**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| 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.

MEMORANDUM BY STRASSBURGER, J.: **FILED NOVEMBER 25, 2013**

Anthony D. Pander (Appellant) appeals from the order entered December 17, 2012, dismissing his petition under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Upon review, we affirm in part, reverse in part, and remand for proceedings consistent with this memorandum.

The four individuals involved in this case are Appellant; his sister, Georgianna Pander (Georgianna); Brian Dingler (Dingler); and Andreas Gabrinidis (Victim). Georgianna and Dingler began dating in July 2007 while Georgianna was still married to Victim. Georgianna and Victim divorced, and in October and November 2007, Georgianna and Dingler married and began living together.

* Retired Senior Judge assigned to the Superior Court.

On December 31, 2007, Georgianna, Dingler, and Appellant were celebrating New Year's Eve. All three of them were drinking alcohol. Dingler testified at trial that at some point after midnight, Appellant was in a "rage" and "flipping out" saying "nobody messes with my sister." N.T., 12/1/2009, at 208-209. Appellant and Dingler got into Appellant's car and drove to Victim's house, approximately 14 miles away. Appellant then got out of the car, got something out of his trunk, and walked up to Victim's enclosed porch. Dingler testified that he heard "muffled arguing" and "wrestling around inside." ***Id***. at 221. Dingler then saw Victim running away. Appellant went into Victim's house, then came out of the house and caught up with Victim several houses away. Dingler testified that he saw Appellant punching Victim while he was lying on the ground. Appellant went back to the car, got in the driver's seat, and drove away at a high rate of speed. The two went back to Dingler's house, and Appellant went into the bathroom. When Dingler awoke the next morning, Appellant was not there.

Several neighbors heard the disturbance. Ashley Street (Street) testified that at approximately 3:00 a.m. on January 1, she heard men "hollering" outside of her home. N.T., 12/2/2009, at 61. She saw the men, who seemed drunk to her, punching each other, so she called the police. She saw that one of the men was on the ground and the other was punching him. She testified that she heard sirens approaching, and saw "the young person" get into a car and drive away. ***Id***. at 69.

Neighbor Kimberly Bumpess also testified. She heard screaming outside her window and saw Victim run out of his house to a neighbor's house screaming for help. She further testified she saw another man pull Victim down and punch Victim while on the ground. She called for her fourteen-year-old son, Shakur, to come to the door. Shakur testified that he was familiar with Victim because he played with Victim's sons. Shakur recognized Appellant as Victim's brother-in-law because he saw him "once a month." N.T., 12/1/2009, at 153. Shakur testified that when he went to the door at his mother's request, he saw Appellant fighting with Victim. Shakur then saw Appellant get into the driver's side of the car.

When police arrived, they found Victim dead on the street. The Medical Examiner determined that Victim had been stabbed to death. Police were unable to find a weapon at the crime scene or in Victim's house. Police contacted Victim's adult daughter, Maria Gabrinidis, to inform her about her father's death. Maria then contacted Georgianna, who was driven to the police station by Dingler, in order for her to make a statement. When Dingler got home from work that day, he learned police wanted to speak to him. He, too, gave a statement. Appellant was arrested on January 1, 2008, and charged with murder, burglary, criminal trespass, and possession of an instrument of crime (PIC).

A jury trial was held from December 1-4, 2009. Appellant presented one witness on his own behalf, Sergeant First Class Brian Byrd. Byrd

testified that Appellant, also a member of the military, had a reputation for being a "good" person and "law abiding" person. N.T., 12/3/2009, at 29.

On December 7, 2009, the jury found Appellant guilty of first-degree murder and PIC. The trial court immediately sentenced Appellant to life in prison for the first-degree murder conviction and a concurrent term of 2 ½ to 5 years' incarceration for the PIC conviction. No post-sentence motions were filed, and Appellant *pro se* filed a timely notice of appeal to this Court. Counsel was appointed for Appellant, and the only issue raised by counsel on direct appeal was whether the trial court erred in refusing to instruct the jury on voluntary intoxication. On February 15, 2011, this Court affirmed Appellant's judgment of sentence. ***Commonwealth v. Pander***, 24 A.3d 454 (Pa. Super. 2011) (table). No petition for allowance of appeal to our Supreme Court was filed.

On May 18, 2011, Appellant filed a timely *pro se* PCRA petition. He filed an amended *pro se* PCRA petition on July 13, 2011. Counsel was appointed, and filed an amended PCRA petition on January 20, 2012. On August 7, 2012, the Commonwealth filed a motion to dismiss the PCRA petition, and Appellant responded on August 13, 2012. On November 19, 2012, the PCRA court issued a notice of its intent to dismiss the petition without a hearing. Appellant did not respond, and the PCRA petition was dismissed on December 17, 2012. Appellant filed a timely notice of appeal. Both Appellant and the PCRA court complied with Pa.R.A.P. 1925.

Appellant presents the following issues for our review, which we have reordered for ease of disposition:

> [1.] Is [Appellant] entitled to post-conviction relief in the form of a new trial or a remand for an evidentiary hearing as a result of the ineffectiveness of appellate counsel for failing to raise on direct appeal the issue of the trial court's refusal to remove juror no. 7 and substitute an alternate juror?
>
> [2.] Is [Appellant] entitled to post-conviction relief in the form of a new trial or a remand for an evidentiary hearing as a result of the ineffectiveness of appellate counsel for failing to raise in the direct appeal the issue of the trial court's denial of [Appellant's] motion for a mistrial following a question by the prosecutor suggesting to the jury that [Appellant] had a burden to produce evidence?
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> [3.] Is [Appellant] entitled to post-conviction relief in the form of a new trial or a remand for an evidentiary hearing as a result of the ineffectiveness of trial counsel for failing to request the trial court for a ***Kloiber***[1] instruction as to the Commonwealth witness Shakur Bumpess?
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> [4.] Is [Appellant] entitled to post-conviction relief in the form of a new trial as a result of the ineffectiveness of trial counsel for failing to request the Commonwealth to test or make arrangements for testing of the blood found in [Appellant's] car?
>
> [5.] Is [Appellant] entitled to post-conviction relief in the form of a new trial or a remand for an evidentiary hearing as a result of the ineffectiveness of trial counsel for failing to present evidence and argument to prove that someone other than [Appellant] committed the murder? Alternatively, was appellate counsel ineffective when he failed to raise in the direct appeal the issue that someone other than [Appellant] committed the crime?
>
> [6.] Is [Appellant] entitled to post-conviction relief in the form of a new trial or a remand for an evidentiary hearing as a result of the ineffectiveness of trial counsel for failing to interview and present the testimony of Philip DeLuca, Eleftheria

[1] ***Commonwealth v. Kloiber***, 106 A.2d 820 (Pa. 1954).

> Gabrandias, Rosemarie Pander, and Charlene Pander as to the contentious relationship Brian Dingler had with the victim and that Georgianna Pander would instigate fights between the victim and Dingler?

Appellant's Brief at 4-5.

"On review of orders denying PCRA relief, our standard is to determine whether the PCRA court's ruling is free of legal error and supported by the record." ***Commonwealth v. Boyer,*** 962 A.2d 1213, 1215 (Pa. Super. 2008). 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 Court may affirm a PCRA court's decision on any grounds if the record supports it. ***Id***. Further, where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Colavita***, 993 A.2d 874, 886 (Pa. 2010). We also observe that "[t]here is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." ***Commonwealth v. Jones***, 942 A.2d 903, 906 (Pa. Super. 2008).

As all of Appellant's claims implicate the ineffective assistance of counsel, we set forth our well-settled considerations when reviewing such claims. "To plead and prove ineffective assistance of counsel a petitioner must establish: (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." ***Commonwealth v. Rykard***, 55 A.3d 1177, 1189-90 (Pa. Super. 2012), *appeal denied*, 64 A.3d 631 (Pa. 2013). Prejudice in the context of ineffective assistance of counsel means there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. ***Commonwealth v. Kimball***, 724 A.2d 326, 332 (Pa. 1999). Failure to establish any prong of the test will defeat an ineffectiveness claim. ***Commonwealth v. Basemore***, 744 A.2d 717, 738 n. 23 (Pa. 2000).

Appellant's first two issues implicate the ineffective assistance of direct appeal counsel as both are issues that were raised by trial counsel during the course of trial, and therefore could have been raised on direct appeal, but were not. Appellant first contends that direct appeal counsel was ineffective for failing to raise the issue of trial court error in denying trial counsel's request to remove Juror No. 7 for cause. Appellant's Brief at 24-32.

On the second day of trial, during the testimony of the Medical Examiner, Juror No. 7 observed several pictures and "needed a break." N.T., 12/2/2009, at 197. The Court Crier indicated that Juror No. 7 was "really upset." ***Id***. The Court Crier told the trial court that "[the other jurors] are concerned for her health … [s]he is about to pass out[.]" ***Id***. at 198. The trial court then questioned Juror No. 7, who indicated that she saw Victim's face and it reminded her of her husband who had died within the last year.

The trial court specifically asked if she could still be fair to both sides, and she stated that she could. The Commonwealth agreed not to show any more pictures to the jury. Specifically, the trial court asked her the following: "Having seen whatever it is that you saw, would that in any way affect your ability to maintain your impartiality and your fairness in this trial?" ***Id***. at 200-01. She answered, "No." ***Id***. at 201. Defense counsel then asked the trial court to seat an alternative juror, and the trial court denied the request.

"Rule [645](a) of the Pennsylvania Rules of Criminal Procedure provides that a trial court may seat an alternate juror whenever a principal juror becomes unable or disqualified to perform his or her duties. Such a decision will be reversed on appeal only upon a finding of an abuse of discretion." ***Commonwealth v. Abu-Jamal***, 720 A.2d 79, 115 (Pa. 1998). "The trial court's discretion in this regard must be based upon a sufficient record of competent evidence to sustain removal." ***Bruckshaw v. Frankford Hosp. of City of Philadelphia***, 58 A.3d 102, 110 (Pa. 2012).

Instantly, Appellant argues that because Juror No. 7 was upset enough that she had to leave the courtroom during the presentation of testimony, "[t]here was a basis for the trial court to presume a likelihood of Juror No. 7's inability to continue as a juror." Appellant's Brief at 29-30. Additionally, Appellant contends that he was prejudiced by Juror No. 7's "inability to guarantee that she would not become upset during the presentation of additional testimony or deliberations." ***Id***. Therefore, he claims there was

no reasonable basis for direct appeal counsel not to raise this on direct appeal.

The PCRA court concluded that substitution of an alternate juror would "deprive her of her duty and privilege to serve on this jury [which] would be unfair [where] she said she can [be fair and impartial]." PCRA Court Opinion, 2/26/2013, at 15 (quoting N.T., 12/2/2009, at 204-05). We agree.

Upon reviewing the record, we cannot say that the trial court abused its discretion when it declined to remove Juror No. 7 because she stated unequivocally that she could be fair and impartial. Thus, we cannot agree with Appellant that he was prejudiced by the trial court's denial of the motion to remove Juror No. 7. Therefore, direct appeal counsel was not ineffective for failing to pursue this issue on direct appeal.

Next, Appellant contends that the trial court erred when it denied trial counsel's motion for mistrial, and direct appeal counsel was ineffective for failing to raise the issue on direct appeal. Appellant's Brief at 32-40.

The request for mistrial arose during the testimony about blood stains that were purportedly found in Appellant's car by a defense investigator. The background on this issue is as follows. On January 3, 2008, homicide detectives obtained a search warrant for Appellant's vehicle, which was actually registered to Rose Pander, the mother of Appellant and Georgianna. The vehicle was processed, no weapons were found in the vehicle, and no blood was seen in or on the vehicle. The vehicle was released back to its

owner on January 3, 2008. On January 9, 2008, a defense investigator took pictures of the vehicle. One of the pictures revealed what appeared to be blood on the passenger-side of the vehicle. No testing was performed by the defense, nor was any request made to the Commonwealth to conduct testing.[2]

On re-direct examination of Detective David Baker, who had processed the vehicle, the Commonwealth asked the following:

> **Q.** Do you know for a fact what is in Defenses' photograph [is] blood?
>
> **A.** No, I cannot.
>
> **Q.** Can it be determined what it is?
>
> **A.** Yeah, if it's sent to our criminalistics laboratory and analyzed.
>
> **Q.** And you're not aware of any request that was made by the Defense to do that?
>
> [**Counsel for Appellant**]: Objection.
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> **The Court**: Sustained.

N.T., 12/2/2009, at 141.[3]

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[2] The defense investigator died prior to trial. ***See*** N.T., 12/2/2009, at 171 (the Assistant District Attorney lamented, "This is the problem you have with a dead investigator because you can't ask them questions.").

[3] We point out that this exchange was, in fact, the second time the Commonwealth attempted to elicit such testimony. On direct examination, the following exchange occurred.

> **Q**. When you processed the car, did that stain appear to be blood?

At that time, trial counsel did not move for a mistrial, but did so after the next witness because he "wanted to wait for a break and this is the first

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**A**. No, it did not.

**Q**. What about it made it not appear to be blood?

**A**. It looks like it could be sauce or ketchup. It had a slight glaze, blood does not when it's drying.

**Q**. Is that consistent with what you see on the door there or not?

**A**. On the door it looks like obvious blood. I mean, it's the way blood looks when it's smeared and there is one drop there.

**Q**. If you thought there was blood on the seat, what would you have done?

**A**. For that portion, I would have cut the seat and submitted it.

**Q**. Just like you can submit things for test, is the Defense entitled to that as well?

**A**. Yes.

**Q**. Did any attorney on behalf of [Appellant] --

**[Counsel for Appellant]**: Objection.

**The Court**: Sustained.

**The Witness**: No.

**The Court**: Sustained. Strike the answer.

N.T., 12/2/2009, at 138-39.

break."[4] ***Id***. at 171. Counsel argued that these questions were cause for a mistrial because "[i]t's burden shifting." ***Id***. at 170. The trial court was clearly concerned about the direction the Commonwealth was headed with these questions. ***Id***. at 171, 172 ("[Y]ou just can't ask those questions and give the jury the appearance that the Defendant has some burden, you can't do that." … "What I'm telling you is that you're getting extremely close to burden shifting. I'm not going to tell you how to try your case, but my point is that if you continue to -- I sustained the objection three times[.]").

Appellant contends that "[t]he prosecutor … suggested by her questioning of Detective Baker that [Appellant] had the obligation to have evidence tested. The prosecutor's question infringed upon [Appellant's] right to maintain silence during trial and to put the Commonwealth to its burden of proving his guilt beyond a reasonable doubt." Appellant's Brief at 37. Moreover, Appellant contends that direct appeal counsel was ineffective for failing to pursue this issue on appeal resulting in prejudice to Appellant.[5]

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[4] "When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity." Pa. R. Crim. P 605(B). We recognize that the motion for mistrial was made a period of time after the objections were sustained; nonetheless, neither the PCRA court nor the Commonwealth has raised any issue with regard to apparent untimeliness of the motion.

[5] Direct appeal counsel included this issue in his concise statement of matters complained of on appeal, but did not address the issue in his brief to this Court. ***See*** Statement of Matters Complained of on Appeal Pursuant to Pa.R.APP.P. 1925(b), 4/23/2010, at ¶ 3.

"A motion for mistrial is a matter addressed to the discretion of the court. A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. ***Commonwealth v. Fetter***, 770 A.2d 762, 768 (Pa. Super. 2001). "A mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice." ***Id***.

The PCRA court, relying on its own trial court opinion, reasoned as follows.

> [The trial court] denied the motion for mistrial because the jury was explicitly instructed that questions by counsel are not evidence, only the answer to those questions are evidence. There was no error because defense counsel timely objected and there was no response to the prosecutor's question. Therefore, there was nothing for the jury to consider and the motion for mistrial was properly denied.

PCRA Court Opinion, 2/26/2013, at 16 (citing Trial Court Opinion, 5/10/2010, at 5-6).[6]

Here, it is clear that the Commonwealth repeatedly attempted to suggest to the jury that Appellant should have and could have had the blood tested. However, we keep in mind that "every improper and inflammatory leading question by a district attorney does not necessarily require a new trial." ***Commonwealth v. Anderson***, 461 A.2d 208, 212 (Pa. 1983). The trial court did sustain the objections to the questions immediately, and the

[6] We also point out that the jury instructions included telling the jury that "[the] Commonwealth has the burden of providing the Defendant guilty beyond a reasonable doubt." N.T., 12/3/2009, at 51-52.

jury heard nothing else about the defense not testing the blood stain. Thus, we cannot say that the trial court abused its discretion in denying Appellant's motion for mistrial; accordingly, direct appeal counsel was not ineffective for failing to raise this issue on direct appeal as there was no prejudice to Appellant.

Appellant's final four issues involve the ineffective assistance of trial counsel. Appellant first contends that trial counsel was ineffective for failing to request an instruction pursuant to ***Commonwealth v. Kloiber***, 106 A.2d 820 (Pa. 1954), with regard to the testimony of Shakur.

> A ***Kloiber*** charge instructs the jury that an eyewitness' identification should be viewed with caution where the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past. However, identification testimony need not be received with caution where it is positive, unshaken, and not weakened by a prior failure to identify.

***Commonwealth v. Jones***, 954 A.2d 1194, 1198 (Pa. Super. 2008) (citation and quotation marks omitted).

On January 1, 2008, Shakur made a statement to police. He told police that the person he saw getting into the car and driving off looked like Appellant. Police then showed Shakur a picture of a group of people, which included Appellant and his family. Shakur identified a man in that picture as Appellant; however, that person was actually not Appellant. ***See*** N.T., 12/1/2009, at 167-71; PCRA Court Opinion, 2/26/2013, at 7 ("[Shakur] admitted that he was unsure about his identification."). At trial, Shakur

identified Appellant as being the individual he saw getting in the car. N.T., 12/1/2009, at 152, 161. However, the trial court did give an instruction consistent with ***Kloiber***.[7] Nonetheless, Appellant contends this instruction was "not an adequate substitute for a ***Kloiber*** instruction since it did not describe circumstances under which [Shakur's] identification testimony is to be received with caution." Appellant's Brief at 44.

We conclude that this claim is without merit. The instruction at issue did specifically inform the jury that when considering Shakur's identification testimony they should consider factors such as prior identifications and

[7] The following instruction was included.

> Now, throughout the trial you heard testimony on identification. And in the testimony of Shakur Bumpess and Kimberly Bumpess, they identified the person committing crimes. In evaluating the testimony in addition to the other instructions I'll give you later for judging the testimony of witnesses you should consider the additional following [] factors.
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> Did the witness have a good opportunity to observe the perpetrator of the offense? Was there sufficient lighting for them to make their observations? Were they close enough to the individual to note their facial and other physical characteristics as well as clothing at the time of the incident? Have they made prior identification of the Defendant as a perpetrator of these crimes at any of the proceedings? Was their identification positive or was it qualified by any hedging or inconsistencies? During the course of this case did the witness identify anyone else as the perpetrator? And in considering whether or not to accept the testimony of Shakur Bumpess and Kimberly Bumpess, you should consider the circumstances under which the identifications were made.

N.T., 12/3/2009, at 62-63.

inconsistencies, which were the exact points Appellant wanted the jury to understand. Accordingly, Appellant is not entitled to relief on this basis.

We now consider Appellant's final three issues, all of which relate to trial counsel's ineffectiveness. First, Appellant contends that trial counsel was ineffective for failing either to conduct testing on the alleged blood stain or request the Commonwealth conduct testing on the alleged blood stain. Appellant's Brief at 60-63. Specifically, Appellant contends that because Appellant was never identified as having occupied the passenger seat of the vehicle, and Dingler did occupy the passenger seat of the vehicle, counsel should have had the purported blood stain tested or at least requested the Commonwealth do so.

The PCRA court concluded that "the record is clear that [t]rial [c]ounsel had a reasonable basis for not requesting a test of blood found in a vehicle used by [Appellant] to drive to and from [Victim's] home." PCRA Court Opnion, 2/26/2013, at 10. Specifically, the PCRA court concluded that "the record shows that [t]rial [c]ounsel sought to argue that someone else committed the crime charged by the *lack* of physical evidence linking [Appellant] to the crime." ***Id***. at 13. We cannot agree with the PCRA court's conclusion.

"Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his

client's interests." ***Commonwealth v. Colavita***, 993 A.2d 874, 887 (Pa. 2010). "A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." ***Id***. "[Where] this question cannot readily be answered from the record, remand for an evidentiary hearing is appropriate, and indeed necessary, in order to address the reasonable basis prong." ***Commonwealth v. Williams***, 899 A.2d 1060, 1064 (Pa. 2006).

Instantly, the PCRA court did not hold an evidentiary hearing to determine exactly why counsel did not conduct testing. Moreover, we cannot agree with the PCRA court that trial counsel's strategy was reasonable under these circumstances where counsel was hamstrung into using a particular strategy due to his own failure to test the alleged blood stain. The prejudice that resulted from this failure to test the purported blood stain is clear because it could call into question Dingler's testimony, which was certainly the most damning evidence against Appellant. Thus, we remand for an evidentiary hearing on this issue.

Next, Appellant contends that trial counsel was ineffective for his failure to present a defense at trial to "prove that someone other than [Appellant] committed the murder." Appellant's Brief at 47. Notably, "[s]ince Dingler had a romantic relationship with [Georgianna] at the time of the killing, he had as much motive to kill [Victim] as [Appellant] did." ***Id***.

Thus, Appellant argues essentially an overall argument that trial counsel's entire defense strategy was deficient. Furthermore, Appellant argues that trial counsel was ineffective for failing to present the "[n]umerous and available witnesses [that] existed at the time of trial who could testify to the contentious relationship [Dingler] had with [Victim] and that [Georgianna] would instigate fights between [Victim] and Dingler." ***Id***. at 54. Specifically, Appellant contends that Philip Deluca, Eleftheria Gabranidis, Rosemarie Pander, and Charlene Pander would have testified to this contentious relationship. ***Id***.

The Commonwealth contends that Appellant has waived these issues because it was his own personal decision not to have witnesses called on his own behalf. Commonwealth's Brief at 21. Specifically, the Commonwealth points to the fact that the trial court conducted a colloquy of Appellant with regard to his defense. The trial court concluded that it was Appellant's "personal decision that he elected" not to present any witnesses other than the one character witness on his own behalf. N.T., 12/2/2009, at 226-231.

The PCRA court, having already concluded that Appellant suffered no prejudice with respect to the alleged blood stain, concluded that "[Appellant] does not offer any evidence that his proposed witnesses were willing to cooperate with the defense on the issue of whether someone else, presumably Dingler, had the motive to murder [Victim]." PCRA Court Opinion, 2/26/2013, at 9. The PCRA court points out that trial counsel,

"through his opening and aggressive cross-examination, went to great lengths to create a reasonable doubt as to whether someone else besides [Appellant] murdered [Victim]." ***Id***. at 9-10.[8] Essentially, the PCRA court concludes that trial counsel's strategy provided Appellant with effective assistance of counsel.

We conclude that without an evidentiary hearing to determine counsel's reasonable basis for his trial strategy, we are unable to agree with such determination. First, as to the Commonwealth's argument that Appellant has waived his right to present these issues, we recognize that

> [our Supreme Court] has held that a defendant who makes a knowing, voluntary, and intelligent decision concerning trial strategy will not later be heard to complain that trial counsel was ineffective on the basis of that decision. To do otherwise, the Court held, would allow a defendant to build into his case a ready-made ineffectiveness claim to be raised in the event of an adverse verdict.

***Commonwealth v. Rios***, 920 A.2d 790, 803 (Pa. 2007) (internal citations and quotations omitted). We also are aware that "[a] defendant is entitled to a fair trial but not a perfect one." ***Commonwealth v. Wright***, 961 A.2d 119, 135 (Pa. 2008). However, we cannot determine if it was a reasonable

[8] In counsel's opening statement, he essentially makes three specific points. First, he suggests that the jury should not believe Dingler's versions of events because it does not make sense. Next, he suggests that Georgianna had a strong motive to lie and time to coordinate stories with Dingler. Finally, he states that he will present evidence of Appellant's peaceful character. N.T., 12/1/2009, at 61-3. We point out that counsel did cross-examine Dingler extensively. N.T., 12/2/2009, at 23-50. However, counsel did not conduct any cross-examination whatsoever of Georgianna. ***Id***. at 119. Furthermore, closing arguments have not been transcribed.

decision for trial counsel to present just one character witness on Appellant's behalf, even where Appellant stated that it was his decision not to call any additional witnesses, without an evidentiary hearing where trial counsel testifies about his trial strategy and Appellant's decision. Moreover, we cannot determine if it was reasonable to suggest to the jury that Georgianna had a motive to lie, but then not cross-examine her at all.

We do recognize, however, that Appellant's PCRA petition presented the claim that there were witnesses available in a defective manner.

> Our courts have set forth the procedure by which a petitioner must properly plead and prove his claim that trial counsel was ineffective in failing to call a witness:
>
> > In order to prevail on a claim of ineffectiveness for failing to call a witness, a defendant must prove, in addition to meeting the [main ineffectiveness prongs], that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness's testimony was so prejudicial as to have denied him a fair trial.
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> ***Commonwealth v. Walls***, 993 A.2d 289, 302 (Pa. Super. 2010) (quoting ***Commonwealth v. Wright***, 599 Pa. 270, 331, 961 A.2d 119, 155 (2008) (citations omitted)).
>
> "Further, ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense." ***Commonwealth v. Khalil***, 806 A.2d 415, 422 (Pa. Super. 2002), appeal denied, 572 Pa. 754, 818 A.2d 503 (2003) (citing ***Commonwealth v. Davis***, 381 Pa. Super. 483, 554 A.2d 104 (1989)). In ***Khalil***, this Court dismissed the appellant's claim that counsel was ineffective for failing to call certain witnesses without an evidentiary hearing

> because the appellant failed to provide sworn statements from the putative witnesses indicating that they were available and willing to testify or that counsel knew of their existence. ***Khalil***, 806 A.2d at 422. This Court provided that we "will not grant relief based on an allegation that a certain witness may have testified in the absence of an affidavit from that witness to show that the witness would, in fact, testify." ***Id***. at 422–23.

***Commonwealth v. McLaurin***, 45 A.3d 1131, 1137 (Pa. Super. 2012), *appeal denied*, 65 A.3d 413 (Pa. 2013).

Instantly, attached to the PCRA petition filed on January 20, 2012, which had been amended by counsel, were four *pro se* "certifications of testimony." Those "certifications" were all written by Appellant himself and had been attached to his original *pro se* PCRA petition. Each "certification" indicated that the individual was available and willing to testify and would testify as to the relationship between Dingler and Victim. It is clear that these certifications, which were not actual affidavits and were signed only by Appellant, did not meet the qualifications set forth in ***McLaurin***, ***supra***. Moreover, in the Commonwealth's motion to dismiss the PCRA petition, it argued that these "certifications" were nonconforming, and Appellant's response did not address that issue, nor did Appellant amend the PCRA petition at that time with proper affidavits.

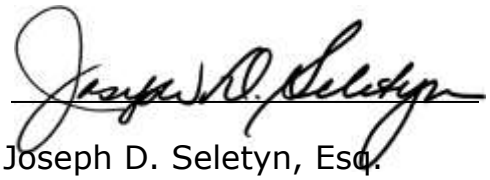
Therefore, we conclude that Appellant is not entitled to relief on the issue of counsel's alleged ineffectiveness for failure to call these specific witnesses as his affidavits do not comply with the mandates of ***McLaurin***.

However, the evidentiary hearing shall still include testimony from trial counsel with regard to the reasonableness of his strategy in general.

Order affirmed in part and reversed in part. Case remanded with instructions. Jurisdiction relinquished.

Judge Bowes files a dissenting memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013