NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ERASMO M. PIEDRA Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 595 EDA 2013

Appeal from the PCRA Order January 16, 2013
In the Court of Common Pleas of Chester County
Civil Division at No(s): CP-15-CR-0001234-2007
CP-15-CR-0001882-2007
CP-15-CR-0001922-2007
CP-15-CR-0001966-2007

BEFORE: BOWES, J., PANELLA, J., and FITZGERALD, J.*

MEMORANDUM BY PANELLA, J. **FILED DECEMBER 04, 2013**

Appellant, Erasmo M. Piedra, appeals from the order entered January 16, 2013, by the Honorable Ronald C. Nagle, Court of Common Pleas of Chester County, which denied his petition filed pursuant to the Post-Conviction Relief Act (PCRA). We affirm.

Following a jury trial, on May 23, 2008, Piedra was convicted of multiple counts of possession with intent to deliver a controlled substance and other drug-related charges.[1] On July 21, 2008, the trial court sentenced

---

* Former Justice specially assigned to the Superior Court.

[1] For a detailed summary of the facts of this case, we direct the reader to pages three through seven of Judge Nagle's memorandum opinion, filed March 20, 2013.

Piedra to a term of 17 to 30 years' imprisonment, to be followed by seven years' probation. On appeal, this Court affirmed Piedra's judgment of sentence, and the Pennsylvania Supreme Court denied allocatur on March 30, 2011. ***Commonwealth v. Piedra***, 15 A.3d 516 (Pa. Super. 2010), ***appeal denied***, 610 Pa. 584, 19 A.3d 1050 (2011).

On March 30, 2012, Piedra filed a timely PCRA petition. An amended petition was filed May 24, 2012. On January 16, 2013, following a hearing, the PCRA court denied Piedra's petition. This timely appeal followed.

On appeal, Piedra raises the following issues for our review:

1. Was trial counsel's failure to properly advise Piedra to accept the District Attorney's offer of a plea agreement ineffective assistance of counsel?

2. Was trial counsel's failure to object to an erroneous jury instruction on the voluntariness of Piedra's confession and ask for a correct instruction ineffective assistance of counsel?

3. Was trial counsel's failure to object to an erroneous jury instruction on accomplice testimony and ask for a correct instruction ineffective assistance of counsel?

4. Did trial counsel render ineffective assistance when he failed to object to the prosecutor's improper comment on Piedra's silence at trial, and when counsel failed to move for a mistrial or a curative instruction?

Appellant's Brief at 2.

"Our standard of review of a trial court order granting or denying relief under the PCRA calls upon us to determine 'whether the determination of the PCRA court is supported by the evidence of record and is free of legal error.'" ***Commonewealth v. Barndt***, 74 A.3d 185, 191-192 (Pa. Super. 2013)

(citation omitted). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Id***. (citation omitted). The PCRA court's credibility determinations are binding on this Court, where there is record support for those determinations. ***Commonwealth v. Timchak***, 69 A.3d 765, 769 (Pa. Super. 2013).

To establish ineffectiveness of counsel, "a PCRA petitioner must show the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner." ***Commonwealth v. Jones***, 71 A.3d 1061, 1063 (Pa. Super. 2013) (citation omitted). "Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different." ***Id***. If a reasonable basis exists for the particular course chosen by counsel, the inquiry ends and counsel's performance is deemed constitutionally effective. ***Commonwealth v. Lauro***, 819 A.2d 100, 106 (Pa. Super. 2003), ***appeal denied***, 574 Pa. 752, 830 A.2d 975 (2003) (citations omitted).

"A criminal defendant has the right to effective counsel during a plea process as well as during trial." ***Commonwealth v. Rathfon***, 899 A.2d 365, 369 (Pa. Super. 2006) (quotation omitted). "Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea." ***Commonwealth v. Hickman***, 799 A.2d 136, 141 (Pa. Super. 2002) (citation omitted). "Where the defendant enters

his plea on the advice of counsel, 'the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.'" ***Id***. (citations and quotations omitted).

"Our trial courts are invested with broad discretion in crafting jury instructions, and such instructions will be upheld so long as they clearly and accurately present the law to the jury for its consideration." ***Commonwealth v. Simpson***, 66 A.3d 253, 274 (Pa. 2013) (citation omitted). "Where a defendant appeals a jury instruction, we consider the challenged instruction in its entirety, rather than isolated fragments." ***Id***.

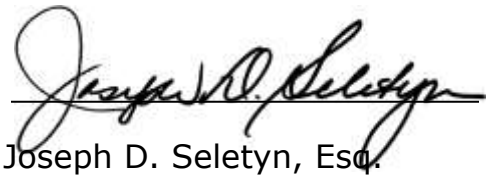
Lastly, we note that the Fifth Amendment also protects a defendant's decision to not testify at trial from being commented on by the prosecution to the jury. ***See Commonwealth v. Fischere***, 70 A.3d 1270, 1276 (Pa. Super. 2013) (citing ***Griffin v. California***, 380 U.S. 609, 612, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)). In reviewing an assertion of prosecutorial misconduct, our inquiry "center[s] on whether the defendant was deprived of a fair trial, not deprived of a perfect trial." ***Commonwealth v. Sneed***, 45 A.3d 1096, 1110 (Pa. 2012) (citation omitted). "A prosecutor's remarks do not constitute reversible error unless their unavoidable effect would prejudice the jurors, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." ***Id***.

With the above standards of review in mind, and after examining the briefs of the parties, the ruling of the PCRA court, as well as the applicable

law, we find that Judge Nagle's ruling is supported by the record and free of legal error. We further find that the PCRA court ably and methodically addressed Peidra's issues raised on appeal. Accordingly, we affirm on the basis of Judge Nagle's thorough and well-written opinion. ***See*** PCRA Court Opinion, filed 3/20/13.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	CHESTER COUNTY, PENNSYLVANIA
vs.	:	
	:	NO. CP-15-CR-0001234-2007;1882-2007; 1922-07; 1966-2007
	:	
ERASMO M. PIEDRA Appellant	:	CRIMINAL ACTION

Nicholas J. Casenta, Chief Deputy District Attorney for the Commonwealth
Kathleen Boyer, Esquire, Attorney for the Appellant

OPINION

We consider the Statement of Errors Complained of on Appeal filed on March 11, 2013 from our dismissal of Appellant, Erasmo M. Piedra's counseled Amended PCRA Petition filed on May 24, 2012 by PCRA counsel Kathleen J. Boyer, Esquire. This is Appellant's first PCRA petition, the original of which was filed by Attorney Boyer on March 30, 2012. We dismissed the Amended Petition on January 16, 2013 by Opinion and Final Order following evidentiary hearing conducted on August 24, 2012. Notice of Appeal was filed on February 15, 2013, and on February 19, 2013 we ordered Appellant to file his Concise Statement within 21 days. On appeal, as in the Amended Petition, Appellant raises the following issues.

1. Counsel failed to object to the court's allegedly improper jury instruction regarding the standard for determining the voluntariness of his statement to the police. Trial Transcript, May 23, 2008, Vol. III, p. 109-112;

2. Counsel failed to object to the trial court's jury instruction regarding accomplice testimony, and failed to request a proper instruction. Trial Transcript, May 23, 2008, Vol. III, p. 127;

3. Counsel failed to object to the Commonwealth attorney's allegedly improper comment to the jury during her closing argument concerning a state trooper's identification of Appellant's voice on an intercepted tape conversation, implying the jury could have decided for itself that it was his voice if Appellant had not remained silent at trial. Trial Transcript, May 23, 2008, p. 9, lines 13-24.

4. Counsel failed to properly advise Appellant regarding a proffered plea agreement and neglected to advise him of the strength of the Commonwealth's case.

Although in paragraph #10(C) of his Amended PCRA petition, Appellant challenged trial counsel's failure to object to the trial court's jury instruction regarding criminal conspiracy, and failed to request a proper instruction, this challenge was withdrawn by Appellant in his Memorandum In Support of Petition for Post-Conviction Relief", p. 2. Accordingly, it has been abandoned.

Procedural History. On May 23, 2008 following a jury trial before the undersigned, Appellant was convicted of multiple counts of Possession of a Controlled Substance with Intent to Deliver, 35 P.S. §780-113(A)(16), and related charges. On July 21, 2008 Appellant was sentenced to an aggregate sentence of 17 to 30 years incarceration, plus 7 years consecutive probation. Following denial of post-sentence motions, Appellant appealed the judgment of sentence on January 22, 2009. On direct appeal, the Superior Court affirmed the judgment of sentence on October 5, 2010. On March 30, 2011, the Pennsylvania Supreme Court denied Appellant's Petition for

Allowance of Appeal. Appellant did not seek review in the United States Supreme Court. A judgment of sentence becomes final for purposes of the timeliness of a petition for relief under the Post Conviction Relief Act once an appellant's means of direct review of a conviction, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, have concluded or the time limits for seeking a direct appeal have expired. 42 Pa.C.S.A. §9545(b)(3). *Commonwealth v. Johnson, 841 A.2d 136 (Pa.Super.,2003).* Direct appellate review of Appellant's direct appeal expired 90 days after the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal and Appellant failed to seek review by the United States Supreme Court. *Commonwealth v. Owens*, 718 A.2d 330, 331 (Pa.Super.,1998); *Commonwealth v. Fairiror*, 809 A.2d 396 (Pa.Super.,2002). Therefore, Appellant's PCRA Petition is timely.

On August 28, 2012, the Commonwealth filed an Answer to the Amended PCRA Petition. In that Answer and during the evidentiary hearing on the Amended Petition which took place on August 24, 2012, the Commonwealth took the position that trial counsel, Timothy M. Barrouk, Esquire was not ineffective as trial counsel, and that the allegations of alleged trial error are without merit.

Substantive History of the Case. Appellant was arrested on March 9, 2007 by the Pennsylvania State Police following a year-long investigation of multiple individuals of Mexican descent engaged in the sale and distribution of illegal drugs in Chester County. Due to the clandestine nature of the illegal drug trade, during the course of their investigation, the State Police in this and related cases, used a confidential informant, "A.L.", (the "informant"), who had been convicted in both state and federal courts as a

drug dealer, and agreed to assist the police in their efforts to infiltrate and identify a network of Spanish speaking persons selling large quantities of cocaine in the County. The police informant is himself of Mexican descent, and agreed to assist police, admittedly hoping to receive consideration on substantial mandatory minimum sentences he faced on both the state and federal levels. He testified, however, that no promises of any kind had been made to him by state or federal authorities. He was acquainted with an individual, Raul Chavez, through whom he was able to contact the Appellant, who, over the course of three separate transactions, sold CI large quantities of cocaine in exchange for "buy" money supplied by the State Police. Through Raul Chavez, the informant was also able to infiltrate a related group of individuals from whom he also purchased illegal drugs in significant quantities during the course of the State Police investigation. These individuals are members of the so-called Barrios Family and their associates, all of whom are Mexican. The informant was able to arrange the purchase from Appellant and others of multi-kilo amounts of cocaine over the course of the investigation, having a "street" value in the hundreds of thousands of dollars. The informant was able to gain the confidence of these individuals, including the Appellant, because of his reputation as a known drug dealer. In all of his face-to-face contacts with Appellant and other members of the cartel, the informant wore a "body wire" provided by the State Police, who also conducted surveillance of him during the course of these multiple contacts. The informant's telephone conversations with Appellant and various of these other individuals were also recorded.

The informant met with Appellant on three separate occasions by pre-arrangement on July 6, 2006, July 20, 2006 and March 8, 2007 at which time Appellant

sold him large quantities of drugs for significant dollars supplied by the State Police, who had prepared informant for each such encounter. In these three transactions, Appellant sold the informant more than 475 grams (16 3/4 ounces) of cocaine. Following the informant's acquisition of the drugs in each instance, the State Police followed him to a prearranged location, and recovered the purchased drugs from him. State Trooper Al Lohman, a long-time criminal/narcotics investigator, managed the informant and led the investigation. At trial, he testified in detail about the informant's encounters with Appellant, the drug purchases, police surveillance of the encounters, provision of the "buy" money to the informant, and recovery of the purchased cocaine from him after each buy. All of these encounters and pre-arrangements were recorded as described above. During the course of his testimony at Appellant's trial, the informant gave detailed testimony about these encounters, explaining the meaning of the "street" lingo used to both arrange for and consummate the transactions. He also positively identified the Appellant as the individual who had sold him the cocaine during each such transaction, and as the person to whom he had paid the "buy" money in exchange for the drugs. The hiatus between the drug purchase dates of July 20, 2006 and March 8, 2007 occurred as a consequence of concentration by the State Police in their investigation of the Barrios Family members, and this informant's assistance in arranging for drug purchases from them, thereby linking various related Appellants to the drug trade in southern Chester County. On March 9, 2007, State Police officers stopped Appellant's car while he was in the company of his girlfriend and another individual. Recovered at that time was a quantity of cocaine and $5,700 in recorded "buy" money that the State Police had provided to the confidential informant to

consummate the cocaine purchase from Appellant that had occurred on March 8, 2007. Appellant's apartment in Oxford, Pennsylvania was also searched. Recovered from there were 2,677 grams of cocaine discovered in a "drop" ceiling, $10,000 in US currency found in a cereal box, 2 electronic scales, drug packaging material and cocaine "cutting" additives, wrappings from a kilo cocaine package, and identification material belonging to Appellant and his girlfriend. After his arrest, Appellant confessed that the recovered drugs and money were his, and that he had been instructed by his supplier to sell and deliver various amounts of cocaine to his supplier's customers.

The recorded conversations that were made during the criminal informant's encounters with the Appellant, who is fluent in Spanish and speaks, but understands some English, were translated into English by State Trooper Kelly Cruz. Trooper Cruz is of Spanish descent, is fluent in several dialects of the Spanish language, including that spoken by Mexican nationals, and, as an undercover narcotics investigator, is conversant with the "lingo" of the drug trade. Transcripts were prepared by the Commonwealth of those recorded conversations by persons fluent in the Spanish language. The individuals whose voices are heard on the recordings are identified in a legend of each such transcription, usually by an assigned identifier, such as UM 1 (unknown male etc). Because of his direct contacts with these individuals, including the Appellant, the police informant, A.L., was later able to identify their voices on the recordings, as was Trooper Cruz, a member of the State Police Vice Unit, who participated in the investigation of the Appellant and members of the Barrios Family, personally interviewed the Appellant, and was able to identify his voice on the tapes containing the recorded conversations. As a narcotics investigator, Trooper Cruz

routinely engaged as an undercover police officer in the investigation of the sale and distribution of illegal narcotics.

Testimony at PCRA Evidentiary Hearing. We conducted an evidentiary hearing on the Amended PCRA Petition on August 24, 2012, at which the Appellant, represented by PCRA counsel, was present and testified. At that hearing, Appellant testified that he was initially represented following his arrest by the Chester County Public Defender. During that representation, plea bargains were discussed by the Defender and the District Attorney, and communicated by the Defender to the Appellant. The initial proffer made by the Commonwealth was a minimum sentence of 15 years imprisonment, later reduced to an offer of 12 to 24 years imprisonment. Attorney Barrouk was hired by Appellant's family to attempt to secure a better deal, and, if unsuccessful, represent the Appellant at trial. Attorney Barrouk subsequently met with Appellant and advised him that he had succeeded in securing a plea agreement with the District Attorney for a reduced proffer, entailing a sentence of 11 to 22 years imprisonment. N.T. 8/24/12, pp. 14–16 & 24-25. Appellant testified that he objected to the length of the latter sentence, and that Attorney Barrouk told him the alternative was to proceed to trial, although Attorney Barrouk advised Appellant he did not know what might happen at trial. Attorney Barrouk told Appellant, "I don't know, anything can happen, we could win". N.T. 8/24/12, p. 16. Appellant admitted on cross- examination that Attorney Barrouk had informed him, that anything could happen at trial, including his conviction, and that, given the Commonwealth's evidence, Appellant had only a 10% chance of acquittal. N.T. 8/24/12, p. 25. Although on direct examination Appellant denied that Attorney Barrouk reviewed the Sentencing Guidelines with him, or told him

that mandatory prison sentences applied to his case, on cross-examination Appellant admitted that Attorney Barrouk explained to him why the proffered sentence was high, involving as the charges did, the large amount of cocaine Appellant was charged with dealing in, and that mandatory sentences applied should he be convicted. N.T. 8/24/12, p. 17, 25-26.

Before trial, in reviewing the Commonwealth's evidence with the Appellant, Attorney Barrouk read the transcripts made by the Commonwealth from the taped recorded conversations between Appellant and the police informant. Appellant admitted that he knew the recordings of his conversations proving drug dealing existed and were in the hands of the police. N.T. 8/24/12, p. 17 & 26. Appellant denied that Attorney Barrouk shared with him photographs police had taken of the cocaine recovered by police from his apartment, but admitted he knew police had seized drugs from his apartment. N.T. 8/24/12, p. 19-20. Appellant testified he did not remember whether Attorney Barrouk told him the Commonwealth was going to use the statement he had made to the police against him at trial. N.T. 8/24/12, p. 20. He claims that had this information been disclosed to him by Attorney Barrouk, he would have taken the 11 to 22 years plea deal offered by the Commonwealth. N.T. 8/24/12, p. 20. However, given Attorney Barrouk's testimony, recounted below, Appellant's testimony is not credible. Appellant admitted Attorney Barrouk did not urge him to go to trial, but that he, Appellant, rejected the proffered 11 to 22 year sentence, believing it was too much time, so he remained optimistic, and chose to go to trial. N.T. 8/24/12, p. 21. Appellant testified that Attorney Barrouk told him the translations from Spanish to English made from the recorded conversations were not done by an expert, and shouldn't be

admissible in court. N.T. 8/24/12, p. 22. However, Attorney Barrouk never told Appellant that the recordings and transcripts would necessarily be excluded at trial. The latter issue, concerning the admissibility at trial of the recorded conversations, was raised on direct appeal and decided adversely to the Appellant. After Appellant rejected the plea proffer, he admitted that Attorney Barrouk reviewed his trial strategy with Appellant "point by point". N.T. 8/24/12, p.23. Once the decision was made to go to trial, Appellant claims Attorney Barrouk did not recommend during trial that Appellant take the proffered plea agreement, although it was proffered again during trial. N.T. 8/24/12, p. 23-24.

Attorney Barrouk testified that he had extensive discussions with Deborah Ryan, the assistant district attorney prosecuting the Appellant, and succeeded in having her reduce the plea offer to 11 to 22 years. Appellant rejected that offer after four or five meetings at which Attorney Barrouk discussed the Commonwealth's case against him and the plea offer. N.T. 8/24/12, p. 28-30. Attorney Barrouk did not specifically tell Appellant to take the proffer or reject it. Instead, he advised Appellant of the options and potential consequences of proceeding to trial, and that acceptance of the offer would mitigate his potential sentencing exposure. He also explained to Appellant the statutory maximum and mandatory minimum sentences he faced if convicted, and the judge's authority to impose consecutive sentences. Attorney Barrouk also explained and reviewed with Appellant the Commonwealth's evidence, and advised him that given the extent and substance of that evidence, Appellant's chances at trial were slim, only a 10% chance of acquittal at trial. Appellant also had the opportunity to hear some of the evidence against him during a pre-trial suppression hearing. N.T. 8/24/12, p.33.

Nonetheless, Appellant remained adamant in rejecting the sentence proffered by the Commonwealth, knowing he did not have a great chance of winning at trial. N.T. 8/24/12, p. 30-31. Although Attorney Barrouk discussed with Appellant the legal issues surrounding the admissibility of the taped conversations and voice identification of the Appellant, he told him "something would have to be screwed up" to preclude their admission in evidence, and Appellant's identification in those recordings, together with the other identifying evidence in the case, as the perpetrator of the charged crimes. N.T. 8/24/12, p. 30-32. Attorney Barrouk advised Appellant there was no certainty that, if convicted, he would get less prison time than offered by the Commonwealth in the proffer, and that he might well get more time than that. Appellant told Attorney Barrouk that he knew he was taking a risk in going to trial, but for the sake of his family, he could not do 11 years. N.T. 8/24/12, p.32. Immediately before trial, ADA Ryan extended another offer of 12 to 24 years, which Appellant rejected, and instead of accepting it, insisted on going to trial. Attorney Barrouk confirmed that before trial he reviewed the transcriptions of the recorded conversations between the Appellant and police informant, and discussed them with the Appellant. Appellant was also aware of the physical evidence police had seized, including the drugs. N.T. 8/24/12, p. 34-35. Appellant confessed when questioned by Trooper Cruz.

Attorney Barrouk testified that an extensive conference was conducted by the trial judge with him and ADA Ryan concerning points requested for charge, during which the charge the trial judge intended to give was reviewed and discussed, and that he was satisfied with the conference and the substance of the judge's proposed charge to the jury. N.T. 8/24/12, p. 35. That testimony is accurate, as it is the undersigned's practice

in every criminal trial to thoroughly review with counsel requested points for charge, and the points for charge the trial judge intends to give the jury. Attorney Barrouk made no objection to the judge's jury charge after it was completed, and requested no additional instructions because he believed the instructions to be both adequate and legally appropriate. N.T. 8/24/12, p. 36.

In her closing to the jury, ADA Ryan stated as follows on the issue of voice recognition:

> "Let me explain something with respect to voice identification. Any person can make a voice identification. You know someone's voice if you heard it before, you could recognize it again. I was actually fortunate to have Kelly Cruz. He was an expert in the area. Anyone can identify a voice. Use your common sense. If you heard that on the wiretap and heard it to be the voice, you, yourself can make the connection that that was the Appellant's voice, if you can compare it to his voice today, but we don't know."

PCRA counsel posed the following question to Attorney Barrouk:

> "Do you recall the district attorney, Ms. Ryan, making a comment during her closing argument that it was difficult for the jury to determine whether it was Mr. Piedra's voice they heard on the surveillance tapes, implying that if he had testified, they would have been able to hear his voice?"

In his response, Attorney Barrouk expressly disagreed with PCRA counsel's interpretation of ADA Ryan's closing remarks on this point, and testified that at the time of ADA Ryan's closing, he took her to mean that it doesn't take an expert to recognize someone's voice, believing it referred to Cruz's testimony that, as a result having heard the taped voices previously, the witness recognized Appellant's voice on the intercepted taped conversations. Attorney Barrouk, while admitting he had not objected or requested a clarifying instruction by the court at that point in the trial, stated that he

knew the court would give the jury the standard instruction that a Appellant has no obligation to testify, can remain silent, and the jury cannot hold that against the Appellant in determining guilt. Indeed, at that juncture, the trial judge had already given that instruction to the jury before any evidence was presented in the case, and again repeated the instruction in his closing charge to the jury. After considering the testimony educed at the evidentiary hearing on the instant PCRA Petition, we credit the testimony of Attorney Barrouk, and find the Appellant's testimony incredible.

Direct Appeal. In his direct appeal, Appellant raised two issues germane to the instant PCRA appeal, the voluntariness of Appellant's confession and the testimony of Trooper Cruz identifying Appellant's voice on the recorded conversations:

> Whether [Appellant]'s inculpatory [sic] statement made to police was made voluntarily in light of the facts that officers were wearing ski mask at the time of arrest and his girlfriend was informed that their child might be taken away if he did not cooperate and she was provided the opportunity to inform [Appellant] of the same[?]
>
> Whether the trial court erred by allowing Trooper Kelly Cruz to [be] recognized as a voice information expert, specifically, whether a he [sic] was tendered as an expert in [an] area that is within the common knowledge of the jury whereby [sic] artificially giving greater credibility to his testimony[?]

Superior Court Opinion, pp. 5-6.

These issues were treated at length in the Superior Courts October 5, 2010 Opinion, No. 323 EDA 2009 affirming his judgment of sentence. In each instance, the Court rejected Appellant's argument that his confession was involuntary, finding it to be voluntary, and that the trial court committed no error in its rulings on voice identification, given the totality of the other evidence against the Appellant. Appellant in this appeal again raises these issues in the context of alleged ineffectiveness of trial counsel.

Viewed in the latter context, we reject the Appellant's contention that trial counsel was ineffective in his representation in either respect.

Discussion of Issues Raised by Appellant. To succeed in a PCRA application, the Appellant must show, by a preponderance of the evidence, 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. This requires the Appellant to show: (1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. In short, an Appellant must prove that counsel's demonstrated ineffectiveness has created a reasonable probability that the outcome of the proceedings would have been different, resulting in an unreliable adjudication of guilt. Section 9543(a)(2)(ii) of the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541 et seq. *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326 (Pa.,1999); *Commonwealth v. Ford*, 570 Pa. 378, 809 A.2d 325 (Pa.,2002); *Commonwealth v. Brady*, 741 A.2d 758 (Pa.Super.,1999). With respect to each of the alleged errors raised in the instant PCRA petition, we find each devoid of merit. Accordingly, trial counsel cannot be considered ineffective for having failed to pursue a baseless or frivolous claim. *Commonwealth v. Pursell*, 508 Pa. 212, 495 A.2d 183 (1985); *Commonwealth v. Peterkin,* 511 Pa. 299, 513 A.2d 373 (1986) (Counsel's assistance is deemed constitutionally effective once court is able to conclude that particular course chosen by counsel had some reasonable basis designed to effectuate

his client's interests). Turning to the individual allegations of ineffective assistance of counsel, we briefly discuss each.

1. Counsel was not ineffective in failing to object to the court's allegedly improper jury instruction regarding the standard for determining the voluntariness of his statement to the police. Trial Transcript, May 23, 2008, Vol. III, p. 109-112.

In the context of the issues raised at trial regarding the Appellant's confession, the charge to the jury was accurate and complete, and taken from the Pa. Standard Jury Instructions, 3.03, 3.04(A) – (D). In charging the jury, the court is free to select its own form of expression so long as the area of law is adequately, accurately and clearly presented to the jury. *Commonwealth v. Blount*, 538 Pa. 156, 647 A.2d 199 (1994). While the judge is not bound by the Pa. Standard Jury Instructions, in this instance the relevant instruction came from the foregoing sections of the Pa. SSJI. *Commonwealth v. Collins*, 810 A.2d 698 (Pa. Super., 2002). Appellant was interviewed at the State Police barracks. The testimony to the jury of the interviewing Trooper, Kelly Cruz made clear that Appellant was advised of his Miranda rights, and Cruz testified as to what those rights are. Appellant acknowledged he understood and waived them. Trial Transcript, May 21, 2008, pp. 30-35. Appellant gave a limited statement to Cruz, which the Trooper did not find credible. Prior to the interview, Appellant's apartment had been searched, and kilos of cocaine, a large amount of money, and drug paraphernalia were found and recovered by police. Marked drug money, whose serial numbers had been recorded by State Police, was also found in Appellant's vehicle upon his arrest following his sale of cocaine the previous day to a State Police informant, the transaction for which was captured on wire and the sale observed by police. Appellant was questioned at the State Police barracks following his arrest about the drug transactions in which he

was involved and about the evidence found in his apartment. Through their informant and their personal observations and recordings of drug sales in which he was previously involved, police knew Appellant was a drug dealer. Appellant filed a pre-trial suppression motion, seeking to keep his statement to Cruz out of evidence. We heard that motion immediately prior to trial and denied it. We concluded that Cruz fully informed Appellant of his Miranda rights, as Cruz described to the jury, and did not use psychological coercion or other force in securing limited admissions from Appellant during a fifteen minute interview the day of his arrest. Appellant's "statement" to Cruz was oral, not written, and is recounted by Cruz at page 64 of the May 23, 2008 trial transcript. Appellant told Cruz that he worked for individuals whom he refused to identify, and who directed his activities in the sale and distribution of cocaine. He stated that the money found in his vehicle the day of his arrest in a diaper bag and in his apartment in a cereal box were the proceeds of drug sales in which he was engaged, and that the cocaine found in a drop ceiling of his apartment had been placed there by him. The information Appellant provided to Trooper Cruz was cumulative of evidence the State Police had already uncovered. Even were a conclusion to be reached that the court's charge to the jury was deficient, any such error on the court's part or on trial counsel's for failing to request a more expansive charge on the point, amounts only to harmless error. *Commonwealth v. Fay*, 344 A.2d 473, 474 (Pa. 1975); *Commonwealth v. Baez*, 720 A.2d 711 (Pa. 1998). The outcome of the trial would have been the same as the other evidence of Appellant's guilt was overwhelming. *Commonwealth v. Kimball, supra.*

2. Counsel was not ineffective in failing to object to the trial court's jury instruction regarding accomplice testimony. Trial Transcript, May 23, 2008, Vol. III, p. 127.

The instant claim arises in respect of the testimony of Raul Chavez. Chavez was called as a witness by the Commonwealth, and testified that he arranged drug transactions between the Appellant, as seller, and A.L., the police informant, as buyer, of a quantity of cocaine in exchange for money. Chavez was present during these transactions and witnessed the exchange. Chavez knew various individuals involved in the illegal drug trade, which led the informant to call Chavez to determine if he could arrange for A.L. to buy drugs. Again, A.L. was the police informant used in this case to get to both Appellant and the members of the Barrios family, separately convicted of drug dealing. Chavez arranged the meetings with Piedra on July 12 and July 20, 2006, and at those meetings A.L. purchased drugs from the Appellant. A.L. gave Chavez $200 after the first transaction was concluded. Trial testimony, May 22, 2008, pp. 238 – 247.

On direct testimony, ADA Ryan elicited the following testimony from Chavez: That he pleaded guilty to conspiring with Appellant for the instant drug transactions and to possession with intent to deliver illegal drugs; that he also pled guilty on August 17, 2006 to a charge of possession with intent to deliver along with another co-Appellant, Jose Agular; that he (Chevez) had not yet been sentenced; that he had not been promised anything by ADA Ryan or any representative of the Commonwealth in exchange for his testimony against Appellant; that on March 20, 2006 Appellant delivered cocaine to another individual, and Chavez conspired with him in that sale; that he, Chavez, had agreed to provide truthful testimony in Appellant's trial; Chavez agreed in his testimony that ADA Ryan told Chavez she could possibly recommend a sentence

to the judge, but never said what that sentence might be. Trial testimony, May 22, 2008, pp. 252.

In addition, Chavez was extensively cross-examined by Attorney Barrouk, during which Chavez admitted he hoped for consideration in his sentencing for his testimony, but was providing truthful testimony, as he was required to do. Trial testimony, May 22, 2008, pp. 252 - 264. Finally, Chavez' s testimony was confirmed by the lead investigator, Trooper Al Lohman, who, together with other officers witnessed the drug transactions between informant A.L. and Appellant, at which Chavez was present. Lohman described those transactions in his testimony at trial. During these transactions, police at the Avondale state police barracks monitored the conversations A.L. had with Appellant. Trial testimony, May 22, 2008, pp. 189 – 236. In addition, Chavez's participation in the drug buys was confirmed by the trial testimony of informant, A.L. Trial testimony, May 22, 2008, pp. 41-188. The testimony of the police informant, A.L., was perhaps the most significant testimony in the Commonwealth's case against the Appellant, which, if believed by the jury, together with the police testimony, was more than sufficient to convict him. Trial transcript, May 22, 2008, pp. 41-188. Even without the testimony of Chavez, the Commonwealth's evidence against Appellant was overwhelming.

While Appellant does not now challenge Attorney Barrouk's effectiveness in relation to the trial judge's conspiracy charge to the jury, he alleges its charge on accomplice testimony was incomplete or inaccurate. To the contrary, considered under the totality of the evidence the jury had in this case, the charge to the jury, taken from the Pa. Standard Jury Instruction 4.01, was accurate. Appellant's brief articulates his

objection to the court's charge as follows: "The Court said, First, use the test of an accomplice because it comes from a corrupt or polluted source. Then, rather than telling the jury to examine an accomplice's testimony closely and accept it only with care and caution, the Court said, you must accept it only with care and caution." We reproduce the court's charge on this point for the Court's convenience, as follows:

> When a Commonwealth witness is an accomplice his or her testimony has circumstantial evidence judged by special precautionary rules. Experience shows that an accomplice when caught may often try to place the blame falsely on someone else. He or she may testify falsely in the hope of obtaining favorable treatment or for some corrupt or wicked motive.
>
> On the other hand an accomplice may be perfectly truthful as a witness. The special rules that I am going to give you are meant to help you distinguish between truthful and false accomplice testimony.
>
> THE COURT: All right. In view of the evidence, Raul Chavez who testified here yesterday was involved in some of these matters. You must regard him as an accomplice in the crimes charged and special rules apply to his testimony. You must decide whether Mr. Chavez was an accomplice in the crimes charged. If after considering all the testimony you find he was an accomplice, you must apply the special rules to his testimony. Otherwise, you ignore the rules. Use the testimony to determine whether Mr. Chavez was an accomplice.
>
> First use the test of an accomplice because it comes from corrupt or polluted source. Second, you must accept it only with care and caution. Third, you should consider whether the testimony of an accomplice is supported in whole or in part by other evidence in the case. Accomplice testimony is more dependable if supported by independent evidence. However, even if there is no independent supporting evidence, you must still find the Appellant guilty or you may find the Appellant not guilty solely on the basis of an accomplice testimony.

> If after using the special rules I have just told you about, you are satisfied beyond a reasonable doubt that the accomplice testified truthfully then the Appellant is guilty.
>
> In order to convict the Appellant of conspiracy you must conclude he reached an agreement with a co-conspirator to commit a crime. In order to establish a Appellant's guilt on accomplice theory an agreement is not required, only aid of the accomplice is required as to Mr. Chavez, he was involved and related to the events occurring on July 12th and July 20, 2006, according to the information against the Appellant.

Trial Transcript, May 23, 2008, Vol. III, pp. 126-128.

Where an accomplice implicates the defendant, the judge should tell the jury that the accomplice is a corrupt and polluted source whose testimony should be viewed with great caution, that is, the weight to be accorded such testimony. *Commonwealth v. Chmiel*, 536 Pa. 244, 639 A.2d 9, 13 (1994); *Commonwealth v. Collins*, 598 Pa. 397, 957 A.2d 237 (2008). To establish prejudice from counsel's failure to challenge the jury charge on appeal, Appellant must show that there is a reasonable probability that, but for counsel's error or omission, the result of the proceeding would have been different. *Commonwealth v. Colavita*, 993 A.2d 874, 887 (Pa.2010). To prevail, the Appellant must demonstrate that if counsel had challenged the jury charge on appeal, there is a reasonable probability Appellant would have been awarded a new trial. "The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." *Commonwealth v. Williams*, 602 Pa. 360, 980 A.2d 510, 523 (2009). There is error only when the trial court abuses its discretion or inaccurately states the law. *Commonwealth v. Hawkins*, 567 Pa. 310, 787 A.2d 292, 301 (2001); *Commonwealth v. Markman*, 591 Pa. 249, 916 A.2d 586, 613 (2007). Under the

evidence presented, Appellant has failed to carry his burden of proof in demonstrating that if Attorney Barrouk had challenged the accomplice jury charge on appeal, there is a reasonable probability Appellant would have been awarded a new trial.

In addition to the latter charge, we also instructed the jury to weigh, analyze, and judge the credibility and reliability of the witnesses; to consider whether any witness had a motive to lie; to consider whether bias or prejudice entered into a witness's testimony, and to consider whether the witness had an interest in the outcome of the trial that would color that witness's testimony. The jury was also instructed that if it believed any witness had lied in his testimony, the jury could, but was not required, to disregard that witnesses testimony. Trial testimony, May 23, 2008, pp. 102-105. In recapping above the manner in which Chavez's testimony was corroborated by other witnesses called by the Commonwealth, and the manner in which his conspiracy and role as an accomplice was mapped out by ADA Ryan in her examination of him, and thoroughly vetted by Attorney Barrouk in his cross-examination of Chavez, we are convinced that Attorney Barrouk was not ineffective in failing to challenge or appeal our accomplice charge to the jury; and, we are further convinced that had he done so, there is no reasonable probability Appellant would have been awarded a new trial. See *Commonwealth v. Smith*, 609 Pa. 605, 17 A.3d 873 (2011). Considered in the light of the totality of the Commonwealth's evidence, any error on the part of counsel in failing to object to the accomplice charge was harmless error. *Commonwealth v. Fay*, and *Commonwealth v. Baez*, supra.

> 3. Trial counsel was not ineffective in failing to object to the Commonwealth attorney's allegedly improper comment to the jury during her closing argument concerning a state trooper's identification of Appellant's voice on an intercepted tape conversation, implying the jury could have decided for

itself that it was his voice if Appellant had not remained silent at trial. Trial Transcript, May 23, 2008, p. 9, lines 13-24.

In her closing to the jury, ADA Ryan stated as follows on the issue of voice recognition:

> "Let me explain something with respect to voice identification. Any person can make a voice identification. You know someone's voice if you heard it before, you could recognize it again. I was actually fortunate to have Kelly Cruz. He was an expert in the area. Anyone can identify a voice. Use your common sense. If you heard that on the wiretap and heard it to be the voice, you, yourself can make the connection that that was the Appellant's voice, if you can compare it to his voice today, but we don't know."

We have explained above how this issue arose. At the time, we did not understand the prosecutor's closing argument to constitute a comment on or questioning of the Appellant's decision not to testify, and certainly did not think the jury would take it to be so. Indeed, we find to be without factual or legal merit Appellant's present contention that ADA Ryan was suggesting that Appellant should have testified in order to rebut the Commonwealth's evidence of voice identification. Assuming it could be so taken, however, we do not find Attorney Barrouk's failure to object, or to have raised this issue on direct appeal, to rise to the level of ineffective assistance of trial counsel.

At the inception of the trial, before any evidence was taken, we preliminarily instructed the jury a second time (after first having done so preliminary to voir dire) that Appellant had no obligation to testify or offer evidence, and that his decision not to do so could not be held against him by the jury. We stressed that the Commonwealth had the burden of proving the charges against the Appellant beyond a reasonable doubt, and that such burden persisted throughout the trial. Trial testimony, May 21, 2008, pp. 5-6.

We again instructed the jury during our final instruction on the law concerning the Commonwealth's burden of proof, that the Appellant had no obligation to testify or offer evidence, that his right to stand silent was a right founded in the U.S. Constitution, and that the jury was precluded from drawing any inference of guilt or any other inference adverse to the Appellant from the fact that he did not testify. Trial testimony, May 23, 2008, Judge's charge, pp. 99-100.

The alleged prejudicial effect of a prosecutor's closing remarks to the jury is evaluated in the context in which they occurred. *Commonwealth v. Smith*, 490 Pa. 380, 416 A.2d 986 (1980); *Commonwealth v. Carpenter*, 533 Pa. 40, 617 A.2d 1263 (1992). The context here was simply the prosecutor's suggestion to the jury that common experience tells us that lay people, without any special training or expertise, having once heard a person's voice, are often able to recognize that voice if they hear it again. It is reasonable to conclude that the ADA Ryan's remarks were meant only to remind the jurors about their own experiences in recognizing voices they have heard before. It remained up to the jurors whether or not to credit the Commonwealth's evidence proffered by Trooper Cruz as an expert in identifying Appellant's voice on the tape recordings. The jury was also adequately instructed, as required, on the Commonwealth's burden of proof, and that it was within the sole province of the jury to determine the facts of the case in arriving at a verdict. We conclude that the totality of our instructions to the jury overcame any such adverse inference in the jury's mind as Appellant now claims to have occurred. In any event, we find that there is no reasonable probability that trial counsel's failure to object to the prosecutor's remark or to raise it as an issue on appeal would have resulted in a different outcome in Appellant's trial, or that

it renders his adjudication of guilt unreliable. *Commonwealth v. Smith*, supra; *Commonwealth v. Fay*, and *Commonwealth v. Baez*, supra.

4. Counsel did not fail to properly advise Appellant regarding a proffered plea agreement and did not neglect to advise him of the strength of the Commonwealth's case.

Although cognizable as a PCRA claim, *Commonwealth ex rel. Dadario v. Goldberg*, 565 Pa. 280, 773 A.2d 126 (2001), a lengthy discussion of this claim is not required. The evidence educed at our evidentiary hearing sur the PCRA Amended Petition is to the contrary, as discussed in our factual findings above. The record is clear that Attorney Barrouk communicated the proffers to the Appellant, advised him of the strength of the Commonwealth's evidence, told him he had only a slim chance of acquittal, 10% or less, and the possible stiffer sentences Appellant faced if convicted. It was Appellant's decision to reject the Commonwealth's plea offers and to go to trial, knowing the maximum sentences and mandatory minimums he faced if convicted. Thus, Attorney Barrouk met his obligation under *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012) (during plea negotiations Appellants are entitled to the effective assistance of counsel). Appellant has failed to convince us that there exists a reasonable probability he would have accepted the offers, since the evidence before me indicates the contrary.

Accordingly, we respectfully recommend that our dismissal of Appellant's Amended PCRA Petition be affirmed.

BY THE COURT

Ronald C. Nagle S.J.