. [Sanchez] and Santos were searched, and keys to three houses were seized.[3] A subsequent search of 626 Chestnut Street resulted in the police finding 1,600 grams of heroin; 3,700 grams of cocaine; $43,554 in cash; as well as packaging materials and a stolen gun. Also at this residence, police discovered mail in the name of [Sanchez] in the top right dresser drawer of bedroom furniture. (Notes of Testimony, 7/5/06-

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[1] ***See Commonwealth v.Fransen***, 42 A.3d 1100, 1113 (Pa. Super. 2012) (an appellate court may affirm a valid judgment based on any reason appearing as of record, regardless of whether it is raised by appellee).

[2] ***See Commonwealth v. Sanchez***, 2194 MDA 2007 (3/24/09).

[3] The police could not testify which of the men possessed which set(s) of keys.

> 7/7/06 at 87.) Medical paperwork for [Sanchez] and a letter addressed to [Sanchez] were recovered here. Additionally, the police found pictures of [Sanchez] and his co-defendant.
>
> The residence at 32 North Queen Street yielded drug packaging materials, a small amount of drugs, and various paperwork in the name of "Santos Ramos." At 314 Reinecke Place, the "processing house," the police found drugs; sandwich bags; plastic bags with the corners ripped; scissors; a coffee grinder; and a newspaper with numbers written in the margins.[4] Originally, 314 Reinecke Place was leased to Santos; however, a year after Santos signed the lease, he moved to 626 Chestnut Street and [Sanchez] assumed the lease. In fact, Santos co-signed the lease with [Sanchez]. An electric bill addressed to Santos was also found along with [Sanchez's] mail.

Opinion, 3/24/09 at 1-2.

We additionally note that a neighbor of the Chestnut Street residence testified she often saw Sanchez at that residence, even when Santos was not present. Sanchez was refinishing furniture there. Sanchez took the witness into the residence to show her the completed furniture. The witness never saw any indication of drugs when she was there. Santos testified at the trial and claimed Sanchez was not part of the drug dealing activities and on the day he was arrested, Santos was giving Sanchez a ride to a relative's home.

Sanchez was convicted of possession with intent to deliver cocaine and heroin, conspiracy as well as other related crimes.[5] Sanchez filed a direct

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[4] The PCRA court correctly notes that no drugs were found at the Reinecke Place residence. This includes no evidence of drug residue on anything seized pursuant to the warrant. We also note that only one plastic bag with a corner ripped off was found, not multiple bags.

[5] 35 P.S. § 780-113(a)(30) (cocaine and heroin) and 18 Pa.C.S. § 903, respectively.

appeal, but was afforded no relief. ***See Commonwealth v. Sanchez***, ***supra***. He then filed this, timely, PCRA petition. After a hearing, he was denied relief and this appeal followed.

As related above, we rely on the opinion of the Honorable Richard K. Renn regarding the disposition of Sanchez's first four claims. [6]

Sanchez's fifth and final claim is that trial counsel was ineffective for failing to object to the testimony of Jeffrey Wagner, forensic drug supervisor for the Pennsylvania State Police. Wagner did not perform the tests on the evidence obtained in this matter. The testing was performed by Kathy Martin, a technician, who, at the time of trial had changed jobs and was employed as a laboratory technician for the Virginia Department of Forensic Sciences. Wagner, as Martin's supervisor, was allowed to testify regarding the contents of the lab reports, because the reports were business records and therefore were admissible as an exception to the hearsay rule. ***See*** Pa.R.E. 803(6).

The Commonwealth and the PCRA court agreed that at the time of trial, relevant law forbid the use of a supervisor to read in lab test reports based on the business records exception. ***See Commonwealth v. Carter***, 861 A.2d 957 (Pa. Super. 2004) (en banc).

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[6] The trial court authored a 1925(a) opinion on March 20, 2012 that specifically addressed the Sanchez's first issue regarding the failure to obtain an expert. That decision incorporated the prior decision of January 17, 2012. Our reliance on the trial court's reasoning includes both decisions.

> In summary, we conclude that Appellant's constitutional right to confrontation was violated when the court admitted the lab report without the testimony of the forensic scientist who performed the mechanics of the testing and prepared the report. We base this conclusion on the following reasons, described above and summarized here: (1) Mr. Reigle was not proffered as an expert but, rather, was proffered and colloquied as a custodian of business records of the lab because the Commonwealth proceeded on the erroneous assumption that the report was properly admitted as a business record; (2) even if Mr. Reigle had been proffered as an expert, the entire substance of his testimony was merely a repetition of the information in the lab report, and the lab report would have remained inadmissible hearsay despite the fact that, as an expert, Mr. Reigle would have been entitled to rely upon it in formulating his own opinion; (3) Mr. Reigle did not have the "close connection" to the actual testing like the witnesses did in ***Kennedy*** and ***Williams***, such that admission of the lab report could be deemed harmless error; and (4) the information in the erroneously admitted report was the only evidence of record establishing an essential element of the drug offenses herein, *i.e.,* the presence of cocaine, and therefore, pursuant to ***McCloud***, required a witness with personal knowledge of the testing.

***Commonwealth v. Carter***, 861 A.2 at 969. Therefore, the trial court, over objection by co-defendant's counsel, erroneously allowed Wagner to testify that the evidence taken from the Chestnut Street residence, the Queen Street residence, as well the that which was obtained through the controlled buys and taken from Ramos-Rodriquez's person was, in fact, illegal narcotics. The lab report also indicated that a quantity of white powder,

found in a shopping bag at Sanchez's residence was not a controlled substance.[7]

We agree, but for different reasons, with the PCRA court that the error was ultimately harmless.[8] The remedy provided for in ***Carter*** was a new trial, not dismissal of the charges. Therefore, had trial counsel objected thereby preserving the issue for direct appellate review, Sanchez would have obtained a new trial. However, our Supreme Court reversed Carter on October 17, 2007. ***See Commonwealth v. Carter***, 932 A.2d 1261 (Pa. 2007). By the time Sanchez filed his timely direct appeal, *nunc pro tunc*, on December 27, 2007, the Supreme Court had reversed ***Carter***. There would have been no point in granting a new trial, because in the new trial Wagner would have been allowed to testify regarding the lab test results just as he had in the original trial. Therefore, even if the issue had been preserved, he could not have prevailed.[9]

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[7] There is no indication in the record how much white powder was seized from the Reinecke Street residence. Nor is there any indication what the white powder was. All the record reveals is that the seized material was not illegal.

[8] ***See Commonwealth v. Fransen***, 42 A.3d 1100, 1113 (Pa. Super. 2012) (an appellate court may affirm a valid judgment based on any reason appearing as of record, regardless of whether it is raised by the appellee).

[9] The law has changed again, reverting to the requirement that the person who conducted the tests be present to testify. ***See Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009) and ***Commonwealth v. Barton-Martin***, 5 A.3d 363 (Pa. Super. 2010). However, those decisions are not
*(Footnote Continued Next Page)*

Judgment of sentence affirmed. Parties are directed to attach a copy of the trial court opinion in the event of further proceedings.

*(Footnote Continued)* ––––––––––––––––––––––

retroactively applied, and do not provide an avenue of relief for Sanchez. ***See Commonwealth v. Brandon***, 51 A.3d 231, 236 (Pa. Super. 2012).

**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA**

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| Commonwealth of Pennsylvania | : | |
| | : | |
| vs. | : | No. CP-67-CR-0001621-2006 |
| | : | |
| Candelario Sanchez | : | PCRA Petition |
| Inmate #GV-5747 | : | |
| SCI Cresson | : | |

Appearances:
For the Commonwealth: Jonathon Blake, Esquire
For Defendant: Lori Yost, Esquire

**ORDER DENYING DEFENDANT'S PETITION FOR POST-CONVICTION COLLATERAL RELIEF**

**AND NOW**, this 13th day of January, 2012, the Court has before it Defendant's Petition for Post-Conviction Collateral Relief. We hereby **DENY** Defendant's Petition. The reasons for this Court's decision can be found in the Opinion in Support.

Defendant has thirty (30) days from the date of this order to file a Notice of Appeal to the Superior Court of Pennsylvania. Defendant must contact his counsel, Lori Yost, immediately if he wants to appeal, or he may file the appeal on his own behalf.

We direct that copies of this Order shall be sent to the Commonwealth, to Lori Yost, Esquire, counsel for Defendant, and to Defendant by certified mail, return receipt requested, at SCI-Cresson, P.O. Box A, Cresson, PA 16699-0001.



BY THE COURT,

Richard K. Renn, Judge

**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA**

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| Commonwealth of Pennsylvania | : | |
| | : | |
| vs. | : | No. CP-67-CR-0001621-2006 |
| | : | |
| Candelario Sanchez<br>Inmate #GV-5747<br>SCI Cresson | : | PCRA Petition |

Appearances:

For the Commonwealth: Jonathon Blake, Esquire
For Defendant: Lori Yost, Esquire

**OPINION IN SUPPORT OF ORDER DENYING DEFENDANT'S PETITION FOR POST-CONVICTION COLLATERAL RELIEF**

Factual and Procedural History:

Defendant was arrested on December 14, 2005 and charged with two counts of Possession with Intent to Deliver; two counts of Criminal Conspiracy; one count of Persons Not to Possess Firearms; and one count of Receiving Stolen Property. At the time of the arrest, Defendant was seated in a vehicle belonging to his co-defendant Santos Ramos-Rodriguez. Ramos-Rodriguez had been contacted by a confidential informant and asked to deliver a certain quantity of drugs to a specific location. Upon arriving at the location, Ramos-Rodriguez and Defendant were both arrested, searched, and search warrants were obtained for three different residences.

Defendant had in his possession a cell phone, $280 in cash, a wallet, and a set of keys.

The search of Co-defendant yielded drugs, cash, and a cell phone. Two additional sets of keys were found in the vehicle, presumably belonging to the co-defendant. (N.T. pp. 308-09).[1] A combination of keys from the three key rings opened the three residences that were searched. Police did not know which residence's key came off of which key ring. (N.T. p. 309).[2]

At 636 Chestnut St., police discovered a large quantity of drugs. Over a million dollars worth of heroin, a half million dollars worth of cocaine, and a large quantity of morphine were found in a hall closet. Various other drugs in pill form and a gun in a lockbox were also found in this location. Police also recovered drug packaging materials from this location including: plastic bags without corners; sifters and spoons; electronic scale; sandwich bags; back packs; coffee grinder; a plate; and various other multi-colored bags. (N.T. pp. 85-88). Milgras Guilb testified that 636 Chestnut was rented to Santos Ramos-Rodriguez, the co-defendant. (N.T. pp. 210-12). Police did find a delivery notice in the apartment addressed to Ramos-Rodriguez with this address on it. Police also found a letter addressed to Defendant at this location but the address on the letter was not this address.

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1 N.T., unless otherwise indicated, will refer to the trial record created on 7/3/06 and 7/5/06-7/6/06.

2 Trooper Keppel had testified that all of the key rings were in Sanchez's possession but this is not consistent with the evidence log which says keys and attached container came from Sanchez but does not indicate who had the other two sets of keys. (N.T. p. 82).

Police found medical paperwork for Defendant in a dresser drawer.

At 32 N. Queen St., police found small quantities of drugs, some drug paraphanalia, a license belonging to Ramos-Rodriguez, bank records for Ramos-Rodriguez, more than $20,000 in cash, and a social security card for Ramos-Rodriguez. No lease was produced for this residence.

At 314 Reinecke Place, police confiscated items including: a box of latex gloves, a box of face masks, a box of sandwich bags, a roll of duct tape, a brown paper bag containing a ripped plastic bag,, a pair of scissors, a newspaper with figures on it, plastic baggies, an electric bill in the name of Ramos-Rodriguez, a coffee grinder, a bag of white powder, and mail for Defendant. Guilb testified that this property was leased to Defendant with Co-defendant as a co-signer. She testified that Co-defendant had leased the property himself before moving to Chestnut St. (N.T. pp. 209-10). No drugs were recovered from this residence. The white powder that was found was not a controlled substance. (N.T. p. 197). Corporal Fenstermacher speculated that the white powder could have been used to break down cocaine during packaging. (N.T. p. 311). The coffee grinder that was found at this location was not sent for testing. (N.T. p. 312).

Following Defendant's arrest, a preliminary hearing was held on March 1, 2006. He was arraigned on April 7, 2006 and the Commonwealth filed the informations. The charge of Receiving Stolen Property was withdrawn and one count of conspiracy was withdrawn.

On May 8, 2006, Defendant's attorney filed an Omnibus pre-trial motion seeking severance of Defendant's case from Co-defendant's case. A hearing was held on May 30, 2006 and the severance was denied. A pre-trial conference was held on June 14, 2006 and the case was listed for trial in July. The jury trial in this case was held on July 3, July 5, and July 6. The jury returned a verdict of guilty to all charges on July 7, 2006.

Defendant was sentenced on August 21, 2006 to 25-50 years in a state correctional institution. An appeal was filed and Defendant's counsel filed a Statement of Matters Complained of on Appeal on October 31, 2006. No brief was ever filed with the Superior Court and the appeal was dismissed on May 17, 2007.

Defendant filed his first pro se PCRA Petition on July 9, 2007. Lori Yost was appointed to represent Defendant on the PCRA. Defendant's appeal rights were re-instated on October 30, 2007. Attorney Yost also filed a Motion for Modification of Sentence which was denied on December 3, 2007.

The Superior Court affirmed Defendant's judgment of conviction in a non-precedential opinion filed on March 24, 2009 and docketed to 2194 MDA 2007. The issues raised on direct appeal were: 1) the denial of the motion to sever the trials; 2) a comment made by the district attorney about defendant testifying; 3) sufficiency of the evidence; 4) jury instructions; and 5) sentencing. The Pennsylvania Supreme Court denied Defendant's petition for allowance of appeal on October 28, 2009. The U.S. Supreme Court also denied a

writ of certiorari.

Defendant timely filed the current PCRA petition on March 15, 2011 and we re-appointed Lori Yost to represent him on this petition and scheduled a hearing.[3] Attorney Yost did file an amended petition on June 9, 2011 and the hearing was held on July 25, 2011.

Issues:

The Amended PCRA Petition raises the following issues:

1) Was trial counsel ineffective for failing to employ an expert in drug packaging and processing and/or ineffective in his cross-examination of the Commonwealth's expert?

2) Was trial counsel ineffective for failing to file a pre-trial motion seeking suppression of the evidence found at 314 Reinecke Place?

3) Was trial counsel ineffective in his cross examination of co-defendant Santos Ramos-Rodriguez?

4) Was trial counsel ineffective in his advice to Defendant not to testify?

5) Was trial counsel ineffective for failing to object to the testimony of the Pa. State Police Crime Lab Supervisor where the analyses in this case were completed by another lab technician who did not testify?

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[3] We consider this PCRA petition to be Sanchez's first as the previous PCRA petition Sanchez filed merely restored his appellate rights. *See Commonwealth v. Lewis*, 718 A.2d 1262 (Pa. Super. Ct. 1998).

Discussion:

*Generally:*

All of the issues raised by Defendant in his PCRA allege ineffective assistance of counsel at trial.

> In the context of a PCRA proceeding, Appellant must establish that the ineffective assistance of counsel was of the type 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.

*Commonwealth v. Washington*, 927 A.2d 586, 594 (Pa. 2007).

For an ineffective assistance of counsel claim, a defendant must prove by a preponderance of the evidence that 1) there is merit to the underlying claim; 2) counsel had no reasonable basis for his or her course of conduct; and 3) there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. *Commonwealth v. Rivers*, 786 A.2d 923, 927 (Pa. 2001). Counsel is presumed effective and "a claim of ineffectiveness may be denied by a showing that the petitioner's evidence fails to meet any of these prongs." *Washington*, 927 A.2d at 594.

"A chosen strategy will not be found to have lacked a reasonable basis unless it is proven 'that an alternative not chosen offered a potential for success substantially greater

than the course actually pursued.'" *Commonwealth v. Cox*, 983 A.2d 666,678 (Pa. 2009)(quoting *Commonwealth v. Williams*, 899 A.2d 1060,1064(Pa. 2006)).

> The harmless error standard, as set forth by this Court in *Commonwealth v. Story*, 476 Pa. at 409, 383 A.2d at 164 (citations omitted), states that "[w]henever there is a ' reasonable possibility' that an error 'might have contributed to the conviction,' the error is not harmless." This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the *Pierce* prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel.

*Commonwealth v. Howard,* 645 A.2d 1300, 1307 - 1308 (Pa.1994).

*Issue 1-Ineffective Assistance of Counsel for Failure to Employ Expert:*

Defendant claims that his trial counsel was ineffective for failing to employ an expert in the area of drug processing/packaging and/or that he was ineffective in his cross-examination of the Commonwealth's expert. Attorney Barnes, Defendant's trial counsel, testified at the PCRA hearing that his theory of defense was always that Defendant was not involved in the drug operation. No drugs were found on Defendant nor in Defendant's apartment; his co-defendant testified that Defendant had no knowledge of the drug business;

Defendant was seen at the co-defendant's apartment refinishing furniture but the drugs kept there were concealed in a closet; and, Defendant was only waiting in the car when one of the controlled buys took place.

Because Defendant was not physically linked to the drugs, an expert would not have added anything to Defendant's case, therefore Defendant's claim fails to satisfy the second prong of the test–that his counsel had no reasonable basis for this course of action. We find that Attorney Barnes decision not to employ his own expert was reasonable based on the evidence the Commonwealth had against Defendant.

Likewise, Attorney Barnes' cross examination of Corporal Fenstermacher, the Commonwealth's expert, was reasonable based on Corporal Fenstermacher's testimony and the evidence. Attorney Barnes questioned Fenstermacher about the everyday household items that were found in Defendant's apartment that the Commonwealth theorized were drug processing or packaging items.(N.T. pp. 250-52). Based on Attorney Barnes' theory of the defense, this was a reasonable line of questioning as all of the items found are normally found in every household.

Additionally, as to the third prong of the test–that the outcome of the trial would have been different–we find that Defendant was not able to carry the burden of proving the outcome would have been different had trial counsel followed a different trial strategy.

*Issue 2–Ineffective Assistance of Counsel for Failing to File a Suppression Motion:*

Defendant asserts that his trial counsel was ineffective for failing to file a suppression motion for the evidence found at 314 Reinecke Place, Defendant's apartment. At the hearing, Attorney Barnes testified that he did not file a suppression motion because no evidence of drugs was found at Defendant's apartment. Because the evidence did not implicate his client, Attorney Barnes did not want it suppressed. All of the items were common household goods with no evidence of any drug residue or traces of any drugs in his apartment.

Based on the evidence presented at trial and the testimony of the items found in Defendant's apartment, we find that the course of conduct chosen by Attorney Barnes was reasonable. Therefore we find that counsel was not ineffective for failing to file a suppression motion.

Attorney Barnes also testified that he did not recall any issues with the warrant. Our review of the record also does not reveal any deficiencies in the warrant, therefore, we find that Defendant also failed to prove that the underlying issue has merit. Attorney Barnes cannot be ineffective for failing to file a motion that lacks merit.

*Issue 3–Ineffective Assistance of Counsel for Failing to effectively cross-examine Co-Defendant Santos Ramos-Rodriguez*

We reviewed the testimony and cross-examination of Defendant's Co-defendant and we conclude that Defendant's cross-examination was reasonable under the circumstances of this case. Ramos-Rodriguez testified on direct that Sanchez did not have any involvement with the drug operation. (N.T. p. 285). Ramos-Rodriguez said that he was only giving Sanchez a ride to his sister's house on the day that the police arrested him. (N.T. p. 285). Although Attorney Barnes did cross-examine Ramos-Rodriguez to explain why Sanchez was at the 636 Chestnut St. address and why their names were both on the lease to 314 Reinecke Place, no additional testimony was necessary following the direct examination. Ramos-Rodriguez took full responsibility for the drug deliveries and attempted to clear Sanchez. It was not ineffective for trial counsel to not elicit further testimony along those lines and risk losing the advantage of the testimony already given.

*Issue 4-Ineffective Assistance of Counsel for Advising Defendant not to Testify*

A defendant's decision to testify at trial:

> is ultimately to be made by the accused after full consultation with counsel. In order to support a claim that counsel was ineffective for failing to call the appellant to the stand, the appellant must demonstrate either that (1) counsel interfered with this client's freedom to testify, or (2) counsel gave specific

> advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf.

*Commonwealth v. Thomas*, 783 A.2d 328, 333 (Pa. Super. Ct. 2001)(quoting *Commonwealth v. Preston*, 613 A.2d 603, 605 (Pa. Super. Ct. 1992)).

At the PCRA hearing both Defendant and his counsel testified. Defendant testified that he told Attorney Barnes he wanted to testify. Attorney Barnes testified that Defendant never suggested to him that he wanted to testify. We resolve issues of credibility in favor of Attorney Barnes.

Additionally, Attorney Barnes testified at the hearing that Defendant was on federal parole and used numerous aliases. Attorney Barnes did not want this information to come out if Defendant were to take the stand. Attorney Barnes also testified that Defendant would not have been a good witness.

Because Defendant testified at the PCRA hearing, we had the opportunity to listen and see him testify and we agree with Attorney Barnes that Defendant would not have been a good witness. He was difficult to understand, even through an interpreter, and there were some inconsistencies in his testimony. In short, he was not a witness who would have materially advanced the cause of his case. We conclude that trial counsel's decision not to call Defendant or encourage him to testify was reasonable.

*Issue 5–Ineffective Assistance of Counsel for Failing to Object to the Testimony of the Lab Supervisor Who Did Not Complete the Drug Analyses*

Defendant argues that his trial counsel should have objected to the testimony of Jeffrey Wagner, a supervisor from the Pennsylvania State Police Laboratory. Defendant asserts that in July of 2006 when his case was tried, the governing case law on the issue was *Commonwealth v. Carter*, 861 A,2d 957 (Pa. Super. Ct. 2004). We agree with Defendant that *Commonwealth v. Carter* was still good law at the time.[4] The Supreme Court did not reverse the holding until October 17, 2007. *Commonwealth v. Carter*, 932 A.2d 1261 (Pa. 2007).

In *Carter*, the Superior Court held that the appellant's "constitutional right to confrontation was violated when the court admitted the lab report without the testimony of the forensic scientist who performed the mechanics of the testing and prepared the report." *Carter, supra*, 861 A.2d at 969. The Superior Court relied on the following facts in reaching its decision: 1) the crime lab manager testified at trial and was not proffered as an expert but as a custodian of business records of the lab because the Commonwealth assumed the report was properly admitted as a business record; 2) even if the lab manager was proffered as an expert, the substance of his testimony was a repetition of the lab report and

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[4] It may still be good law. *See Commonwealth v. Barton-Martin*, 5 A.3d 363(Pa. Super. Ct. 2010).

the lab report would have remained inadmissible hearsay; 3) the lab manger in this case did not have the "close connection" to the actual testing like the witnesses in *Kennedy* and *Williams* such that admission of the lab report could be deemed harmless error[5]; and 4) the information in the report was the only evidence of record establishing an essential element of the drug offenses in this case and therefore required a witness with personal knowledge of the testing.[6]

At the PCRA hearing, the Commonwealth conceded that the Superior Court's holding in *Commonwealth v. Carter* was the law at the time. At the trial of this case, Jeffrey Wagner testified that he was the lab supervisor when the drug evidence was submitted to the lab for testing. (N.T. p. 167). Wagner testified that as the supervisor he did review all of the data and results and that he did so in this case. (N.T. pp. 195-96). The Superior Court found it important in *Carter* that the person testifying was the manager who sometimes reviewed the

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[5] *Williams* and *Kennedy* refer to cases relied upon by the Superior Court in the *Carter* opinion. *Kennedy* is a Tennessee case in which the lab supervisor who testified had direct participation in checking the actual scientist's results and testified as an expert. *State v. Kennedy*, 7 S.W.3d 58 (Tenn.Crim.App. 1999). *Williams* was a Wisconsin case that was similar to *Kennedy*. *State of Wisconsin v. Williams*, 253 Wis.2d 99(2002).

[6] In *Com. v. McCloud*, the Supreme Court stated that the purpose of offered evidence is a factor in determining its admissibility. "If [business records] are offered to prove an essential element of the crime or connect the defendant directly to the commission of the crime, then they must be proved through persons having personal knowledge of the element or connection and such persons must be available to testify for cross-examination." *Com. v. McCloud*, 322 A.2d 653(Pa. 1974).

work of the analysts when the supervisors were not available, but did not normally have a close connection to the testing.

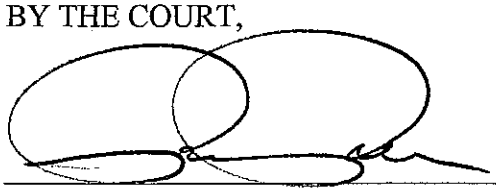
At trial, Attorney Silver, Co-defendant's counsel, did try to object to his testimony but Wagner was permitted to testify under the business records exception. (N.T. pp. 192-95). This was contrary to the holding in *Carter*. Attorney Barnes did not object to the testimony. At the PCRA hearing Attorney Barnes did testify that he was not aware of the *Carter* case.

Although we do find that *Carter* was the prevailing law at the time of this trial, we cannot conclude that trial counsel's failure to object to the testimony of the lab supervisor so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. The drugs in this case were not found on Defendant nor in his apartment. Attorney Barnes would have wanted the lab test in because the white substance found in Defendant's apartment was not a controlled substance according to the testimony of Jeffrey Wagner. (N.T. pp. 197-98). No connection was made between that white powder and the drugs that were in Co-Defendant's apartment, other than speculation that it may have been a diluent.

Conclusion:

From the testimony at trial and the physical evidence recovered in this case, Attorney Barnes' strategy in this case was reasonable and we do not find that counsel provided ineffective assistance. Therefore, we must deny Defendant's PCRA Petition.[7]

BY THE COURT,



Richard K. Renn, Judge

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[7] It is unfortunate we cannot re-examine this case under a sufficiency of the evidence claim. The Superior Court has already reviewed that claim and affirmed Defendant's conviction on appeal. We note that on page 2 of the Superior Court's opinion, it erroneously stated that drugs were found at 314 Reinecke Place. We do not know if this was a factor in its decision to affirm the conviction. Additionally, the Superior Court found that Appellant appeared to actively participate in the illegal enterprise based on mail and paperwork found at another location and his presence at the "drug house", in spite of the fact that uncontradicted testimony from a Commonwealth witness established he was refinishing furniture at that location. Uncontradicted testimony also established that the drugs that were present at the "drug house" were not within view as they were concealed in bags in the middle of a deep closet. We have significant concerns whether the evidence produced at trial, was, indeed, sufficient to link Defendant to the drugs and drug enterprise.