UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

20-3184

RAMIK BANKS

V

SUPERINTENDENT MAHANOY SCI

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

Appendix "A"

s/ Theodore McKee
Circuit Judge

Date: March 30, 2022
SLC/cc: Ramik Banks
Jennifer O. Andress, Esq.

BLD-010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-3184**

RAMIK BANKS, Appellant

v.

SUPERINTENDENT MAHANOY SCI; ET AL.

(E.D. Pa. Civ. No. 2-19-cv-02605)

Present: MCKEE, GREENAWAY, JR., and PORTER, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Banks's request for a certificate of appealability is denied. Jurists of reason would agree without debate that, for substantially the reasons provided by the Magistrate Judge in the report and recommendation, Banks's claims are procedurally defaulted and fail on the merits. See generally Slack v. McDaniel, 529 U.S. 473, 484 (2000). More specifically, Banks's challenge to the sufficiency of the evidence fails because he has not shown that the jury's verdict "was so insupportable as to fall below the threshold of bare rationality." Coleman v. Johnson, 566 U.S. 650, 656 (2012) (per curiam). Jurists of reason would also agree that the District Court correctly denied Banks's ineffectiveness claims as inadequately developed. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1991). Further, Banks has not made "a substantial showing of the denial of a constitutional right" as to these claims. 28 U.S.C. § 2253(c)(2). Finally, jurists of reason would agree with the District Court that the relevant statute is not unconstitutionally vague. See United States v. Zhi Yong Guo, 634 F.3d 1119, 1122 (9th Cir. 2011) ("[A]

Appendix "B"

statute does not fail the vagueness test simply because it involves a complex regulatory scheme, or requires that several sources be read together[.]").

By the Court,

s/Theodore A.McKee
Circuit Judge

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Dated: December 2, 2021
SLC/cc: Ramik Banks
Jennnifer O. Andress, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAMIR BANKS, Petitioner,	:	
v.	:	CIVIL ACTION NO. 19-CV-2605
THERESA DELBASO, *et al.*, Respondents.	:	

ORDER

AND NOW this 6th day of October, 2020, upon careful and independent review of the petition for writ of habeas corpus, and the Report and Recommendation of the Honorable Jacob P. Hart, as well as the review of Petitioner's objections to the Report and Recommendation, it is hereby **ORDERED** as follows:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for writ of habeas corpus is **DISMISSED**; and
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

/s/ Jeffrey L. Schmehl
JEFFREY L. SCHMEHL, J.

Appendix "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAMIK BANKS,	:	
	:	CIVIL ACTION
Petitioner,	:	
v.	:	
	:	NO. 19-2605
THERESA DELBALSO, et al.,	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION

JACOB P. HART, U.S.M.J. April 29, 2020

I. FACTS AND PROCEDURAL HISTORY

On April 20, 2012, following a jury trial before the Honorable Glenn B. Bronson of the Philadelphia County Court of Common Pleas, Petitioner, Ramik Banks ("Petitioner" or "Banks"), was convicted of first-degree murder, criminal conspiracy, carrying a firearm on the public streets or public property in Philadelphia, and possession of an instrument of crime. The trial court summarized the facts revealed at trial as follows:

> On August 14, 2010, at approximately 1:00 a.m., Robert Lewis was driving his girlfriend, Toccara Levins, home to the 5700 block of Rodman Street in Philadelphia. Shortly after reaching the intersection of Rodman Street and 58th Street, their path was blocked by [Banks], who was obstructing the street with his bicycle. Mr. Lewis honked his horn. [Banks] did not react, and Ms. Levins got out of the car. Ms. Levins asked [Banks] to move out of the street, to which [Banks] responded, "[f**k] no" and "I'm not moving out of the street." As Ms. Levins got back into the car, Mr. Lewis got out of the car. Mr. Lewis approached [Banks], who said, '[i]t is cool, old head." Mr. Lewis then got back into the car, and continued to drive up the street to Ms. Levins's house.
>
> After Mr. Lewis and Ms. Levins got back into their car and pulled away, [Banks] called his cousin, Anthony Washington. [Banks] then went to a corner store and met up with Mr. Washington, who had brought a gun for himself and a .45 caliber handgun for [Banks]. [Banks] and Mr. Washington returned to Rodman Street and approached Mr. Lewis's car, and [Banks] attempted to fire his gun at Mr. Lewis.

Appendix "D"

The gun jammed and [Banks] ran away from the car, at which point Mr. Lewis got out of the car and chased [Banks], firing his revolver at him. [Banks] turned around and attempted to fire back. This timed the gun worked and [Banks] succeeded in shooting at Mr. Lewis. As Mr. Lewis limped back to his car, Mr. Washington approached Mr. Lewis and began shooting him, hitting him in the head and neck.

Ms. Levins and her sister, Jalisa Kennedy, were inside their home when they heard the gunshots. After the gunshots, Ms. Levins called the police and then ran to find Mr. Lewis, who had collapsed on the corner of 57th Street and Rodman Street. Philadelphia Police Officer Bruce Wright arrived on the scene. Ms. Kennedy approached Officer Wright and told him that she saw two men besides Mr. Lewis out in the street during the gunfire. Officer Wright drove the two women around

in his patrol car, canvassing the area in an attempt to locate the shooters. As the car approached the intersection of 56th Street and Pine Street, Ms. Levins saw [Banks] and identified him as the man with whom Mr. Lewis had gotten into the altercation shortly before the shooting. [Banks] was taken into custody.

Mr. Lewis was taken to the Hospital of the University of Pennsylvania, where he was pronounced dead on arrival. He was shot twice in the head, once in the shoulder, once in the elbow, and once in the leg. Mr. Lewis's autopsy revealed that he was shot by bullets from both a .45 caliber handgun and a 9-milimeter handgun. Police recovered eighteen fired cartridge casings from the scene of the shooting. Twelve of the fired cartridge casings came from a .45 caliber handgun, and five cartridge casings came from Mr. Lewis's revolver.

[Banks] was brought to the Homicide Unit of the Philadelphia Police Department. Philadelphia Police Detective John Harkins read [Banksl his Miranda warnings, and [Banks] agreed to be interviewed by the police. [Banks] then denied being present at the scene of the shooting or having anything to do with the shooting. [Banks] was held at the Homicide Unit overnight.

The following morning, Det. Harkins again questioned [Banks], at which point [Banks] confessed to Det. Harkins that he had shot Mr. Lewis. [Banks] said that he was in the middle of the street "talking to some girls" when Mr. Lewis pulled up in his car and Ms. Levins in the front seat. [Banks] said that Mr. Lewis told him to move out of the way, and that [Banks] tried to walk away, but Mr. Lewis drove up next to him and got out of the car. [Banks] told Det. Harkins that as he backed away from Mr. Lewis, he heard gunshots, and he then turned and began running away. [Banks] told Det. Harkins that he then pulled out his own gun and fired

> backwards at Mr. Lewis as he ran away. [Banks] denied that there was a second shooter, and claimed that he acted alone in killing Mr. Lewis.

Trial Court Op., 11/20/12, at 2-4.

On March 15, 2011, Banks was charged with first-degree murder, criminal conspiracy, carrying firearms on public streets or public property in Philadelphia, possessing instruments of crime (PIC), and persons not to possess, use, manufacture, sell or transfer firearms. He proceeded to trial on April 16, 2012. The Commonwealth presented testimony from 18 witnesses and Banks testified on his own behalf. Following a five-day trial, on April 20, 2012, he was convicted of all charges with the exception of persons not to possess, use, manufacture, control, sell or transfer firearms. On that same day, Banks was sentenced to a mandatory sentence of life imprisonment without the possibility of parole for the first-degree murder conviction.

On April 30, 2012, Banks filed a post-sentence motion arguing that the verdict was against the weight of the evidence. The trial court denied his post-sentence motion on August 10, 2012.

Petitioner filed a direct appeal alleging (1) evidence was not sufficient to support the verdict for first-degree murder, (2) verdict for first-degree murder was against the weight of the evidence, and (3) and the Commonwealth did not prove conspiracy. His judgment of sentence was affirmed by the Pennsylvania Superior Court on April 14, 2013. Commonwealth v. Banks, 2539 EDA 2012 (Pa. Super. August 14, 2013) (Doc. 13-1). The Pennsylvania Supreme Court denied Banks's petition for allowance of appeal.

On November 18, 2014, Banks filed a petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. C.S. §9541 *et seq.* His appointed counsel filed an

amended petition on his behalf on February 9, 2016. On January 16, 2018, after issuing a Notice of Intent to Dismiss the Petition, the PCRA court dismissed the petition without a hearing. Banks filed a Notice of Appeal and presented the following issues on appeal of the dismissal of his PCRA petition: (1) whether the PCRA court erred in holding that his claim that counsel was ineffective for not requesting a voluntary intoxication charge was without merit; (2) whether the PCRA court erred in holding that his claim that counsel was ineffective for not objecting to prosecutorial misconduct during the Commonwealth's closing argument was without merit; and (3) whether Banks serving an illegal sentence. Doc 13-2 at 2. On March 28, 2019, the Pennsylvania Superior Court affirmed the judgment of the PCRA court, finding that Banks had waived the claims and that the third claim lacked merit. Commonwealth v. Banks, 356 EDA 2018 (Pa. Super. March 28, 2019) (Doc. 13-2).

Banks filed a pro se Petition for Writ of Habeas Corpus in this Court on June 14, 2019. He raised the following claims: (1) insufficiency of the evidence to sustain a conviction of first degree murder; (2) Ineffective assistance of counsel for failing to pursue a voluntary intoxication defense and for failing to object to improper comments during the Commonwealth's closing argument; (3) that he was sentenced under a constitutionally vague statute; and (4) ineffective assistance of counsel for failing to object to the expert qualifications of the ballistics analyst and for failing to object to a purportedly erroneous jury instruction on witness credibility. Doc. No. 2. Banks had filed a previous petition for writ of habeas corpus in this Court on November 17, 2015 (Docket No. 15-cv-1945). He was permitted to withdraw that petition without prejudice to allow him to refile when his state court proceedings concluded.

Respondent asserts that all of Petitioner's claims are procedurally defaulted, unreviewable, and/or lack merit and request that the federal habeas petition be denied. Upon review, this Court agrees.

II. APPLICABLE LEGAL STANDARDS

A. Standard for Issuance of a Writ of Habeas Corpus

Congress, by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly limited the federal courts' power to grant a writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, a federal court shall not grant habeas relief unless the adjudication:

1. Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

2. Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court has made clear that a writ may issue under the "contrary to" clause of Section 2254(d)(1) only if the "state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court "unreasonably applies it to the facts of the particular case." Id. This requires a petitioner to demonstrate that the state court's analysis was

"objectively unreasonable." Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

Further, state court factual determinations are given considerable deference under the AEDPA. Lambert v. Blackwell, 387 F.3d 210, 239 (3d Cir. 2004). A petitioner must establish that the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

B. Exhaustion and Procedural Default

"[A] federal habeas court may not grant a petition for writ of habeas corpus unless the petitioner has first exhausted the remedies available in the state courts." Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). The procedural default barrier, in the context of habeas corpus, precludes federal courts from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . ." Id. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

1. Exceptions to Procedural Default

To survive procedural default in the federal courts, a petitioner must either "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

a. Cause and Prejudice Exception

A showing of cause demands that a petitioner establish that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available to counsel; or (2) a showing that "some interference by officials" made compliance with the state procedural rule impracticable. Murray v. Carrier, 477 U.S. 478, 488 (1986). Once cause is proven, a petitioner must also show that prejudice resulted from trial errors that "worked to [petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494.

There is also a narrow exception in which attorney error in collateral proceedings may sometimes establish cause for the default of a claim of ineffective assistance of trial counsel. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) (finding that in some cases ineffective assistance of PCRA cases can serve as cause and prejudice to excuse procedural default of ineffective assistance of trial counsel claims that could not have been previously presented). As a general rule because there is no constitutional right to an attorney in a state post-conviction proceeding, a habeas petitioner cannot claim constitutionally ineffective assistance of PCRA counsel. Coleman v. Thompson, supra, at 752. However, in Martinez, the United States Supreme Court held that "where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Id. at 1320. Martinez has been used to establish cause and prejudice for failure to bring ineffective assistance of counsel claims at initial review collateral proceedings where they could not have previously

been raised. Id. In order to overcome procedural default under Martinez, a petitioner must demonstrate that his collateral review counsel was ineffective pursuant to the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984) and "must also demonstrate that the underlying ineffective- assistance-of-trial-counsel claim is a substantial one, which is to say that the petitioner must demonstrate that the claim has some merit." Id. at 1318.

b. Fundamental Miscarriage of Justice Exception

To establish the fundamental miscarriage of justice exception, the petitioner must demonstrate his or her "actual innocence." Schlup v. Delo, 513 U.S. 298, 324 (1995); Calderon v. Thompson, 523 U.S. 558, 559 (1998). A demonstration of actual innocence requires the petitioner to present new, reliable evidence of his or her innocence that was not presented at trial. Schlup, 513 U.S. at 324. The new evidence must be considered along with the entire record, including that which was excluded or unavailable at trial. Id. at 327-28. Once such evidence is presented, the petitioner's defaulted claims can only be reviewed if "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in light of the new factual evidence. Id. at 327.

C. Ineffective Assistance of Legal Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment. Counsel is presumed to have acted effectively unless the petitioner demonstrates both that "counsel's representation fell below an objective standard of reasonableness" and that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 686–88, 693–94.

First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. at 688. The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Because of the difficulties in making a fair assessment, eliminating the "distorting effect" of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). It is well-established that counsel cannot be ineffective for failing to raise a meritless claim. Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d 706, 730 (E.D. Pa. 2001).

To satisfy the second prong of the Strickland analysis, a defendant must establish that the deficient performance prejudiced the defense. This showing requires a demonstration that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. Strickland, 466 U.S. at 687. More specifically, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

III. DISCUSSION

A. Sufficiency of the Evidence

In his first claim Petitioner alleges that the evidence presented at trial was insufficient to sustain his conviction of first-degree murder. He argues that "[t]he Commonwealth failed to

prove that Petitioner possessed the requisite *mens rea* for first degree murder[,] 'a specific intent to kill.'" Doc. No. 2 at 7.

A habeas claim alleging insufficiency of the evidence is grounded in the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment guarantees that no person shall be criminally convicted except upon sufficient proof, which is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Jackson v. Virginia, 443 U.S. 309, 316 (1979). Traditionally, the standard of review for challenges to sufficiency of the evidence is highly deferential. "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction. . . . does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.'" Jackson, 443 U.S. at 318-19 (quoting Woodby v. INS, 385 U.S. 276, 282 (1966)). Rather, as set forth by the United States Supreme Court, "[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original); see also Sullivan v. Cuyler, 723 F.2d 1077, 1081 (3d Cir. 1983) (adopting the Jackson standard).

Banks raised this claim to the Pennsylvania Superior Court on direct appeal. The Superior Court noted that he admitted that he "shot and killed the victim" but alleged that the Commonwealth failed to prove that he acted with a specific intent to kill because the Commonwealth failed to disprove that he was acting in self-defense when he shot the victim. Doc. No. 13-1 at 6. The court rejected his claim as follows:

> Upon review of the evidence in the light most favorable to the Commonwealth, as the verdict winner, we conclude there was ample evidence for the jury to find that [Banks] possessed the requisite *mens rea* for first-degree murder. Our review of

> the record reveals that [Banks] enlisted the help of Anthony Washington, a.k.a. 'Peanut,' following a verbal altercation with the victim. N.T., 4/17/12, at 229-231. Washington brought firearms for [Banks] and himself that were utilized in the shootout. Id. The record further reveals that he victim died from multiple gunshot wounds to the leg, elbow, shoulder, and head that he sustained in a shootout with [Banks] and his cohort. N.T., 4/17/12, at 119, 122-124; N.T., 4/18/12, at 139-141. The jury could infer the specific intent to kill where the evidence showed deadly weapons, specifically.45 caliber and .9 mm handguns, were used on a vital part of the victim's body, his head. N.T., 4/17/12, at 127; N.T., 4/18/12, at 127, 193-199. See Commonwealth v. VanDiver, 962 A.2d 1170, 1176 (Pa. 2009) (finding that the jury properly could infer specific intent from appellant's use of a handgun upon the victim's head), reargument denied, 983 A.2d 1199 (Pa. 2009), cert. denied, VanDiver v. Pennsylvania, 559 U.S. 1038 (2010).

Doc. No. 13-1 at 8-9. The Superior Court also quoted the following portion of the trial court's opinion, in support of its findings:

> [Commonwealth witness Jalisa] Kennedy testified that she saw two men, not one, at the scene of the shooting. A ballistics expert testified that three different kinds of fired cartridge cases were found at the scene of the shooting. Finally, the medical examiner testified that [the victim] was shot five times, and that at least two of the bullets that struck [the victim] came from two different guns.
>
> [Banks], by contrast, presented solely his own testimony in support of his claim of self-defense. [Banks], who initially denied any involvement in or knowledge of the shooting, changed his story the day after the shooting. He told police that [the victim] approached him and shot at him, that [Banks] attempted to flee, and that he only shot backwards over his shoulder to defend himself from [the victim's] shots. Despite Ms. Kennedy's testimony to the contrary, [Banks] claimed that no one else was involved in or present at the scene of the shooting. [Banks] also offered no explanation for why [the victim] was struck by two different calibers of bullets that could not have been fired from the same gun.

Doc. No. 13-1 at 9 (Superior Court Op.), quoting Trial Court Opinion, 1/20/12, at 8-9.

The Superior Court found that based upon its review of the case, "the evidence clearly established that [Banks] maliciously and intentionally killed the victim." Doc. No. 13-1 at 10.

The state court's findings are not contrary to the clearly established federal law in this

area, which requires that "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. As the state court found, the testimony presented at trial did not support Banks's claim that he shot at the victim in self-defense, but instead supported the finding that Banks acted with the specific intent to kill. Clearly, upon review of the evidence as presented by the prosecution in this case, there is no doubt that a rational trier of fact could have found the essential elements of the crime, including the specific intent to kill, beyond a reasonable doubt. The state court's finding is consistent with the clearly established federal law and was not based upon an unreasonable determination of the facts. Therefore, the claim must be denied.

B. Ineffective Assistance of Trial Counsel for Failing to Present Voluntary Intoxication Defense and Failing to Object to Alleged Prosecutorial Misconduct

In his second claim, Petitioner argues that he was denied his Sixth Amendment right to the effective assistance of trial counsel when his counsel failed to present a defense of voluntary intoxication and failed to object to statements made during the Commonwealth's closing argument. Although he does not further articulate these claims in his habeas petition, the Superior Court noted that Banks relied upon his testimony at trial that he was "kind of drunk" at the time of the crime. Doc. No. 13-2 at 4. According to the Superior Court, the Commonwealth's statements in its closing argument that Banks referenced were that his "testimony was completely unbelievable," that Banks "repeatedly tried to shoot [the victim] while he was still in the car," and that "several witnesses feared retaliation from [Banks]." Id.

The Superior Court found that wholly lacking from Bank's argument regarding the alleged ineffective assistance of counsel was a discussion regarding prejudice. The court found

that as a result of Banks's failure to comply with the mandates of Commonwealth v. Wholaver, 177 A.2d 136, 144 (Pa. 2018) and Commonwealth v. Fears, 86 A.2d 795, 804 (Pa. 2014), his claims were waived. The Superior Court relied upon the Pennsylvania Supreme Court's requirement that an appellant must meaningfully discuss each of the three ineffective assistance prongs and held that where an appellant failed to do so, he is not entitled to relief and the court is "constrained to find such a claim waived for lack of development." Fears, 86 A.2d at 804.

Given the state court's finding that the claim was waived as a result of Banks's failure to properly present it, the claim is therefore procedurally defaulted. Banks has failed to even allege cause and prejudice or actual innocence to excuse the default.

Furthermore, as the government contends, in addition to the claims being procedurally defaulted, Banks also failed to properly develop the claims. The relevant clearly established federal law to prove ineffective assistance of counsel is set forth in Strickland. Failure to establish either prong of the Strickland standard precludes relief. As was the case in state court, Banks is silent as to what prejudice he suffered as a result of the alleged ineffective assistance of counsel. His claim therefore must be denied as he has not even alleged prejudice. Furthermore, as the government argues, Banks's claims in his federal habeas petition are so vague that he failed to explain what evidence would have supported the defense and he does not even specify what statements in the closing argument were improper. See Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir. 1991) (holding that it is the petitioner's burden to articulate his allegations in a straightforward manner both at the state level and in federal court).

We agree with the government that Banks is not entitled to review on his procedurally defaulted and underdeveloped claims. Furthermore, he has not alleged the requisite prejudice and has not established that his counsel was ineffective. The claims must be denied.

C. Constitutionality of 18 Pa. Cons. Stat. § 1102

In his third claim, Banks asserts that 18 Pa. Cons. Stat. §1102, the statute regarding sentencing for convictions of first-degree murder, is unconstitutionally vague because it "does not provide fair notice to the public that life imprisonment means life without parole." Doc. No. 2 at 11. Banks raised this claim in his PCRA petition, but the Superior Court found that it had not been properly presented and was waived.

The Superior Court found that Banks's claim, challenging the constitutionality of the sentencing statute as vague, is not cognizable under the PCRA. Doc. 13-2 at 5, citing Rouse, 191 A.3d at 6-7. The claim was waived because he failed to raise it at sentencing or in a post-sentence motion.

The Superior Court found that even if the claim had not been waived, he still would not have prevailed. The court agreed with the PCRA court that the claim lacks merit and adopted the PCRA court's analysis:

> "[D]uly enacted legislation carries with it a strong presumption of constitutionality." Commonwealth v. Turner, 80 A.3d 754, 759 (Pa. 2013). It will therefore be upheld, "unless it clearly, palpably, and plainly violates the constitution." Commonwealth v. Neiman, 84 A.3d 603, 6711 (Pa. 2013) (internal quotations omitted). Under the void-for-vagueness standard, a statute is unconstitutional if it is "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." Commonwealth v. Davidson, 938 A.2d 198, 207 (Pa. 2007). On the other hand, a statute will pass constitutional muster[] if it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Id. (quoting Kodender v. Lawson, 461 U.S. 352, 357 (1983)). Specifically, a sentencing statute is constitutional if it states with specific clarity the consequences of violating a criminal statute. Commonwealth v. Berryman, 649 A.2d 961, 985 (Pa. Super. 1994) (citing U.S. v. Batchelder, 442 U.S. 114, 123c (1979)).
>
> Here, the sentencing statute at issue, 18 Pa.C.S.[A.] § 1102(a)(1), plainly states that a person convicted of first[-]degree murder[] "shall be sentenced to death or a term

> of life imprisonment. 61 Pa.C.S.[A.] § 6137(a)(1) ("The board may parole ... any inmate to whom the power to parole is granted to the board by this chapter, except an inmate condemned to death or serving life imprisonment..."). Moreover, the fact that parole eligibility is codified in a separate statute is irrelevant, since both statutes read together put [a] defendant on notice that the penalty for first[-]degree murder is life without parole or death. See Commonwealth v. Bell, 645 A.2d 211, 281 (Pa. 1994) (mandatory minimum statute ... was not unconstitutionally vague for failing to specify a [] sentence since the [sentence] was implied when read together with other statutes).

Doc. No. 13-2 (Superior Court Opinion) at 8-9, citing PCRA Court Opinion, 4/11/18, at 11-12.

Given the state court's finding that Banks failed to present the clam to the state court to allow for review, the claim is now procedurally defaulted. The court's finding that Banks's failed to comply with these procedural requirements was based upon an independent and adequate state rule, which precludes habeas review. Banks has not set forth any basis to excuse the default. Therefore, the claim must be denied.

In addition, as the government contends, the claim also lacks merit. The court found that the parole eligibility statute together with the challenged statute make clear that there is no eligibility for parole. Banks has made no attempt to show that the state court's alternate finding that the claim lacks merit was contrary to, or an unreasonable application of clearly established federal law or based upon an unreasonable application of the facts. The claim must be denied.

D. Ineffective Assistance of Trial Counsel for Failing to Challenge the Ballistics Expert and Challenge Jury Instruction Regarding Witness Credibility

In his final claim, Banks alleges that his counsel provided ineffective assistance by failing to object to the expert testimony on ballistics and for failing to object to an allegedly erroneous jury instruction on witness credibility. As the government asserts, Banks failed to raise these arguments in the state courts. Since he is no longer able to file a timely PCRA petition, he is now unable to exhaust the claims and the claims are procedurally defaulted.

In addition to being defaulted as a result of his failure to present them to the state courts, Banks has failed to explain on what basis he believes counsel should have objected to the ballistics expert or how he was prejudiced. He also fails to explain why the jury instruction was flawed or how he was prejudiced by counsel's failure to object to the instruction. As the government contends, Bank has also failed to present the claims in this petition in a manner to allow for meaningful review. See Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir. 1987) ("[B]ald assertions and conclusory allegations" do not provide a court with sufficient information. To allow for proper assessment of habeas claims); Zettlemoyer, 923 F.2d at 301 (bald assertions and conclusory allegations without specific facts supporting a claim of a constitutional violation do not provide sufficient grounds for habeas relief). His final claim must also be denied.

IV. CONCLUSION

For all of the foregoing reasons, Banks's habeas petition should be denied in its entirety. Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 29th day of April, 2020, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. The Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT

/s/ Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

COMMONWEALTH OF PENNSYLVANIA v. RAMIK BANKS, Appellant
SUPERIOR COURT OF PENNSYLVANIA
2019 Pa. Super. Unpub. LEXIS 1160; 215 A.3d 688
No. 356 EDA 2018
March 28, 2019, Decided
March 28, 2019, Filed

Notice:

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

Editorial Information: Prior History

Appeal from the PCRA Order January 16, 2018, in the Court of Common Pleas of Philadelphia County. Criminal Division at No(s): CP-51-CR-0002500-2011.Commonwealth v. Banks, 83 A.3d 1064, 2013 Pa. Super. LEXIS 3811 (Pa. Super. Ct., Aug. 14, 2013)
Judges: BEFORE: BENDER, P.J.E., OLSON, J., and MUSMANNO, J. MEMORANDUM BY MUSMANNO, J.

Opinion

Opinion by: MUSMANNO

Opinion

MEMORANDUM BY MUSMANNO, J.:

Ramik Banks ("Banks") appeals from the Order dismissing his first Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA").1 We affirm.

On April 20, 2012, following a jury trial, Banks was convicted of one count each of first-degree murder, conspiracy to commit murder, carrying a firearm on a public street in Philadelphia, and possessing an instrument of crime.2 He was subsequently sentenced to life in prison for the murder charge, with no further penalty for the remaining charges. On November 18, 2014, following this Court's affirmation of the judgment of sentence and our Supreme Court's denial of allowance of appeal,3 Banks filed the instant, timely Petition. The PCRA court appointed Banks counsel, who filed an Amended Petition on his behalf on February 9, 2016. On January 16, 2018, having previously issued a Pa.R.A.P. 907 Notice, the PCRA court dismissed Banks's Petition without a hearing. Banks filed a timely Notice of Appeal and a court-ordered Pa.R.A.P. 1925(b) Concise Statement.

Banks now presents the following questions for our review:

1. Did the PCRA court err in holding that [Banks's] claim that counsel was ineffective for not requesting a voluntary intoxication charge was without merit?

2. Did the PCRA court err in holding that [Banks's] claim that counsel was ineffective for not objecting to prosecutorial misconduct during the Commonwealth's closing arguments [*sic*]?

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Appendix "E"

3. Is [Banks] serving an illegal sentence?Brief for Appellant at 2 (some capitalization omitted).

Our standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ortiz***, 2011 PA Super 56, 17 A.3d 417, 420 (Pa. Super. 2011). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Id.***

Banks's first two arguments claim ineffective assistance of trial counsel. To be eligible for relief based on a claim of ineffective assistance of counsel, a PCRA petitioner must demonstrate, by a preponderance of the evidence, that (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or omission; and (3) there is a reasonable probability that the result of the proceeding would have been different absent such error. ***Commonwealth v. Spotz***, 610 Pa. 17, 18 A.3d 244, 260 (Pa. 2011). "A PCRA petitioner must address *each of these prongs* on appeal." ***Commonwealth v. Wholaver***, 644 Pa. 386, 177 A.3d 136, 144 (Pa. 2018) (emphasis added). "When an appellant fails to meaningfully discuss *each* of the three ineffectiveness prongs, he is not entitled to relief, and we are constrained to find such claims waived for lack of development." ***Commonwealth v. Fears***, 624 Pa. 446, 86 A.3d 795, 804 (Pa. 2014) (emphasis added) (internal citation and quotation marks omitted).

In asserting his first two claims, Banks neglects to address the third prong of an effectiveness claim, *i.e.* prejudice resulting from counsel's alleged ineffectiveness. Instead, Banks devotes the entirety of his argument to the first and second prongs of an effectiveness claim, *i.e.* underlying merit and the lack of a reasonable basis for counsel's action or inaction. ***See*** Brief for Appellant at 9-17. In so doing, Banks alleges that trial counsel was ineffective in both failing to request a voluntary intoxication charge to the jury and failing to object to the Commonwealth's closing argument. ***See id.*** Banks relies on his testimony at trial that he was "kind of drunk" at the time of the crime, as well as a delayed ***Miranda***4 warning following his arrest to support his claim that counsel should have requested a voluntary intoxication charge in his defense, in addition to the self-defense charge. ***Id.*** at 11. Banks also alleges that his counsel was ineffective for failing to object to the prosecutor's various statements during closing, including that Banks's "testimony was completely unbelievable," that Banks "repeatedly tried to shoot [the victim] while he was still in the car," and that "several witnesses feared retaliation from [Banks]." ***Id.*** at 14-16. Wholly lacking from these arguments, however, is any discussion of resultant prejudice. An assertion of prejudice is especially important where, as here, the trial court's jury instructions could be viewed as alleviating any possible prejudice. Accordingly, due to Banks's failure to comply with the mandates of ***Wholaver*** and ***Fears, supra***, we are compelled to find his first two claims waived.

In his third claim, Banks purports to challenge the legality of his sentence rather than the effectiveness of his counsel. ***See*** Brief for Appellant at 18. Specifically, Banks claims that the statute authorizing his sentence is unconstitutionally vague, as it fails to state that a sentence of life in prison under the statute is without the possibility of parole. ***See*** Brief for Appellant at 18-22; ***see also Id.*** at 20-21 (stating that "Section 1102[, which relates to a sentence for first-degree murder,] fails to give people of ordinary intelligence fair notice that life imprisonment means life without parole").

Before addressing the merits of Banks's argument, we must first discern whether Banks properly brought his claim under the PCRA.

Our recent decision in ***Commonwealth v. Rouse***, 2018 PA Super 159, 191 A.3d 1 (Pa. Super. 2018), guides our determination. In ***Rouse***, the appellant challenged his sentence through a *habeas corpus* petition, claiming that the statute authorizing his sentence - 18 Pa.C.S.A. § 1102 - was unconstitutionally vague because it failed to provide adequate notice that the sentence of "life

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imprisonment" excluded the possibility of parole. ***Id.*** at 2. The PCRA court in that case treated the appellant's petition as a PCRA petition and dismissed it on grounds of timeliness. Upon review, this Court concluded that the trial court improperly treated the *habeas* petition as a PCRA petition. ***Id.*** at 7. In so concluding, this Court acknowledged the tension between Sections 9542 and 9543 of the PCRA. ***Id.*** at 4.

The general language of Section 9542 states that the PCRA is to be "the *sole means* of obtaining collateral relief [for persons serving *illegal sentences*] and encompasses all other ... remedies ... *including habeas corpus.*" 42 Pa.C.S.A. § 9542 (emphasis added). However, the eligibility-for-relief provisions of Section 9543 allow for the redress of illegal sentences only insofar as the claim arises from the "imposition of a sentence greater than the lawful maximum." 42 Pa.C.S.A. § 9543.

We then looked to the categories of "illegal sentences" historically recognized by our courts:

> The phrase "illegal sentence" is a term of art in Pennsylvania Courts that is applied to three narrow categories of cases[:] ... claims that the sentence fell outside of the legal parameters prescribed by the applicable statute; [] claims involving merger/double jeopardy; and [] claims implicating the rule in ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), [and its progeny].***Rouse***, 191 A.3d at 5 (some internal citations and quotation marks omitted).5 Importantly, we recognized that claims targeting a sentencing statute do not inherently constitute "illegal-sentencing claims" simply by virtue of challenging such a statute. ***Id.*** at 6. We then held that a claim alleging
>
> *void-for-vagueness* [] is a sentencing issue that presents a legal question that *is qualitatively distinct from the categories of illegal sentences recognized by our courts*[, which encompass those cognizable under the PCRA as exceeding the prescribed parameters]. It does not challenge the sentencing court's authority or actions insomuch as it challenges the legislature's ostensible failure to provide adequate notice of the penalty....***Id.*** at 6 (internal citations and quotation marks omitted) (emphasis added). As a result, we concluded that the PCRA court in ***Rouse*** erred when it treated the appellant's void-for-vagueness argument as if it were a legality challenge within the purview of the PCRA. ***Id.***

With this in mind, we turn again to Banks's final claim. Banks characterizes this challenge as being one of legality, cognizable under the PCRA. ***See*** Brief for Appellant at 18, fn. 3. However, the substance of his argument belies such a characterization. Like the appellant in ***Rouse***, Banks asserts that Section 1102 is unconstitutionally vague as it pertains to the imposition of a life sentence without parole. Brief for Appellant at 20-22. Because Banks's argument, similar to that of the appellant in ***Rouse***, "directly seek[s] protection from legislatures, not judges, [his argument] falls into the category of a sentencing issue that presents a legal question rather than a claim that the sentence is illegal." ***Rouse***, 191 A.3d at 6 (internal citations and quotation marks omitted).6 Accordingly, Banks's third claim is not cognizable under the PCRA and is not reviewable from the posture of a PCRA appeal.

Even if we were to treat Banks's Petition as a Petition for *habeas corpus* relief, Banks would not be entitled to relief. Having established that Banks's claim is not one of illegal sentencing, the claim is subject to waiver. ***See Rouse***, 191 A.3d at 6-7 (stating that waiver exists where a *habeas corpus* claim could have been raised at sentencing or in a post-sentence motion but was not so raised). Our review of the record indicates that Banks failed to raise the issue of Section 1102's vagueness in either a post-sentence motion or at the sentencing hearing. Consequently, Banks's third claim is waived.

Finally, even if Banks did not waive his challenge to the language of Section 1102, he still would not have prevailed. The PCRA court provided the following analysis in concluding that Banks's

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void-for-vagueness challenge is without merit, which we agree with and adopt for the purpose of this appeal:

> "[D]uly enacted legislation carries with it a strong presumption of constitutionality." ***Commonwealth v. Turner***, 622 Pa. 318, 80 A.3d 754, 759 (Pa. 2013). It will therefore be upheld, "unless it clearly, palpably, and plainly violates the constitution." ***Commonwealth v. Neiman***, 624 Pa. 53, 84 A.3d 603, 611 (Pa. 2013) (internal quotations omitted). Under the void-for-vagueness standard, a statute is unconstitutional if it is "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." ***Commonwealth v. Davidson***, 595 Pa. 1, 938 A.2d 198, 207 (Pa. 2007). On the other hand, a statute will pass constitutional muster[] if it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." ***Id.*** (quoting ***Kolender v. Lawson***, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). Specifically, a sentencing statute is constitutional if it states with specific clarity the consequences of violating a criminal statute. ***Commonwealth v. Berryman***, 437 Pa. Super. 258, 649 A.2d 961, 985 (Pa. Super. 1994) (citing ***United States v. Batchelder***, 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)).
>
> Here, the sentencing statute at issue, 18 Pa.C.S.[A.] § 1102(a)(1), plainly states that a person convicted of first[-] degree murder[] "shall be sentenced to death or a term of life imprisonment." While [S]ection 1102(a)(1) is silent about parole eligibility, a separate statute unambiguously provides that the parole board is without power to parole anyone serving a sentence of life imprisonment. 61 Pa.C.S.[A.] § 6137(a)(1) ("The board may parole ... any inmate to whom the power to parole is granted to the board by this chapter, except an inmate condemned to death or serving life imprisonment...."). Moreover, the fact that parole eligibility is codified in a separate statute is irrelevant, since both statutes read together put [a] defendant on notice that the penalty for first[-]degree murder is life without parole or death. ***See Commonwealth v. Bell***, 537 Pa. 558, 645 A.2d 211, 218 (Pa. 1994) (mandatory minimum statute ... was not unconstitutionally vague for failing to specify a [] sentence since the [sentence] was implied when read together with other statutes).PCRA Court Opinion, 4/11/18, at 11-12.

Based upon the foregoing, we conclude that Banks is not entitled to relief and affirm the PCRA court's Order dismissing Banks's Petition.

Order affirmed.

Judgment Entered.

Date: 3/28/19

Footnotes

1

See 42 Pa.C.S.A. §§ 9541-9546.

2

18 Pa.C.S.A. §§ 2502(a), 903, 6108, 907(a).

3

See Commonwealth v. Banks, 2013 Pa. Super. Unpub. LEXIS 2925 (unpublished memorandum), ***appeal denied***, 624 Pa. 686, 87 A.3d 317 (Pa. 2014).

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4

See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

5

We note that "this Court has also held that claims pertaining to the Eighth Amendment ... also pertain to the legality of sentences." ***Rouse***, 191 A.3d at 5-6.

6

We note that Banks, unlike the appellant in ***Rouse***, does explicitly contend that his sentence exceeds the lawful maximum, as any sentence would arguably be excessive if Section 1102 were declared unconstitutional. Brief for Appellant at 18, fn. 3. Nonetheless, in ***Rouse***, we found the supposition of such an argument unconvincing. ***See Rouse***, 191 A.3d at 5. In keeping with our prior reasoning, we decline to accept Banks's contention.

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 14, 2014

Mr. Ramik Banks
Prisoner ID #KM5391
SCI Mahanoy
301 Morea Road
Frackville, PA 17932

Re: Ramik Banks
v. Pennsylvania
No. 14-5581

Dear Mr. Banks:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

Appendix "F"

COMMONWEALTH OF PENNSYLVANIA, Respondent v. RAMIK BANKS, Petitioner
SUPREME COURT OF PENNSYLVANIA
624 Pa. 686; 87 A.3d 317; 2014 Pa. LEXIS 619
No. 474 EAL 2013
March 5, 2014, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

Petition for Allowance of Appeal from the Order of the Superior Court.Commonwealth v. Banks, 83 A.3d 1064, 2013 Pa. Super. LEXIS 3811 (Pa. Super. Ct., Aug. 14, 2013)

Opinion

ORDER

PER CURIAM

AND NOW, this 5th day of March, 2014, the Petition for Allowance of Appeal is **DENIED**.

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Appendix "C"

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

COMMONWEALTH OF PENNSYLVANIA Appellee v. RAMIK BANKS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2539 EDA 2012

Appeal from the Judgment of Sentence April 20, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0002500-2011

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

MEMORANDUM BY MUNDY, J.: **FILED AUGUST 14, 2013**

Appellant, Ramik Banks, appeals from the April 20, 2012 aggregate judgment of sentence of life imprisonment without the possibility of parole imposed after a jury found him guilty of first-degree murder, criminal conspiracy, carrying firearms on public streets or public property in Philadelphia, and possessing instruments of crime (PIC).[1] After careful review, we affirm the judgment of sentence.

The trial court summarized the relevant facts of this case as follows.

> On August 14, 2010, at approximately 1:00 a.m., Robert Lewis was driving his girlfriend, Toccara

---

* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 2502, 903 (to commit first-degree murder), 6108, and 907, respectively.

Appendix "H"

> the car. [Appellant] told Det. Harkins that as he backed away from Mr. Lewis, he heard gunshots, and he then turned and began running away. [Appellant] told Det. Harkins that he then pulled out his own gun and fired backwards at Mr. Lewis as he ran away. [Appellant] denied that there was a second shooter, and claimed that he acted alone in killing Mr. Lewis.

Trial Court Opinion, 11/20/12, at 2-4 (citations to notes of testimony omitted).

On March 15, 2011, Appellant was charged with the aforementioned offenses, as well as the charge of persons not to possess, use, manufacture, control, sell or transfer firearms.[3] On April 16, 2012, Appellant proceeded to a jury trial. At trial, the Commonwealth presented the testimony of 18 witnesses, and Appellant testified on his own behalf. Following a five-day trial, Appellant was found guilty of first-degree murder, criminal conspiracy, carrying firearms on public streets or public property in Philadelphia, and PIC on April 20, 2012. The trial court acquitted Appellant of persons not to possess, use, manufacture, control, sell or transfer firearms. N.T., 4/20/12, at 18-19. That same day, the trial court sentenced Appellant to an aggregate term of life imprisonment without the possibility of parole. On April 30, 2012, Appellant filed a timely post-sentence motion arguing, *inter alia*, that the verdict was against the weight of the evidence. ***See*** Motion for

---

[3] 18 Pa.C.S.A. § 6105.

Judgment of Acquittal and/or Motion for New Trial, 4/30/12, at ¶¶ 2, 6. The trial court denied Appellant's post-sentence motion on August 10, 2012. This timely appeal followed.[4]

On appeal, Appellant raises the following issues for our review.

> I. Is [Appellant] entitled to an arrest of judgment on the charge of Murder in the First Degree where the evidence is not sufficient to support the verdict, as the Commonwealth could not establish beyond a reasonable doubt that the [Appellant] was the actor, co-conspirator or accomplice, or that he acted with specific intent to kill?
>
> II. Is [Appellant] entitled to a new trial on the charge of Murder in the First Degree where the verdict was against the weight of the evidence?
>
> III. Is [Appellant] entitled to an arrest of judgment on the charge of Criminal Conspiracy where the Commonwealth did not prove that any agreement was reached by and between [Appellant] and others allegedly involved, and where the evidence did not prove that [Appellant] had conspired with anyone?

Appellant's Brief at 3.[5]

Appellant first argues that there was insufficient evidence to sustain his conviction for the first-degree murder of Robert Lewis (hereinafter, the victim). ***Id.*** at 10. "The standard we apply in reviewing the sufficiency of

---

[4] Appellant and the trial court have complied with Pa.R.A.P. 1925.

[5] For the purposes of our review, we have elected to address Appellant's claims in a slightly different order than presented in his appellate brief.

the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt." ***Commonwealth v. O'Brien***, 939 A.2d 912, 913 (Pa. Super. 2007) (citation omitted). "Any doubts concerning an appellant's guilt [are] to be resolved by the trier of fact unless the evidence was so weak and inconclusive that no probability of fact could be drawn therefrom." ***Commonwealth v. West***, 937 A.2d 516, 523 (Pa. Super. 2007), *appeal denied,* 947 A.2d 737 (Pa. 2008). Moreover, "[t]he Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." ***Commonwealth v. Perez***, 931 A.2d 703, 707 (Pa. Super. 2007) (citations omitted).

Instantly, Appellant concedes that he "shot and killed the victim[,]" but alleges that the Commonwealth failed to prove that he possessed the requisite *mens rea* for first-degree murder, "a specific intent to kill[.]" Appellant's Brief at 10-11, 14. In support of this contention, Appellant maintains the Commonwealth failed to disprove that he was acting in self-defense when he shot the victim. ***Id.*** at 12-13. We disagree.

The crime of first-degree murder is defined in the Pennsylvania Crimes Code, which provides "[a] criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa.C.S.A.

§ 2502(a). "Intentional killing" is defined as a "killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." ***Id.*** § 2502(d). It is the element of a willful, premeditated and deliberate intent to kill that distinguishes first-degree murder from all other types of criminal homicide. "In order to support a charge of murder of the first degree, the Commonwealth must prove that the defendant acted with a specific intent to kill; that a human being was unlawfully killed; that the person accused did the killing; and that the killing was done with deliberation." ***Commonwealth v. Kim***, 888 A.2d 847, 852 (Pa. Super. 2005), *appeal denied*, 899 A.2d 1122 (Pa. 2006).

Where an appellant raises the issue of self-defense, as is the case here, we are guided by the following principles. The use of force in self-protection is governed by 18 Pa.C.S.A. § 505, which provides, in relevant part, as follows.

> **§ 505. Use of force in self-protection**
>
> **(a) Use of force justifiable for protection of the person.--**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.
>
> **(b) Limitations on justifying necessity for use of force.--**
>
> ...
>
> (2) The use of deadly force is not justifiable under this section unless the actor believes that such force

> is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:
>
> (i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
>
> (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating....

18 Pa.C.S.A. § 505(a), (b)(2). "If a defendant introduces evidence of self-defense, the Commonwealth bears the burden of disproving the self-defense claim beyond a reasonable doubt." ***Commonwealth v. Houser***, 18 A.3d 1128, 1315 (Pa. 2011), *cert. denied*, ***Houser v. Pennsylvania***, 132 S. Ct. 1715 (2012).

Upon review of the evidence in the light most favorable to the Commonwealth, as the verdict winner, we conclude there was ample evidence for the jury to find that Appellant possessed the requisite *mens rea* for first-degree murder. Our review of the record reveals that Appellant enlisted the help of Anthony Washington, a.k.a. "Peanut," following a verbal altercation with the victim. N.T., 4/17/12, at 229-231. Washington brought firearms for Appellant and himself that were utilized in the shootout. ***Id.*** The record further reveals that the victim died from multiple gunshot wounds to leg, elbow, shoulder, and head that he sustained in a shootout with Appellant and his cohort. N.T., 4/17/12, at 119, 122-124; N.T., 4/18/12, at 139-141. The jury could infer the specific intent to kill where

the evidence showed deadly weapons, specifically .45 caliber and .9 mm handguns, were used on a vital part of the victim's body, his head. N.T., 4/17/12, at 127; N.T, 4/18/12, at 127, 193-199. ***See Commonwealth v. VanDivner***, 962 A.2d 1170, 1176 (Pa. 2009) (finding that the jury properly could infer specific intent from appellant's use of a handgun upon the victim's head), *reargument denied*, 983 A.2d 1199 (Pa. 2009), *cert. denied*, ***VanDivner v. Pennsylvania***, 559 U.S. 1038 (2010).

Moreover, as the trial court noted in its opinion,

> [Commonwealth witness Jalisa] Kennedy testified that she saw two men, not one, at the scene of the shooting. A ballistics expert testified that three different kinds of fired cartridge cases were found at the scene of the shooting. Finally, the medical examiner testified that [the victim] was shot five times, and that at least two of the bullets that struck [the victim] came from two different guns.
>
> ...
>
> [Appellant], by contrast, presented solely his own testimony in support of his claim of self-defense. [Appellant], who initially denied any involvement in or knowledge of the shooting, changed his story the day after the shooting. He told police that [the victim] approached him and shot at him, that [Appellant] attempted to flee, and that he only shot backwards over his shoulder to defend himself from [the victim's] shots. Despite Ms. Kennedy's testimony to the contrary, [Appellant] claimed that no one else was involved in or present at the scene of the shooting. [Appellant] also offered no explanation for why [the victim] was struck by two different calibers of bullets that could not have been fired from the same gun.

Trial Court Opinion, 11/20/12, at 8-9 (citations to notes of testimony omitted).

Based upon our review, this evidence clearly established that Appellant maliciously and intentionally killed the victim. Accordingly, Appellant's claim that there was insufficient evidence to sustain his conviction for first-degree murder must fail.

We now turn to Appellant's claim that there is insufficient evidence to sustain his conviction for criminal conspiracy to commit first-degree murder. Appellant's Brief at 18. "To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy." ***Commonwealth v. McCall***, 911 A.2d 992, 996 (Pa. Super. 2006); ***see also*** 18 Pa.C.S.A. § 903(a). "Conspiracy requires proof of an additional factor which accomplice liability does not - the existence of an agreement." ***Commonwealth v. McClendon***, 874 A.2d 1223, 1229 (Pa. Super. 2005).

> The essence of a criminal conspiracy is the common understanding that a particular criminal objective is to be accomplished. Mere association with the perpetrators, mere presence at the scene, or mere knowledge of the crime is insufficient. Rather, the Commonwealth must prove that the defendant shared the criminal intent, *i.e.*, that the [defendant] was an active participant in the criminal enterprise and that he had knowledge of the conspiratorial agreement. The defendant does not need to commit

> the overt act; a co-conspirator may commit the overt act.

Commonwealth v. Lambert, 795 A.2d 1010, 1016 (Pa. Super. 2002) (internal citations and quotation marks omitted), *appeal denied*, 805 A.2d 521 (Pa. 2002).

Herein, the trial court concluded that there was ample evidence to support Appellant's conviction for criminal conspiracy. ***See*** Trial Court Opinion, 11/20/12, at 9. Viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, we agree with the trial court's assessment.

The evidence adduced at trial clearly supports a reasonable inference that Appellant conspired with Anthony Washington, a.k.a. "Peanut," to shoot and kill the victim on the day in question. As noted, Commonwealth witness Jalisa Kennedy testified at trial that she observed the victim and two other males at the scene of the shooting. N.T., 4/17/12, at 143-150. The record further reveals that two witnesses who were incarcerated with Appellant, Raymond Wooden and Darian Brown, initially informed the police that Appellant had enlisted the help of "Peanut" to shoot the victim, prior to recanting said statements at trial. ***Id.*** at 230-231; N.T., 4/18/12, at 165-169. Additionally, ballistics evidence established that three separate firearms were discharged at the scene, only one of which belonged to the victim. N.T., 4/18/12, at 193-199. Moreover, Dr. Samuel Gulino, the Chief Medical Examiner for the City of Philadelphia, testified that he conducted a

postmortem examination of the victim and concluded that he was struck by bullets from two different guns. N.T., 4/17/12, at 113, 126-127.

It is well settled that circumstantial evidence may provide proof of a criminal conspiracy. "The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt." ***Commonwealth v. Perez***, 931 A.2d 703, 708 (Pa. Super. 2007) (citation and internal quotation marks omitted). Furthermore, "proof by eye witnesses or direct evidence of ... identity or of the commission by the defendant of the crime charged is not necessary [to sustain a conviction]." ***Commonwealth v. Payne***, 868 A.2d 1257, 1260 (Pa. Super. 2005) (citation omitted), *appeal denied*, 877 A.2d 461 (Pa. 2005). Based on the foregoing, we conclude that the record reflects a sufficient "web of evidence" to support the jury's determination that Appellant is guilty of criminal conspiracy beyond a reasonable doubt.

We now turn to Appellant's claim that he is entitled to a new trial because the verdict was against the weight of the evidence. Appellant's Brief at 16.[6] This Court has long recognized that "[a] true weight of the

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[6] Pennsylvania Rule of Criminal Procedure 607 provides, in pertinent part, that a claim that the verdict was against the weight of the evidence "shall be raised with the trial judge in a motion for a new trial: (1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion." Pa.R.Crim.P. 607(A). "The purpose of this rule is to make it clear that a challenge to the weight of the evidence must be raised with the trial judge or it will be waived."
(Footnote Continued Next Page)

evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed." ***Commonwealth v. Lewis***, 911 A.2d 558, 566 (Pa. Super. 2006) (citation omitted). Where the trial court has ruled on a weight claim, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, "[our] review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." ***Commonwealth v. Tharp***, 830 A.2d 519, 528 (Pa. 2003), *cert. denied*, ***Tharp v. Pennsylvania***, 541 U.S. 1045 (2004).

In the instant matter, Appellant does not dispute that he "shot and killed the victim or, at the very least, participated in actions that led to the victim's death[.]" Appellant's Brief at 16. Rather, Appellant avers that "[t]he community should be shocked to learn that [he] is serving a life imprisonment plus 70 to 140 years when he defended himself on the public streets." ***Id.*** at 16-17. For the reasons that follow, we conclude that Appellant's claim must fail.

It is well established that this Court is precluded from reweighing the evidence and substituting our credibility determination for that of the fact-finder. ***See Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003)

(Footnote Continued) ———————————

Commonwealth v. McCall, 911 A.2d 992, 997 (Pa. Super. 2006). In the instant matter, Appellant properly preserved his weight of the evidence claim by raising it in his April 30, 2012 post-sentence motion.

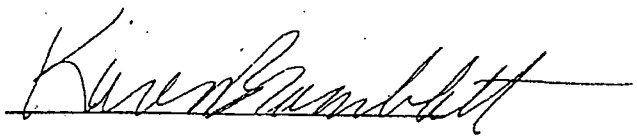
(citations omitted) (stating, "[t]he weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses[]"), *cert. denied*, ***Champney v. Pennsylvania***, 542 U.S. 939 (2004). Additionally, "the evidence at trial need not preclude every possibility of innocence, and the fact-finder is free to resolve any doubts regarding a defendant's guilt unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances." ***Commonwealth v. Emler***, 903 A.2d 1273, 1276 (Pa. Super. 2006).

Herein, the jury found the testimony of the Commonwealth's witnesses credible, and elected not to believe Appellant's version of the events. The trial court, in turn, rejected Appellant's contention that the jury's verdict was a "shock [to] one's sense of justice." Trial Court Opinion, 11/20/12, at 10. We decline to disturb these determinations on appeal. ***See Champney, supra***. Accordingly, Appellant's challenge to the weight of the evidence must fail.

For all the foregoing reasons, we discern no error on the part of the trial court in rejecting Appellant's claims of error. Accordingly, we affirm the April 20, 2012 judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Prothonotary

Date: 8/14/2013