NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOSEPH RHONE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 675 WDA 2012

Appeal from the Order entered March 26, 2012,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0001484-2003.

BEFORE: ALLEN, WECHT, and STRASSBURGER,* JJ.

MEMORANDUM BY ALLEN, J. Filed: February 15, 2013

Joseph Rhone ("Appellant") appeals *pro se* from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. sections 9541-9546. We affirm.

The pertinent facts and procedural history have been summarized as follows:

> On January 8, 2003, McKeesport police received information that Makimna Gustave ("Gustave"), [Appellant's] sister, was selling drugs in a bar in the 300 block of Sixth Street. Detective Thomas Greene subsequently recovered crack cocaine from Gustave's person. Gustave was arrested for possession with intent to deliver as well as possession of a controlled substance. The information regarding Gustave's drug dealings was provided to the police by [Thomas Holmes ("Holmes")], the victim in the instant appeal. Holmes had been a confidential informant for more than 15 years.

*Retired Senior Judge assigned to Superior Court.

Testimony was presented that [Appellant and Yusef Rhone ("Yusef"), his younger brother and co-defendant,] were aware that Holmes provided information to the police that led to their sister's arrest. On the evening after Gustave's arrest, [Appellant] and Yusef, along with their friend Darrell Collins ("Collins"), encountered Holmes as they walked along Cornell Alley. According to Collins, Yusef approached [Holmes] and asked him for a cigarette. A discussion ensued which escalated into an argument. Yusef fired a shot at Holmes who ran up the alley with [Appellant] and Yusef chasing him. Collins fled in the opposite direction; he testified to hearing three or four more shots being fired as he ran. After a pause, Collins heard another round of shots. At trial, Collins testified that while he was in jail with Yusef, Yusef confessed that he fired a gun at Holmes.

Leonard Topley ("Topley") testified that he was at home with his step-daughter when he heard three gunshots. Topley lives at 637 Madison Avenue which is near Holmes' residence. As Topley walked up the driveway toward the sidewalk to investigate, he was approached by a man with a limp who grabbed him by the shoulders and said, twice, "They shot me." Topley went to call 911, and the victim tried to follow him into the house; Topley prevented him from doing so. Upon shutting the door, Topley heard three more gunshots. Topley then heard his step-daughter screaming for him to let her into the house.

Detective Joseph Osinski ("Detective Osinski") testified that he knew Holmes as an informant and was in the process of meeting Holmes after receiving repeated calls from him the day following Gustave's arrest. The detective and Holmes had arranged to meet on Madison Avenue, which was just behind where Holmes lived. At approximately 8:00 p.m., Detective Osinski left the police station; and it took him approximately three to four minutes to reach Madison Avenue. Upon approach, he heard a young female screaming. At 637 Madison Avenue, he observed a body slumping to the ground; the person was lying on the porch as the front door slammed.

The detective parked his vehicle, walked to the porch, and rolled the body over to render aid; Detective Osinski identified the body as that of Holmes. Holmes was found

clutching a lighter in his hand. Paramedics arrived and Holmes was pronounced dead at 8:18 p.m. It was later determined that Holmes died as a result of gunshot wounds to the head, the left arm, and the trunk. Four spent .380 cartridge casings stamped with "PMC .38 auto," were collected at the scene.

Dr. Abdulrezzak Shakir testified that the autopsy evidence showed that Holmes was shot multiple times in the head, upper left arm, shoulder, and both thighs. It was determined that he was shot eight times and with two different guns; he was shot three times in the head and five times in the body. It was determined that the cause of death was gunshot wounds to the head and left arm. All five shots that hit the body were recovered either from the victim or the victim's clothing. One of the three shots to the head was recovered inside the victim.

Dr. Robert Levine ("Dr. Levine"), a criminalist in the Allegheny County Medical Examiners Officer and an expert in firearms, examined the ballistic evidence and determined that the five bullets that hit the victim's body were .38 caliber bullets fired with the same gun, whereas the bullet recovered from the victim's head and a bullet found at the scene were .380s that were fired by the same gun (albeit a different one tha[n] had fired the .38s). Dr. Levine testified that the .38 caliber bullets were fired by a revolver which leaves no cartridge casings, and the .380 that was used was a semiautomatic from which discharged casings are ejected from the firearm.

The Commonwealth also presented the testimony of Devin King ("King"). King stated that he was on house arrest; on the night in question, he was on his porch when he saw [Appellant], Yusef, and Collins. King testified that as they walked by, [Appellant] stated, "I'll make you be like your boy," and flashed a small chrome handgun in King's direction. King reported the incident with the firearm to the police. An arrest warrant was put out for [Appellant], Yusef, and Collins charging them with terroristic threats, recklessly endangering another person, and conspiracy.

Thereafter, on January 15, 2003, Detective Andrew Schurman ("Detective Schurman") of the Allegheny County

police department arrived at [Appellant] and Yusef's residence to execute a search warrant for the premises and an arrest warrant for both men regarding the incident with King. At this time, both men were also considered persons of interest in the murder of Holmes. In Yusef's bedroom, Detective Schurman found Yusef's birth certificate and a live .380 caliber cartridge head-stamped "PMC .380 auto," which is the same head stamp on the spent cartridge casings found at the scene of the murder. Additionally, a newspaper article from January 10, 2003, entitled "McKeesport Police Head Hunt for the Gunman" was found in [Appellant's] bedroom.

The men were transported to the McKeesport police station and waived their ***Miranda*** rights. Detective Schurman interviewed [Appellant] about both the incident with King and the events surrounding the shooting death of Holmes. [Appellant] denied involvement in the incident involving King; he claimed he had not been in King's neighborhood for three months. [Appellant] also stated that he had no knowledge of Holmes' murder beyond what he had seen on television. [Appellant] stated that Holmes had a reputation for being a "snitch" but denied knowing that his sister was arrested the day prior to Holmes' murder.

Yusef was also interviewed on this date and told detectives that he was not present during the shooting incident and was not with [Appellant] the night Holmes was shot. Yusef, however, stated that [Appellant] had confessed to him that he had killed Holmes on January 9, 2003. Yusef denied being with [Appellant] on the night Holmes was shot.

The following day, January 16, 2003, an arrest warrant was secured for [Appellant] for the murder of Holmes; he was arrested at the Allegheny County Jail for the death of Holmes. After being read his ***Miranda*** warnings, [Appellant] again waived his rights and agreed to speak with the detectives. The officer explained that [Yusef] had provided information implicating him and that his sister, Markita Nixon, had shot a man on the North Side three days prior with a .380 caliber silver handgun. [Appellant] then stated that he wanted to tell his side of the story.

Appellant explained that he encountered Holmes on Cornell Alley and stated that Holmes confronted him regarding fake crack cocaine that [Appellant] had sold him some six months earlier. [Appellant] claimed that Holmes reached for a gun in his waistband, which [Appellant] eventually wrestled away from Holmes. [Appellant] shot Holmes twice; and as Holmes got up and ran, he shot him twice more. [Appellant] then put this version of events in writing and provided it again on tape. [Appellant's audiotaped statement was played for the jury.] [Appellant] later admitted to the police that he used a .380 caliber semi-automatic which fit the description of the gun used to threaten King. [Appellant] indicated that he shot at the victim four times, but it is clear from physical evidence that he was shot eight times and by two different guns.

On September 25, 2005, the Allegheny County Police obtained an arrest warrant for Yusef, charging him with the murder of Holmes. Yusef waived his ***Miranda*** rights and admitted to being an eyewitness when Holmes was shot on Cornell Alley on January 9, 2003 but stated that he was not the shooter. Yusef stated that two weapons were used, a black .380 and a silver .38. Yusef also admitted that Holmes had a reputation for being a "snitch." Yusef had heard that Holmes had "snitched" on their sister. Yusef also admitted to previously providing the police with a different version of events on January 15, 2003. Yusef stated that [Appellant] gave him a .380 weapon and asked him to "get rid of it for him." Yusef put the gun into a bag and took it to his sister's house.

After this version was taped, Yusef indicated he wanted to again change his statement as it was not the entire truth. Yusef again agreed to place his admissions on audiotape. During the recorded session, he implicated himself and admitted to having more of a role in the incident. In his second statement, Yusef admitted that he fired the first shot at Holmes with a .38 revolver. Yusef stated that he fired this gun until it clicked empty, which he thought was three to four shots. Yusef stated that he fired a .38 caliber weapon in Holmes' direction but explained that he did not intend to harm Holmes, but only wanted to frighten him. He stated that the shots he fired at Holmes were "low" and that he ran away after firing the

> weapon and that [Appellant] chased Holmes. Yusef also stated that [Appellant] had asked him to "get rid of" the .380 for him so he hid it on the side of his sister's house in the bushes. Yusef claim[ed] that he has "no idea" what happened to the .38 weapon.
>
> * * *
>
> [Appellant] was charged with one count of homicide. On March 15, 2004, he filed an omnibus motion seeking to suppress statements made to the police. After multiple changes of counsel, a hearing on the motion to suppress was held; the motion was denied. On July 14, 2005, the matter was re-opened upon the request of the defense, and an additional hearing was held wherein [Appellant] testified. On July 28, 2005, the motion was again denied. On May 1, 2006, the Commonwealth filed a motion to amend the criminal information, seeking to add one count of criminal conspiracy. The motion was granted. Yusef was charged with one count of criminal homicide and one count of criminal conspiracy to commit murder.
>
> On May 2, 2006, a joint jury trial was held before the Honorable John A. Zottola. On May 5, 2006, the jury found both [Appellant] and Yusef guilty of murder and conspiracy. On July 24, 2006, both men were sentenced to life imprisonment for first degree murder as well as a concurrent life sentence for conspiracy. [Appellant] and Yusef each filed post-sentence motions challenging the sufficiency and weight of the evidence. Judge Zottola denied the motions. Thereafter, both men filed timely notices of appeal.

Commonwealth v. Rhone, 959 A.2d 972 (Pa. Super. 2008), unpublished memorandum at 2-10 (citations and footnotes omitted),

In addition to sufficiency and weight challenges, Appellant also raised a claim that the trial court erred in denying his suppression motion. Finding

no merit to any of these claims, this Court, in an unpublished memorandum filed on July 17, 2008, affirmed Appellant's judgment of sentence.[1] ***Rhone***, ***supra***. Our Supreme Court denied Appellant's petition for allowance of appeal on April 1, 2009. ***Commonwealth v. Rhone***, 968 A.2d 232 (Pa. 2009).

On March 25, 2010, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel. On January 19, 2012, the PCRA court vacated its previous order appointing counsel and appointed another attorney to represent Appellant. On February 24, 2012, PCRA counsel filed a motion to withdraw as counsel and a "no merit" letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On February 27, 2012, the PCRA court granted PCRA counsel's motion to withdraw, and entered an order giving Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's PCRA petition. Appellant filed his response on March 16, 2012. By order entered March 26, 2012, the PCRA court dismissed Appellant's PCRA petition. This timely appeal followed. Both Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues:

---

[1] This Court affirmed Yusef's judgment of sentence in the same memorandum.

I. Did the PCRA court err in dismissing Appellant's PCRA Petition as meritless on the grounds that the violation of Appellant's confrontation rights under the Sixth Amendment was harmless beyond a reasonable doubt?

II. Did the PCRA court err in dismissing Appellant's PCRA Petition as meritless on the grounds that trial counsel was not ineffective in failing to address issues related to Appellant's unlawful arrest on misdemeanor charges not committed in the officer's presence, thus, challenging the tainted information obtained as a result of the unconstitutional arrest?

III. Did the PCRA court err in dismissing Appellant's PCRA Petition as meritless on the grounds that trial counsel was not ineffective for not objecting to the inadequate and erroneous Malice Instruction in regards to third-degree murder?

Appellant's Brief at 4.

When examining a post-conviction court's grant or denial of relief, we are limited to determining whether the court's findings were supported by the record and whether the court's order is otherwise free of legal error. ***Commonwealth v. Quaranibal***, 763 A.2d 941, 942 (Pa. Super. 2000). We will not disturb findings that are supported in the record. ***Id.*** The PCRA provides no absolute right to a hearing, and the post-conviction court may elect to dismiss a petition after thoroughly reviewing the claims presented, and determining that they are utterly without support in the record. ***Id.***

To be entitled to relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the errors enumerated in section 9543(a)(2) of

the PCRA. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). Additionally, the petitioner must establish that the issues he raises have not been previously litigated. ***Commonwealth v. Carpenter***, 725 A.2d 154, 160 (Pa. 1999). An issue has been "previously litigated" if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or if the issue has been raised and decided in a proceeding collaterally attacking the conviction or sentence. ***Carpenter***, 725 A.2d at 160; 42 Pa.C.S.A. § 9544(a)(2), (3). If a claim has not been previously litigated, the petitioner must then prove that the issue was not waived. ***Carpenter***, 725 A.2d at 160. An issue will be deemed waived under the PCRA "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding." 42 Pa.C.S.A. § 9544(b).

Although not raised with specificity in his first claim, Appellant challenges the stewardship of prior counsel in all three of his claims.[2] In reviewing Appellant's issues, we apply the following principles. Counsel is presumed to be effective, and Appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa. Super. 2004).

---

[2] To the extent Appellant asserts trial court error as to his first issue, the claim is waived under the PCRA because it could have been raised on direct appeal. ***Carpenter***, ***supra***.

> In order for Appellant to prevail on a claim of ineffective assistance of counsel, he 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. ***Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326, 333 (1999). Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Id.*** The petitioner bears the burden of proving all three prongs of the test. ***Commonwealth v. Meadows***, 567 Pa. 344, 787 A.2d 312, 319-20 (2001).

Commonwealth v. Johnson, 868 A.2d 1278, 1281 (Pa. Super. 2005). In assessing a claim of ineffectiveness, when it is clear that an appellant has failed to meet the prejudice prong, the court may dispose of the claim on that basis alone, without a determination of whether the first two prongs have been met. ***Commonwealth v. Travaglia***, 661 A.2d 352, 357 (Pa. 1995). Counsel cannot be deemed ineffective for failing to pursue a meritless claim. ***Commonwealth v. Loner***, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*), *appeal denied*, 852 A.2d 311 (Pa. 2004).

In his first issue, Appellant claims that trial counsel was ineffective for failing to object to a ***Bruton***[3] violation that occurred at trial when the Commonwealth played Yusef's recorded statements to police. According to

---

[3] ***Bruton v. United States***, 391 U.S. 123 (1968).

Appellant, because Yusef did not testify at their joint trial, the Commonwealth "introduced a non-testifying co-defendant's statements against him as substantive evidence." Appellant's Brief at 13. Appellant argues that he was severely prejudiced by the introduction of this evidence, and the PCRA court erred in concluding that the introduction was harmless error. We disagree.

"In ***Bruton***, the Court held that a defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment when his non-testifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, because there is a high risk that the jury will consider the statement against the defendant." ***Commonwealth v. Rainey***, 928 A.2d 215, 226-27 (Pa. 2007) (citation omitted). Since ***Bruton***, our Supreme Court has refined the high court's ruling on several occasions. Our Supreme Court has "approved of redaction as an appropriate method of protecting [a] defendant's rights under the ***Bruton*** decision." ***Rainey***, 928 A.2d at 226-228. Even if a violation occurs, as Appellant suggests happened in his case, a ***Bruton*** violation may be harmless error in light of the other evidence introduced at trial. Our Supreme Court has explained:

> The mere finding of a violation of the [***Bruton***] rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co[-] defendant's admission is so insignificant in comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Commonwealth v. Wharton, 607 A.2d 710, 718 (Pa. 1992) (*quoting* ***Schneble v. Florida***, 405 U.S. 427, 430 (1972)).

The PCRA court in this case agreed with PCRA counsel's assessment that if any ***Bruton*** violation occurred, it was harmless error, given the other evidence introduced by the Commonwealth against Appellant. Our review of the record supports this conclusion. Most significantly, Appellant's own recorded confession was played for the jury. ***See Wharton***, 607 A.2d at 717 (discussing "refinement of the ***Bruton*** rule [dealing] with so-called 'interlocking confessions'"). In his statement, Appellant confessed to the crime, placed himself at the crime scene, and took responsibility for killing the victim. Thus, the independent evidence of Appellant's guilt is overwhelming. ***See id.*** (assuming admission of co-defendant's confession implicating the defendant in context of other evidence violated ***Bruton*** rule, any error was harmless given overwhelming evidence including the defendant's confession to murder and robbery); ***see also Commonwealth v. Bond***, 652 A.2d 308, 315 (Pa. 1995) (explaining that any error in admission of co-defendant's redacted confession was harmless in light of the independent evidence of the defendant's guilt, which included a full confession to murder). Additionally, in this case, the trial court instructed the jury as to the proper use of a co-defendant's statement. ***See*** N.T., 5/5/06, at 625. Thus, as Appellant cannot establish that he was prejudiced by counsel's failure to object at trial, his ineffectiveness claim fails. ***Loner***, ***supra***.

Appellant supports his next claim of ineffective assistance of counsel by asserting that he and Yusef were illegally arrested for terroristic threats. During this "unlawful detention," Yusef gave a statement to police, which implicated Appellant in Holmes' murder. Appellant's Brief at 13. Appellant further asserts that Yusef's statement "was subsequently used to compel and influence" Appellant "to eventually admit to being involved" in the murder. ***Id.*** According to Appellant, "[t]he introduction of this illegally obtained evidence to convict [him] denied him a fair trial, in that the truth-determining process was [a]ffected." ***Id.*** Thus, Appellant claims that trial counsel was ineffective "for failing to challenge Appellant's statement on the basis that it was obtained by exploiting information learned during Appellant's initial unlawful arrest on misdemeanor charges[.]" Appellant's Brief at 29 (capitalization removed). We disagree.

Initially, we note that the validity of Appellant's confession was previously litigated, because this Court reviewed the propriety of the denial of Appellant's suppression motion on direct appeal. ***See Rhone***, unpublished memorandum at 15-20; ***Carpenter***, ***supra***. Although Appellant challenged the legality of his initial arrest on appeal, we found the issue waived because he did not raise it in his Pa.R.A.P. 1925(b) statement.[4]

---

[4] Appellant also claims that appeal counsel was ineffective for failing to include this claim in his Rule 1925(b) statement.

Appellant claims "trial counsel could not have had a reasonable basis for not challenging [his] statement as fruit from the poisonous tree, during the suppression hearing." Appellant's Brief at 35.

Appellant's claim entitles him to no relief. Appellant gave his confession following his lawful arrest for homicide the day after Yusef implicated him in Holmes' murder. Unfortunately for Appellant, while Yusef could have challenged his statement following his arrest for terroristic threats, Appellant cannot. ***See generally***, ***Wong Sun v. United States***, 371 U.S. 471 (1963) (explaining that certain constitutional rights are personal rights which may not be asserted vicariously); ***see also Commonwealth v. Powell***, 994 A.2d 1096, 1107 (Pa. Super. 2010) (reiterating that Pennsylvania courts "have repeatedly refused to recognize the vicarious assertion of constitutional rights"). Thus, because a motion to suppress claiming a violation of Yusef's constitutional rights would have been meritless, trial counsel cannot be deemed ineffective for failing to raise this meritless claim. ***Loner***, ***supra***.

In his third and final issue, Appellant claims that trial counsel was ineffective for failing to object to the trial court's jury instruction defining third-degree murder. According to Appellant, he was "denied due process and equal protection of the law when the jury was not given the opportunity to weigh and consider all the elements of malice as it related to third degree murder." Appellant's Brief at 14. Appellant asserts "not only was the malice

charge not adequately and accurately stated, but it was confusing as well." ***Id.*** We disagree.

"When reviewing a challenge to part of a jury instruction, we must review the jury charge as a whole to determine if it is fair and complete. A trial court has wide discretion in phrasing its jury instructions, and can choose its own words as long as the law is clearly, adequately, and accurately presented to the jury for its consideration. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law." ***Commonwealth v. Roser***, 914 A.2d 447, 455 (Pa. Super. 2006) (citation omitted). Stated differently, "[a] faulty jury charge will require the grant of a new trial only where the charge permitted a finding of guilt without requiring the Commonwealth to establish the critical elements of the crimes charged beyond a reasonable doubt." ***Commonwealth v. Wayne***, 720 A.2d 456, 465 (Pa. 1998).

In its charge to the jury, the trial court included the following instruction:

> Before defining the elements of any of these crimes, I will tell you about malice, which is an element of murder. A person who kills must act with malice to be guilty of any degree of murder.
>
> The word malice differs for each degree of murder. Thus, for murder of the first degree, a killing is with malice if the perpetrator acts with first an intent to kill or, as I will explain later in my definition of first degree murder, the killing is willful, deliberate and premeditated.

For murder of the third degree, a killing is with malice if a perpetrator's actions show his or her wanton and willful disregard of an unjustified and extremely high risk that their conduct would result in death of serious bodily injury to another.

In this form of malice, the Commonwealth must not prove that the perpetrator specifically intended to kill another. The Commonwealth must prove, however, that he took action while consciously, that is knowingly, disregarding the most serious risk he was creating and that his disregard of that risk demonstrates the extreme indifference to the value of human life.

* * *

Third degree murder. Third degree murder is any killing with malice that is not first degree murder. [Appellant] has been charged with third degree murder.

In order to find [Appellant] guilty of this offense, you must find that the following elements have been proven beyond a reasonable doubt: first, that [Holmes] is dead; second, that [Appellant] killed him; and third, that [Appellant] did so with malice.

The word malice, as I am using it, has a special legal meaning. It does not simply mean hatred, spite or ill will. Malice is a shorthand way of referring to the mental state that the law regards bad enough to make a killing murder.

A killing of third degree is malice if the perpetrator shows wanton and willful disregard, an unjustified high risk that his or her conduct would result in death or serious bodily injury to another.

In formal analysis, the Commonwealth need not prove that the perpetrator specifically intended to kill. Here, the Commonwealth must prove however that the perpetrator's actions were consciously, that is knowingly, disregarding the most serious risk he or she created by his or her disregard of that risk. The perpetrator demonstrated his or her extreme indifference to the value of life.

In deciding whether or not [Appellant] acted with malice, you should consider all the evidence regarding

> [his] words and conduct surrounding the circumstances that may show [his] state of mind. If you believe [Appellant] intentionally used a deadly weapon to a vital part of the victim's body, you may regard that as circumstantial evidence from which you may choose, if you decide, that [Appellant] acted with malice.

N.T., 5/5/06, at 635-40.

Our review of the above jury instruction when read in the context of the entire jury charge, refutes Appellant's claim. While the trial court did not use the precise language proffered by Appellant, it adequately defined the term "malice." ***Roser***, ***supra***; ***see also Commonwealth v. Robinson***, 877 A.2d 433, 444-45 (Pa. 2005) (holding instructions on malice, first-degree murder, and third-degree murder were accurate and adequate).

Appellant's claim that jury confusion is demonstrated by the jury's request to be re-instructed with regard to the elements of first and third-degree murder is without merit. "Questions from the jury and requests to be recharged are common and most certainly do not create a presumption of jury confusion." ***Commonwealth v. Weaver***, 768 A.2d 331, 335 (Pa. Super. 2001) (citation omitted). Indeed, "the questions could also be interpreted as a sign of a conscientious jury." ***Id.*** Thus, because trial counsel cannot be deemed ineffective for failing to raise a meritless objection to the trial court's malice instruction, Appellant's third claim fails. ***Loner***, ***supra***.

In sum, Appellant's ineffectiveness claims are without merit. We therefore affirm the PCRA court's order dismissing Appellant's *pro se* PCRA petition.

Order affirmed.