NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ANTHONY D. PANDER,	:	
	:	
Appellant	:	No. 3478 EDA 2012

Appeal from the PCRA Order December 17, 2012
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No: CP-51-CR-0009831-2008.

BEFORE: BENDER, J., BOWES, J., and STRASSBURGER,* JJ.

DISSENTING MEMORANDUM BY BOWES, J.: **FILED NOVEMBER 25, 2013**

As I disagree that Appellant has raised any issues warranting an evidentiary hearing based on trial counsel's ineffectiveness, I respectfully dissent. I recognize that in ***Commonwealth v. Williams***, 899 A.2d 1060 (Pa. 1999), while discussing the reasonable basis of a claim that counsel was ineffective in failing to secure DNA testing, the Supreme Court opined,

> It is easy to say that failing to pursue exculpatory evidence is ineffectiveness, but this presumes the evidence will indeed be exculpatory. If counsel were sure the accused's DNA would not be revealed in any relevant samples from the victim or scene, certainly testing would give exculpatory results and should be sought. However, the client's mere claim of innocence or alibi does not always settle the question; effectiveness of counsel is not dependent on accepting the candor of the client. Testing that shows the DNA matches suddenly makes a conviction-one that might have been avoided or less than certain-a sure thing.

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* Retired Senior Judge assigned to the Superior Court.

> That is, subjecting a client to DNA testing is very likely to settle whether there will be a conviction or not. It can demolish the prosecution's case, but it can cast it in concrete as well. It can eliminate the potential of a "not guilty" verdict based on an alibi, or on reasonable doubt, and the less compelling the Commonwealth's case, the less compelling is the desire for pre-trial DNA testing. Not seeking testing that has the potential to convict a client may be a very reasonable strategy; strategy is not measured through hindsight against alternatives not pursued, so long as trial counsel had a reasonable basis for the decision made.

Williams, ***supra*** at 1064. The ***Williams*** Court continued, stating, "where a defendant requests pre-trial DNA testing, counsel should advise him such test has the potential to strongly inculpate, not just exonerate. If the defendant still wishes to have the test, counsel should accede to this demand." ***Id***. at 1065. Since it was unclear in ***Williams*** why his attorney did not seek DNA testing, the ***Williams*** Court remanded for a determination as to whether counsel had a reasonable basis for not pursuing the testing.

However, in this matter, DNA testing would not have led to a reasonable probability that the outcome of the trial would have been different. As the Commonwealth astutely points out, aside from the witness Brian Dingler, whom Appellant claims committed the crime, two other eyewitnesses identified Appellant as the murderer. Equally important, both witnesses unequivocally saw him enter the driver's side of the car before fleeing. Those witnesses had seen Appellant in the neighborhood on prior occasions. Admittedly, one of those witnesses did misidentify the perpetrator in a photo array. That witness, a fourteen-year-old at the time

of the murder, however, was not friends with Dingler, conclusively identified Appellant at trial, and remained steadfast that the attacker was the driver of the car that fled the scene. A third witness could not identify Appellant, but testified to seeing the assailant jump into the driver's seat of the vehicle after the attack. Not a single person identified Dingler as the person who killed the victim or stated that he drove the vehicle, despite Dingler's acknowledged presence as the passenger in Appellant's vehicle.[1]

Under Appellant's theory, Dingler fought with the victim and killed him before entering the passenger side of the car. Dingler then deposited blood from the fight in the passenger area of the vehicle, which police did not discover when examining the car. However, the evidence overwhelmingly established that the killer entered the driver's side of the vehicle, and Appellant himself concedes that Dingler was seated in the passenger's side of the car. If Dingler was the killer, he would have had to have entered the driver's side of the door and could not have caused blood to be in the passenger area. Hence, Appellant's claim makes little logical sense and is fundamentally flawed.

I add that the officer who processed the vehicle originally testified that the blood-like stain in the passenger area was not in the vehicle when he examined it. The blood stain appeared in a photograph taken by a defense

[1] The Commonwealth asked the two eyewitnesses who identified Appellant if they recognized Brian Dingler from that night; each stated that they did not.

investigator seven days after police processed the car. The car was released to Appellant's mother, the owner, six days before the stain was discovered. Thus, the fact that blood was located in the vehicle after police examined it does not exculpate Appellant in any manner.[2]

I further disagree that Appellant is entitled to a hearing on his claim that counsel was ineffective for failing to call or interview witnesses. The majority misapprehends governing precedent, which has concluded that similar issues under analogous factual circumstances **lack arguable merit**. Once this Court determines that an issue lacks arguable merit, we need not reach the question of whether counsel had a reasonable basis for his trial strategy. Thus, the majority's statement that it "cannot determine if it was a reasonable decision for trial counsel to present just one character witness on Appellant's behalf," Majority Memorandum at 19-20, disregards long-standing precedent as to the arguable merit of such claims.

The decision cited by the majority, ***Commonwealth v. Rios***, 920 A.2d 790 (Pa. 2007), refutes the majority's limited analysis. In ***Rios***, the Supreme Court concluded that a claim that counsel was ineffective in failing to call alibi witnesses lacked arguable merit where the trial court conducted a colloquy of the defendant regarding whether he agreed with the decision

[2] A small red stain in the passenger area was present when police examined the vehicle, but the officer testified that it appeared to be ketchup or sauce, not blood.

not to proffer those witnesses. The High Court premised its decision on ***Commonwealth v. Paddy***, 800 A.2d 294 (Pa. 2002). Therein, the Court stated, "As Paddy expressed the view that the decision not to call alibi witnesses was his as well as trial counsel's, and his decision has not been shown to have been unknowingly, involuntarily, or unintelligently made, this allegation of ineffectiveness lacks arguable merit." ***Id***. at 316.

Instantly, the trial court conducted a thorough colloquy regarding Appellant's decision not to testify, not to call fact witnesses, and to present one character witness. I set forth part of that colloquy below.

> Court: It's also my understanding the Defense will not be presenting any factual testimony in terms of what happened on the date that this incident is alleged to have occurred. You talked to your attorney about that as well?
>
> Defendant: Yes, sir.
>
> Court: You've had numerous conversations about that?
>
> Defendant: Yes, sir.
>
> Court: It's your personal decision not to present any evidence on the factual issues; is that correct?
>
> Defendant: Yes, sir.
>
> Court: Now, you've been with your attorney for two years now?
>
> Defendant: Yes, sir.
>
> Court: And you had occasion to discuss all aspects of your case with him?
>
> Defendant: Yes.

> Court: And you're satisfied with his representation so far?
>
> Defendant: Yes, sir.
>
> Court: Any questions, Counsel?
>
> Prosecutor: No, thank you.
>
> Trial Counsel: Just briefly. Mr. Pander, His Honor asked you questions about your decision. Have you had a chance to talk to me? Do you remember asking those questions?
>
> Defendant: Yes, sir.
>
> Trial Counsel: You had a chance to talk to Mr. Henry from my office.
>
> Defendant: Yes, sir.
>
> Trial Counsel: At the lunch break, we've had conversations with you today in the basement?
>
> Defendant: Yes, sir.
>
> Trial Counsel: That was about a lot of aspects of the case, correct?
>
> Defendant: Yes, sir.
>
> Court: Are there any witnesses that you desire to call to testify outside of the witness that's schedule[d] tomorrow morning?
>
> Defendant: No, sir, just the character witness tomorrow.

N.T., 12/2/07, at 228-230. Based on these representations and the ***Rios*** and ***Paddy*** decisions, Appellant's issue has no arguable merit. Since the claim lacks arguable merit, I cannot agree with the majority's reasoning that

an evidentiary hearing is warranted to determine the reasonableness of trial counsel's strategy.

I acknowledge that in ***Commonwealth v. Nieves***, 746 A.2d 1102 (Pa. 2000), a pre-***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), direct appeal, our Supreme Court found an ineffectiveness claim warranted relief where the defendant was colloquied as to his decision not to testify in his own defense. This matter, nonetheless, does not involve Appellant's decision to testify, which has different constitutional ramifications than does presenting other witnesses. The colloquy in this matter conclusively establishes that Appellant agreed with trial counsel's decision not to present additional witnesses. Therefore, his claim that counsel was ineffective in failing to interview and call additional witnesses is without arguable merit.

I, nonetheless, write further to distance myself from the majority's reliance on ***Commonwealth v. McLaurin***, 45 A.3d 1131 (Pa.Super. 2012), for the position that Appellant's failure-to-call-witnesses-claim was defective based on his failure to provide affidavits. Pointedly, ***McLaurin*** is erroneous to the extent it is read to require affidavits. Such a reading is flatly contradicted by ***Commonwealth v. Brown***, 767 A.2d 576 (Pa.Super.

2001), and is in clear derogation of both the PCRA statute and the rules of criminal procedure.[3]

McLaurin relied on ***Commonwealth v. Khalil***, 806 A.2d 415 (Pa.Super. 2002), which was not a PCRA case, and involved an allegation of ineffectiveness during direct appeal. Thus, the ***McLaurin*** panel's reliance on that decision is problematic where, as here, the rules of procedure and statute governing PCRA matters clearly provide that witness certifications are sufficient. Specifically, Pa.R.Crim.P. 902(A)(15) states that a petition seeking an evidentiary hearing shall include, "a signed certification as to each intended witness, stating the witness's name, address, and date of birth, and the substance of the witness's testimony. Any documents material to the witness's testimony shall also be included in the petition[.]"

While the rule also sets forth that a "defendant shall attach to the petition any affidavits, records, documents, or other evidence which show the facts stated in support of the grounds for relief," this is not a prerequisite for an evidentiary hearing. Pa.R.Crim.P. 902(D). Concomitantly, the statute reads,

> Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance

[3] I note that the lead author of the majority herein penned a concurring and dissenting opinion in ***Commonwealth v. McLaurin***, 45 A.3d 1131 (Pa.Super. 2012), which disagreed with ***McLaurin's*** analysis related to the affidavit issue.

> of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

42 Pa.C.S. § 9545(d)(1).

Interpreting the statute and the predecessor rule to Rule 902, Pa.R.Crim.P. 1502, the ***Brown*** Court found that a sworn affidavit is not necessary to secure a hearing. That court, quoting from the legislative history of the statute, observed:

> the notes from the legislative history pertaining to the enactment of this statutory section indicate that the legislature expressly considered the question of whether a PCRA petitioner would be required to obtain a sworn or notarized statement from a proposed witness in order to have the witness testify at an evidentiary hearing. A principal architect of the 1995 Legislative Amendments to the PCRA, Senator Stewart Greenleaf, spoke on this question as follows:
>
> > In addition, when we held the hearing there was concern about the fact that when you file a petition, we want to make sure that it is a meritorious petition, we do not want to have a frivolous petition, that there are some witnesses that would be available to testify, so the original bill required that each witness had to sign a statement and have a notarized, sworn statement at the end of the statement indicating that this was a true and correct representation of what he would testify to at the coming collateral hearing. There were objections to that, feeling that that was too onerous to require a defendant to go out and obtained notarized statements from all of his witnesses, some of which would be hostile witnesses, and I agreed with that.
> >
> > So as a result, this amendment allows a defendant to merely present a summary of the

> statement so we know generally what that witness is going to say and merely sign a certification. **Either the witness, his attorney, the defendant's attorney, or the petitioner himself**, **the defendant himself can sign a certification** saying to his best knowledge that this was an accurate statement of what the witness would testify to. So I think it is an effort, again, not to take anyone's rights away from him but also to help that defendant in the processing of his appeal and hopefully to make it easier for him to obtain a hearing, which we want him to obtain.
>
> Pa. Senate Journal, 1st Spec. Sess., June 13, 1995, at 217.

Brown, ***supra*** at 582-583 (Pa.Super. 2001) (emphasis added). The ***Brown*** panel then stated, "consistent with this express legislative intent, we hold that Appellant was not required to attach sworn affidavits to his PCRA petition in support of his request for an evidentiary hearing." ***Id***. at 583.

As the decision in ***Brown*** based its ruling on both statutory construction and the rules of procedure, and ***McLaurin*** and the cases relied on by the Commonwealth are premised on non-PCRA cases, ***Brown*** is the proper governing precedent. Further, as highlighted by the ***Brown*** decision, the Commonwealth's argument that Appellant's offer of proof was deficient because he created the certifications himself is spurious. Its citations to ***Commonwealth v. Farmer***, 758 A.2d 173 (Pa.Super. 2000), and ***Commonwealth v. Lopez***, 739 A.2d 485 (Pa. 1999), are also misplaced as neither ***Farmer*** nor ***Lopez*** was a PCRA case.

Additionally, the Commonwealth's citation to ***Commonwealth v. Clark***, 961 A.2d 80 (Pa. 2008), does not support the position that affidavits are necessary or that certifications from the witnesses themselves are mandated. The ***Clark*** Court held that, "Regardless of whether the attachments to Appellant's PCRA petition sufficed to establish [the witness's] availability as a witness, his claim nonetheless fails because its underlying premise is faulty." ***Clark***, ***supra*** at 91. Specifically, the proffered witness's proposed testimony intended to be used to impeach another witness would not have impeached the witness who did testify.

Simply put, the certification requirement can be met by an attorney or *pro se* petitioner certifying what the witness will testify regarding. ***See Brown***, ***supra***; 42 Pa.C.S. § 9545(d)(1); Pa.R.Crim.P. 902(A)(15). Despite the Philadelphia District Attorney Office's continued attempts to contort the law in PCRA matters with respect to witness certifications, I agree with it that Appellant's witness issue has no arguable merit.

For all the aforementioned reasons, I respectfully dissent.