

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ELI DAVIS

Appellant

No. 983 EDA 2012

Appeal from the PCRA Order of March 8, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0610141-2006

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY WECHT, J.:

FILED MAY 17, 2013

Eli Davis ("Appellant") appeals the denial of his petition for relief filed under the Post Conviction Relief Act ("PCRA").¹ After review, we affirm.

On January 28, 2008, following a jury trial, Appellant was convicted of first-degree murder, 18 Pa.C.S.A. § 2502, and firearms not to be carried without a license, 18 Pa.C.S.A. § 6106. That same day, Appellant was sentenced to life imprisonment for the murder conviction and a concurrent two-and-a-half to five-year prison term for the firearms conviction. Appellant filed a timely direct appeal, and this Court affirmed the judgment

* Retired Senior Judge assigned to the Superior Court.

¹ 42 Pa.C.S.A. §§ 9541, *et seq.*

of sentence. **Commonwealth v. Davis**, 560 EDA 2008 (Pa. Super. June 12, 2009) (unpublished memorandum).

Appellant filed a timely PCRA petition on March 15, 2011, in which Appellant claimed that trial counsel was ineffective. Appellant alleged that the trial court gave inadequate jury instructions on imperfect self-defense and voluntary manslaughter, and that trial counsel was ineffective for failing to object or to insist upon a proper instruction. PCRA Petition, 3/15/2011, at 5-11. The Commonwealth moved to dismiss the petition. On March 8, 2012, the PCRA court dismissed the petition without a hearing.

This appeal followed. The PRCA court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied. On August 1, 2012, the PCRA court filed its Rule 1925(a) opinion.

On appeal, Appellant raises one issue: "Was the Appellant deprived of effective assistance of counsel in failing to request that the jury be fully and properly charged as to voluntary manslaughter, 18 Pa.C.S. 2503(b)?" Appellant's Brief at 3.

The "standard of review for an order denying post-conviction relief is limited to whether the record supports the post-conviction court's determination, and whether that decision is free of legal error." **Commonwealth v. Allen**, 732 A.2d 582, 586 (Pa. 1999). The PCRA court's findings "will not be disturbed unless there is no support for the findings in the certified record." **Commonwealth v. Johnson**, 945 A.2d 185, 188 (Pa.

Super. 2008). “Where ... there is record support for a PCRA court’s credibility determinations, we, as a reviewing court, are bound by those determinations.” **Commonwealth v. Abu-Jamal**, 720 A.2d 79, 93 (Pa. 1998) (citation omitted).

The applicable test for ineffectiveness of counsel is as follows:

[T]he appellant must overcome the presumption of competence by showing that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel’s ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different.

Commonwealth v. Bomar, 826 A.2d 831, 855 (Pa. 2003). Failure to satisfy a single prong of the above test will result in the rejection of the underlying claim. **Commonwealth v. Jones**, 811 A.2d 994, 1002 (Pa. Super. 2002).

Following a review of the record, we adopt the PCRA court’s well-reasoned August 1, 2012 opinion (finding that “a jury instruction on voluntary manslaughter, unreasonable belief of self-defense was not warranted” due to lack of evidentiary support; and finding that “[t]he facts of the instant case do not support voluntary manslaughter based on an unreasonable belief of ... defense of another”). A copy of that opinion is attached hereto for reference. We agree with the PRCA court that there is no arguable merit to the underlying legal issue. Therefore, Appellant cannot prevail on his ineffective assistance of counsel challenge.

J-S77029-12

Order affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 5/17/2013

IN THE COURT OF COMMON PLEA OF PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0610141-2006

v.

ELI DAVIS , Appellant : No. 983 EDA 2012

FILED

AUG 1 2012

Criminal Appeals Unit
First Judicial District of PA

OPINION OF THE COURT

Appellant, Eli Davis, appeals from this Court's denial of relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, *et seq.* There was no genuine issue of material fact warranting an evidentiary hearing nor was any relief due.

On January 28, 2008, Appellant was convicted by a jury of first-degree murder, 18 Pa.C.S.A. § 2502, and a violation of the Uniform Firearms Act, 18 Pa.C.S.A. § 6106, for the shooting death of Kareem Sephcs on November 7, 2005.¹ Following the jury's verdict, this Court sentenced Appellant to life imprisonment for murder and imposed a concurrent sentence of two and a half to five years imprisonment for the firearms violation. Appellant filed a timely Notice of Appeal to the Superior Court. On June 12, 2009, the Superior Court affirmed the judgments of sentence. The Supreme Court of Pennsylvania denied Appellant's Petition for Allowance of Appeal on June 10, 2010.

Appellant filed a timely PCRA petition on March 15, 2011, alleging that the assistance of his trial counsel was so ineffective as to "[undermine] the truth-determining process [such] that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. §

¹ Appellant initially entered into a negotiated plea agreement to Third Degree Murder on June 12, 2007, but withdrew the plea prior to the sentencing hearing on July 23, 2007.

9543(a)(2)(ii). The alleged ineffective assistance was a failure to request a complete instruction on voluntary manslaughter including the unreasonable belief of self-defense or defense of another pursuant to 18 Pa.C.S. § 2503(b). On motion from the Commonwealth, and after providing notice pursuant to Pa.R.Crim.P. 907, this Court dismissed the PCRA petition without a hearing on March 8, 2012. The instant appeal arises from that dismissal.

The facts found by the jury were as follows. On the evening of November 7, 2005 in the area of 5700 Beaumont Avenue, Appellant and the decedent, Kareem Sephes, had an argument which escalated into a fist fight, according to the testimony of eyewitnesses Hakim Price, Lamar Robinson, Domonique Taylor, and Kalil Sephes, the decedent's twin brother.² (N.T. 1/24/08 p. 77-82, 131-132, 201-202; N.T. 1/25/08 p. 78-79.) Price testified that there was a brief break in the fighting due to a worry that the police were nearby. (N.T. 1/24/08 p. 82-83, 98.) The fighting resumed as a crowd of approximately fifteen to twenty persons gathered in a shared driveway intersecting Beaumont Street, including one who was a friend of Appellant. (*Id.* at 82-83, 141, 201-202.) Kalil testified that the decedent was gaining the upper hand in the fist fight with Appellant. (N.T. 1/25/08 p. 78.) Robinson testified that Appellant's friend threw a punch at the decedent, after which the gathered crowd attacked the friend. (N.T. 1/24/08 p. 99, 132.) Taylor and Kalil testified that as the friend was being beaten by the crowd, Appellant pulled out a gun, aimed at the decedent, and attempted to fire. (N.T. 1/24/08 202-203; N.T. 1/25/08 p. 79-

² Kalil Sephes testified at the preliminary hearing. This Court found him to be unavailable at trial. After determining that Appellant's counsel was given a full and fair cross examination at the hearing consistent with the rule established by *Commonwealth v. Bazemore*, 614 A.2d 684, 685 (Pa. 1992), we allowed this preliminary hearing testimony to be read to the jury. (N.T. 1/25/08 p. 62.)

80, 83.) This testimony was corroborated by statements Price and Robinson gave to the police that same night.³ (N.T. 1/24/08 p. 99, 141.)

Price and Kalil testified that upon seeing the gun, the decedent and the crowd started to flee, running away in different directions. (N.T. 1/24/08 p. 84; N.T. 1/25/08 p. 88.) The gun failed to fire, so Appellant "smacked" the gun. (N.T. 1/24/08 p. 99-100; N.T. 1/25/08 p. 80-81.) According to Price and Robinson's statements, Appellant fired six shots at the decedent as the decedent fled, which is corroborated by physical evidence. (N.T. 1/24/08 p. 35-38, 100, 142.) The decedent was hit once in the back, and the bullet pierced his heart and left lung, causing his death. (N.T. 1/25/08 p. 9-11, 14.) Thereafter, Appellant fled the jurisdiction, and was apprehended in Collingswood, New Jersey on February 2, 2006. (*Id.* at 124-127, 129-131.)

The Pennsylvania Suggested Standard Criminal Jury Instruction on voluntary manslaughter contains two optional parts: instructions on the heat of passion corresponding to 18 Pa.C.S. § 2503(a), and instructions on an unreasonable belief in justifying circumstances corresponding to 18 Pa.C.S. § 2503(b). At trial, Appellant's trial counsel requested both parts of the voluntary manslaughter instruction, along with the complete defense of self-defense. (N.T. 1/28/08 p. 11-13.) The Commonwealth opposed an instruction on imperfect self-defense—as well on self-defense—due to a lack of evidentiary support, for many of the same reasons found below. (N.T. 1/28/08 p. 13-14.) This Court determined at trial that an instruction on unreasonable belief of self-defense was not warranted due to this lack of evidentiary support, and instructed the jury only on heat of passion.⁴ In the instant matter Appellant claims that his trial

³ Price and Robinson gave these written statements to police, which they also signed and adopted that night. These were introduced at trial as substantive evidence of prior inconsistent statements under the rule established by *Commonwealth v. Lively*, 610 A.2d 7, 10 (Pa. 1992).

⁴ Though the trial record erroneously indicates that this Court agreed to instruct on imperfect self-defense and denied an instruction on self-defense, this was not our intention. (N.T. 1/28/08 p. 15, 71-97.) The instructions we gave were the instructions we intended to give, and both counsel understood this. Indeed, it

counsel was ineffective for failing to challenge this Court's refusal to charge on unreasonable belief of justification.

The instant appeal is from this Court's denial of an evidentiary hearing for a claim of ineffective assistance of counsel and dismissal of the PCRA petition. The Sixth Amendment recognizes a right to the assistance of counsel, and that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). The test for ineffective assistance of counsel ("Pierce test") has three prongs, all of which Appellant must meet: "[that] (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission." *Commonwealth v. Koehler*, 36 A.3d 121, 132 (Pa. 2012) (citing *Commonwealth v. Pierce*, 527 A.2d 973, 975 (1987)). Since counsel is presumed to be effective, "the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." *Id.* (citing *Strickland*, 466 U.S. at 687-91). Moreover, "[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). "[I]f the court can determine without an evidentiary hearing that one of the prongs [of the test for ineffective assistance of counsel] cannot be met, then no purpose would be advanced by holding an evidentiary hearing." *Id.* In the instant case, Appellant fails to meet the first and second prongs, and therefore no relief is due.

A defendant charged with murder may instead be convicted of voluntary manslaughter "if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable." 18 Pa.C.S. §

would have been unusual for us to instruct on imperfect self-defense and not instruct on self-defense, as the reasonableness of the actor's belief is usually a question for the trier of fact. *Commonwealth v. Lightfoot*, 648 A.2d 761, 764 (Pa. 1994).

2503(b) (2010). This reduction from murder to voluntary manslaughter requires that the defendant have a subjective belief that the circumstances justify the killing, although that belief is objectively unreasonable. *Commonwealth v. Carter*, 466 A.2d 1328, 1332 (Pa. 1983). The justifications under Chapter 5 of Title 18 include both self-defense, 18 Pa.C.S. § 505 (2010), and defense of another, 18 Pa.C.S. § 506 (2010).⁵

Unreasonable belief self-defense differs from the complete justification of self-defense "in only one respect[.:] an unreasonable rather than a reasonable belief that deadly force was required to save the actor's life." *Commonwealth v. Tilley*, 595 A.2d 575, 582 (Pa. 1991). "All other principles of justification under 18 Pa.C.S. § 505" must still be met in order to invoke unreasonable belief self-defense to reduce culpability for the use of deadly force from murder to voluntary manslaughter. *Id.* As with the excerpt of the Pennsylvania Suggested Standard Criminal Jury Instruction on voluntary manslaughter above, the other principles of justification that must be met to invoke unreasonable belief self-defense are "(1) the actor [subjectively] believed himself to be in imminent danger of death or serious bodily harm and that it was necessary to use deadly force against the victim in order to prevent such harm, (2) the actor was without fault in provoking or continuing the situation that resulted in the killing, and (3) the actor did not violate any duty to retreat." *Commonwealth v. Washington*, 692 A.2d 1024, 1028 (Pa. 1997). Without factual support for any one of these elements, a jury instruction on unreasonable belief self-defense voluntary manslaughter is not warranted.

In order to warrant such a jury instruction, the trier of fact must be able to find that the defendant had a sincere belief in circumstances justifying the killing. "[T]he defendant's belief, sincere though unreasonable, negates malice" that would otherwise prove an element of murder.

⁵ Sections 505 and 506 were amended by 2011 Pa. Legis. Serv. Act. 2011-10 (H.B. 40) on June 28, 2011 (effective August 29, 2011). This opinion refers exclusively to the prior versions of both statutes.

Carter, 466 A.2d at 1332. There are sets of facts that tend to show that a defendant is guilty of murder rather than voluntary manslaughter, particularly when the defendant uses deadly force against non-deadly force. "[W]hen the actor is confronted by non-deadly force [. . .] the actor's retaliation must not be excessive." *Commonwealth v. Jones*, 332 A.2d 464, 466 (Pa. Super. 1974). Using a knife during a fist fight is considered excessive retaliation that tends to show murder rather than manslaughter; a fortiori, firing a handgun during a fist fight is excessive retaliation as well. *Id.*; see *Commonwealth v. Sacco*, 98 Pa. Super. 347, 350-51 (1929) (using a knife to repel a bare-fisted attacker is excessive deadly force that precludes the use of self-defense); see *Commonwealth v. Gelber*, 594 A.2d 672 (Pa. Super. 1991) (fact that defendant had sole possession of the knife and victim was unarmed supports a finding that defendant did not act in self-defense). Firing six times at a victim is "simply more force than would have been necessary for [a defendant] to use in order to protect himself," and is also excessive retaliation tending to show murder rather than manslaughter. *Commonwealth v. Harvey*, 812 A.2d 1190, 1196 (Pa. 2002) (six shots fired at an unarmed victim walking towards defendant tended to disprove self-defense). Attacking a victim from behind using deadly force tends to show murder rather than manslaughter. *Commonwealth v. Marks*, 704 A.2d 1095, 1099 (Pa. Super. 1997) (sledgehammer blows to the back of the victim's head tended to disprove self-defense). In addition, since specific intent to kill "may be inferred from the use of a deadly weapon on a vital part of the victim's body," firing at a vital part of a fleeing victim's body tends to show murder rather than manslaughter. *Commonwealth v. Rivera*, 983 A.2d 1211, 1220 (Pa. 2009). These sets of facts and what they tend to show may preclude a trial court from issuing an instruction on voluntary manslaughter including unreasonable belief self-defense.

Instantly, the evidence demonstrated that Appellant was engaged in a fist fight with the decedent, and Appellant pulled out a gun and fired at the decedent, using deadly force against an unarmed victim. Appellant fired six times, using deadly force which was excessive under the circumstances. Appellant fired at a fleeing victim, attacking him from behind. The decedent was hit in the upper back and the bullet pierced his heart and lung, which are vital parts of the body. This evidence negated any claim that Appellant had a belief, reasonable or unreasonable, in self-defense. Accordingly, a jury instruction on voluntary manslaughter, unreasonable belief of self-defense was not warranted.

In addition to a sincere belief in circumstances justifying the killing, a defendant invoking unreasonable belief of self-defense must be without fault in provoking or continuing the situation. "Generally, an individual is not entitled to claim self-defense unless he or she is free from fault in provoking or continuing the difficulty which culminated in the slaying," which applies equally to unreasonable belief self-defense. *Commonwealth v. Soto*, 657 A.2d 40, 43 (Pa. Super. 1995). "[A] defendant is free from fault unless he or she provokes or continues a conflict with the intent of causing death or serious bodily injury." *Id.* (quoting *Commonwealth v. Samuel*, 590 A.2d 1245, 1247 (Pa. 1991)).

Though the evidence was unclear on who started the fist fight between Appellant and the decedent, the evidence was clear on who escalated this conflict. Appellant was the only person in the conflict to produce a handgun. Upon seeing the handgun, the crowd and the decedent began to flee, while Appellant took aim at the decedent. The decedent and the crowd continued to flee as Appellant's gun misfired, requiring Appellant to "smack" the gun to begin firing at the decedent. Any imminent threat against Appellant ended at the point the crowd and the decedent

started to flee. These facts demonstrated Appellant was at fault for continuing the situation. Accordingly, an instruction on unreasonable belief self-defense was not warranted.

Aside from a sincere belief in self-defense and faultlessness with regard to provoking or continuing the conflict, a defendant invoking unreasonable belief self-defense has a duty to retreat if "the actor knows that he can avoid the necessity of using [deadly] force with complete safety by retreating." § 505(b)(2)(ii) (2010). Violating this duty to retreat precludes a reduction of culpability from murder to voluntary manslaughter on the basis of unreasonable belief self-defense. Though a defendant "is not obliged to retreat from his dwelling or place of work," neither location applies to the instant case. § 505(b)(2)(ii)(A) (2010). As the decedent and the crowd were running away from Appellant, clearly Appellant could have retreated with complete safety. Instead, Appellant violated this duty to retreat. For this reason, as well, an instruction on unreasonable belief self-defense was not warranted.

Appellant also claimed he was entitled to an unreasonable belief instruction under the theory of unreasonable defense of another. The justification defense of another relies substantially on elements of the justification of self-defense. The use of force upon another to protect a third person is justifiable when the following elements are met:⁶

- (1) the actor would be justified under [§ 505 self-defense] in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect;
- (2) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
- (3) the actor believes that his intervention is necessary for the protection of such other person.

⁶ Section 506(b) also significantly alters the actor's duty to retreat, eliminating that obligation unless the actor can secure the safety of the other person by retreating or by causing the other person to retreat. Since the evidence in the instant case does not clearly show whether Appellant's friend could retreat or whether Appellant's retreat could secure Appellant's friend's safety, and since other means can dispose of the issue of unreasonable belief defense of another, this opinion does not address the existence of a duty to retreat with regard to defense of another.

18 Pa.C.S. § 506(a) (2010). As with unreasonable belief self-defense, unreasonable belief defense of another differs from the complete justification of defense of another in only one respect: the actor's belief in justifying circumstances was unreasonable.

Appellant failed to satisfy the first element of unreasonable belief defense of another, for the same reasons why he failed to satisfy unreasonable belief self-defense. Though the physical danger of the violent crowd to Appellant's friend was far more severe than that of the single decedent to Appellant, both dangers ended the moment the Appellant produced the gun and the decedent and the crowd around Appellant's friend started to flee. As mentioned above, Appellant used excessive deadly force against an unarmed, fleeing victim, aiming at a vital part of that victim's body. The same evidence that tended to show that Appellant had no belief in self-defense also tended to show that Appellant had no belief in defense of another. Furthermore, as established above, Appellant continued the conflict at that point with an intent to cause death or serious bodily injury. Therefore, even if Appellant were to claim unreasonable self-defense against the "injury he believe[d] to be threatened to the person whom he [sought] to protect," as shown above, the evidence negated any such claim of a belief in self-defense and Appellant was clearly at fault in continuing the conflict. 18 Pa.C.S. § 506(a)(1) (2010). Because Appellant would be unable to claim unreasonable belief self-defense against the danger threatening Appellant's friend, an instruction on unreasonable belief defense of another voluntary manslaughter was not warranted.

The reasons behind the failure to satisfy the first element of unreasonable belief defense of another apply equally to the second element (that Appellant's friend would be justified in using the force at issue). Had Appellant's friend been exercising the same deadly force as Appellant under the circumstances as the Appellant believed them to be, the evidence would

similarly negate any claim of belief in self-defense and Appellant's friend would be entirely culpable for continuing the conflict. Shifting the viewpoint from Appellant to Appellant's friend would not reduce the excessiveness of the deadly force at issue nor would it shift any blame away from the shooter for continuing the conflict. Therefore, Appellant's friend would not "be justified in using such protective force" under the "circumstances as the [Appellant] believe[d] them to be." § 506(a)(2). Because Appellant's friend would be unable to claim unreasonable belief self-defense using the same force the Appellant used, an instruction on unreasonable belief defense of another voluntary manslaughter was not warranted.

The reasons behind the failure to satisfy the first element of unreasonable belief defense of another also apply to the third element (that Appellant "believe[d] that his intervention [was] necessary for the protection of" Appellant's friend). § 506(a)(3). The danger to Appellant's friend ceased the moment the Appellant produced the gun and the crowd began to flee. Any further force was unnecessary to secure the protection of Appellant's friend, which demonstrated that Appellant had no belief in the need to intervene on his friend's behalf. Furthermore, for the reasons stated above, the use of excessive deadly force further negated any such belief in the need for intervention. For this reason, as well as the two above, an instruction on unreasonable belief defense of another voluntary manslaughter was not warranted.

The facts of the instant case do not support voluntary manslaughter based on an unreasonable belief of either self-defense or defense of another, no such jury instruction was warranted. As "[c]ounsel [is] not ineffective for failing to raise a meritless issue," Appellant's trial counsel was not ineffective for failing to make a meritless objection over the denial of an unwarranted instruction. *Commonwealth v. Spatz*, 18 A.3d 244, 262 (Pa. 2011). As Appellant

has failed to meet the first prong of the *Pierce* test on the record alone, the instant PCRA petition did not present a genuine issue of material fact.

Moreover, even if Appellant could demonstrate some arguable merit to his claims, the record demonstrated that Appellant's trial counsel had a reasonable basis for the strategy he pursued. "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." *Koehler*, 36 A.3d at 132 (quoting *Commonwealth v. Howard*, 719 A.2d 233, 237 (1998)). "The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record." *Pierce*, 527 A.2d at 975 (quoting *Commonwealth ex rel. Washington v. Maroney*, 235 A.2d 349, 352-353 (1967)). "Courts should not deem counsel's strategy or tactic unreasonable 'unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.'" *Koehler*, 36 A.3d at 132 (quoting *Howard*, 719 A.2d at 237).

Appellant's trial counsel's chosen strategy was that of mistaken identity: that Appellant was not the shooter, and witness statements and testimony to the contrary were not credible. In his closing argument, counsel noted that in Price and Robinson's trial testimony "both say something that creates reasonable doubt"—that "they [both] say [Appellant is] not the shooter." (N.T. 1/24/08 p. 84, 134; N.T. 1/28/08 p. 28, 30.) Counsel stressed that Price and Robinson's testimonies at trial were consistent with each other, though both eyewitnesses were incarcerated in separate facilities. (N.T. 1/28/08 p. 28-29.) Though the Commonwealth used Price and Robinson's statements to police from the night of the shooting as prior inconsistent statements to impeach their trial testimony, counsel argued that the jury could not credibly rely upon these statements and should not "accept one version like gospel as opposed to the other." (N.T.

1/24/08 p. 99, 141; N.T. 1/28/08 p. 29-30.) Counsel also called into question police behavior during the time Price and Robinson's statements were taken. (N.T. 1/28/08 p. 29, 32-33.) Additionally, though Taylor's testimony corroborated that the shooter fought with the decedent prior to the murder, counsel emphasized that he could not and did not identify Appellant as the shooter and that he was "in a position where he really couldn't see what happened." (N.T. 1/24/08 p. 205; N.T. 1/28/08 p. 32.) Lastly, as the decedent's twin brother, Kalil Sephes, was unavailable for trial, counsel called into question Kalil's recollections from his preliminary hearing testimony, and also the motivation behind the Kalil's absence. (N.T. 1/28/08 p. 34-38.)

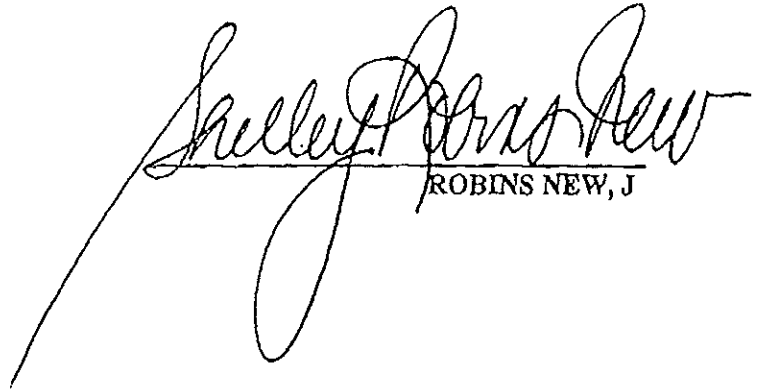
Clearly, credibility was both the foundation and the weakest element of the Commonwealth's case, and Appellant's trial counsel attempted to exploit this weakness to create a reasonable doubt as to the identity of the shooter. This strategy was designed to achieve a full acquittal on all charges. Counsel only briefly mentioned the possibility of self-defense in a hypothetical sense, but did not call it into greater focus as doing so might have undermined this strategy of mistaken identity. (*Id.* at 22-23.) Therefore, Appellant's trial counsel's strategy had a reasonable basis.

Since Appellant's trial counsel had a reasonable basis for his actions and omissions at trial, Appellant has failed to meet the second prong of the *Pierce* test. Since this failure was determined based on the record alone, the instant PCRA petition did not present a genuine issue of material fact.

Appellant's claim of ineffective assistance of counsel presented no genuine issues of material fact, and therefore no evidentiary hearing was necessary. The claim was without merit as Appellant was not entitled to an instruction on unreasonable belief voluntary manslaughter based on the facts of the case, and Appellant's trial counsel followed a reasonable strategy to

attempt to obtain his acquittal. Consequently, Appellant's trial counsel cannot be deemed ineffective. Therefore, the Order dismissing Appellant's PCRA petition should be affirmed.⁷

BY THE COURT:



Handwritten signature of Shelley Robins New, written in black ink. The signature is cursive and stylized, with a long horizontal stroke extending to the left. Below the signature, the name "ROBINS NEW, J" is printed in a serif font.

⁷ The Court wishes to acknowledge the assistance of Jeffrey Cohen, a Temple Law School student intern, with the research and writing of this opinion.