[J-163-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 240 Capital Appeal Docket
	:	
Appellee	:	Appeal from the July 28, 1998 order of the
	:	Court of Common Pleas of Philadelphia
	:	County, docketed at Nos. 3282-3288 June
v.	:	Term 1991, Denying Appellant's Petition
	:	under the Post Conviction Relief Act
	:	
EDWARD BRACEY,	:	
	:	
Appellant	:	SUBMITTED: August 2, 1999
	:	

OPINION

MR. JUSTICE NIGRO **DECIDED: December 31, 2001**

Appellant Edward Bracey appeals from the order of the Court of Common Pleas denying his petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541, et seq. We affirm.

On February 4, 1991, Philadelphia Police Officer Daniel Boyle attempted to stop a stolen vehicle being driven by Appellant. Appellant refused to stop the vehicle and eventually crashed into a building. Appellant immediately jumped out of the vehicle and onto the hood and roof of Officer Boyle's cruiser while brandishing a 9-mm automatic handgun. He then jumped off the cruiser, pointed his gun at Officer Boyle and instructed the officer not to touch his weapon. When Officer Boyle tried to reverse his car to remove it from the area, Appellant fired no less than eight shots into the cruiser and fled the scene. Officer Boyle died two days later. Physical evidence and several witnesses linked Appellant to the crime and one witness identified Appellant as the shooter.

On February 6, 1991, police responded to a call that a man had entered a residence and set himself on fire. Police entered the residence and found Appellant. Appellant was arrested and taken to the hospital, where he was eventually interviewed after physicians advised police that Appellant was well enough to do so. During the interview, Appellant confessed to shooting Officer Boyle. The police then recovered the murder weapon, which Appellant had disposed of in a sewer.

On March 3, 1992, a jury found Appellant guilty of murder in the first-degree, possessing an instrument of crime, theft by receiving stolen property and criminal trespass. Following a penalty hearing, the jury found two aggravating circumstances[1] and no mitigating circumstances and accordingly, fixed Appellant's penalty at death. Appellant filed post-trial motions, which were denied. Appellant's trial counsel then withdrew from representation, and Appellant was appointed new counsel for purposes of his direct appeal. On July 21, 1995, this Court affirmed Appellant's judgment of sentence. See Commonwealth v. Bracey, 667 A.2d 1062 (Pa. 1995). Appellant filed a pro se PCRA petition on May 10, 1996. The Center for Legal Education, Advocacy and Defense Assistance (CLEADA) was appointed to represent Appellant and subsequently filed an amended PCRA petition on Appellant's behalf. In response, the Commonwealth filed a motion to dismiss the petition based upon the existing record. Following a hearing, the PCRA court found that all but one of Appellant's claims could be decided on the existing record. Therefore, the PCRA court granted Appellant's request for an evidentiary hearing on the sole issue of whether counsel rendered ineffective assistance during the penalty phase of Appellant's trial and denied Appellant's request for an evidentiary hearing on all

[1] The two aggravating circumstances found by the sentencing jury were that the victim was a police officer killed in the performance of his duties, 42 Pa. C.S. § 9711(d)(1), and that Appellant had a significant history of felony convictions involving the use or threat of violence, 42 Pa. C.S. § 9711(d)(9).

remaining grounds. Following a seven-day evidentiary hearing, the PCRA court denied relief. Appellant then filed the instant appeal.

Appellant raises numerous issues in his voluminous brief to this Court. The Commonwealth argues, however, that several of Appellant's claims have either been waived or previously litigated. We agree.

To be eligible for relief under the PCRA, a petitioner must establish that his allegations have not been previously litigated or waived. 42 Pa. C.S. § 9543(a)(3). An issue is deemed finally litigated for purposes of the PCRA 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." 42 Pa. C.S. § 9544(a)(2). If the allegations of error have not been previously litigated, a petitioner must also demonstrate that those allegations have not been waived. An allegation is deemed waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, [or] on appeal. . . ." 42 Pa. C.S. § 9544(b).

Here, Appellant claims that the Commonwealth improperly introduced victim-impact evidence during the penalty phase of his trial; that the Commonwealth improperly relied on two burglary convictions to establish the aggravating circumstance under 42 P.S. § 9711(d)(9), i.e. that the defendant has a significant history of felony convictions involving the use or threat of violence; and that his confession was involuntary and therefore, inadmissible. These claims were all disposed of on Appellant's direct appeal to this Court, see Commonwealth v. Bracey, 662 A.2d 1062, 1068-75 (Pa. 1995), and have therefore been previously litigated for purposes of the PCRA.[2] Accordingly,

[2] Appellant's attempt to frame these previously litigated issues as claims of prior counsel's ineffectiveness does not make these claims cognizable under the PCRA. This Court has held that a petitioner cannot obtain post-conviction review of claims previously litigated on appeal by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims. See Commonwealth v. Porter, 728 A.2d. 890, 896 (Pa. 1999); see also Commonwealth v. Albrecht, 720 A.2d 693, 703 (Pa. 1998) (issue remains previously litigated within (continued…)

these claims are not reviewable under the PCRA. See 42 Pa. C.S. § 9543(a)(3).[3]

Appellant also raises several claims of trial court and constitutional error and claims of prosecutorial misconduct that have been waived. Specifically, Appellant contends that the overwhelming presence of uniformed police officers at his trial subverted the fundamental fairness of his trial; that the trial court erred in failing to advise the jury regarding the meaning of a life sentence under Simmons v. South Carolina, 114 S. Ct. 2187 (1994); that the aggravating circumstance listed in 42 P.S. § 9711(d)(9) is unconstitutionally vague; that the prosecutor committed misconduct by suggesting that Appellant had an alias; that the prosecutor unconstitutionally used his peremptory strikes in a discriminatory manner under Batson v. Kentucky, 476 U.S. 79 (1986); that the alleged error under Batson violated international law; and that the trial court erred in failing to adequately instruct the jury on the nature of aggravating and mitigating factors. Appellant could have raised each of these claims in his direct appeal to this Court but failed to do so.

(…continued)
meaning of PCRA despite appellant's assertion that counsel's ineffectiveness caused claim to fail on direct appeal).

[3] Appellant also argues that the victim impact testimony that he now complains of was broader than that challenged on his direct appeal. To the extent that this claim has not been previously litigated, and to the extent that Appellant avoids a finding of waiver by making an adequate argument that all prior counsel were ineffective for failing to properly litigate this claim, such allegations of ineffectiveness offer Appellant no basis for relief. In support of his claim, Appellant essentially relies on Commonwealth v. Fisher, 681 A.2d 130 (Pa. 1996), where this Court explicitly held, for the first time, that victim impact testimony was inadmissible at the penalty phase of a capital case under the statute then in effect. However, because Fisher was handed down after Appellant's direct appeal to this Court was decided, Appellant is not entitled to rely on that case to support claims made in a collateral appeal such as the one presented here. See Commonwealth v. Todaro, 701 A.2d 1343 (Pa. 1997) (even decision that is given full retroactive effect is not applied to any case on collateral review unless the decision was handed down during pendancy of defendant's direct appeal and issue was properly preserved).

Accordingly, these claims are waived under the PCRA and therefore, can offer Appellant no basis for relief.[4]

In his reply brief to this Court, Appellant argues that the Court must review all of his issues on the merits, despite any waiver, in accordance with our relaxed waiver rule in capital cases.[5] In Commonwealth v. Albrecht, however, this Court held that "while it has been our 'practice' to decline to apply our ordinary waiver principles in capital cases, we will no longer do so in PCRA appeals." Albrecht, 720 A.2d 693, 700 (Pa. 1998) (citations omitted). This holding was based in part on the recognition that the very terms of the PCRA exclude waived issues from the class of cognizable PCRA claims. Id.; 42 Pa. C.S. § 9543(a)(3) (to be eligible for relief under PCRA, a petitioner must prove that the allegation

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[4] At the end of his argument relating to several of these waived claims, Appellant, in what appears to be nothing more than an after-thought, tacks on a sentence that trial and appellate counsel were ineffective for failing to raise and/or properly litigate the underlying claims of error. Such an undeveloped argument, which fails to meaningfully discuss and apply the standard governing the review of ineffectiveness claims, simply does not satisfy Appellant's burden of establishing that he is entitled to any relief. Moreover, when addressing these claims in his PCRA petition, Appellant either failed to raise a properly layered ineffectiveness claim or did so in the same inadequate and cursory manner in which he attempts to present such claims to this Court. See Commonwealth v. Zillgit, 419 A.2d 1078, 1079 n.3 (Pa. 1980) (appellate court will not consider issue unless it is properly presented in post-conviction petition).

[5] Despite Appellant's clear burden under the PCRA to show, as a threshold matter, that an issue has not been waived, Appellant waited until his reply brief to raise a number of arguments as to why his claims should not be dismissed as waived. Under our Rules of Appellate Procedure, an appellant is prohibited from raising new issues or remedying an original brief's deficient discussions in a reply brief. See Pa. R.A.P. 2113(a); Commonwealth v. Fahy, 737 A.2d 214, 219 n.8 (Pa. 1999). Nonetheless, because this appeal necessitates a discussion of the applicability of the relaxed waiver doctrine to PCRA capital appeals, and because the Commonwealth has filed a motion to respond to Appellant's reply brief and provided such a response, we will review Appellant's claims regarding the relaxed waiver doctrine, grant the Commonwealth's motion to permit response and consider such response to Appellant's relaxed waiver argument in his reply brief. See Fahy, 737 A.2d at 219 n.8 (discussing impropriety of Appellant raising number of arguments as to why his PCRA petition was not untimely filed for first time in reply brief, but granting Commonwealth's motion to respond and reviewing Appellant's arguments regarding timeliness).

of error has not been waived). Thus, under Albrecht, the relaxed waiver rule is no longer applicable to PCRA appeals and therefore, any claims that have been waived by Appellant are beyond the power of this Court to review under the terms of the PCRA.

Appellant asserts, however, that retroactively applying the rule in Albrecht to his case, which involves a PCRA petition filed before the decision in Albrecht was issued in November of 1998, would unconstitutionally permit a "new rule of law" to bar review of his claims. We disagree. As we stated in Commonwealth v. Pursell:

> [W]e recently held that we would no longer apply the "relaxed waiver" rule applicable to direct appellate review of capital cases in appeals from post-conviction proceedings in capital cases. See Commonwealth v. Albrecht, 54 Pa. 31, 720 A.2d 693 (1998). Instead, we now require strict adherence to the statutory language of the PCRA, and will afford post-conviction review only where a petitioner shows that the statutory exceptions to waiver in the PCRA apply [found in the pre-1995 version of the PCRA], or where a petitioner properly raises claims of counsel's ineffectiveness. **Because this represents a clarification of our existing standard for reviewing appeals from the denial of post-conviction petitions in capital cases, we apply the Albrecht standard to all similar cases currently under review by this Court.**

Pursell, 724 A.2d 293, 302 (Pa. 1999) (emphasis added). See also Commonwealth v. Porter, 728 A.2d 890, 897 (Pa. 1999) (Albrecht clarified standard that relaxed waiver rule will not apply to collateral attacks). Thus, because Albrecht merely clarified this Court's practice of relaxing our waiver rules in death penalty cases, Appellant suffers no constitutional violations by having Albrecht applied to his case. See Commonwealth v. Basemore, 744 A.2d 717, 725-26 (Pa. 2000) (applying Albrecht to PCRA appeal, where defendant filed PCRA petition in 1995, did not constitute unconstitutional retroactive application of new rule of law because Albrecht merely represented clarification of existing standard for reviewing PCRA appeals). Moreover, we note that this Court has consistently refused to invoke the relaxed waiver rule under Albrecht in PCRA capital appeals similar to the instant one. See, e.g., Commonwealth v. Pursell, 724 A.2d at 306 (applying Albrecht to 1982 conviction, where PCRA petition was filed in 1991); Commonwealth v. Laird, 726 A.2d

346, 354 (Pa. 1999) (applying Albrecht to 1988 conviction, where PCRA petition was filed in 1993); Commonwealth v. Wallace, 724 A.2d 916, 920-21 (Pa. 1999) (applying Albrecht to 1985 conviction, where PCRA petition was filed in 1995). Accordingly, we find no merit to Appellant's argument that Albrecht cannot constitutionally be applied to his case.

Appellant also raises several claims of prior counsel's ineffectiveness. Because these claims are framed as ones of ineffectiveness, and because they are adequately argued under the standard governing such claims, these claims have not been waived for purposes of the PCRA and are therefore, reviewable.[6]

To prevail on a claim alleging counsel's ineffectiveness under the PCRA, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, i.e. there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different. Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999); Commonwealth v. Douglas, 645 A.2d 226, 230 (Pa. 1994).

Appellant first claims that the PCRA court erred in finding that Appellant's trial counsel, Mr. Perrone, did not render ineffective assistance at his penalty phase. Specifically, Appellant argues that Mr. Perrone was ineffective for failing to adequately investigate and present evidence at the penalty phase that Appellant was organically brain damaged or mentally ill. In support of his claim, Appellant presented the testimony of Drs. Carol Armstrong, Neil Blumberg and Barry Krop, who examined Appellant five and six

[6] As this Court has previously stated, a petitioner can avoid a finding of waiver under the PCRA by making a proper claim of ineffective assistance of counsel at his first available opportunity to do so. Commonwealth v. Wallace, 724 A.2d at 921. Here, the PCRA petition marked the first opportunity Appellant had to challenge appellate counsel's failure to assert claims of trial counsel's ineffectiveness and therefore, Appellant's layered claims of prior counsel's ineffectiveness are not waived.

years after the shooting, and essentially concluded that Appellant has suffered from long-standing organic brain damage.

Appellant's claim, however, is negated by the mental health evaluation conducted by Dr. Arthur Boxer on September 15, 1991, less than one year after the murder. Prior to trial, Mr. Perrone hired Dr. Boxer, a board-certified psychiatrist who had performed at least two hundred psychiatric evaluations in criminal cases before evaluating Appellant.[7] Mr. Perrone asked Dr. Boxer to evaluate Appellant to determine whether there were any psychiatric defenses available to him at trial and whether there was any mental health mitigation evidence that could be presented to the jury at the penalty phase. Following his examination, Dr. Boxer sent Mr. Perrone a letter indicating that, based on his evaluation of Appellant and review of the mitigating circumstances allowed by the Commonwealth, he did not see any mitigating mental health evidence that could be presented at the penalty phase. N.T., 4/28/98, at 28, 40, 80; see also Letter by A. Boxer, M.D. to N. Perrone, Jan. 31, 1992. Rather, Dr. Boxer testified at the PCRA hearing that Appellant had been responsive and articulate during his evaluation and had not behaved in a manner that suggested that he had any psychiatric problems. See N.T., 4/28/98, at 65. Dr. Boxer further testified that he had not seen any evidence of organicity or any indication that Appellant had organic brain damage or a major mental illness during his evaluation of Appellant. Id. at 70-71. Dr. Boxer relayed this information to Mr. Perrone, testifying that prior to sending the letter, he also spoke to Mr. Perrone on the telephone and indicated to him that he would be unable to offer testimony helpful to establishing any mental health mitigation evidence. Id. at 70-71, 80.

[7] Dr. Boxer was referred to Mr. Perrone by the Mental Health Division of the Defenders Association of Philadelphia.

We agree with the PCRA court that Mr. Perrone reasonably relied on the opinion of Dr. Boxer, who no one disputes is a qualified psychiatric expert. Despite Appellant's suggestions to the contrary, counsel was not required to disregard the findings of his expert and continue to consult experts, at the expense of limited judicial resources, until he found one willing to testify that Appellant was organically brain damaged or manifested some kind of major mental illness. As Mr. Perrone stated at the PCRA hearing, "I'm not a psychiatrist, psychologist . . . that's why I had Dr. Boxer evaluate [Appellant]." N.T., 4/22/98, at 101. Clearly, Mr. Perrone was entitled to rely on the observations and conclusions of Dr. Boxer, who informed Mr. Perrone that his evaluation did not reveal any mental health mitigation evidence that he could testify to at Appellant's penalty phase hearing. N.T., 4/28/98, at 28, 40, 80.

Moreover, as the PCRA court noted, prior mental health evaluations of Appellant did not give rise to the conclusion that Appellant was brain damaged or mentally ill. One court-ordered mental health evaluation of Appellant, prepared by Dr. Edwin Camiel in 1982, stated that although Appellant showed evidence of a personality disorder, he did not manifest any major mental illness. Likewise, a mental health evaluation report prepared by Philadelphia court psychologist Lawrence Byrne in 1984 indicated that while Appellant had schizoid personality traits, he suffered from no psychological factors which would interfere with the court's ability to sentence him. Both Dr. Camiel and Mr. Byrne, who also evaluated Appellant for the instant case and found him to be competent for sentencing, testified at the evidentiary hearing that they saw no signs of organicity or organic brain damage during their evaluations of Appellant. N.T., 4/24/98, at 230; N.T., 4/27/98, at 20, 44. While Appellant baldly asserts that Mr. Perrone was also ineffective for failing to present Dr. Camiel's and Mr. Byrne's mental health reports to the jury, we agree with the PCRA court that counsel's decision not to do so did not constitute ineffectiveness. See Commonwealth v. Holland, 727 A.2d 563, 565 (Pa. 1999) (counsel not ineffective for failing to introduce

prior mental health reports at penalty hearing when reports were product of psychological examinations of defendant resulting from criminal activity and would therefore have contained details of prior crimes): Commonwealth v. Yarris, 549 A.2d 513, 531 (Pa. 1988) (counsel not ineffective for failing to introduce evidence that would have shown defendant to be an anti-social person who suffered from severe personality disorder).[8]

In sum, we find no error in the PCRA court's determination that counsel was not ineffective for failing to pursue and present evidence related to Appellant's alleged mental illness and organic brain damage when previous mental health evaluations did not conclude that Appellant was brain damaged or mentally ill and when counsel consulted a recognized mental health expert and relied on his conclusion that his evaluation revealed no mitigating mental health evidence to which he could testify. Thus, this claim fails to offer Appellant any basis for relief. See Commonwealth v. Lewis, 743 A.2d 907, 909 (Pa. 2000) (although defendant offered testimony of psychiatrist, who examined Appellant fifteen years after the murder, to support his claim that counsel was ineffective for failing to present evidence of defendant's mental illness at defendant's penalty hearing, defendant's claim was negated by mental health evaluation conducted less than one year after murder which concluded that defendant did not manifest any major mental illness).

Appellant also alleges that counsel was ineffective for failing to discover and present evidence that as a child, he was physically and emotionally abused by his father and stepfather. He contends that counsel should have discovered this evidence of abuse from family members and presented such evidence as mitigation in the penalty phase of his trial. This claim fails.

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[8] We also note that the Commonwealth presented the testimony of Dr. Thomas Sacchetti, a board-certified neurologist, at the PCRA hearing. Dr. Sacchetti essentially agreed with the findings of Dr. Boxer, Mr. Byrne and Dr. Camiel, testifying that Appellant does not suffer from organic brain disease. N.T., 4/28/98, at 112.

Mr. Perrone testified at the PCRA hearing that he met with members of Appellant's family several times and that, although he asked questions about Appellant's background, no one indicated during the interviews that Appellant had been abused as a child. N.T., 4/22/98, at 90-91, 108-09, 124. Further, Appellant himself did not inform counsel of any physical abuse and had even informed previous mental health practitioners that he had not had any problems at home and had gotten along with his stepfather. See Evaluation by L. Byrne, May 4, 1984; Evaluation by A. Boxer, M.D., Sept. 15, 1991 (family history section of report noting Appellant's statement that stepfather "did everything for us."); N.T., 4/24/98, at 224-25; N.T., 4/27/98, at 19, 20. Because Appellant and his family failed to reveal the abuse to counsel during their consultations with him, counsel cannot be deemed ineffective for failing to present such evidence. See Commonwealth v. Miller, 746 A.2d 592, 599 (Pa. 2000) (counsel not ineffective for failing to present evidence of abuse when defendant and his family failed to reveal such evidence of abuse to counsel); Commonwealth v. Peterkin, 513 A.2d 373, 383 (Pa. 1986) (reasonableness of counsel's investigative decisions depends critically upon information supplied by defendant).[9]

Next, Appellant argues that the PCRA court erred by failing to grant an evidentiary hearing or a new trial based on his remaining claims of ineffective assistance of counsel. Under Rule 1509 of the Rules of Criminal Procedure, a PCRA court is entitled, after a review of the petition, answer and other matters of record, to determine whether an evidentiary hearing is required. See Pa. R. Crim. P. 1509; Commonwealth v. Morris, 684

[9] Although Appellant's mother and sisters never disputed at the PCRA hearing that they did not inform Mr. Perrone that Appellant had been abused as a child, Appellant complains that this omission resulted from counsel's failure to ask the right questions. During his interviews with the family, however, counsel did question the family about Appellant's background and household environment, see N.T., 4/22/98, at 108-09, but no suggestions were made that Appellant's background included physical or emotional abuse. As the PCRA court found, the record in the instant case simply does not demonstrate that "counsel failed to ask questions which would logically lead to the answers [Appellant] now claims went unexplored." PCRA Ct. Op., July 28, 1998, at 21.

A.2d 1037, 1042 (Pa. 1996) (no need for evidentiary hearing under PCRA where there are no genuine factual issues to be resolved). After reviewing the record, we find that the PCRA court acted within its discretion when it denied Appellant's petition without holding a hearing on the following ineffectiveness claims.

First, Appellant contends that the PCRA court erred in failing to hold a hearing on his assertion that Mr. Perrone was ineffective for failing to impeach the testimony of Hector Crespo. We disagree.

At Appellant's trial, Mr. Crespo, who had witnessed the shooting of Officer Boyle from his apartment window, testified for the Commonwealth. Mr. Crespo testified that in the early morning hours of February 4, 1991, he heard a crash, looked out the window of his third floor apartment and saw a man pull out a gun and jump on the hood of a police car. N.T., 2/25/92, at 106-07. Mr. Crespo heard the man, who was pointing a gun at the officer, tell the officer "Don't go for that *** gun." Id. at 110. Mr. Crespo then saw the police car reverse and the man with the gun run to the passenger window of the police car and shoot the officer inside. Id. at 111.

While Appellant contends that Mr. Perrone was ineffective for failing to impeach Crespo on his ability to see and identify Appellant, the record demonstrates that counsel effectively cross-examined this witness. During cross-examination, Mr. Perrone brought out the fact that Crespo was unable to see the shooter's face from his third floor apartment, that Crespo's apartment was approximately 140 feet from the crime scene, that Crespo had been sleeping when he first heard the crash and that it was dark outside when Crespo witnessed the shooting. N.T., 2/25/92, at 127-36. Mr. Perrone also tried to establish that a light pole and a billboard actually blocked Crespo's view of the shooting. Id. at 153-54. Moreover, the jury was shown photographs of the view from Crespo's apartment to the crime scene. Id. at 116. Given this record, it is clear that counsel was not ineffective in his

efforts to impeach Crespo on his ability to see and identify Appellant. Accordingly, the PCRA court did not err in denying relief without first holding a hearing on this claim.

Appellant also complains that the PCRA court erred in failing to grant a hearing on his claim that counsel was ineffective for failing to interview and call three witnesses, namely Bobby James Payne, Donna Stroman and Arthur Berry, regarding their allegations that police were intimidating witnesses throughout their investigation of Officer Boyle's murder. This claim fails.

To establish that counsel was ineffective for not calling certain witnesses, a defendant must prove (1) the existence and availability of the witnesses; (2) counsel's actual awareness of, or duty to know, the witnesses; (3) the witnesses' willingness and ability to cooperate and appear on the defendant's behalf; and (4) the necessity for the proposed testimony. Commonwealth v. Wilson, 672 A.2d 293, 298 (Pa. 1996).

Here, Appellant has failed to meet his burden. His brief to this Court fails to establish that Mr. Perrone was aware, or should have been aware, of Bobby James Payne or Donna Stroman, or that they had information related to alleged police misconduct. As to Mr. Berry, Appellant has failed to establish that Mr. Berry was prepared to cooperate and testify for him at trial. In fact, Mr. Berry did testify at Appellant's trial -- for the Commonwealth. N.T., 2/26/92, at 60. There is simply no indication that Mr. Perrone should have known of Mr. Berry's allegations of police misconduct, which were not made until long after Mr. Berry testified for the Commonwealth at Appellant's trial. Thus, Appellant has failed to establish that counsel was ineffective for not calling these witnesses and the PCRA court properly dismissed this claim without a hearing.

Next, Appellant claims that the PCRA court should have granted a hearing on his claim that Mr. Perrone was ineffective for failing to request a competency hearing. He essentially contends that his family members' testimony at the PCRA hearing that he has

always been "slow" and the opinions of Drs. Armstrong, Blumberg and Krop demonstrate that counsel should have challenged Appellant's competency to stand trial. This claim fails.

In the first instance, Appellant's reliance on the conclusions of his defense experts to support his competency claim is misplaced. Although the focal time for evaluating a defendant's competency is at the time of trial, Appellant's defense experts did not evaluate Appellant until five or more years after Appellant's trial. Commonwealth v. Hughes, 555 A.2d 1264, 1270 (Pa. 1989) (pertinent time for purposes of determining competency to stand trial is time of trial). In any event, the record does not indicate that Mr. Perrone was ineffective for failing to seek a competency hearing. Mr. Perrone testified that during his pre-trial interviews with Appellant, there was no indication that Appellant was not competent to stand trial. N.T., 4/22/98, at 146. These observations were substantiated by Dr. Boxer, the psychiatrist Mr. Perrone hired to evaluate Appellant. Following his evaluation, Dr. Boxer did not in any way question Appellant's competency or offer any conclusions that would lead Mr. Perrone to challenge his client's competency. Rather, Dr. Boxer testified that Appellant was articulate and responsive during his evaluation and did not act in a manner that was suggestive of any psychiatric problems. N.T., 4/28/98, at 65. In addition to these findings by Dr. Boxer, we note that Mr. Byrne conducted a mental health evaluation of Appellant in the days following his convictions in the instant case and concluded that Appellant was competent for sentencing, noting that he was coherent and cooperative during the evaluation and understood the nature of the interview. See Evaluation by L. Byrne, March 4, 1992. Based on these circumstances, we decline to find that counsel was ineffective for failing to seek a competency hearing and thus, find that the PCRA court did not err in denying relief without first holding a hearing on this claim.

Next, Appellant argues that the PCRA court erred in failing to hold a hearing on his claims that counsel was ineffective for failing to present the defenses of diminished capacity, imperfect self-defense and voluntary intoxication. We disagree.

Again relying on family members' testimony and the expert opinions presented at his PCRA hearing, Appellant first asserts that Mr. Perrone was ineffective for failing to investigate and present a defense of diminished capacity.[10] As discussed above, however, Mr. Perrone consulted a reputable mental-health expert for the purpose of determining whether there were any psychiatric defenses that could be presented at trial. Dr. Boxer evaluated Appellant and informed Mr. Perrone that Appellant did not suffer from organic brain disease or any other major mental illness. Instead, he diagnosed Appellant as suffering form an anti-social personality disorder. See Commonwealth v. Zettlemoyer, 454 A.2d 937, 944 (Pa. 1982), cert. denied, 461 U.S. 970 (1983) (personality disorder does not suffice to demonstrate accused's diminished capacity). Since counsel was entitled to rely on Dr. Boxer's expert opinion, he cannot be deemed ineffective for failing to present a defense that contradicted that opinion.

Next, Appellant asserts that Mr. Perrone should have presented an imperfect self-defense theory at trial. He suggests that the abuse he suffered as a child left him with "ingrained fear and exaggerated startle response" and that this evidence, if presented to the jury by Mr. Perrone, would have explained why Appellant believed he was in danger and therefore, shot Officer Boyle.[11] This claim is meritless.

Under 18 Pa. C. S. § 2503(b):

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[10] When asserting a diminished capacity defense to first-degree murder, a defendant is attempting to negate the element of specific intent to kill and if successful, first-degree murder is reduced to third-degree murder. Commonwealth v. McCullum, 738 A.2d 1007, 1009 (Pa. 1999). The defense of diminished capacity is extremely limited and can only be established if the defendant proves that at the time of the killing, he was suffering from a mental disorder that specifically affected the cognitive functions of deliberation necessary to formulate a specific intent to kill. Id.

[11] Since there is no indication that Officer Boyle used or attempted to use his weapon, it appears that Appellant is suggesting that he believed Officer Boyle was going to run him over when trying to escape Appellant's loaded gun. However, the record demonstrates that Officer Boyle actually put his cruiser into reverse and backed away from Appellant before Appellant fired his gun.

> A person who intentionally or knowingly kills an individual commits 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 (relating to general principles of justification), but his belief is unreasonable.

18 Pa. C.S. § 2503(b). In explaining what elements are necessary to establish unreasonable belief voluntary manslaughter, which is sometimes referred to as "imperfect self-defense," we have stated:

> This self-defense claim is imperfect in only one respect -- an unreasonable rather than a reasonable belief that deadly force was required to save the actor's life. All other principles of justification under 18 Pa. C.S. § 505 must [still be met in order to establish] unreasonable belief voluntary manslaughter.

Commonwealth v. Tilley, 595 A.2d 575, 582 (Pa. 1991). In order to establish the defense of self-defense under 18 Pa. C.S. § 505, the defendant must not only show that he was protecting himself against the use of unlawful force but must also show that he was free from fault in provoking or continuing the difficulty which resulted in the killing. See 18 Pa. C.S. § 505;[12] Tilley, 595 A.2d at 581. Here, even if there was any evidence that Officer Boyle was using anything but lawful force in his encounter with Appellant, Appellant clearly could not establish that he was free from fault in provoking the event that led up to Officer Boyle's murder. Before fatally shooting Officer Boyle, Appellant jumped on the hood of Officer Boyle's car, aimed a loaded handgun at him and ordered him not to touch his weapon. Since there was absolutely no evidence that Appellant acted in self-defense -- imperfect or otherwise-- Appellant's claim that his counsel was ineffective for failing to

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[12] 18 Pa. C.S. § 505 provides:

> The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

present such evidence necessarily fails. Consequently, the PCRA court did not err in denying Appellant's request for a hearing on this claim.[13]

With little elaboration, Appellant also claims that Mr. Perrone should have investigated and presented a defense that he was voluntarily intoxicated when he shot Officer Boyle. This claim is without merit. As Appellant concedes, the only alleged evidence of any potential intoxication at the time of the murder was Appellant's own statement that he had been drinking before the offense. Clearly, Appellant's bald assertion that counsel should have somehow mounted a voluntary intoxication defense from this statement, when he offers absolutely no other evidence to support his claim that he was intoxicated at the time of the shooting, fails to offer him any basis for relief. See Commonwealth v. Mason, 741 A.2d 708, 714 n.4 (Pa. 2000) (in order to establish voluntary intoxication, evidence must show that defendant was unable to form specific intent to kill because he was so overwhelmed or overpowered by alcohol/drugs to the point of losing his faculties at time crime was committed).

Finally, Appellant asserts that he is entitled to relief due to the cumulative effect of the alleged errors and instances of ineffective assistance of counsel. In previously addressing a similar claim, this Court has stated that "no number of failed claims may collectively attain merit if they could not do so individually." Commonwealth v. Williams, 615 A.2d 716, 722 (Pa. 1992). This principle applies equally to the instant case.

In sum, we find that those claims of Appellant that have not been previously litigated or waived are without merit. Moreover, the PCRA court properly rejected Appellant's claim that counsel rendered ineffective assistance at his penalty phase hearing and acted within

[13] As the Commonwealth points out, despite the fact that there was no evidence to support a finding that Appellant acted in self-defense, counsel did argue that Appellant fired at the officer because he was scared and also requested and received an instruction on voluntary manslaughter.

its discretion by dismissing the remainder of his claims without holding a hearing. The order of the PCRA court denying post-conviction relief is therefore affirmed.[14]

Mr. Justice Cappy files a concurring opinion.

Mr. Justice Castille files a concurring opinion.

Mr. Justice Saylor files a concurring opinion in which

Mr. Justice Cappy joins.

[14] The Prothonotary of the Supreme Court is directed to transmit the complete record of this case to the Governor of Pennsylvania. See 42 Pa. C.S. § 9711(i).