APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Table of Contents

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MELVIN STILLS	:	
Appellant	:	No. 1266 EDA 2018

Appeal from the PCRA Order April 2, 2018,
in the Court of Common Pleas of Philadelphia County,
Criminal Division at No(s): CP-51-CR-0004532-2013.

BEFORE: OTT, J., KUNSELMAN, J., and McLAUGHLIN, J.

MEMORANDUM BY KUNSELMAN, J.: **FILED MARCH 31, 2020**

Melvin Stills appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

The PCRA court summarized the relevant factual history as follows:

> On January 29, 2013, around 6:00 p.m., Tahir Jackson was walking on Fisher Street in Philadelphia with his girlfriend, Dereka Sowell, and friend James Hargrove when he saw two men riding toward them on bikes. Mr. Jackson testified that one man was tall, wearing a black jacket and red hoodie, riding a black and silver Mongoose bike, and the other man was shorter, wearing a black hoodie, black jacket and riding a pink and purple child's bike. Mr. Jackson identified the shorter man as [Stills], and the taller man as codefendant Corey Battle. [Stills] jumped off his bike, pulled out a black gun, and pointed it at Mr. Hargrove. Corey Battle approached Mr. Jackson from behind and began to choke him so hard that he was lifted off the ground and couldn't breathe. Ms. Sowell also testified that [Stills] was the one with the gun and Corey Battle choked Mr. Jackson from behind. [Stills] told Mr. Hargrove, "whatever you got in your pocket, give it up," then took Mr. Hargrove's cell phone. [Stills] then pointed the gun at Ms. Sowell and said, "you need to back up before you get shot." Corey Battle checked Mr. Jackson's pockets, and finding nothing, pushed him to the ground, and grabbed Ms. Sowell. Mr. Jackson tried to

> get up to defend his girlfriend, but [Stills] pointed the gun at him and said, "Stay there. You don't want to get shot." [Stills] stood over Mr. Jackson, a few feet away while pointing the gun directly at him. Both Mr. Jackson and Ms. Sowell testified that [Stills] did not have anything covering his face. After not finding any items on Ms. Sowell, [Stills] and Corey Battle got back on their bikes and rode off.
>
> Mr. Jackson called the police who arrived minutes later. While the victims met with police, [Stills] rode past on his pink and purple child's bike, along with another male. Officer Rosenbaum noticed a bulge on [Stills's] right hip area. Both men fled after the officer tried to stop them, and during the chase, Officer Rosenbaum saw [Stills] discard a firearm from his right hip area, the same area he saw the bulge. Police later recovered the weapon, and identified it as a black Beretta handgun. Mr. Jackson and Ms. Sowell identified [Stills] as the man who robbed them. [Stills] later gave a statement to detectives in which he admitted that he and Corey Battle had robbed the victims at gunpoint.

PCRA Court Opinion, 3/13/19, at 3-4 (citations to the record omitted).

Following a non-jury trial, Stills was found guilty of three counts each of robbery, terroristic threats, and theft by unlawful taking, and one count each of criminal conspiracy, firearms not to be carried without a license, carrying firearms on public streets or public property in Philadelphia, and persons not to possess firearms.[1] On August 7, 2014, Stills was sentenced to an aggregate sentence of fifteen to thirty years of incarceration, followed by twelve years of probation. This Court affirmed the judgment of sentence. ***See Commonwealth v. Stills***, 136 A.3d 1026 (Pa. Super. 2016) (unpublished memorandum).

[1] ***See*** 18 Pa.C.S.A. §§ 3701, 2706, 3921, 903, 6106, 6108, 6105.

On September 9, 2016, Stills filed a *pro se* PCRA petition. The PCRA court appointed Stills counsel, who filed an amended petition. The Commonwealth filed a motion to dismiss, after which Stills filed a supplement to his petition. The PCRA court filed a Pa.R.Crim.P. 907 notice of its intent to dismiss the petition without a hearing, to which Stills filed a response. On April 2, 2018, the PCRA court entered an order dismissing Stills' PCRA petition. Stills filed a timely notice of appeal, and both Stills and the PCRA court complied with Pa.R.A.P. 1925.

Stills raises the following issues for our review:

1. Did the [PCRA] court err when it dismissed [Stills' PCRA] petition without an evidentiary hearing?

2. Did the [PCRA] court err when it dismissed as meritless [Stills'] claim that trial/appellate counsel was ineffective for failing to identify the correct subsection of the robbery statute that formed the basis of the charge and conviction?

3. Did the [PCRA] court err when it dismissed as meritless [Stills'] claim that trial/appellate counsel was ineffective for failing to move for an acquittal due to the evidence not being sufficient to meet the burden of robbery with infliction of serious bodily injury?

4. Did the [PCRA] court err when it dismissed as meritless [Stills'] claim that trial/appellate counsel was ineffective for failing to identify the correct subsection of robbery that the conspiracy reflected?

5. Did the [PCRA] court err when it dismissed as meritless [Stills'] claim that trial/appellate counsel was ineffective for failing to move for an acquittal due to the evidence not being sufficient [to] show a conspiracy to commit a robbery with the infliction of serious bodily injury?

6. Did the [PCRA] court err when it dismissed as meritless [Stills'] claim that trial/appellate counsel was ineffective for failing to properly execute the direct appeal due to misunderstanding his client's robbery charge and conviction, among other errors?

7. Did the [PCRA] court err when it dismissed as meritless [Stills'] claim that trial/appellate counsel was ineffective for failing to properly execute the direct appeal due to misunderstanding his client's conspiracy charge and conviction?

Stills's Brief at 2-3 (issues reordered for ease of disposition).[2]

When addressing a challenge to the dismissal of a PCRA petition, our standard of review is as follows:

> We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. This Court may affirm a PCRA court's decision on any grounds if the record supports it. Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted)

Additionally, when a petitioner alleges trial counsel's ineffectiveness in a PCRA petition, he must prove by a preponderance of the evidence that his

[2] Regarding Stills' first issue, he concedes that the PCRA court did not err in determining that no evidentiary hearing was warranted since there is no dispute that Stills' counsel misapprehended the correct subsection of the robbery statute that was indicated on the criminal information. ***See*** Stills' Brief at 11. Thus, we need not address the issue.

conviction or sentence resulted from 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." 42 Pa.C.S.A. § 9543(a)(2)(ii). The petitioner must demonstrate:

> (1) that the underlying claim has arguable merit; (2) that no reasonable basis existed for counsel's actions or failure to act; and (3) that the petitioner suffered prejudice as a result of counsel's error. To prove that counsel's chosen strategy lacked a reasonable basis, a petitioner must prove that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. Regarding the prejudice prong, a petitioner must demonstrate that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. Counsel is presumed to be effective; accordingly, to succeed on a claim of ineffectiveness[,] the petitioner must advance sufficient evidence to overcome this presumption.

Commonwealth v. Johnson, 139 A.3d 1257, 1272 (Pa. 2016) (internal citations and quotation marks omitted). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. ***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010).

As all of Stills' issues of trial counsel ineffectiveness are related, we will address them together. In his second, third, fourth and fifth issues, Stills contends that trial counsel was ineffective for misapprehending the specific subsection of the robbery statute under which Stills was charged. According to Stills, the criminal information, trial disposition form, order of sentence, and all dockets indicate that he was charged with three counts of robbery under

18 Pa.C.S.A. § 3701(a)(1)(i), which provides, in relevant part, that "[a] person is guilty of robbery if, in the course of committing a theft, he . . . inflicts serious bodily injury upon another[.]" Yet, trial counsel proceeded as if Stills had been charged under subsection (a)(1)(ii), which provides "[a] person is guilty of robbery if, in the course of committing a theft, he . . . threatens another with or intentionally puts him in fear of immediate serious bodily injury[.]" In other words, Stills was charged with actually committing serious bodily injury during the theft, yet his counsel proceeded as if he was charged with only threatening serious bodily injury during the theft.

Stills claims that trial counsel failed to read the docket or the information to ascertain the specific robbery charge lodged against him, and never raised the issue of a lack of serious bodily injury at the preliminary hearing. Stills argues that his conviction under § 3701(a)(1)(i) is not supported by the evidence because no one was ever seriously injured. He claims that one complainant stated that she was not injured, and the other complainant testified that he was briefly put in a choke hold by Stills' co-defendant, but never stated that he was seriously injured. Stills contends that trial counsel was ineffective for failing to move for an acquittal when the evidence failed to show serious bodily injury.

For the same reasons, Stills contends that trial counsel was ineffective for failing to apprehend that the conspiracy charge brought against him was linked to the charges of robbery with infliction of serious bodily injury under

§ 3701(a)(1)(i). He claims that the Commonwealth was required to prove that he and his co-defendant had a shared criminal objective to inflict serious bodily injury during the course of a theft. Stills argues that, based on the complainants' testimony, no one was seriously injured. Stills therefore claims that trial counsel was ineffective for failing to move for an acquittal because the evidence was insufficient to prove the conspiracy charge.

Here, the PCRA court acknowledged that trial counsel failed to recognize that the facts surrounding Stills' crimes did not match the subsection of the robbery statute listed on the criminal information (*i.e.*, § 3701(a)(1)(i)). However, it nevertheless determined that Stills' claims of trial counsel's ineffectiveness lack merit because he failed to establish the prejudice prong of the ineffectiveness test. The PCRA court determined that, had trial counsel recognized the error at any time prior to the rendering of a verdict, the trial court would have permitted the Commonwealth to amend the information to list the correct subsection of the robbery statute (*i.e.*, § 3701(a)(1)(ii)),[3] pursuant to Pa.R.Crim.P. 564.[4] In reaching that conclusion, the PCRA court reasoned as follows:

[3] Both subsections 3701(a)(1)(i) and 3701(a)(1)(ii) are graded as felonies of the first-degree.

[4] Rule 564 provides, in relevant part: "The court may allow an information to be amended, provided that the information as amended does not charge offenses arising from a different set of events and that the amended charges

Keeping in mind that the purpose of Rule 564 is to place a defendant on notice regarding his alleged criminal conduct so he has a fair opportunity to prepare a defense, [Stills'] arguments of ineffectiveness fail. Yes, a mistake was made as to the subsection of the robbery statute, but to offer [Stills] relief on that basis, under the facts of this case, would be to elevate form over substance.

Factors to consider in determining whether a defendant was prejudiced by an amendment include:

> (1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during a preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

Com. v. Grekis, 411 Pa. Super. 513, 601 A.2d 1284, 1292 (1992).

Applying the instant set of facts to the above factors it is clear that [Stills] was not prejudiced by the error of subsection because (1) the factual scenario supporting the charges never changed; (2) no new facts were added that were previously unknown to [Stills]; (3) the entire factual scenario was developed not only during a preliminary hearing, but also through the discovery that was turned over to [Stills] on May 21, 2013 and included police interviews with each of the three victims, in addition to Corey Battle and [Stills]; (5) the Commonwealth tried the case, and [Stills] defended the case as if the bills of information had already been amended to reflect [18 Pa.C.S.A. § 3701(a)(1)(ii), which is the subsection of the robbery statute which requires] a threat of serious bodily injury; and (6) it is immaterial that the Commonwealth failed to amend the information, as [Stills] had ample notice and preparation that the case was about him threatening serious bodily harm, as not only

are not so materially different from the original charge that the defendant would be unfairly prejudiced."

> were those the facts at the preliminary hearing, and in the discovery, but he was also charged with terroristic threats. So even if the court found that subsection (a)(1)(i) was materially different than subsection(a)(1)(ii), [Stills] still cannot show prejudice because he was placed on notice regarding his alleged criminal conduct, and had a fair opportunity to prepare a defense.
>
> In this instance, had counsel caught the error in subsection, this [c]ourt would have allowed the Commonwealth to change the information based on the above analysis. This would have corrected a technical error, but would not have changed the outcome of the trial. If defense counsel had moved for an acquittal on that basis, this [c]ourt would have denied that motion, and allowed the Commonwealth to amend the information, based on the above analysis.

PCRA Court Opinion, 3/13/19, at 7-9. The PCRA court similarly determined that any pre-verdict challenge by trial counsel to the conspiracy charge would have failed since Stills "was not misled as to the charges against him, not precluded from anticipating the Commonwealth's proof, and no substantial right was impaired." ***Id***. at 9-10.

The record supports the PCRA court's determination that Stills failed to demonstrate that he was prejudiced by trial counsel's failure to seek an acquittal on the basis that the evidence did not establish that he inflicted serious bodily injury or conspired to inflict serious bodily injury. The record also supports the PCRA court's determination that, had trial counsel raised the issue, the trial court would have permitted the Commonwealth to amend the criminal information to reflect the correct subsection of the robbery statute. Such an amendment would have been appropriate because Stills was afforded abundant notice from the outset of the criminal proceedings that the evidence

supported a finding that he had conspired with his co-defendant to threaten the victims with serious bodily injury and had, in fact, threatened them with serious bodily injury. Thus, Stills' claims pertaining to trial counsel's ineffectiveness entitle him to no relief.

However, Stills additionally disputes the PCRA court's dismissal of his claims that appellate counsel was ineffective. Stills points out that his trial counsel also represented him in his direct appeal. According to Stills, direct appeal counsel continued to identify and argue the wrong subsection of the robbery statute in his appellate filings. Stills claims that, had appellate counsel argued sufficiency under the correct robbery subsection on direct appeal, this Court would have recognized that the evidence was insufficient to support Stills' robbery and conspiracy convictions due to a lack of serious bodily injury. Thus, Stills claims that his direct appeal counsel effectively denied Stills appellate review of his convictions.[5]

[5] Stills also argues that appellate counsel offered no argument on the second issue he raised on direct appeal, resulting in waiver of that issue. Stills' Brief at 15. Stills does not identify in his PCRA appellate brief, the second issue raised in his direct appeal; however, our review discloses that the second issue that appellate counsel raised in Stills' direct appeal challenged the identity of the perpetrator. ***See Stills***, 136 A.3d 1026 (unpublished memorandum at *1). This particular claim of ineffectiveness is not properly before us in this appeal, as it was not raised in Stills' concise statement or identified in his statement of questions presented. ***See Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998) (holding that if an appellant is directed to file a concise statement of matters to be raised on appeal pursuant to Pa.R.A.P. 1925(b), any issues not raised in that statement are waived); ***see also*** Pa.R.A.P. 302(a) (providing that issues not raised in the lower court are waived and

Notably, the certified record does not contain copies of the filings authored by appellate counsel in Stills' direct appeal. ***See Commonwealth v. Muntz***, 630 A.2d 51, 55 (Pa. Super. 1993) (for the purposes of an appeal, it is the responsibility of the appellant to offer a complete record for our review). Based on our precedent, where a claim is dependent upon materials not provided in the certified record, that claim is considered waived. ***Id***. Here, Stills failed to present the filings made by direct appeal counsel to the PCRA court, and to ensure that those filings were made part of the PCRA court record. Accordingly, his ineffectiveness claim pertaining to direct appeal counsel is waived.[6]

cannot be raised for the first time on appeal); ***See*** Pa.R.A.P 2116(a) (providing that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.").

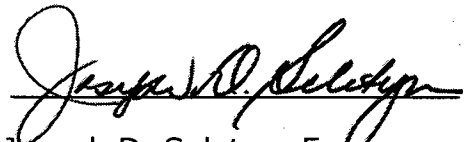
[6] Importantly, the appellate brief filed by direct appeal counsel was only filed in this Court in connection with Stills' direct appeal. It had never been filed in the lower court, and thus was not reflected on the lower court docket. As such, it was incumbent upon Stills to present that filing to the PCRA court in support of his ineffectiveness claim when he filed his PCRA petition, and then to ensure that that a copy of that filing was made a part of the PCRA court record below. Notably, Stills belatedly recognized this omission ***after*** filing an appeal of the PCRA court's denial of relief. During the pendency of this appeal, he requested leave to supplement the certified record with a copy of the brief filed by direct appeal counsel. We properly denied his request because the brief had never been presented to the PCRA court, nor made a part of the PCRA court record. ***See*** Pa.R.A.P. 1921 (providing that "[t]he original papers and exhibits filed in the lower court . . . and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases."). Because direct appeal counsel's brief was not presented to the PCRA court, or included in any filing in the PCRA court, we may not consider it in this appeal. ***See id.***; ***see also Commonwealth v.***

Order affirmed.

Judge McLaughlin joins this memorandum.

Judge Ott did not participate in this memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/31/2020

Bracalielly, 658 A.2d 755, 763 (Pa. 1995) (holding that "appellate courts may only consider facts which have been duly certified in the record on appeal").

Filed 01/27/2020

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 1266 EDA 2018
	:	
v.	:	
	:	
MELVIN STILLS	:	
	:	
Appellant	:	

ORDER

IT IS HEREBY ORDERED:

THAT upon consideration of the application for reconsideration filed December 30, 2019 in this appeal, the Court hereby grants **panel reconsideration**;

THAT the decision of this Court filed December 17, 2019, is hereby withdrawn; and

THAT the parties need not file any additional briefs.

PER CURIAM

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MELVIN STILLS	:	
Appellant	:	No. 1266 EDA 2018

Appeal from the PCRA Order April 2, 2018,
in the Court of Common Pleas of Philadelphia County,
Criminal Division at No(s): CP-51-CR-0004532-2013.

BEFORE: OTT, J., KUNSELMAN, J., and McLAUGHLIN, J.

MEMORANDUM BY KUNSELMAN, J.: **FILED DECEMBER 17, 2019**

Melvin Stills appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

The PCRA court summarized the relevant factual history as follows:

> On January 29, 2013, around 6:00 p.m., Tahir Jackson was walking on Fisher Street in Philadelphia with his girlfriend, Dereka Sowell, and friend James Hargrove when he saw two men riding toward them on bikes. Mr. Jackson testified that one man was tall, wearing a black jacket and red hoodie, riding a black and silver Mongoose bike, and the other man was shorter, wearing a black hoodie, black jacket and riding a pink and purple child's bike. Mr. Jackson identified the shorter man as [Stills], and the taller man as codefendant Corey Battle. [Stills] jumped off his bike, pulled out a black gun, and pointed it at Mr. Hargrove. Corey Battle approached Mr. Jackson from behind and began to choke him so hard that he was lifted off the ground and couldn't breathe. Ms. Sowell also testified that [Stills] was the one with the gun and Corey Battle choked Mr. Jackson from behind. [Stills] told Mr. Hargrove, "whatever you got in your pocket, give it up," then took Mr. Hargrove's cell phone. [Stills] then pointed the gun at Ms. Sowell and said, "you need to back up before you get shot." Corey Battle checked Mr. Jackson's pockets, and finding nothing, pushed him to the ground, and grabbed Ms. Sowell. Mr. Jackson tried to

> get up to defend his girlfriend, but [Stills] pointed the gun at him and said, "Stay there. You don't want to get shot." [Stills] stood over Mr. Jackson, a few feet away while pointing the gun directly at him. Both Mr. Jackson and Ms. Sowell testified that [Stills] did not have anything covering his face. After not finding any items on Ms. Sowell, [Stills] and Corey Battle got back on their bikes and rode off.
>
> Mr. Jackson called the police who arrived minutes later. While the victims met with police, [Stills] rode past on his pink and purple child's bike, along with another male. Officer Rosenbaum noticed a bulge on [Stills's] right hip area. Both men fled after the officer tried to stop them, and during the chase, Officer Rosenbaum saw [Stills] discard a firearm from his right hip area, the same area he saw the bulge. Police later recovered the weapon, and identified it as a black Beretta handgun. Mr. Jackson and Ms. Sowell identified [Stills] as the man who robbed them. [Stills] later gave a statement to detectives in which he admitted that he and Corey Battle had robbed the victims at gunpoint.

PCRA Court Opinion, 3/13/19, at 3-4 (citations to the record omitted).

Following a non-jury trial, Stills was found guilty of three counts each of robbery, terroristic threats, and theft by unlawful taking, and one count each of criminal conspiracy, firearms not to be carried without a license, carrying firearms on public streets or public property in Philadelphia, and persons not to possess firearms.[1] On August 7, 2014, Stills was sentenced to an aggregate sentence of fifteen to thirty years of incarceration, followed by twelve years of probation. This Court affirmed the judgment of sentence. ***See Commonwealth v. Stills***, 136 A.3d 1026 (Pa. Super. 2016) (unpublished memorandum).

[1] ***See*** 18 Pa.C.S.A. §§ 3701, 2706, 3921, 903, 6106, 6108, 6105.

On September 9, 2016, Stills filed a *pro se* PCRA petition. The PCRA court appointed Stills counsel, who filed an amended petition. The Commonwealth filed a motion to dismiss, after which Stills filed a supplement to his petition. The PCRA court filed a Pa.R.Crim.P. 907 notice of its intent to dismiss the petition without a hearing, to which Stills filed a response. On April 2, 2018, the PCRA court entered an order dismissing Stills's PCRA petition. Stills filed a timely notice of appeal, and both Stills and the PCRA court complied with Pa.R.A.P. 1925.

Stills raises the following issues for our review:

1. Did the [PCRA] court err when it dismissed Stills's [PCRA] petition without an evidentiary hearing?

2. Did the [PCRA] court err when it dismissed as meritless Stills's claim that trial/appellate counsel was ineffective for failing to identify the correct subsection of the robbery statute that formed the basis of the charge and conviction?

3. Did the [PCRA] court err when it dismissed as meritless Stills's claim that trial/appellate counsel was ineffective for failing to move for an acquittal due to the evidence not being sufficient to meet the burden of robbery with infliction of serious bodily injury?

4. Did the [PCRA] court err when it dismissed as meritless Still's claim that trial/appellate counsel was ineffective for failing to properly execute the direct appeal due to misunderstanding his client's robbery charge and conviction, among other errors?

5. Did the [PCRA] court err when it dismissed as meritless Still's claim that trial/appellate counsel was ineffective for failing to identify the correct subsection of robbery that the conspiracy reflected?

6. Did the [PCRA] court err when it dismissed as meritless Stills's claim that trial/appellate counsel was ineffective for failing to

move for an acquittal due to the evidence not being sufficient [to] show a conspiracy to commit a robbery with the infliction of serious bodily injury?

7. Did the [PCRA] court err when it dismissed as meritless Stills's claim that trial/appellate counsel was ineffective for failing to properly execute the direct appeal due to misunderstanding his client's conspiracy charge and conviction?

Stills's Brief at 2-3.[2]

When addressing a challenge to the dismissal of a PCRA petition, our standard of review is as follows:

> We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. This Court may affirm a PCRA court's decision on any grounds if the record supports it. Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted)

Additionally, when a petitioner alleges trial counsel's ineffectiveness in a PCRA petition, he must prove by a preponderance of the evidence that his

[2] Regarding Stills's first issue, he concedes that the PCRA court did not err in determining that no evidentiary hearing was warranted since there is no dispute that Stills's counsel misapprehended the correct subsection of the robbery statute that was indicated on the criminal information. ***See*** Stills's Brief at 11. Thus, we need not address the issue.

conviction or sentence resulted from 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." 42 Pa.C.S.A. § 9543(a)(2)(ii). The petitioner must demonstrate:

> (1) that the underlying claim has arguable merit; (2) that no reasonable basis existed for counsel's actions or failure to act; and (3) that the petitioner suffered prejudice as a result of counsel's error. To prove that counsel's chosen strategy lacked a reasonable basis, a petitioner must prove that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. Regarding the prejudice prong, a petitioner must demonstrate that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. Counsel is presumed to be effective; accordingly, to succeed on a claim of ineffectiveness[,] the petitioner must advance sufficient evidence to overcome this presumption.

Commonwealth v. Johnson, 139 A.3d 1257, 1272 (Pa. 2016) (internal citations and quotation marks omitted). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. ***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010).

As all of Stills's issues are related, we will address them together. In his second, third and fourth issues, Stills contends that his trial counsel was ineffective for misapprehending the specific subsection of the robbery statute under which Stills was charged. According to Stills, the information, trial disposition form, order of sentence, and all dockets indicate that he was charged with three counts of robbery under 18 Pa.C.S.A. § 3701(a)(1)(i),

which provides, in relevant part, that "[a] person is guilty of robbery if, in the course of committing a theft, he . . . inflicts serious bodily injury upon another[.]" Stills claims that his counsel failed to read the docket or the information to ascertain the specific robbery charge lodged against him, and never raised the issue of a lack of serious bodily injury at the preliminary hearing. Stills argues that his conviction is not supported by the evidence because no one was ever seriously injured. He claims that one complainant stated that she was not injured, and the other complainant testified that he was briefly put in a choke hold by Stills's co-defendant, but never stated that he was seriously injured. Stills contends that trial counsel was ineffective for failing to move for an acquittal when the evidence failed to show serious bodily injury.

In his remaining issues, Stills contends that the conspiracy charge brought against him was linked to the charges of robbery with infliction of serious bodily injury. He therefore claims that the Commonwealth was required to prove that he and his co-defendant had a shared criminal objective to inflict serious bodily injury during the course of a theft. Stills argues that, based on the complainants' testimony, no one was seriously injured. From this perspective, Stills claims that the evidence was insufficient to prove the conspiracy charge.

Here, the PCRA court acknowledged that trial counsel failed to recognize that the facts surrounding Stills's crimes did not match the subsection of the

robbery statute listed on the criminal information (*i.e.*, § 3701(a)(1)(i)). However, it nevertheless determined that Stills's claims of trial counsel's ineffectiveness lack merit because he failed to establish the prejudice prong of the ineffectiveness test. The PCRA court determined that, had trial counsel recognized the error at any time prior to the rendering of a verdict, the trial court would have permitted the Commonwealth to amend the information to list the correct subsection of the robbery statute (*i.e.*, § 3701(a)(1)(ii)),[3] pursuant to Pa.R.Crim.P. 564.[4] In reaching that conclusion, the PCRA court reasoned as follows:

> Keeping in mind that the purpose of Rule 564 is to place a defendant on notice regarding his alleged criminal conduct so he has a fair opportunity to prepare a defense, [Stills's] arguments of ineffectiveness fail. Yes, a mistake was made as to the subsection of the robbery statute, but to offer [Stills] relief on that basis, under the facts of this case, would be to elevate form over substance.
>
> Factors to consider in determining whether a defendant was prejudiced by an amendment include:
>
> > (1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether

[3] Pursuant to subsection 3701(a)(1)(ii), "A person is guilty of robbery if, in the course of committing a theft, he . . . threatens another with or intentionally puts him in fear of immediate serious bodily injury[.]" Both subsections 3701(a)(1)(i) and 3701(a)(1)(ii) are graded as felonies of the first-degree.

[4] Rule 564 provides, in relevant part: "The court may allow an information to be amended, provided that the information as amended does not charge offenses arising from a different set of events and that the amended charges are not so materially different from the original charge that the defendant would be unfairly prejudiced."

> the entire factual scenario was developed during a preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

Com. v. Grekis, 411 Pa. Super. 513, 601 A.2d 1284, 1292 (1992).

Applying the instant set of facts to the above factors it is clear that [Stills] was not prejudiced by the error of subsection because (1) the factual scenario supporting the charges never changed; (2) no new facts were added that were previously unknown to [Stills]; (3) the entire factual scenario was developed not only during a preliminary hearing, but also through the discovery that was turned over to [Stills] on May 21, 2013 and included police interviews with each of the three victims, in addition to Corey Battle and [Stills]; (5) the Commonwealth tried the case, and [Stills] defended the case as if the bills of information had already been amended to reflect [18 Pa.C.S.A. § 3701(a)(1)(ii), which is the subsection of the robbery statute which requires] a threat of serious bodily injury; and (6) it is immaterial that the Commonwealth failed to amend the information, as [Stills] had ample notice and preparation that the case was about him threatening serious bodily harm, as not only were those the facts at the preliminary hearing, and in the discovery, but he was also charged with terroristic threats. So even if the court found that subsection (a)(1)(i) was materially different than subsection(a)(1)(ii), [Stills] still cannot show prejudice because he was placed on notice regarding his alleged criminal conduct, and had a fair opportunity to prepare a defense.

In this instance, had counsel caught the error in subsection, this [c]ourt would have allowed the Commonwealth to change the information based on the above analysis. This would have corrected a technical error, but would not have changed the outcome of the trial. If defense counsel had moved for an acquittal on that basis, this [c]ourt would have denied that motion, and allowed the Commonwealth to amend the information, based on the above analysis.

PCRA Court Opinion, 3/13/19, at 7-9. The PCRA court similarly determined that any pre-verdict challenge by trial counsel to the conspiracy charge would have failed since Stills "was not misled as to the charges against him, not precluded from anticipating the Commonwealth's proof, and no substantial right was impaired." ***Id***. at 9-10.

The record supports the PCRA court's determination that Stills failed to demonstrate that he was prejudiced by trial counsel's failure to seek an acquittal on the basis that the evidence did not establish that he inflicted serious bodily injury or conspired to inflict serious bodily injury. The record also supports the PCRA court's determination that, had trial counsel raised the issue, the trial court would have permitted the Commonwealth to amend the criminal information to reflect the correct subsection of the robbery statute. Such an amendment would have been appropriate because Stills was afforded abundant notice from the outset of the criminal proceedings that the evidence supported a finding that he had conspired with his co-defendant to threaten the victims with serious bodily injury and had, in fact, threatened them with serious bodily injury. Thus, Stills's claims pertaining to trial counsel's ineffectiveness entitle him to no relief.

However, Stills additionally disputes the PCRA court's dismissal of his claims that appellate counsel was ineffective. Stills points out that his trial counsel also represented him in his direct appeal. In that capacity, counsel continued to identify and argue the wrong subsection of the robbery statute.

Stills claims that, had appellate counsel argued sufficiency under the correct robbery subsection on direct appeal, this Court would have recognized that the evidence did not support Stills's robbery convictions due to a lack of serious bodily injury. Thus, Stills claims that his direct appeal counsel effectively denied Stills appellate review of his robbery convictions.[5] He additionally claims that, had counsel challenged the sufficiency of the conspiracy charge on direct appeal, the charges may have been overturned.

Notably, Stills has not included in the certified record copies of the filings authored by appellate counsel in Stills's direct appeal; thus, we are unable to evaluate them. ***See Commonwealth v. Muntz***, 630 A.2d 51, 55 (Pa. Super. 1993) (for the purposes of an appeal, it is the responsibility of the appellant to offer a complete record for our review). Based on our precedent, where a

[5] Stills also argues that appellate counsel offered no argument on the second issue he raised on direct appeal, resulting in waiver of that issue. Stills's Brief at 15. Stills does not identify in his PCRA Appellate brief, the second issue from his direct appeal; however, our review discloses that the second issue that appellate counsel raised in Stills's direct appeal challenged the identity of the perpetrator. ***See Stills***, 136 A.3d 1026 (unpublished memorandum at *1). This particular claim of ineffectiveness is not properly before us in this appeal, as it was not raised in Stills's concise statement or identified in his statement of questions presented. ***See Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998) (holding that if an appellant is directed to file a concise statement of matters to be raised on appeal pursuant to Pa.R.A.P. 1925(b), any issues not raised in that statement are waived); ***see also*** Pa.R.A.P. 302(a) (providing that issues not raised in the lower court are waived and cannot be raised for the first time on appeal); ***See*** Pa.R.A.P 2116(a) (providing that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.").

claim is dependent upon materials not provided in the certified record, that claim is considered waived. ***Id***.

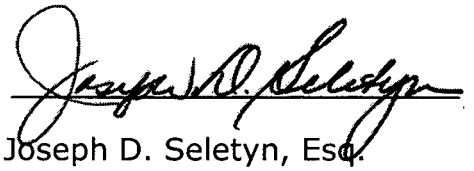
However, since we have the benefit of this Court's disposition of Stills's direct appeal, ***Stills***, 136 A.3d 1026 (unpublished memorandum), we will address this issue. In our prior decision, this Court indicated that Stills challenged "[w]hether the evidence was sufficient to convict [Stills] of three counts of ***Robbery*** F(1), ***Conspiracy*** and related charges when ***the Commonwealth failed to prove beyond a reasonable doubt that there was a threat of serious bodily injury and/or any serious injury to any of the victims***." ***Id***. (unpublished memorandum at *1) (emphasis added). Based on the framing of this issue, it is clear that appellate counsel challenged ***both*** the robbery and conspiracy convictions on the basis that the evidence was insufficient to establish that Stills ***either*** threatened the victims with serious bodily injury, or inflicted serious bodily injury. ***See id***.[6] Accordingly, Stills's claims that appellate counsel was ineffective warrant no relief.

[6] Moreover, in considering Stills direct appeal, this Court expressly determined that the evidence of record was sufficient to establish that Stills threatened the victims with serious bodily injury during the course of a theft, noting as follows:

> The trial court's opinion comprehensively discusses and properly disposes of the questions presented. (***See*** Trial Court Opinion, filed May 1, 2015, at 4-9 (un-paginated)) (finding: (1) Victims Mr. Jackson and Ms. Sowell testified that [Stills] pointed gun at third victim, Mr. Hargrove, and took Mr. Hargrove's cell phone; then, [Stills] pointed gun at Mr. Jackson and Ms. Sowell and threatened

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/19

> to shoot them; evidence was sufficient to sustain [Stills's] robbery convictions related to all three Victims, ***where [Stills] threatened Mr. Jackson and Ms. Sowell during course of theft and intentionally put all Victims in fear of serious bodily injury***.

Id. (unpublished memorandum at *2-3) (emphasis added, footnote omitted).

FILED
2019 MAR 13 PM 2:41

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	**NO.: CP-51-CR-4532-2013**
v.	:	**Superior Court No.: 1266 EDA 2018**
MELVIN STILLS	:	

OPINION

ANHALT, J.

Appellant in the above-captioned matter appeals this Court's judgment regarding its dismissal of his Post-Conviction Relief Act ("PCRA") petition. This Court submits the following Opinion in accordance with the requirements of Pa.R.A.P. 1925(a).

Appellant's PCRA Petition lacks merit. As such, Appellant's petition was rightfully dismissed and the judgment should be affirmed.

CASE HISTORY

Following a waiver trial in front of this Court on May 30, 2014, Appellant was found guilty of three counts of robbery, one count of conspiracy, three counts of terroristic threats, three counts of theft, and violations of the Uniform Firearms Act §6105, §6106, and §6108. On August 7, 2014, Appellant was sentenced to an aggregate sentence of fifteen to thirty years incarceration with a twelve year probationary tail. The Superior Court affirmed the judgment of sentence on January 6, 2016. Appellant filed a *pro se* PCRA Petition on September 9, 2016. Current counsel was appointed on November 4, 2016, and submitted an Amended PCRA Petition on June 7, 2017. The Commonwealth filed a motion to dismiss, after which Appellant

filed a supplement to his petition. This Court filed a 907 Notice of Intent to Dismiss on February 13, 2018, to which Appellant filed a response on March 4, 2018.

On April 2, 2018, the Court formally dismissed Appellant's PCRA Petition as without merit.

On April 26, 2018, Appellant filed a timely notice of appeal, and on June 26, 2018, Appellant filed a timely Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Appellant raises the following issues on appeal:

1. Did the trial court err when it dismissed the Appellant's Post Conviction Relief Act petition without an evidentiary hearing?
2. Did the trial court err when it dismissed as meritless Appellant's claim that trial/appellate counsel was ineffective for:
    a. failing to identify the correct subsection of the robbery statute that formed the basis of the charge and conviction?
    b. failing to move for an acquittal due to the evidence not being sufficient to meet the burden of robbery with infliction of serious bodily injury?
    c. failing to properly execute the direct appeal due to misunderstanding his client's robbery charge and conviction among other errors?
    d. failing to identify the correct subsection of the robbery statute that the conspiracy reflected?
    e. failing to move for an acquittal due to the evidence not being sufficient to show a conspiracy to commit a robbery with the infliction of serious bodily injury?

f. failing to properly execute the direct appeal due to misunderstanding his client's conspiracy charge and conviction?

FACTUAL HISTORY

On January 29, 2013, around 6:00 p.m., Tahir Jackson was walking on Fisher Street in Philadelphia with his girlfriend, Dereka Sowell, and friend James Hargrove when he saw two men riding toward them on bikes. *N.T. 5/30/14* at 11-13. Mr. Jackson testified that one man was tall, wearing a black jacket and red hoodie, riding a black and silver Mongoose bike, and the other man was shorter, wearing a black hoodie, black jacket and riding a pink and purple child's bike. *Id.* at 32-34. Mr. Jackson identified the shorter man as Appellant, and the taller man as co-defendant Corey Battle.[1] *Id.* at 34, *N.T. 4/2/13* at 15. Appellant jumped off his bike, pulled out a black gun, and pointed it at Mr. Hargrove. Corey Battle approached Mr. Jackson from behind and began to choke him so hard that he was lifted off the ground and couldn't breathe. *Id.* at 12-18, 27, 45, 58. Ms. Sowell also testified that Appellant was the one with the gun and Corey Battle choked Mr. Jackson from behind. *Id.* at 45.

Appellant told Mr. Hargrove, "whatever you got in your pocket, give it up," then took Mr. Hargrove's cell phone. *Id.* at 19. Appellant then pointed the gun at Ms. Sowell and said, "you need to back up before you get shot." *Id.* at 46. Corey Battle checked Mr. Jackson's pockets, and finding nothing, pushed him to the ground, and grabbed Ms. Sowell. *Id.* at 20-21. Mr. Jackson tried to get up to defend his girlfriend, but Appellant pointed the gun at him and said, "Stay there. You don't want to get shot." *Id.* at 22. Appellant stood over Mr. Jackson, a few feet away while pointing the gun directly at him. *Id.* Both Mr. Jackson and Ms. Sowell testified

[1] On July 9, 2013, co-defendant Mr. Battle entered a negotiated guilty plea to robbery – inflict serious bodily injury, 18 Pa. C.S. § 3701(a)(1)(i), and conspiracy to commit robbery serious bodily injury, 18 Pa. C.S. § 903.

that Appellant did not have anything covering his face. *Id.* at 24, 50. After not finding any items on Ms. Sowell, Appellant and Corey Battle got back on their bikes and rode off. *Id.* at 24.

Mr. Jackson called the police who arrived minutes later. *Id.* at 25-26. While the victims met with police, Appellant rode past on his pink and purple child's bike, along with another male. *Id.* at 58, 61. Officer Rosenbaum noticed a bulge on Appellant's right hip area. *Id.* Both men fled after the officer tried to stop them, and during the chase, Officer Rosenbaum saw Appellant discard a firearm from his right hip area, the same area he saw the bulge. *Id.* at 59-60. Police later recovered the weapon, and identified it as a black Beretta handgun. *Id.* at 58-59. Mr. Jackson and Ms. Sowell identified Appellant as the man who robbed them. Appellant later gave a statement to detectives in which he admitted that he and Corey Battle had robbed the victims at gunpoint. *Id.* at 27-30, 49, 57-59.

DISCUSSION

I. The trial court properly dismissed Appellant's PCRA Petition without an evidentiary hearing because there was no genuine issue of material fact.

Pursuant to Rule 907(1), if after reviewing the PCRA Petition, any filings by the petitioner and Commonwealth, and other matters of record relating to the claim, the judge is satisfied that there are no "genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief," the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal. Pa. R. Crim. P. 907(1).

In his PCRA Petition, Appellant alleged that trial counsel failed to properly identify the correct subsection of the robbery statute, and because of that, was ineffective in various ways.

The Commonwealth admits that the subsection was misidentified. Therefore, there is not a factual issue as to the subsection, but rather, legal issues about if that error caused ineffectiveness. The PCRA Court properly dismissed the petition without an evidentiary hearing because there was no material fact at issue, and the legal issues did not merit relief.

II. The trial court properly dismissed the PCRA Petition as meritless because Appellant failed to show the requisite prejudice.

The essential question Appellant raises is if his counsel was ineffective where the bills of information, all discovery, and testimony at the preliminary hearing described a robbery where defendant *threatens* another with or intentionally puts him in fear of serious bodily injury, but the bill of information listed 3701(a)(1)(i), which is a robbery where he *inflicts* serious bodily injury. The answer is that no, in this instance, counsel was not ineffective because there was no prejudice to Appellant.

When evaluating claims of ineffective assistance of counsel, it is well-settled that counsel is presumed to be effective. *Com. v. Lesko*, 15 A.3d 345, 380 (Pa. 2011). To establish ineffectiveness under the PCRA, an Appellant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's course of conduct was without any reasonable basis designed to effectuate his client's interest; and (3) he was prejudiced by counsel's ineffectiveness. *Com. v. Lauro*, 2003 PA Super 80, 819 A.2d 100, 105–06 (2003). The Court must reject the ineffectiveness claim if an Appellant fails to satisfy any prong of the test. *Com. v. Fulton*, 830 A.2d 567, 572 (Pa. 2003).

Additionally, courts are not required to analyze the elements of an ineffectiveness claim in any particular order of priority; instead, if a claim fails under any necessary element of the Strickland test, the court may proceed to that element first. *Lesko*, 15 A.3d at 374.

a. **Robbery Conviction**

Appellant's first three claims of ineffectiveness of counsel relate to his conviction for robbery under 18 Pa. C.S. § 3701(a)(1)(i), which provides that a person commits robbery if, in the course of committing theft, he "inflicts serious bodily injury upon another." He claims trial/appellate counsel was ineffective for failing to identify the correct subsection of the robbery statute that formed the basis of the charge and conviction, and subsequently failing to move for an acquittal or properly execute an appeal. These claims fail because Appellant fails to show the requisite prejudice.

Prejudice in the context of ineffective assistance of counsel means establishing that there is a reasonable probability that, but for counsel's alleged errors, the outcome of the trial would have been different. *Commonwealth v. Bond*, 819 A.2d 33, 42 (2002). The inquiry here is if counsel had recognized the error on the bills of information, either before or during the trial, is there a reasonable probability that the outcome would have been different? The answer is no.

Counsel's error was failing to recognize that the facts about his client's crime did not match the subsection listed on the bills of information. Had counsel brought this to the court's attention, the court would have looked to Rule 564 and the line of cases that address it for guidance. Pa. R. Crim. P. 564.

At the outset, the court notes that the purpose of the bill of information is to provide a criminal defendant sufficient notice to prepare a defense. An information is not to be read in an overly technical form. *Commonwealth v. Morales*, 669 A.2d 1003, 1006-7 (Pa. Super. 1996). A defendant is only entitled to relief when an error misleads him as to the charges against him,

precludes him from anticipating the Commonwealth's proof, or impairs a substantial right. *Commonwealth v. McIntosh*, 476 A.2d 1316, 1321 (Pa. Super. 1984).

Furthermore, Rule 564 provides: "The court may allow an information to be amended, provided that the information as amended does not charge offenses arising from a different set of events and that the amended charges are not so materially different from the original charge that the defendant would be unfairly prejudiced. Upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice." Pa. R. Crim. P. 564.

"The purpose of Rule 564 is to ensure a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed." *Commonwealth v. Duda*, 831 A.2d 728, 732 (Pa.Super. 2003). The test to be applied is:

> [W]hether the crimes specified in the original indictment or information involve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct. If, however, the amended provision alleges a different set of events, or the elements or defenses to the amended crime are materially different from the elements or defenses to the crime originally charged, such that the defendant would be prejudiced by the change, then the amendment is not permitted.
>
> *Commonwealth v. Davalos*, 779 A.2d 1190, 1194 (Pa.Super.2001) (citation omitted).

Keeping in mind that the purpose of Rule 564 is to place a defendant on notice regarding his alleged criminal conduct so he has a fair opportunity to prepare a defense, Appellant's arguments of ineffectiveness fail. Yes, a mistake was made as to the subsection of the robbery

statute, but to offer Appellant relief on that basis, under the facts of this case, would be to elevate form over substance.

Factors to consider in determining whether a defendant was prejudiced by an amendment include:

(1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during a preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

Com. v. Grekis, 411 Pa. Super. 513, 601 A.2d 1284, 1292 (1992).

Applying the instant set of facts to the above factors it is clear that Appellant was not prejudiced by the error of subsection because (1) the factual scenario supporting the charges never changed; (2) no new facts were added that were previously unknown to the defendant; (3) the entire factual scenario was developed not only during a preliminary hearing, but also through the discovery that was turned over to Appellant on May 21, 2013 and included police interviews with each of the three victims, in addition to Corey Battle and Appellant; (5) the Commonwealth tried the case, and defendant defended the case as if the bills of information had already been amended to reflect a threat of serious bodily injury; and (6) it is immaterial that the Commonwealth failed to amend the information, as Appellant had ample notice and preparation that the case was about him threatening serious bodily harm, as not only were those the facts at the preliminary hearing, and in the discovery, but he was also charged with terroristic threats. So even if the court found that subsection (a)(1)(i) was materially different than subsection

(a)(1)(ii), Appellant still cannot show prejudice because he was placed on notice regarding his alleged criminal conduct, and had a fair opportunity to prepare a defense.[2]

In this instance, had counsel caught the error in subsection, this Court would have allowed the Commonwealth to change the information based on the above analysis. This would have corrected a technical error, but would not have changed the outcome of the trial. If defense counsel had moved for an acquittal on that basis, this Court would have denied that motion, and allowed the Commonwealth to amend the information, based on the above analysis. Had appellate counsel pointed out the error of subsection on direct appeal, the Superior Court would have gone through the above analysis, and likely upheld the conviction because the fundamental principle of fairness was upheld and defendant was not prejudiced.

Because there is not a reasonable probability that the outcome would have changed had trial/appellate counsel realized the mistaken robbery subsection, Appellant has not demonstrated prejudice, and his ineffectiveness claims fail.

b. <u>Conspiracy Conviction</u>

Appellant makes similar arguments with respect to the conspiracy charge: that counsel was ineffective for failing to identify the correct robbery subsection that the conspiracy reflected, and therefore ineffective for failing to move for an acquittal of the conspiracy charge on that basis, and for failing to properly execute the direct appeal of the conspiracy conviction.

[2] In addition, both subsection (a)(1)(i) and subsection (a)(1)(ii) are 1st degree felonies, and the court used the Offense Gravity Score of 10 for sentencing, which is the correct score for threatening serious bodily injury.

As stated above, the purpose of the bill of information is to provide a criminal defendant sufficient notice to prepare a defense. An information is not to be read in an overly technical form. *Commonwealth v. Morales*, 669 A.2d 1003, 1006-7 (Pa. Super. 1996). A defendant is only entitled to relief when an error misleads him as to the charges against him, precludes him from anticipating the Commonwealth's proof, or impairs a substantial right. *Commonwealth v. McIntosh*, 476 A.2d 1316, 1321 (Pa. Super. 1984).

The Commonwealth notified Appellant of the facts it intended to prove at trial. The discovery packet included various accounts of how Appellant worked in concert with Corey Battle to rob the victims at gunpoint. In addition, at the preliminary hearing, attended by both Appellant and Corey Battle, the witnesses testified to Appellant working with Cory Battle to rob them at gunpoint. *N.T. 4/2/13* at 4-8, 14-18. The witnesses testified at trial in conformance to these statements. Given these consistent accounts, Appellant was not misled as to the charges against him, not precluded from anticipating the Commonwealth's proof, and no substantial right was impaired.

Because Appellant would not have been entitled to dismissal of the conspiracy charges against him based on the citation of the wrong subsection of the robbery statute in the bills of information, or his assertion that the conspiracy charge was too vague, he has failed to establish that his counsel was ineffective, as counsel is not ineffective for failing to raise a meritless claim.

CONCLUSION

Because Appellant failed to demonstrate prejudice or arguable merit, his ineffective assistance of counsel claims fail. As there is no material fact at issue, the PCRA Court properly

dismissed the petition without an evidentiary hearing. As such, the PCRA petition lacks merit, and the dismissal of his petition should be affirmed.

BY THE COURT:

Diana L. Anhalt

DATE: March 12, 2019

DIANA L. ANHALT, J.

PROOF OF SERVICE

I hereby certify that on the date set forth below, I caused an original copy of the Judicial Opinion to be served upon the persons at following locations, which service satisfies the requirements of Pa.R.A.P. 122:

Thomas Ferrant
1735 Market St, Suite 3750
Philadelphia, PA 19103
(first class mail)

Appeals Unit
Office of the District Attorney
Three South Penn Square
Philadelphia, PA 19107
(first class mail)

Melvin Stills
#NG3738
SCI Fayette
421 Labelle Rd
La Belle, PA 15450
(first class mail)

Diana L. Anhalt

Date: 3/12/19

By: _____
Honorable Diana L. Anhalt

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 241 EAL 2020
Respondent	:	
	:	Petition for Allowance of Appeal
	:	from the Order of the Superior Court
v.	:	
MELVIN STILLS,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 12th day of November, 2020, the Petition for Allowance of Appeal is **DENIED**.

A True Copy
As Of 11/12/2020

Attest: _____
Patricia A. Johnson
Chief Clerk
Supreme Court of Pennsylvania

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

COMMONWEALTH OF PENNSYLVANIA Appellee v. MELVIN STILLS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2539 EDA 2014

Appeal from the Judgment of Sentence August 7, 2014
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0004532-2013

BEFORE: GANTMAN, P.J., MUNDY, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED JANUARY 06, 2016**

Appellant, Melvin Stills, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his bench trial convictions for three counts each of robbery, terroristic threats, and theft by unlawful taking or disposition, and one count each of criminal conspiracy, firearms not to be carried without a license, carrying firearms on public streets or public property in Philadelphia, and persons not to possess firearms.[1] We affirm.

In its opinion, the trial court fully sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them. We clarify only that on August 7, 2014, the court sentenced Appellant

[1] 18 Pa.C.S.A. §§ 3701; 2706; 3921; 903; 6106; 6108; 6105, respectively.

to an aggregate term of fifteen (15) to thirty (30) years' imprisonment, plus twelve (12) years' probation.[2]

Appellant raises two issues for our review:

> WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF THREE COUNTS OF ROBBERY (F1), CONSPIRACY AND RELATED CHARGES WHEN THE COMMONWEALTH FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THERE WAS A THREAT OF SERIOUS BODILY INJURY AND/OR ANY SERIOUS INJURY TO ANY OF THE VICTIMS?
>
> WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF THREE COUNTS OF ROBBERY, CONSPIRACY AND RELATED CHARGES SINCE THE COMMONWEALTH FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS THE ONE WHO COMMITTED THE ROBBERIES?

(Appellant's Brief at 4).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Diana L. Anhalt, we conclude Appellant's issues merit no relief. The trial court's opinion comprehensively discusses and properly disposes of the questions presented. (***See*** Trial Court Opinion, filed May 1, 2015, at 4-9 (un-paginated)) (finding: **(1)** Victims Mr. Jackson and Ms. Sowell testified that Appellant pointed gun at third victim, Mr. Hargrove, and took Mr. Hargrove's

---

[2] In addition to the crimes listed on the first page of the trial court's opinion, the court also convicted Appellant of three counts each of terroristic threats and theft by unlawful taking or disposition. Further, the events which gave rise to Appellant's convictions took place on January 29, 2013.

cell phone; then, Appellant pointed gun at Mr. Jackson and Ms. Sowell and threatened to shoot them; evidence was sufficient to sustain Appellant's robbery convictions related to all three Victims,[3] where Appellant threatened Mr. Jackson and Ms. Sowell during course of theft and intentionally put all Victims in fear of serious bodily injury;[4] **(2)**[5] five minutes after robbery, Ms. Sowell and Mr. Jackson positively identified Appellant as man who robbed them; Ms. Sowell and Mr. Jackson testified at trial they were certain Appellant was perpetrator; Mr. Jackson testified that Appellant was very close to him during encounter and wore nothing to cover his face; Victims also testified Appellant was riding distinct bike; police spotted Appellant riding bike matching unique description moments after receiving call that robbery was in progress; police also recovered gun Appellant had discarded that matched Ms. Sowell's description of gun used; Commonwealth

---

[3] Appellant's cohort searched Mr. Jackson and Ms. Sowell but took no property from those victims.

[4] We decline Appellant's invitation to "reconsider the robbery statute" to hold that certain gunpoint robberies can constitute second-degree felonies instead of first-degree felonies. Appellant concedes he lacks any legal authority to support his position.

[5] Notwithstanding his statement of questions presented, Appellant challenges only the sufficiency of the evidence to sustain his robbery convictions. Appellant makes no argument whatsoever in support of his second issue on appeal. Thus, Appellant has abandoned issue two. Moreover, even if Appellant had properly preserved his second issue, we would affirm on the basis of the trial court's opinion.

presented sufficient evidence to prove Appellant was perpetrator).[6] Accordingly, we affirm on the basis of the trial court's opinion.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/6/2016

[6] On page three of the court's opinion, the court states: "Officer Rosenbaum noticed a bulge on Appellant's ride hip area." No doubt the court meant **right** hip area.

FILED
MAY 01 2015
Criminal Appeals Unit
First Judicial District of PA

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA
CRIMINAL DIVISION TRIAL

COMMONWEALTH OF PENNSYLVANIA	:	NO.: ~~CP-51-CR-0004530-2013~~ : CP-51-CR-0004532-2013
v.	:	Superior Court No.: 2539 EDA 2014
MELVIN STILLS	:	

CP-51-CR-0004532-2013 Comm. v. Stills, Melvin
Opinion
7288973461

OPINION

ANHALT, J.

Appellant in the above-captioned matter appeals the trial court's judgment regarding Appellant's convictions for Robbery, a felony in the first degree (F1). The trial court submits the following Opinion in accordance with the requirements of Pa.R.A.P. 1925(a). For the reasons set forth herein, the trial court holds that the judgment should be affirmed.

PROCEDURAL HISTORY

On January 29, 2013, police arrested and charged Appellant, Melvin Stills, with three counts of Robbery, (F1), Conspiracy (F1), and several Violations of the Uniform Firearms Act (VUFA). On May 30, 2014, Appellant waived his right to a jury and proceeded to a bench trial before the trial court. On that date, the trial court found Appellant guilty of three counts of Robbery, (F1), Conspiracy (F1), and VUFA §6105 (F2), §6106 (F3) and §6108 (M1).

On August 7, 2014, the trial court sentenced Appellant to ten to twenty years of state custody on each charge of Robbery and Conspiracy, five to ten years state consecutive for VUFA §6105, seven years consecutive state probation for VUFA §6106, and five years consecutive state probation for VUFA §6108.

Appellant filed this timely appeal of the trial court decision on August 29, 2014. Appellant filed a 1925(b) statement on September 23, 2014. Appellant argues that the evidence was insufficient to sustain his conviction for Robbery because the Commonwealth failed to prove there was a threat of serious bodily injury to any of the victims. Appellant also argues that the evidence was insufficient to sustain his convictions for three counts of Robbery (F1) because the Commonwealth failed to meet its burden and prove that Appellant was the one who committed the Robberies.

FACTUAL HISTORY

On January 29, 2013 Appellant robbed Tahir Jackson, Dereka Sowell, and James Hargrove at gun point at the intersection of Fairhill St. and W. Fisher Ave. in Philadelphia, Pennsylvania. (N.T., 5/30/14, pp. 11-12, 45). While walking to the Rite Aid, Mr. Jackson observed two men on bikes coming towards him. (N.T., 5/30/14, p. 13). Mr. Jackson testified that one man was tall, wearing a black jacket and a red hoodie riding a black and silver Mongoose bike. (N.T., 5/30/14, p. 32). The other man was shorter, wearing a black hoodie with a black jacket and riding a pink and purple little girl's bike. (N.T., 5/30/14, pp. 32, 34). Mr. Jackson identified the shorter male on the pink and purple bike as Appellant. (N.T., 5/30/14, p. 34). As the two men approached, Appellant jumped off the bike, pulled out a gun, and pointed it at Mr. Hargrove while the other man choked Mr. Jackson from behind. (N.T., 5/30/14, p. 13-14). Ms. Sowell also testified that Appellant was the one with the gun and the other man choked Mr. Jackson from behind. (N.T., 5/30/14, p. 45). Mr. Jackson was six to eight feet away from Mr. Hargrove as the Appellant held a gun on him. (N.T., 5/30/14, p. 15).

Mr. Jackson testified that Appellant told Mr. Hargrove "whatever you got in your pocket, give it up." (N.T., 5/30/14, p. 19). Appellant then took Mr. Hargrove's cell phone. (N.T.,

5/30/14, p. 20). Ms. Sowell testified that Appellant pulled a gun on her. (N.T., 5/30/14, p. 46). Appellant threatened Ms. Sowell and said "you need to back up before you get shot." *Id.* The other male then checked Mr. Jackson's pockets and after finding nothing, pushed Mr. Jackson to the ground and grabbed Ms. Sowell. (N.T., 5/30/14, pp. 20-21). When Mr. Jackson tried to get up and defend Ms. Sowell, Appellant pointed the gun at him and said "you don't want to get shot." (N.T., 5/30/14, p. 22). Appellant was standing over Mr. Jackson a few feet away as he held the gun on him. *Id.* Both Mr. Jackson and Ms. Sowell testified that Appellant did not have anything covering his face. (N.T., 5/30/14, pp. 24, 50). After finding no items on Ms. Sowell, Appellant and the other man got back on their bikes and rode off. (N.T., 5/30/14, p. 24).

Mr. Jackson ran to Ms. Sowell's mothers house to call the police who arrived minutes later. (N.T., 5/30/14, p. 25-26). Police Officer Rosenbaum testified that while surveying the area for a Robbery in progress, he observed Appellant riding a pink and purple child's bike along with another male. (N.T., 5/30/14, p. 58, 61). Officer Rosenbaum noticed a bulge on Appellant's ride hip area. Id. When the officer attempted to stop them, they both fled. (N.T., 5/30/14, p. 58). During the chase, Officer Rosenbaum observed Appellant discard a firearm from his right hip area, the same area he saw the bulge. (N.T., 5/30/14, pp. 59-60).

Mr. Jackson and Ms. Sowell both testified that Appellant robbed them at gun point. (N.T., 5/30/14, pp. 29, 55-56). Ms. Sowell testified that the gun used by Appellant was all black and resembled a gun that police carry. (N.T., 5/30/14, pp. 45-46). Officer Rosenbaum testified that Appellant discarded a firearm that he later recovered. (N.T., 5/30/14, pp. 58-59). The gun was a black Beretta handgun. *Id.*

DISCUSSION

Appellant argues that the evidence was insufficient to sustain his conviction for Robbery because the Commonwealth failed to prove there was a threat of serious bodily injury to any of the victims. Appellant also argues that the evidence was insufficient to sustain his conviction for Robbery because the Commonwealth failed to prove that Appellant was the one who committed the Robberies.

In evaluating a challenge to the sufficiency of the evidence, the reviewing court must determine, whether viewing all the evidence in a light most favorable to the Commonwealth, the trier of fact could have found that each element of the offense charges was proved beyond a reasonable doubt. *Commw. v. Lee*, 956 A.2d 1024, 1027 (Pa. Super Ct. 2008). This standard applies whether the evidence presented is circumstantial or direct, provided the evidence links the accused to the crime beyond a reasonable doubt. *Commw. v. Morales*, 669 A.2d 1003, 1005 (Pa. Super. Ct. 1996). "Unless the evidence presented at trial is 'so weak and inconclusive that as a matter of law, no probability of fact can be drawn from the combined circumstances,' the verdict should not be disturbed on appeal." *Lee,* at 1027-28 (quoting *Commw v. Davis,* 799 A.2d 860, 866 (Pa. Super. Ct. 2002)).

A person is guilty of Robbery, a felony in the first degree, if in the course of committing a theft, he "threatens another with or intentionally puts him in fear of immediate serious bodily injury." 18 Pa.C.S.A. §3701(a)(1)(ii). The evidence is sufficient to convict a defendant of Robbery under this section if the evidence demonstrates aggressive actions that threatened the victim's safety. *Commw v. Hansley,* 24 A.3d 410, 416 (Pa. Super. Ct. 2011); *Commw. v. Jannett*, 58 A.3d 818, 821-22 (Pa. Super. Ct. 2012); *Commw. v. Valentine*, 101 A.3d 801, 807 (Pa. Super. Ct. 2014). For the purposes of §3701(a)(1)(ii), the court must focus on the nature of the threat

posed by the assailant and whether he reasonably placed a victim in fear of immediate serious bodily injury. *Hansley*, 24 A.3d at 416; *Jannett*, 58 A.3d at 821-22.

Appellant's actions in pointing a gun and threatening a victim were sufficient evidence to convict appellant of Robbery. *Commw. v. Valentine,* 101 A.3d 801 (Pa. Super. Ct. 2014). In *Valentine*, Ms. Gibbs was waiting for a bus when appellant approached her from behind with a gun. *Id.* at 804. Appellant point a handgun at Ms. Gibbs, threatened to shoot her, demanded money, and took her purse and phone. *Id.* Appellant was arrested and charged with Robbery. *Id.* At trial, a jury found appellant guilty of Robbery and appellant appealed. *Id.*. The court upheld the conviction finding the evidence was sufficient to convict appellant of Robbery. *Id.* at 807. The court determined that appellant's actions in pointing a gun at Ms. Gibbs and threatening to shoot her would have placed a reasonable person in fear of serious bodily. *Id.*

In the present case, the evidence presented at trial was sufficient to establish that Appellant placed Mr. Jackson and Ms. Sowell in fear of serious bodily injury. Appellant pointed a gun at Ms. Sowell and said, "You need to back up before you get shot." (N.T., 5/30/14, p. 46). Appellant also pointed a gun at Mr. Jackson and said, "You don't want to get shot." (N.T., 5/30/14, p. 22). Appellant's actions of pointing a gun and threatening Mr. Jackson and Ms. Sowell reasonably put them in fear of serious bodily injury. *Valentine*, 101 A.3d at 804.

Terrorizing multiple people during the course of committing one theft is sufficient to support Robbery convictions for each of those persons. *Commw. v. Gilliard,* 850 A.2d 1273, 1275 (Pa. Super. Ct. 2004). In *Gilliard*, a defendant appealed a conviction of five counts of robbery alleging the evidence was insufficient because he only committed one theft. *Id.* at 1275. The Pennsylvania Superior Court held that the defendant threatened to inflict serious bodily injury on all four patrons when he pointed a gun at them and forced them to the back room. *Id.*

at 1276-1277. The evidence was sufficient to support defendant's convictions because the defendants' actions were sufficiently threatening to all of the patrons at the bar and placed them in fear of serious bodily injury. *Id.*

Appellant's single theft is sufficient to support three convictions for Robbery. Like in *Gilliard*, the Appellant here threatened multiple people although he committed only a single theft. 850 A.2d at 1276. Both Mr. Jackson and Ms. Sowell testified that Appellant pointed a gun at Mr. Hargrove and took his cell phone. (N.T., 5/30/14, pp. 13, 46). Afterwards, Appellant pointed the gun at Mr. Jackson and Ms. Sowell and threatened them. *Id.* The evidence is sufficient to convict Appellant of three counts of Robbery because Appellant intentionally put Mr. Jackson, Ms. Sowell, and Mr. Hargrove in fear of serious bodily injury when he pointed a gun at them and threatened them.

Appellant also contends that the evidence was insufficient to sustain his conviction for Robbery because the Commonwealth failed to prove that Appellant was the one who committed the robberies. Evidence of identification need not be positive and certain to sustain a conviction. *Commw. v. Orr,* 38 A.3d 868, 874 (Pa. Super. Ct. 2011). Identification evidence, which is solely based on similar height, coloration, and clothing, is not enough to convict a defendant as the perpetrator of a crime. *Commw. v. Crews*, 436 Pa. 346 (1970). Although common items of clothing and general physical characteristics are usually insufficient to support a conviction, such evidence can be used as other circumstances to establish the identity of a perpetrator. *Orr,* 38 A.3d at 874. Any indefiniteness and uncertainty in identification testimony goes to weight. *Id.* Circumstantial evidence alone is sufficient to convict a person; direct evidence is not absolutely needed. *Commw. v. Smith,* 283 Pa. Super 360, 423 A.2d 1296 (1981).

Appellant's contention that the Commonwealth failed to prove that Appellant committed the robberies is without merit. In assessing whether the totality of the circumstances supports an independent basis for identification of a defendant as perpetrator, the following factors are to be considered:

> ...the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Commw. v. Edwards, 762 A.2d 382, 391 (Pa. Super. Ct. 2000). The most important factor is the opportunity of the witness to view the suspect at the time of the crime. *Id.* Five minutes after the Robbery occurred, both Ms. Sowell and Mr. Jackson positively identified Appellant as the guy who robbed them. (N.T., 5/30/14, pp. 28-29, 39, 49). At trial, both victims testified that they were certain that Appellant was the guy who robbed them. (N.T., 5/30/14, pp. 13-14, 46-47). Mr. Jackson testified that he was about six to eight feet away from Appellant during the initial encounter. (N.T., 5/30/14, p. 15). Mr. Jackson also testified that when Appellant approached him with the gun, he was standing right over him. (N.T., 5/30/14, p. 24) Mr. Jackson could see Appellant entire face because Appellant did not have anything covering his face. (N.T., 5/30/14, pp. 24, 33, 35).

The Commonwealth also presented evidence of a distinct bike that Appellant was identified as riding. Testimony by Mr. Jackson and Ms. Sowell indicates that Appellant was riding a purple and pink child's bike. (N.T., 5/30/14, pp. 32, 34, 53). Additionally, Officer Rosenbaum spotted the Appellant riding a pink and purple child's bike moments after receiving a call for Robbery in progress. (N.T., 5/30/14, pp. 58, 61). Lastly, the Commonwealth presented evidence of a gun that was used during the Robbery. Ms. Sowell testified that the gun used by Appellant was all black and resembled a gun that police carry. (N.T., 5/30/14, pp. 45-46).

Officer Rosenbaum testified that he observed Appellant discard a firearm in the alley during his chase. (N.T., 5/30/14, pp. 58-59). That gun was recovered and identified as a black Beretta handgun. *Id.*

Mr. Jackson's testimony that Appellant had on a black hoodie when Appellant was arrested wearing a white hoodie is not dispositive but simply goes to weight. *Orr*, 38 A.3d at 874. The Robbery took place at night when it was dark outside. (N.T., 5/30/14, p. 31).

The Commonwealth has presented enough evidence to prove beyond a reasonable doubt that Appellant committed these crimes. *Crews,* 436 Pa. at 349; *Edwards*, 762 A.2d at 391; *Orr,* 38 A.3d at 874. The Commonwealth presented evidence in the form of testimony of two victims of the Robbery who gave identical accounts about what happened on January 14, 2013. (N.T., 5/30/14, pp. 13, 20, 45, 48). Both victims testified that Appellant took Mr. Hargrove's cell phone and held them at gun point. (N.T., 5/30/14, pp. 37, 52). Additionally, both victims and Police Officer Rosenbaum testified that Appellant was riding a pink and purple child's bike. (N.T., 5/30/14, pp. 32, 34, 53, 58, 61). The combination of the evidence presented by the Commonwealth is sufficiently reliable to convict Appellant.

Therefore, there is sufficient evidence to convict Appellant of Robbery, a felony in the first degree (F1).

CONCLUSION

For the foregoing reasons, Appellant's three convictions for Robbery (F1) should be affirmed.

BY THE COURT:

Diana L. Anhalt

DIANA ANHALT, J.

April 29, 2015

PROOF OF SERVICE

I hereby certify that on the date set forth below, I caused an original copy of the Judicial Opinion to be served upon the persons at the following locations, which service satisfies the requirements of Pa. R.A.P. 122:

Douglas N. Stern, Esquire
1420 Walnut Street, Suite 1201
Philadelphia, PA 19102

Hugh Burns, Esquire
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107

Date: 4/29/15

By: Diana L. Anhalt
Diana Anhalt, Judge