No. 22-5283

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD FUNK — PETITIONER
(Your Name)

VS.

SUPERINTENDENT SOMERSET SCI et al — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☑ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

(1) Third Circuit Court of Appeals (Docket # 19-2972)

(2) U.S. District Court - Middle District of Pennsylvania (# 1:18-cv-02111-YK)

(3) Court of Common Pleas - Union County (CP-60-CR-0000175-1999) & state appellate courts & PCRA court.

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☑ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, GERALD FUNK, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$	$	$
Self-employment	$ 0	$	$	$
Income from real property (such as rental income)	$ 0	$	$	$
Interest and dividends	$ 0	$	$	$
Gifts	$ 0	$	$	$
Alimony	$ 0	$	$	$
Child Support	$ 0	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$	$
Disability (such as social security, insurance payments)	$ 0	$	$	$
Unemployment payments	$ 0	$	$	$
Public-assistance (such as welfare)	$ 0	$	$	$
Other (specify): Prisoner Earnings	$ 115.00	$	$	$
Total monthly income:	$ 115.00 (Prison Wages) INMATE	$	$	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE - Incarcerated since 1998			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 87.09
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
Inmate - prison account	$ 87.09	$
	$	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description NONE
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
NONE		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ NONE	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 17.50	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): Hygiene, medicines, shoes, food	$ 60.00	$
Total monthly expenses:	$ 77.50	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Incarcerated since 1998. No surviving family for income help.
Prison pay is 42¢ an hour.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 23, 2022, 2022

X [signature]

(Signature)

judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

See Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000).

In assessing § 2244(d)(2)'s tolling provision, for purposes of tolling the federal habeas statute of limitations, a "properly filed application for State post-conviction or other collateral review" only includes applications which are filed in a timely fashion under state law. Therefore, if the petitioner is delinquent in seeking state collateral review of his conviction, that tardy state pleading will not be considered a "properly filed application for State post-conviction or other collateral review" and will not toll the limitations period. Pace v. DiGuglielmo, 544 U.S. 408, 412-14 (2005); Long v. Wilson, 393 F.3d 390, 394-95 (3d. Cir. 2004). Moreover, in contrast to the direct appeal tolling provisions, this post-conviction petition tolling provision does not allow for an additional period of tolling for the petitioner who does not seek further discretionary appellate court review of his conviction and sentence. Miller v. Dragovich, 311 F.3d 574, 578 (3d Cir. 2002).

Beyond this tolling period mandated by statute, it has also been held that AEDPA's one-year limitations period is not a jurisdictional bar to the filing of habeas petitions, Miller, 145 F.3d at 617-18, and, therefore, is subject to equitable tolling. Id. at 618-19. Yet, while equitable tolling is permitted in state habeas petitions under AEDPA, it is not favored. As the United States Court of Appeals for

the Third Circuit has observed: "[E]quitable tolling is proper only when the 'principles of equity would make [the] rigid application [of a limitation period] unfair.' Generally, this will occur when the petitioner has 'in some extraordinary way ... been prevented from asserting his or her rights' The petitioner must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims' Mere excusable neglect is not sufficient." Id. at 618-19 (citations omitted). Indeed, it has been held that only:

> [T]hree circumstances permit[ ] equitable tolling: if
>
> (1) the defendant has actively misled the plaintiff,
> (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.

Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001) (quoting Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted)).

It is against these legal benchmarks that we assess the instant petition.

B. This Petition Should Be Denied.

In his petition, Funk raises three claims that he believes entitle him to habeas relief. He first contends that the evidence at trial was insufficient to convict him of aggravated assault and robbery. He further argues that his trial counsel was ineffective with respect to both the plea-bargaining process and the failure to file a speedy trial motion. For their part, the respondents assert that Funk's petition is

untimely, as it was filed almost one month after the one-year limitations period expired.

After a review of the record, we agree with the respondents that Funk's petition was filed after the expiration of the AEDPA's one-year statute of limitations. WE also agree that this petition does not fall within any express statutory tolling provisions of §2244. However, we believe that equitable tolling principles should apply to allow us to consider the merits of Funk's claims, as this case reveals a confusing procedural history that resulted in Funk attempting to fully litigate his state claims yet failing to do so in time. However, when assessed on the merits, Funk's claims fail as a matter of law, as these claims were thoroughly considered and properly denied by the state courts. Thus, we recommend that this petition be denied.

(1) Although the Petition Would Otherwise Be Time-Barred, Equitable Tolling Principles Should Apply.

As we have stated, the AEDPA prescribes a one-year statute of limitations in which a petitioner may file a petition for habeas corpus, and this period begins to run on the date the petitioner's conviction becomes final. 28 U.S.C. § 2244(d)(1). In the instant case, Funk's conviction became final on September 1, 2003, as his Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on June 3, 2003, and Funk then had ninety days to appeal to the Supreme Court of the United States. See Jones v. Morton, 195 F.3d 153, 157 (3d Cir. 1999) ("[A] state

court criminal judgment becomes 'final,' and the statute of limitations begins to run, 'at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari expires'") (citations omitted). Thus, the one-year period in which Funk must have filed his habeas petition began to run on September 1, 2003. From this date, 101 days elapsed until Funk filed his timely PCRA petition on December 11, 2003, which tolled the limitations period while Funk was litigating his post-conviction petition in state court.

Funk's state court litigation ultimately spanned a period of about fourteen years, and the Superior Court affirmed the denial of Funk's post-conviction petition on December 12, 2017. (Doc. 11-1, at 91). Funk filed a petition for reargument with the Superior Court on December 29, 2017, which was denied on February 23, 2018. (Id., at 92). A letter from the Office of the Prothonotary dated March 7, 2018 indicated that Funk's petition for reargument was not timely filed. (Id., at 93). Indeed, Pennsylvania Rule of Appellate Procedure 2542(1) states that "an application for reargument shall be filed with the prothonotary within 14 days after the entry of the judgment or other order involved." Pa. R.A.P. 2542(1). Additionally, this letter informed Funk that his deadline for filing a Petition for Allowance of Appeal to the Pennsylvania Supreme Court had passed, and that his only remaining course of action would be to file a Petition for Leave to File a Petition for Allowance of Appeal Nunc Pro Tunc. (Doc. 11-1, at 93). Funk filed this petition for leave to

App 27

file on March 13, 2018, and the petition was denied on June 18, 2018. (Id., at 97). After his motion for reconsideration was denied on September 27, 2018, Funk filed the instant habeas petition on November 1.

For their part, the respondents argue that Funk's petition was untimely and is now barred by the statute of limitations. They contend that the AEDPA's limitations period resumed on January 12, 2018, after the time for filing a Petition for Allowance of Appeal had passed, and thus Funk's petition had to be filed by October 3, 2018 for the petition to be timely. However, Funk did not file his petition until November 1, 2018, almost a month after the limitations period had expired.

While we regard this as a close case, in our view, Funk's petition should not be dismissed on statute of limitations grounds. Rather, we believe that equitable tolling principles should apply to allow us to analyze the merits of Funk's claims. On this score, we first note that Funk was diligently pursuing his claims throughout the entirety of his state litigation. This is evidenced by the fact that, once his motion for reargument was denied, within days Funk filed documents with the Pennsylvania Supreme Court. (Doc. 11-1, at 93). Additionally, after receiving the Prothonotary's letter dated March 7, 2018, it took only six days for Funk to file his Petition for Leave to File. (Id.) When this petition was denied, Funk filed a motion for reconsideration of the denial. (Id., at 96).

Significantly, we note that, although Funk's Petition for Allowance of Appeal deadline was January 11, 2018, the letter from the Prothonotary's Office informed Funk that he could file a Petition for Leave to File a Petition for Allowance of Appeal Nunc Pro Tunc. (Id., at 93). On this score, our Court of Appeals has held that an "extraordinary" circumstance that permits equitable tolling "is where a court has misled a party regarding the steps that the party needs to take to preserve a claim." Munchinski v. Wilson, 694 F.3d 308, 329-30 (3d Cir. 2012) (quoting Brinson v. Vaughn, 398 F.3d 225, 230 (3d Cir. 2012)); see also Jenkins v. Superintendent of Laurel Highlands, 705 F.3d 80 (3d Cir. 2013) (holding that a prisoner's reliance on the state Supreme Court's instructions for filing warranted equitable tolling of the prisoner's habeas petition).

Here, although the letter from the Prothonotary's Office noted that Funk's deadline for filing a Petition for Allowance of Appeal had passed, the letter suggested that he file a Petition for Leave to File a Petition for Allowance of Appeal Nunc Pro Tunc as his next course of action. (Doc. 11-1, at 93). Thus, Funk reasonably relied on the suggestion of the Prothonotary, and continued to litigate his case in state court, rather than filing his habeas corpus petition. In our view, this suggestion is the kind of extraordinary circumstance that prevented the timely filing of Funk's habeas petition and entitles him to equitable tolling. See Jenkins, 705 F.3d at 91. Accordingly, we will now address the merits of Funk's habeas claims.

(2) Funk's Claims Fail on Their Merits.

As we have explained, Funk raises three grounds on which he believes he is entitled to relief—a sufficiency of the evidence claim and two claims of ineffective assistance of trial counsel. These claims were raised in Funk's PCRA petition and were denied both by the PCRA court and the Superior Court on appeal. After a review of the state court decisions, in our view, the courts' decisions were not based on an unreasonable application of Strickland, or on an unreasonable determination of the facts. Thus, Funk's claims have no merit, and his petition should be denied.

(a) Sufficiency of the Evidence

With respect to his first claim, Funk contends that there was insufficient evidence at trial from which a jury could convict him of aggravated assault and robbery. He asserts that the evidence at trial did not show that he had the intent to inflict serious bodily injury, or that a serious bodily injury was inflicted upon the victim. (Doc. 1, at 16). Specifically, Funk argues that: "The victim testified she is not hit or beaten, just choked. She is grabbed from behind, choked, and passed out." (Doc. 1, at 16). He further asserts that the evidence failed to show that he intended to inflict serious bodily injury because the victim's treating physician testified that "whoever choked [the victim] was careful not to break her neck." (Id.) Thus, Funk argues that, because there was no serious bodily injury, the jury could not have convicted him of aggravated assault or robbery. This claim was denied both on direct

appeal and by the PCRA court, as the court found there was sufficient evidence to allow the jury to convict Funk of these charges.

Funk must meet precise and demanding legal standards to prevail on this claim that the evidence was insufficient to convict him of these offenses. As we have recently observed:

> In Jackson v. Virginia, the United States Supreme Court held that "in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 ... the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. 307, 324 (1979). Furthermore, when a petitioner argues about the sufficiency of the evidence in the context of a federal habeas petition, the petitioner would only be entitled to relief if the state courts' decisions regarding the sufficiency of the evidence presented at trial was "an unreasonable application of ... clearly established Federal law," 28 U.S.C. § 2254(d)(1), or if the state court's application of that law itself is "objectively unreasonable," Williams v. Taylor, 529 U.S. 362, 409 (2000); see also McDaniel v. Brown, 558 U.S. 120, 132-33 (2010). Moreover, the rule announced in Jackson "requires a reviewing court to review the evidence 'in the light most favorable to the prosecution.' " Id. (quoting Jackson, 443 U.S. at 319). What this means is that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. at 133 (quoting Jackson, 443 U.S. at 326).

Hawk v. Overmyer, No. 3:16-CV-135, 2019 WL 1187356, at *5 (M.D. Pa. Jan. 17, 2019), report and recommendation adopted sub nom. Hawk v. Overmeyer, No. 3:16-CV-135, 2019 WL 1163830 (M.D. Pa. Mar. 13, 2019).

Here, Funk simply has not satisfied this burden of proof. The PCRA court noted that the Commonwealth presented evidence at trial that showed that Funk had strangled his victim to the point of unconsciousness. (Doc. 11-1, at 63). Notably, Funk's federal habeas corpus petition does not dispute that the evidence establishes that Funk strangled this elderly woman into unconsciousness. (Doc.1 at 16.) Additionally, the Commonwealth presented evidence of petechial hemorrhage to the victim's face, as well as the victim's own testimony that it took a month for her throat to return to normal. (Id.) The court found that this evidence clearly met the definition of "serious bodily injury" in 18 Pa. Cons. Stat § 2601, which includes a "protracted impairment of the function of a bodily organ." (Id. (quoting § 2601)). The Superior Court affirmed this finding, noting that, not only was there sufficient evidence to show that Funk inflicted serious bodily harm, but also that he committed a felony during the course of committing a theft. (Id., at 86). Thus, Funk's claim was thoroughly considered by both the PCRA and the Superior Court and was found to be without merit. Additionally, to the extent Funk asserted this claim as a claim of ineffective assistance of counsel, the PCRA court found that counsel could not be deemed ineffective for failing to raise a meritless issue. (Id., at 63).

On this score, we conclude that the state court's finding was a reasonable application of clearly established law based on a reasonable determination of the facts. Contrary to Funk's assertion that the victim suffered only "bruises, scratches

[and] abrasions," the court found that the Commonwealth's evidence, which included testimony from the victim as well as evidence that Funk choked her to the point of unconsciousness, met the definition of serious bodily injury for the charges of aggravated assault and robbery.[2] Thus, this claim does not warrant habeas relief.

(b) Ineffective Assistance of Counsel

Next, Funk asserts two ineffective assistance of counsel claims, arguing that counsel was ineffective for failing to communicate a plea offer to him and for failing to file a speedy trial motion. These claims were addressed by the PCRA court and the Superior Court on appeal and denied on their merits.

With respect to the claim regarding the plea bargain process, the PCRA court relied on testimony given at the PCRA hearing, both by trial counsel and by the District Attorney, and found that Funk had not met his burden to show his counsel was ineffective. (Id., at 68). Ineffective assistance of counsel claims regarding the rejection of a plea agreement are governed by Strickland. Hill v. Lockhart, 474 U.S.

[2] Likewise Funk's argument that the evidence was insufficient to establish his guilt on the robbery charge is also unavailing. Indeed, the argument warrants only brief consideration. Relying upon a case involving theft from a voluntarily intoxicated person who had passed out, Funk argues that the element of force necessary for a robbery was entirely missing in this case. Like the state courts we disagree, and note that Funk's argument fails to consider the fact that the jury found that he used brute force to strangle his victim and render her unconscious before he assaulted her and stole her property. The state courts correctly concluded that this assault fully satisfied the force requirement for a robbery charge.

52, 57-59 (1985). In order for Funk to establish that his counsel was ineffective in this respect, he would need to show that:

> [B]ut for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler v. Cooper, 566 U.S. 156, 164 (2012); see also United Stated v. Vaughn, 704 F. App'x 207, 212 (3d Cir. 2017) ("To effectively assist their clients in the plea bargaining process, counsel must provide defendants facing a potential guilty plea enough information to make a reasonably informed decision whether to accept a plea offer") (internal citations and quotations omitted)).

In this case, the PCRA court noted that the proposed plea agreement was conveyed to Funk on the morning of trial or very close to that date, and that Funk explicitly rejected the plea agreement in favor of going to trial. (Id.) Specifically, at the PCRA hearing, both trial counsel and the district attorney testified that Funk, on the morning of trial, was offered a plea agreement, which included pleading guilty to 8-20 years on the rape charge and the other charges would be dismissed. (Doc. 11-1, at 83-85). Both also testified that Funk explicitly rejected this offer and opted to go to trial. (Id.) Thus, the court found that counsel fulfilled his duty to convey the agreement to Funk, and Funk could not claim that counsel was ineffective. The

Superior Court affirmed this finding, noting that the PCRA court found trial counsel and the District Attorney credible, and that the testimony established that Funk was advised of the plea offer and decided to reject it. (Id.) On this score, we cannot conclude that the state courts' decisions rested on an unreasonable application of Strickland, as Funk failed to show that he would have accepted the plea agreement rather than proceed to trial. Thus, this claim does not warrant habeas relief.

Finally, Funk asserts a claim that his trial counsel was ineffective for failing to file a speedy trial motion under Rule 600 of the Pennsylvania Rules of Criminal Procedure.[3] Rule 600 states that "[t]rial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed." Pa. R. Crim. P. 600(a)(2)(a). Funk argues that he was brought to trial 470 days after the complaint was filed, and thus his state statutory speedy trial rights were violated. Accordingly, Funk claims that his counsel was ineffective for failing to file a Rule 600 motion on his behalf.

This claim was heard by the PCRA court and the Superior Court on appeal. The PCRA court found that there was no speedy trial violation, and thus, counsel could not be deemed ineffective for failing to file such a motion. (Doc. 11-1, at 70-72). In its analysis, the PCRA court first noted that, in order for time to be excluded

[3] This Rule is referred to in Funk's petition as Rule 1100. The Rule was amended and renumbered to Rule 600 in April 2001, after Funk was convicted. Thus, we will refer to the Rule by its current number.

from the 365-day period set forth in the Rule, the Commonwealth had the burden to show that the delay was attributable to the motions filed by the defendant, and that the Commonwealth was reasonably diligent in responding to such motions. (Id., at 70). The Court then found that there was a total of 197 days that were excluded from the 365-day time period, and that this included: (1) defense counsel's request for a continuance of the preliminary hearing; (2) counsel's filing of an Amended Omnibus motion, which contained complex issues related to DNA evidence, a motion to suppress evidence, and a motion to compel photos of DNA exhibits; and (3) a motion for continuance filed two weeks before jury selection was supposed to begin. (Id., at 71). Thus, the PCRA court concluded that much of the delay was attributable to the defendant and was excludable, and thus Funk's speedy trial rights were not violated. (Id.). Accordingly, the court held that counsel was not ineffective for failing to file such a motion. (Id., at 72). These findings were upheld on appeal to the Superior Court, which affirmed the denial of Funk's PCRA petition. (Id., at 80-81).

On this score, we cannot conclude that the state court's decision was based on an unreasonable application of the law or an unreasonable determination of the facts. Here, the state court found that Funk's counsel could not have been ineffective for failing to file a speedy trial motion because there had been no speedy trial violation. Thus, to the extent that Funk is challenging the state court's determination that there was no speedy trial violation under Rule 600, this claim is not cognizable on habeas

review, as it is based on state, not federal, law. See Estelle v. McGuire, 502 U.S. 62, 67–68 (1991) (explaining that federal habeas courts are not permitted to review questions of state law); Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Wainwright v. Skyes, 433 U.S. 72, 81 (1977) (indicating that questions of state substantive law are not cognizable on federal habeas review); see also Cann v. Bickle, 2011 WL 7644037, at *7 (E.D. Pa. March 30, 2011) ("Any speedy trial claim based on the state procedural rule is not cognizable on federal habeas corpus relief, as the Sixth Amendment does not require a defendant to be brought to trial within any specified period of time"). Additionally, with respect to the court's ineffective assistance analysis, we note that it is well-settled that counsel cannot be deemed ineffective for failing to raise an issue that has no merit. See United States v. Mannino, 212 F.3d 835, 840 (3d Cir. 2000) (finding that counsel cannot be held to be ineffective under Strickland for the failure to raise an issue on appeal if the claim is not meritorious). Accordingly, this claim has no merit and does not entitle Funk to habeas relief.

In sum, while we find that Funk's petition should be entitled to equitable tolling based on the confusing procedural history in this case, we also find that his claims are wholly without merit. Accordingly, we recommend that this petition for writ of habeas corpus be denied.

IV. Recommendation

Accordingly, for the foregoing reasons, IT IS HEREBY RECOMMENDED THAT the petition be DENIED and that a certificate of appealability should not issue.

The petitioner is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 4th day of June, 2019.

/s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

App 38

5-2-22

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2972

GERALD FUNK,

Appellant

v.

SUPERINTENDENT SOMERSET SCI; ATTORNEY GENERAL PENSYLVANIA;
DISTRICT ATTORNEY UNION COUNTY

District Court No.: 1-18-cv-02111

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, McKEE, AMBRO, 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,

s/ THOMAS L. AMBRO
Circuit Judge

Dated: April 29, 2022

APPENDIX - D
App 39

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 19-2972

GERALD FUNK,
Appellant

v.

SUPERINTENDENT SOMERSET SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY UNION COUNTY

(M.D. Pa. No. 1-18-cv-02111)

Present: AMBRO, Circuit Judge

1. Motion by Appellant for Leave to File Petition for Rehearing

Respectfully,
Clerk/CJG

ORDER

The foregoing Motion by Appellant for Leave to File Petition for Rehearing is **granted.** The petition for rehearing shall be filed and served within 30 days of the date of this order.

By the Court,

s/THOMAS L. AMBRO
Circuit Judge

Dated: February 24, 2022
CJG/cc: Tadhg Dooley, Esq.
David R. Roth, Esq.
D. Peter Johnson, Esq.
Ronald Eisenberg, Esq.

APPENDIX - E App 40

Mandate #63
10/1/21

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2972

GERALD FUNK

Appellant

v.

SUPERINTENDENT SOMERSET SCI; ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY UNION COUNTY

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1-18-cv-02111)
District Judge: Honorable Yvette Kane

Argued on June 3, 2021

Before: AMBRO, HARDIMAN, and PHIPPS, Circuit Judges

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Middle District of Pennsylvania and was argued on June 3, 2021.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered August 5, 2019, be and the same is hereby affirmed. Costs are not taxed. All of the above in accordance with the opinion of this Court.

APPENDIX- F App 41

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: August 10, 2021

Certified as a true copy and issued in lieu of a formal mandate on October 1, 2021

Teste: Patricia A Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit

App 42

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
GERALD L. FUNK	:	No. 220 MDA 2017
Appellant		

Appeal from the PCRA Order December 30, 2016
In the Court of Common Pleas of Union County Criminal Division at
No(s): CP-60-CR-0000175-1999

BEFORE: BENDER, P.J.E., LAZARUS, J., and STEVENS*, P.J.E.

MEMORANDUM BY STEVENS, P.J.E.: **FILED DECEMBER 12, 2017**

Appellant Gerald L. Funk appeals *pro se* from the December 30, 2016, order entered in the Court of Common Pleas of Union County dismissing his first petition filed under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. For the reasons that follow, we affirm.

The relevant facts and procedural history are as follows: In the early morning hours of September 11, 1998, Appellant, who was then twenty-five years old, attacked a sixty-four-year-old woman as she was walking to work at Bucknell University in Lewisburg, Pennsylvania. Appellant accosted the victim by the arms, choked her, and dragged her from the street to a cemetery, where he raped her. Thereafter, Appellant was charged with attempted homicide, aggravated assault, rape, and robbery on August 3, 1999.

* Former Justice specially assigned to the Superior Court.

APPENDIX - G App 43

On December 13, 2000, represented by Michael Suders, Esquire, Appellant proceeded to a jury trial, following which he was convicted on all counts. Appellant proceeded to a sentencing hearing on January 17, 2001, at which the trial court sentenced Appellant to an aggregate of thirty years to sixty years in prison. Appellant filed a post-sentence motion, which the trial court denied, and Attorney Suders filed a direct appeal to this Court on Appellant's behalf.

On direct appeal, Appellant presented nine issues.[1] Adopting the reasoning set forth by the trial court in its April 10, 2001, opinion denying Appellant's post-sentence motion, this Court concluded Appellant was not entitled to relief and, consequently, on April 11, 2002, we affirmed his judgment of sentence. ***See Commonwealth v. Funk***, 823 MDA 2001 (Pa.Super. filed 4/11/02) (unpublished memorandum). Our Supreme Court subsequently denied review. ***Commonwealth v. Funk***, 825 A.2d 637 (Pa. 2003) (*per curiam* order).

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[1] Specifically, Appellant alleged: (1) The trial court erred in denying his pre-trial suppression motion; (2) The trial court erred in denying his motion to preclude the prosecutor from trying the case; (3) The trial court erred in admitting and using DNA evidence; (4) The trial court erred in denying Appellant's motion for arrest of judgment on two counts of robbery; (5) The jury's verdict was against the weight of the evidence; (6) Appellant's sentence was excessive; (7) Appellant should be resentenced before a different judge; (8) The trial court erred in prohibiting Appellant from introducing evidence of a vacant building at the crime scene; and (9) The trial court erred by permitting the prosecutor to present evidence that Appellant defended himself.

App 44

On December 11, 2003, Appellant filed a timely, *pro se* PCRA petition, new counsel was appointed, and on March 3, 2005, counsel filed an amended PCRA petition. Appellant subsequently expressed his desire to proceed *pro* se, and following a colloquy, the PCRA court granted Appellant's request to proceed *pro* se but directed that the previously appointed PCRA counsel serve as stand-by counsel. Thereafter, various hearings were held, with the PCRA court ultimately concluding, with the Commonwealth's stipulation, that trial counsel was ineffective for failing to argue for concurrency at the time of the imposition of sentence. Thus, the PCRA court, in effect, granted the PCRA petition, vacated Appellant's judgment of sentence, and imposed a new sentence, with an aggregate of thirteen years to thirty years in prison. PCRA Court Order, dated 9/4/12.

Appellant filed a post-sentence motion, which sought "the withdrawal of the plea and sentencing agreement entered into on September 4, 2012,...[and] an order to reinstate [Appellant's] PCRA petition." Post Sentence Motions, 9/20/12. After Appellant's motion was denied by operation of law, Appellant filed an appeal to this Court.

Concluding the Commonwealth and PCRA court had engaged in "unorthodox and improper maneuverings," a panel of this Court relevantly held:

> We conclude that the trial court did not abuse its discretion in imposing consecutive sentences; without underlying merit, there can be no ineffective assistance of counsel for failing to argue for the imposition of concurrent sentences. Thus, in that

> there was no support for the Commonwealth's fallacious stipulation to the ineffectiveness of counsel, there was no basis to grant the PCRA petition, vacate the judgment of sentence, or resentence Appellant.
>
> Clearly, there was no basis upon which the PCRA court could vacate the sentence imposed in 2001, so the Commonwealth designated a factitious basis of ineffective assistance of counsel that never had been raised and that was completely lacking in support in the record, and it "advised" the PCRA court to proceed in reliance thereon. Conveniently, Appellant requests this Court to vacate the sentence imposed, and the law requires that we do exactly that.

Commonwealth v. Funk, 854 MDA 2013, at *24-25 (Pa.Super. filed 1/27/14) (unpublished memorandum).

Consequently, this Court vacated the PCRA court's September 4, 2012, order and judgment of sentence, directed the reinstatement of the original judgment of sentence imposed on January 17, 2001, directed the reinstatement of Appellant's PCRA petition, and remanded for additional consideration thereof. ***Id.*** at *25. This Court relinquished jurisdiction.

Subsequently, by order entered on April 4, 2014, the PCRA court,[2] consistent with this Court's directive, reinstated the judgment of sentence entered on January 17, 2001, and reinstated Appellant's PCRA petition.

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[2] We note that, by order entered on March 5, 2014, the original PCRA court judge, Judge Harold F. Woelfel, Jr., recused himself, and the PCRA matter was reassigned to Judge Michael T. Hudock.

App 46

Thereafter, the PCRA court held numerous evidentiary hearings at which Appellant proceeded *pro se* with stand-by counsel.

By order and opinion entered on December 30, 2016, the PCRA court denied Appellant's PCRA petition,[3] and this timely *pro se* appeal followed.[4] The PCRA court did not direct Appellant to file a Pa.R.A.P. 1925(b) statement.

Appellant presents the following issues on appeal:

> 1. The PCRA court erred by dismissing Appellant's claim that [trial] counsel [was] ineffective in failing to raise a timely Rule 1100 violation.
> 2. The PCRA court erred by dismissing the claim that trial counsel was ineffective during the plea bargaining process.
> 3. The PCRA court erred by dismissing Appellant's claim that counsel was ineffective in failing to adequately challenge the sufficiency of the evidence to prove aggravated assault and robbery.
> 4. The PCRA court erred by dismissing Appellant's claim that [trial] counsel [was] ineffective during pre-trial stages where counsel failed to support his motion to suppress evidence with known info[rmation].

Appellant's Brief at 4.

Initially, we note the following relevant legal precepts.

> When reviewing the denial of a PCRA petition, we must determine whether the PCRA court's order is supported by the record and free of legal error. Generally, we are bound by a PCRA

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[3] The PCRA court filed a supplemental opinion on January 18, 2017.

[4] Although Appellant's *pro se* appeal was not docketed until February 1, 2017, we shall deem it to have been filed on Monday, January 30, 2017, when it was handed to prison officials for filing. ***See Commonwealth v. Little***, 716 A.2d 1287 (Pa.Super. 1998) (discussing prisoner mailbox rule); 1 Pa.C.S.A. § 1908 (computation of time).

App 47

> court's credibility determinations. However, with regard to a court's legal conclusions, we apply a *de novo* standard.

Commonwealth v. Johnson, 635 Pa. 665, 139 A.3d 1257, 1272 (2016) (quotation marks and quotations omitted).

To be eligible for relief pursuant to the PCRA, Appellant must establish, *inter alia*, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in 42 Pa.C.S.A. § 9543(a)(2). ***See*** 42 Pa.C.S.A. § 9543(a)(2). He must also establish that the issues raised in the PCRA petition have not been previously litigated or waived. ***See*** 42 Pa.C.S.A. § 9543(a)(3).

With regard to claims of ineffective assistance of counsel:

> It is well-established that counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. To prevail on an ineffectiveness claim, the petitioner has the burden to prove that (1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance. The failure to satisfy any one of the prongs will cause the entire claim to fail.

Commonwealth v. Benner, 147 A.3d 915, 919–20 (Pa.Super. 2016) (quotation marks, quotations, and citations omitted).

> We need not analyze the prongs of an ineffectiveness claim in any particular order. Rather, we may discuss first any prong that an appellant cannot satisfy under the prevailing law and the applicable facts and circumstances of the case. Finally, counsel cannot be deemed ineffective for failing to raise a meritless claim.

Johnson, 635 Pa. at 691, 139 A.3d at 1272 (citations omitted).[5]

In his first claim, Appellant contends trial counsel was ineffective in failing to file a motion to dismiss his case under former Pa.R.Crim.P. 1100.[6]

Initially, we note that Rule 1100 (now Rule 600)[7] serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. ***Commonwealth v. Jefferson***, 741 A.2d 222, 225 (Pa.Super. 1999). In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right

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[5] It is noteworthy that, at the time Appellant filed his direct appeal, in 2001, the prevailing law required that an appellant raise claims of ineffectiveness of trial counsel at the first opportunity of new counsel, on pain of waiver. ***See Commonwealth v. Hubbard***, 472 Pa. 259, 372 A.2d 687 (1977), *abrogated* by ***Commonwealth v. Grant***, 572 Pa. 48, 813 A.2d 726, 738 (2002). Accordingly, where a PCRA petitioner was represented by new counsel on a **pre-*Grant*** direct appeal, in order to secure PCRA relief on a claim deriving from trial counsel effectiveness, he must demonstrate not only that trial counsel was ineffective, but also that appellate counsel was ineffective for either failing to litigate the claim at all, or was ineffective in the manner in which he litigated the claim of trial counsel's ineffectiveness on direct appeal. ***Commonwealth v. Chmiel***, 612 Pa. 333, 30 A.3d 1111, 1128 (2011). However, in the case *sub judice*, Appellant was represented by Attorney Suders in both the trial court and on direct appeal. Thus, the instant PCRA proceeding was the first opportunity for Appellant to raise claims pertaining to trial counsel's effectiveness, and thus, it was unnecessary for him to "layer" his claims of ineffectiveness.

[6] We note that, at the PCRA hearing, trial counsel confirmed that he did not file a Rule 1100 motion to dismiss, noting that, in his opinion, such a motion would have been frivolous. N.T., 11/23/15, at 118.

[7] Effective April 1, 2001, Pa.R.Crim.P. 1100 was amended and renumbered Pa.R.Crim.P. 600. However, since Rule 1100 was in effect during the time of Appellant's trial proceedings below, we shall analysis his claim thereunder.

App 49

to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. ***Id.*** The administrative mandate of Rule 1100 certainly was not designed to insulate the criminally accused from good faith prosecution through no fault of the Commonwealth. ***Id.***

We begin our analysis by calculating the "mechanical run date" for Rule 1100 purposes. As our Supreme Court has explained,

> The mechanical run date is the date by which the trial must commence under Rule 1100. It is calculated by adding 365 days (the time for commencing trial under Rule 1100) to the date on which the criminal complaint is filed. . . .[T]he mechanical run date can be modified or extended by adding to the date any periods of time in which delay is caused by the defendant [or the defendant's attorney]. Once the mechanical run date is modified accordingly, it then becomes an adjusted run date.

Commonwealth v. Cook, 544 Pa. 361, 676 A.2d 639, 645 n.12 (1996). Any delay caused by the need to reschedule a trial because of a continuance attributable to the defense constitutes excludable time, even if the defendant was prepared to go to trial at an earlier date. ***Id.*** at 374, 676 A.2d at 645.

In the instant case, the PCRA court determined that there was no merit to Appellant's underlying Rule 1100 claim. Specifically, the PCRA court reasoned as follows:

> The Commonwealth filed its complaint against [Appellant] on August 3, 1999. Pursuant to Pa.R.Crim.P. 1100, [which was] in effect at the time, the mechanical run date for [Appellant's] trial was August 2, 2000. Trial commenced with jury selection on November 11, 2000, some one hundred (100) days after the run date. [Appellant] argues that none of the pre-trial delay is attributable to him. . . .[Specifically, Appellant] argues that the delays related to the filing of his Omnibus Motion, the Amended

App 50

> Omnibus Motion, and Motion to Compel Discovery should count against the Commonwealth. [The PCRA] court disagrees.
>
> Initially, [Appellant's] attorney requested and received a continuance of the preliminary hearing from August 12, 1999, to September 2, 1999, for an excludable period of twenty-one (21) days. The court also counts as excludable the nine day time during which [Appellant] was without counsel from April 24, 2000, to May 3, 2000, when trial counsel entered his appearance of record. On May 9, 2000, trial counsel filed a motion for continuance to file an amended omnibus motion. Counsel filed this motion on May 24, 2000.
>
> Trial counsel's issues in the amended motion included various issues related to DNA evidence, which apparently was the Commonwealth's strongest evidence. These issues included the request to hire a DNA expert, a Motion to Suppress Evidence, and a motion to compel photos of DNA exhibits. The trial court granted this motion on July 26, 2000. The court finds that the sixty-three (63) day period from the filing of the Amended Omnibus Motion to its decision is excludable as the [delay related thereto was attributable to Appellant]. The court granted [Appellant's] motion to hire a DNA expert in its July 26, 2000, order on [Appellant's] Amended Omnibus Motion. Jury selection in [Appellant's] trial was scheduled for August 15, 2000. The trial court granted this motion. Jury selection took place on November 14, 2000. Testimony began on December 13, 2000. The time of this continuance is also excluded.
>
> The excludable time in this case totals, at least, one hundred ninety-seven (197) days, including the time when [Appellant] did not have counsel, the delay related to the Amended Omnibus Motion that rendered [Appellant] unavailable for trial, and the delay in trial from the August 2, 2000, motion to the commencement of jury selection on November 14, 2000.

PCRA Court Opinion, filed 1/18/17, at 1-2.

We agree with the PCRA court's reasoning in this regard and conclude that trial counsel cannot be deemed ineffective in failing to raise a meritless claim. ***See Johnson, supra.***

In his next claim, Appellant contends trial counsel was ineffective during the plea bargaining process. Specifically, he claims that guilty plea counsel did not adequately explain the deal offered by the Commonwealth, including failing to inform Appellant of "the deal currently available at trial [of] 8-20 years, 1 count rape, and 7 felonies withdrawn[.]" Appellant's Brief at 15. He further asserts guilty plea counsel did not inform him that the trial court judge was willing to forego his general "policy" that all pleas on the day of trial are considered to be open pleas to all counts charged in the information. ***See id.***

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." ***Missouri v. Frye***, 132 S.Ct. 1399, 1408 (2012). In ***Commonwealth v. Chazin***, 873 A.2d 732 (Pa.Super. 2005), this Court addressed the issue of ineffectiveness of counsel with regard to counsel's duty to inform a defendant of the risks and benefits of a plea offer. This Court noted that in order for a defendant to be entitled to relief, he has the burden of proving that: (1) an offer for a plea was made; (2) trial counsel failed to inform him of such offer; (3) trial counsel had no reasonable basis for failing to inform him of the offer; and (4) he was prejudiced thereby. ***Id.*** at 735.

In the case *sub judice*, at the PCRA hearing, trial counsel testified as follows upon direct-examination by Appellant:

> **Q:** July 26—no, not July 26—July 6, 2000, did [the district attorney] at a pretrial conference make a plea offer?

App 52

A: Whatever the date was there was a plea offer made.

Q: And did you have the Sheriff's Department take me to the District Attorney's Office to hear that plea offer on that date?

A: I don't recall the specifics of that date, but the plea offers were always communicated to you.

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Q: Was it before the July 26th, 2000 pretrial hearing?

A: The record should speak for itself on that, what the date was.

Q: Was that the eight- to 20-year offer for the count of rape, withdraw all remaining charges?

A: I remember it came down to something like that, yeah.

Q: And do you know if I rejected any prior plea offers?

A: You rejected all of the offers, eventually.

Q: On December 13th, 2000 at trial, did you tell me that [the trial court judge] has a policy that at trial all pleas are open pleas to all charges?

A: I probably told you that at some point, but I think they waived that, and that was the—one of the reasons why the sentence of 40 to 60—40 to 80, whatever it was originally, was a surprise, because he agreed to just the eight years or whatever it was at trial. So he was going to waive that at that point.

Q: So if I would have taken a plea at trial, [the trial court judge] was willing to impose the eight to 20; is that what you just said?

A: Right. Yeah, he was willing to not accept an open plea.

N.T., PCRA hearing, 11/24/15, at 172-74.

Further, trial counsel testified as follows at the PCRA hearing upon cross-examination by the district attorney:

Q: [Trial counsel], do you remember that it was the day trial began that I offered a plea to just the rape, eight years to 20 years, and that we went and discussed with the [trial court judge] whether or not he would forego his policy, and that the Judge said that he would? Do you remember that?

A: I remember it was—it was—there was before-the-trial negotiations, and right after that the trial. I remember going down there, yeah.

Q: And then after we did that, we brought [Appellant] into my office with yourself, me, Detective Neitz, and offered—I offered to him the eight to 20 years. Do you remember that's –that we sat together in the office just before trial?

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A: I remember that there were discussions like that. I'm not sure whether that was—was the actual day of trial. I remember the last time talking to him I think I was downstairs, I don't know.

Q: Do you remember during the discussions [Appellant] hearing the offer clearly and then indicated—leaned over, that he would—said that he would—I guess we're going to trial or we're not going to—I'm not going to plead; he rejected it?

A: Yeah, I believe—

Q: In this meeting.

A: To my recollection that might have been like the day before.

Id. at 175-77.

Moreover, Appellant questioned the district attorney at the PCRA hearing, and the following relevant exchange occurred:

Q: The last [plea] discussion immediately prior to trial, who were those discussions with?

A: Pardon me?

Q: Who were the discussions with?

A: Initially, between counsel, then counsel with you, and then counsel and I approached the judge to see if he would forego his normal policy of not allowing pleas on the day of trial, which he indicated he would. There was then a meeting with [trial counsel], myself, Bill Neitz and you in my office, where you were offered a plea to the rape with a bottom of the standard range, I believe, which was 96 months to 20 years. You, in that meeting, leaned forward and said I'm going to trial and that was the end of it, and we proceeded to trial.

App 54

> **Q:** With regard to the meeting that you just testified to, are you sure that didn't occur during May or July of 2000?
>
> **A:** Yes. That was immediately prior to trial, that did happen.
>
> **Q:** Okay. And that was for 96 months?
>
> **A:** It was an offer 96 months to 20 years, 8 years to 20 years on the rape.
>
> **Q:** All right.
>
> **A:** And dismiss the remaining charges. My desire was to not have to have the victim testify.

N.T, PCRA hearing, 4/24/12, at 16-17.

Based on the aforementioned, the PCRA court concluded:

> The credible testimony offered by [the] District Attorney [ ] and trial counsel during the PCRA hearing. . .establishes that, contrary to [Appellant's] testimony, the proposed plea agreement was communicated to [Appellant] either on the morning of the commencement of trial or very close to that date, and that [Appellant] rejected the plea agreement. Trial counsel fulfilled his duty to inform [Appellant] of the proposed agreement. [Appellant] himself rejected the plea agreement and chose to take his chances at trial.

PCRA Court Opinion, filed 12/30/16, at 9.

We agree with the PCRA court's reasoning and conclude Appellant is not entitled to relief on his claim of ineffective assistance of trial counsel. ***See Chazin, supra.***

In his next claim, Appellant contends that counsel was ineffective in failing to adequately challenge the sufficiency of the evidence to prove aggravated assault and robbery. In this regard, he argues the evidence does not sufficiently establish that he caused serious bodily injury or that he committed a felony during the course of committing a theft.

Initially, we note that, while Appellant argues at length that the evidence is insufficient as to aggravated assault and robbery, he conclusory opines that there is no reasonable strategic basis for counsel's prejudicial failure to raise his sufficiency claims. Further, it is not clear whether Appellant is arguing that trial counsel was ineffective in failing to make/argue properly a motion in the trial court or whether counsel was ineffective in failing to raise/argue properly the sufficiency issue on appeal.

In any event, as the PCRA court notes:

> [There was sufficient evidence presented] from which the jury could have found beyond a reasonable doubt that [Appellant] intentionally caused serious bodily injury to his victim. This evidence included strangulation to the point of unconsciousness, which could have resulted in death; the petechial hemorrhage to the victim's face, [and] the victim's own testimony that it took a month for her throat to return to normal.

PCRA Court Opinion, filed 12/30/16, at 3-4.

Further, the trial court concluded in its April 10, 2001, opinion denying Appellant's post-sentence motion that the evidence sufficiently revealed Appellant committed a felony during the course of committing a theft, and this Court accepted the trial court's reasoning upon direct appeal. Therefore, Appellant is not entitled to relief on his ineffectiveness claim. ***See Benner, supra.***

In his final claim, Appellant contends trial counsel was ineffective in failing to support his pre-trial motion to suppress the DNA evidence with

known information.[8] Appellant presents a laundry list of statements contained in the affidavit of probable cause and contends trial counsel should have challenged the accuracy of the statements. Specifically, he avers trial counsel should have challenged the following alleged misstatements of fact contained in the affidavit of probable cause: (1) The affidavit provided a description of the assailant, which was different than the description given to the police by the victim; (2) The affidavit mistakenly indicated that a photographic line-up was used when, in fact, the police showed the victim a single photograph of Appellant; (3) The affidavit mistakenly indicated that a police sketch, which was drawn based upon the victim's description of her attacker, resembled Appellant; (4) The affidavit inaccurately suggested that only long, brown hair was found on the victim's clothing; (5) The affidavit indicated that the assailant wore a black shirt with a red collar, similar to shirts worn by Pizza Hut employees; however, the affidavit omitted the fact that Appellant had returned his Pizza Hut shirt to his employer six weeks prior to the assault when he resigned; and (6) The affidavit indicated Betty Lyman saw Appellant in the vicinity of the crime at approximately 4:00 a.m.; however, Ms. Lyman

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[8] On May 7, 1999, Detective William Neitz filed an application for a search warrant, which was supported by an affidavit of probable cause. On May 8, 1999, a search warrant was issued to "complete [a] body search of [Appellant,] including blood, pubic hairs, head hairs, and any other specim[e]ns needed to satisfy a standard rape suspect kit." Trial Court Opinion, filed 4/12/10, at 6.

App 57

is a known liar and the affidavit omitted this fact. We conclude Appellant is not entitled to relief on his ineffectiveness claim.

In the case *sub judice*, the record reveals that trial counsel filed a pre-trial motion seeking to suppress the DNA evidence collected from Appellant on the basis the warrant lacked probable cause. Therein, trial counsel averred the affidavit lacked sufficient probable cause since: the perpetrator had short hair whereas Appellant had long hair, the police sketch did not resemble Appellant, the police utilized statements of Ms. Lyman who was known by authorities to be less than truthful, and the victim stated the shirt worn by her attacker was similar to a Bucknell Bison cafeteria shirt. Moreover, trial counsel filed an amended pre-trial suppression motion arguing that the affidavit of probable cause contained material misrepresentations.

Furthermore, at a suppression hearing held on January 31, 2000, trial counsel argued the search warrant should be deemed invalid since the affidavit of probable cause contained several misrepresentations of material fact. In essence, trial counsel sought to show that the affiant, Detective Neitz, was acquainted with Appellant prior to the incident and fashioned an affidavit of probable cause, which falsely pointed to Appellant as the perpetrator. In this vein, trial counsel questioned Detective Neitz regarding various matters, including whether the victim had indicated her attacker wore a Pizza Hut type delivery shirt or a Bucknell Bison cafeteria shirt, whether a piece of long, brown hair was found on the victim, and whether the police sketch resembled

App 58

Appellant. Trial counsel specifically argued that the affidavit of probable cause "does not accurately depict what was told to Officer Neitz" by the victim. N.T., suppression hearing, 1/31/2000, at 15. He noted that Appellant had long hair whereas the victim described her attacker as having short hair.[9] ***Id.*** at 16.

On July 26, 2000, a supplemental suppression hearing was held, at which trial counsel extensively cross-examined Detective Neitz regarding the validity of the evidence supporting the affidavit of probable cause, particularly the evidence set forth identifying Appellant as the possible perpetrator. Specifically, he cross-examined Detective Neitz as to the accuracy of Ms. Lyman's statement that, at the time of the incident, Appellant telephoned her, indicating he was in the vicinity where the incident subsequently occurred. N.T., suppression hearing, 7/26/2000, at 102-04. Trial counsel further cross-examined Detective Neitz regarding the victim's report that she heard a "karate yell" before she was attacked and whether he investigated how many people in the area attended karate classes. ***Id.*** at 104-05. Trial counsel also cross-examined Detective Neitz about the long, brown hair found on the victim's clothing and whether the source of the hair was from someone other than the attacker. ***Id.*** at 106-08. Trial counsel additionally cross-examined

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[9] At the conclusion of this hearing, the trial court judge recused herself; however, upon the assignment of a new trial court judge, the parties agreed that the transcript of the notes of testimony would be incorporated for review by the newly-assigned judge.

Detective Neitz as to the affidavit's accuracy of the victim's description of the shirt worn by her attacker. ***Id.*** at 108-12.

At the PCRA hearing, trial counsel indicated that his pre-trial strategy was to demonstrate that the police used misstatements, exaggerations, and omissions to secure the search warrant. N.T., PCRA hearing, 11/24/15, at 25. He testified that, since the victim never saw her attacker's face, his primary trial strategy was to attempt to have the DNA evidence excluded or, alternatively, lessen the impact of the DNA evidence. N.T., PCRA hearing, 2/17/16, 8-9. Appellant, himself, admitted during the PCRA hearing that, in litigating the suppression motion, trial counsel's strategy was "that the Commonwealth was relying on false information to support unwarranted charges." N.T., PCRA hearing, 11/24/15, at 32.

Based on the aforementioned, we initially note that, with regard to many of the specific statements of alleged misrepresentation set forth by Appellant, trial counsel, in fact, challenged the accuracy of these statements during the litigation of Appellant's suppression motion. N.T., suppression hearing, 1/31/2000, at 15 (trial counsel argued the affidavit of probable cause "does not accurately depict what was told to Officer Neitz" by the victim); ***Id.*** (trial counsel argued the affidavit of probable cause improperly indicates the police sketch resembles Appellant). Trial counsel noted as much during the PCRA hearing. ***See*** N.T., PCRA hearing, 11/24/15, at 57-59 (trial counsel noted that he briefed and addressed at the suppression hearing the fact the affidavit

App 60

of probable cause inaccurately suggested that only long, brown hair was found on the victim's clothing); ***Id.*** at 69, 93 (trial counsel testified that he briefed and addressed at the suppression hearing the fact Ms. Lyman is not credible). Thus, there is no merit to Appellant's claim that trial counsel failed to challenge the accuracy of these statements contained in the affidavit of probable cause.

Moreover, as to the remaining statements, trial counsel set forth a reasonable, strategic basis for not challenging the specific statements. ***Id.*** at 43-52 (trial counsel testified that he did not challenge whether the affiant, Detective Neitz, conducted a photographic line-up since, at the suppression hearing, Detective Neitz admitted that he did not conduct such a line-up); ***Id.*** at 60-65 (trial counsel testified that he did not challenge whether Appellant had a Pizza Hut shirt in his possession, despite the fact he previously resigned from his employment, since witnesses informed trial counsel Appellant may have stolen such a shirt). Accordingly, we agree with the PCRA court that Appellant is not entitled to relief on his ineffective assistance of counsel claim. ***See Benner, supra.***

For all of the foregoing reasons, we affirm.

Affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/12/2017

App 61

Filed 02/23/2018

IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 220 MDA 2017
v.	:	
GERALD L. FUNK	:	
Appellant	:	

ORDER

IT IS HEREBY ORDERED:

THAT the application filed December 29, 2017, requesting reargument of the decision dated December 12, 2017, is DENIED.

PER CURIAM

APPENDIX H
App 62

DA

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	OF THE 17TH JUDICIAL DISTRICT
	:	OF PENNSYLVANIA
vs.	:	UNION COUNTY BRANCH
	:	
	:	CRIMINAL DIVISION
GERALD L. FUNK, Defendant	:	NO. CP-60-CR-0000175-1999

OPINION

HUDOCK, P.J. – December 30, 2016

A. HISTORY

The procedural history of this case from the original incident on September 11, 1998 to this Opinion is long and torturous, to say the least. The Commonwealth in its Brief in Opposition to the defendant's Second Post Conviction Relief Act Petition has set forth an accurate summary of the background of this case.

The court notes that the Superior Court's denial of Mr. Funk's direct appeal is set forth at 2002 Pa. Super. 1652, 803 A. 2d 791 (2002). The Supreme Court's denial of Funk's Petition for Allowance of Appeal is set forth at 573 Pa. 688, 825 A. 2d 637 (2003). The Superior Court's grant of Mr. Funk's appeal following his resentencing in 2012 is set forth at 854 MDA 2013.

APPENDIX I App 63

In his Second Amended PCRA Petition Mr. Funk raised numerous allegations of ineffective assistance of counsel related to trial counsel's performance. Section 9543(a) of the Post-Conviction Relief Act ("Act") provides in pertinent part:

> To be eligible for relief...the petitioner must plead and prove by a preponderance of the evidence all of the following: (1) that the petitioner has been convicted of a crime under the laws of this Commonwealth and is currently serving a sentence of imprisonment...(2) that the conviction resulted from...[i]neffective 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, and (3) that the allegation of error has not been previously litigated or waived.

A PCRA defendant must demonstrate that trial counsel's representation was so deficient such that it undermined the truth-determining process rendering unreliable the adjudication of the Defendant's guilt.

Insofar as the Defendant is alleging ineffective assistance of trial counsel, he must rebut the presumption of professional competence and in doing so must demonstrate: 1) that the claim is of arguable merit; 2) that counsel had no reasonable basis for her action or inaction; and 3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. *Commonwealth v. Marinelli*, 810 A.2d 1257, 1267 (Pa. 2002). A failure to satisfy any prong of this test will require rejection of the claim. *Commonwealth v. Gibble*, 863 A.2d 455, 460 (Pa. 2004). If it is clear that a defendant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on this basis alone. *Id.*, citing *Commonwealth v. Albrecht*. 720 A.2d 693. 701 (Pa. 1998).

App 64

B. DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

In his post-sentence Motion and on direct appeal to the Superior Court, Mr. Funk raised the issue of sufficiency of the evidence regarding his convictions for aggravated assault and robbery. He has raised the same issue in his Second Amended PCRA Petition.

In order to be eligible for relief, in addition to proving that counsel was ineffective, the record must establish that the issue has not been previously litigated or waived. 42 Pa.C.S.§9543(a)(3). An issue has been previously litigated if "the highest appellate court in which the petitioner could have had a review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S.§9544(a)(2). Although Funk raised the issue of sufficiency of the evidence for his robbery conviction on direct appeal, he did not raise the issue of the sufficiency of the evidence on his aggravated assault conviction in his post-sentence motion. Nor did he raise the issue of the sufficiency of the evidence of serious bodily injury on direct appeal. Therefore, the court concludes that this issue has not been previously litigated and this issue will be addressed on the merits.

In order to prove the offense of aggravated assault, the Commonwealth must prove that Mr. Funk "attempted to cause serious bodily injury to another or caused such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa.C.S. §2702(a) (1). Serious bodily injury is "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.§2601.

The Commonwealth in its brief in opposition to Mr. Funk's Second PCRA Petition, at pages 66-68, has set forth evidence from the trial from which the jury could have found beyond a

App 65

reasonable doubt that Mr. Funk intentionally caused serious bodily injury to his victim. This evidence included strangulation to the point of unconsciousness, which could have resulted in death; the petechial hemorrhage to the victim's face, the victim's own testimony that it took a month for her throat to return to normal. This clearly meets the definition of protracted impairment of the function of a bodily organ. Trial counsel cannot be deemed ineffective for his failure to raise this meritless claim. *Commonwealth v. Gaskins*, 1997 Pa. Super. 595, 692 A. 2d 224 (1997).

II. RULE 1100

The Commonwealth filed its complaint against Mr. Funk on August 3, 1999. Pursuant to Pa.R.Crim.P. 1100 in effect at that time the mechanical run date for Mr. Funk's trial was August 2, 2000. Trial commenced with jury selection on November 11, 2000 some one hundred days after the run date. If a defendant is deemed unavailable for trial, the time during which the defendant is unavailable is excluded from this calculation. Mr. Funk correctly points out that the mere filing of a pre-trial motion does not render him unavailable for trial. For time to be excludable from the Rule 1100 calculation, the Commonwealth must show that the delay in commencement of trial was caused by the filing of the motion and that the Commonwealth exercised due diligence in opposing or responding to the motion. Due diligence is a fact-specific concept that must be determined on a case-by-case basis. *Commonwealth v. Hill*, 558 Pa. 238, 736 A.2d 578, (Pa. 1999). Funk argues that the delays related to the filing of his Omnibus Motion, the Amended Omnibus Motion, and Motion to Compel Discovery should count against the Commonwealth.

App 66

II. KLOIBER CHARGE

Funk claims trial counsel rendered ineffective assistance at trial because he failed to request a "Kloiber" instruction. *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A.2d 820 (Pa. 1954) entitles a defendant to a cautionary instruction when either (1) a witness was in a position that prevented a clear observation of the actor; (2) a witness is equivocal in his or her identification of the assailant; or (3) the witness has failed to identify the defendant on one or more prior occasions.

The existence of any of these factors renders the witness's in-court identification of a defendant suspect and necessitates the instruction.

In this case the victim, Ms. Conrad, never identified Funk as her assailant. She did not pick him out in a photo lineup. She did not identify him in any pre-trial proceeding. She did not identify him at trial. None of the factors that warrant a cautionary instruction exist in this case.

Ms. Conrad did not have clear observation of her assailant, but she did not identify Funk as her assailant. She did not equivocate in her identification of Funk because she never testified that Funk was her assailant. She did fail to identify Funk as the assailant before trial, but again she did identify him as her assailant at trial.

In order to establish that trial counsel rendered ineffective assistance of counsel on this issue Funk must first establish that the claim has arguable merit. *Marinelli*, supra, at 1267. This he has failed to do.

Funk's reliance on *Commonwealth v. Mouzon*, 456 Pa. 230, 318 A. 2d 703(Pa. 1974), *Commonwealth v. Simmons*, 436 Pa. Super. 203, 647 A. 2d 568 (Pa. Super. 1994), and *Commonwealth v. McKnight*, 307 Pa. Super. 213, 453 A. 2d 1, (Pa. Super. 1982) is misplaced. In

all three cases a witness or witnesses testified at trial concerning the identity of the defendant in one of the three circumstances in *Kloiber*, supra, none of which exist in this case.

For these reasons Funk's claim that the failure to request the "Kloiber" instruction constitutes ineffective assistance of counsel lacks any arguable merit.

III. CLOSING ARGUMENTS

Mr. Funk claims that trial counsel rendered ineffective assistance because he failed to object to certain remarks made by the District Attorney in his summation.

The standards used to determine whether comments in a closing argument are objectionable are set forth in *Commonwealth v. Cooper*, 941 A.2d 655, 596 Pa. 119 (Pa. 2007) as follows:

A prosecutor has reasonable latitude during his closing argument to advocate his case, respond to arguments of opposing counsel, and fairly present the Commonwealth's version of the evidence to the jury. Commonwealth v. Abu Jamal, 553 Pa. 485, 720 A.2d 79, 110 (Pa. 1998). A challenged statement by a prosecutor must be evaluated in the context in which it was made. Commonwealth v. Hall, 549 Pa. 269, 701 A.2d 190, 198 (Pa. 1997). Not every intemperate or improper remark mandates the granting of a new trial. Commonwealth v. Stoltzfus, 462 Pa. 43, 337 A.2d 873 (Pa. 1975). Reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict. Commonwealth v. Cox, 556 Pa. 368, 728 A.2d 923, 931 (Pa. 1999).

Careful reading of the remarks in the context in which the District Attorney made them reveals that the comments were fair commentary on the evidence and any inferences to be drawn from that evidence which complied with the standards set forth in *Cooper*.

For these reasons Funk's claim lacks arguable merit

IV. USE OF COMPOSITE SKETCH

Mr. Funk claims that trial counsel rendered ineffective assistance because he failed to object to the Commonwealth's use of a composite sketch during the re-direct examination of the victim after defense counsel brought up the subject during cross-examination.

This court agrees with the Commonwealth's argument in its brief that the composite drawing served to refresh the victim's memory on re-direct. The District Attorney did not use the drawing for some nefarious purpose, as suggested by Mr. Funk. For this reason, Funk's claim lacks arguable merit.

V. FAILURE TO IMPEACH THE CREDIBILITY OF BETTY EPLEY

Mr. Funk claims that trial counsel rendered ineffective assistance because he failed to attack the credibility of Commonwealth witness Betty Epley. Ms. Epley was Mr. Funk's former girlfriend. The Commonwealth apparently concedes that this claim is, at least, of arguable merit. Contrary to Funk's argument, however, the Commonwealth argues that trial counsel had very good reasons not to attack her credibility. The reasoning is set forth in the Commonwealth's brief and on page 13, lines 4-25 of the transcript of February 17, 2016. This court agrees with the Commonwealth's argument and trial counsel's stated reasons for not attacking Ms. Epley's credibility. Even if Mr. Funk met his burden of proof that the failure to attack credibility had no reasonable basis, he has not shown that there is a reasonable probability that the outcome of the trial would have been different.

VI. PRE-TRIAL REPRESENTATION

Mr. Funk claims that trial counsel rendered ineffective assistance in his pre-trial handling of the case. He claims that counsel was ineffective because he failed to request appointment of an expert on the issue of coincidental DNA matches. He failed to move for the dismissal of the attempted murder charge pre-trial. He improperly handled the pre-trial motion to suppress DNA evidence.

The court finds that counsel was not ineffective is his pre-trial representation of Mr. Funk and adopts the argument of the Commonwealth set forth at Issue 7 in its brief.

VII. FAILURE TO SEQUESTER JURORS

Mr. Funk claims that trial counsel rendered ineffective assistance because he failed to request that the jury be sequestered and that he withdrew his motion for a mistrial because several jurors saw Funk in the presence of a deputy sheriff.

This court agrees with the Commonwealth's argument that the failure to request a sequestered jury lacks arguable merit. This court also agrees that, in light of Deputy Sheriff Ritter's testimony referenced in the Commonwealth's brief, trial counsel's decision to withdraw the motion for a mistrial had a reasonable basis to advance Mr. Funk's interests. Moreover, Funk has not shown that there was a reasonable probability that the outcome would have been different if counsel had not withdrawn the motion.

VIII. JURY INSTRUCTIONS

Mr. Funk claims that trial counsel rendered ineffective assistance because he failed to object to the trial court's instructions on the offenses of robbery and aggravated assault. On the surface this claim has arguable merit. There certainly would not be a valid reason for failure to object to an erroneous instruction. It is certainly arguable that there would be a reasonable probability that the outcome would be different if the court gave proper instructions. Unfortunately for Mr. Funk, reviewing the charge in its entirety, the court's instructions were proper. This court agrees with the argument of the Commonwealth in this regard. Counsel is not ineffective for failure to raise this issue.

IX. SHIRT WITNESSES

Mr. Funk claims that trial counsel rendered ineffective assistance because he failed to call certain witnesses to testify that he returned work shirts to Pizza Hut after he left employment there.

At the PCRA hearing trial counsel explained why he did not call these witnesses. This testimony is referred to in the Commonwealth's brief.

Attorney Suders' testimony establishes that he interviewed these witnesses and that he had valid reasons to not call them to testify. The prevention of testimony that Mr. Funk could have taken shirts from a shed at the Pizza Hut and that he practiced his karate moves while at work at Pizza Hut was certainly a valid reason not to call the witnesses. Funk has not shown that there was a reasonable probability that the outcome would have been different if counsel had called the witnesses.

X. PLEA BARGAINING

Mr. Funk claims that trial counsel rendered ineffective assistance because he failed to inform Funk of a proposed plea agreement that called for a minimum sentence of eight years. This court agrees that Funk's claim has arguable merit. The credible testimony offered by District Attorney Johnson and trial counsel during the PCRA hearing as referenced in the Commonwealth's brief establishes that, contrary to Funk's testimony, the proposed plea agreement was communicated to Funk, either on the morning of the commencement of trial or very close to that date, and that Funk rejected the plea agreement. Trial counsel fulfilled his duty to inform the defendant of the proposed agreement. Funk himself rejected the plea agreement and chose to take his chances at trial. Consequently, Mr. Funk has not met his burden of proof on this issue.

App 71

C. CONCLUSION

For the reasons stated, we conclude that the Defendant's Second Petition for Post-Conviction Relief does not raise any meritorious issues and will issue an Order of dismissal.

BY THE COURT:

Michael T. Hudock

HUDOCK, P.J.

c: D. Peter Johnson, Esquire, District Attorney
Defendant
Jenna Neidig, Esquire
The Honorable Louise O. Knight, Senior Judge

e-copy: The Honorable Michael H. Sholley, Judge

PROTHONOTARY-CLERK OF COURTS,
UNION COUNTY, PA
CERTIFIED FROM THE RECORD ON THIS DATE

DEC 30 2015

BY: Linda Richards Elisha L. Smith, Deputy

App 72

DA

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF THE 17TH JUDICIAL DISTRICT
: OF PENNSYLVANIA
vs. : UNION COUNTY BRANCH
:
GERALD L. FUNK, : CRIMINAL DIVISION
Defendant : NO. CP-60-CR-0000175-1999

SUPPLEMENTAL OPINION

HUDOCK, P.J. – January 17, 2017[1]

RULE 1100

The Commonwealth filed its complaint against Mr. Funk on August 3, 1999. Pursuant to Pa.R.Crim.P. 1100 in effect at that time the mechanical run date for Mr. Funk's trial was August 2, 2000. Trial commenced with jury selection on November 11, 2000, some one hundred (100) days after the run date. Funk argues that none of the pre-trial delay is attributable to him. The Commonwealth argues to the contrary.

Review of the pre-trial history of this case reveals that Funk filed numerous pre-trial motions. Mr. Funk correctly points out that the mere filing of a pre-trial motion does not render him unavailable for trial. If, however, Funk is deemed unavailable for trial, the time during which he was unavailable is excluded from this calculation. For time to be excludable from the Rule 1100 calculation, the Commonwealth must show that the delay in commencement of trial was caused by the filing of the motion and that the Commonwealth exercised due diligence in opposing or responding to the motion. Due diligence is a fact-specific concept that must be determined on a case-by-case basis. *Commonwealth v. Hill*, 558 Pa. 238, 736 A.2d 578, (Pa. 1999). Funk argues that the delays related to the filing of his Omnibus Motion, the Amended

[1] The Court submits this Supplemental Opinion because part of the Opinion on the Rule 1100 issue was accidentally omitted.

App 73

Omnibus Motion, and Motion to Compel Discovery should count against the Commonwealth. This court disagrees.

Initially, Funk's attorney requested and received a continuance of the preliminary hearing from August 12, 1999 to September 2, 1999 for an excludable period of twenty-one (21) days. The court also counts as excludable the nine day time during which Funk was without counsel from April 24, 2000 to May 3, 2000 when trial counsel entered his appearance of record. On May 9, 2000 trial counsel filed a motion for continuance to file an amended omnibus motion. Counsel filed this motion on May 24, 2000.

Trial counsel's issues in the amended motion included various issues related to DNA evidence, which apparently was the Commonwealth's strongest evidence. These issues included the request to hire a DNA expert, a Motion to Suppress evidence, and a motion to compel photos of DNA exhibits. The trial court granted this motion on July 26, 2000. The court finds that the sixty-three (63) day period from the filing of the Amended Omnibus Motion to its decision is excludable as the issues rendered Funk unavailable for trial. The court granted Funk's motion to hire a DNA expert in its July 26, 2000 order on Funk's Amended Omnibus Motion. Jury selection in Funk's trial was scheduled for August 15, 2000. Funk's trial counsel filed a motion for continuance on August 2, 2000. The trial court granted this motion. Jury selection took place on November 14, 2000. Testimony began on December 13, 2000. The time of this continuance is also excluded.

The excludable time in this case totals, at least, one hundred ninety-seven (197) days, including the time when the defendant did not have counsel, the delay related to the Amended Omnibus Motion that rendered Funk unavailable for trial, and the delay in trial from the August 2, 2000 motion to the commencement of jury selection on November 14, 2000.

Trial counsel did not render ineffective assistance when he failed to raise this issue.

BY THE COURT:

Michael T. Hudock

HUDOCK, P.J.

c: D. Peter Johnson, Esquire, District Attorney
Defendant
Jenna Neidig, Esquire
The Honorable Louise O. Knight, Senior Judge

e-copy: The Honorable Michael H. Sholley, Judge

PROTHONOTARY-CLERK OF COURTS,
UNION COUNTY, PA
CERTIFIED FROM THE RECORD ON THIS DATE

JAN 18 2017

BY: Linda Richards
Harriet Zeyn, Deputy

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	OF THE 17TH JUDICIAL DISTRICT
	:	OF PENNSYLVANIA
vs.	:	UNION COUNTY BRANCH
	:	
	:	CRIMINAL DIVISION
GERALD L. FUNK, Defendant	:	NO. CP-60-CR-0000175-1999

ORDER OF DISMISSAL

AND NOW December 30, 2016, for the reasons stated in the Court's Opinion dated December 30, 2016, the Court hereby ORDERS that the Defendant's Second Petition for Post-Conviction Relief is dismissed.

BY THE COURT:

Michael F. Hudock

HUDOCK, P.J.

c: D. Peter Johnson, Esquire, District Attorney
Defendant
Jenna Neidig, Esquire
The Honorable Louise O. Knight, Senior Judge

e-copy: The Honorable Michael H. Sholley, Judge

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 57 MM 2018
Respondent	:	
v.	:	
GERALD L. FUNK,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 18th day of June, 2018, the Petition for Leave to File Petition for Allowance of Appeal *Nunc Pro Tunc* is DENIED.

A True Copy Elizabeth E. Zisk
As Of 6/18/2018

Attest: [signature]
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX J
App 77

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 57 MM 2018
v.		
GERALD L. FUNK, Petitioner		

ORDER

PER CURIAM

AND NOW, this 27th day of September, 2018, the Application for Reconsideration is DENIED.

A True Copy Elizabeth E. Zisk
As Of 09/27/2018

Attest:
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX K
App 78

PCRA TRANSCRIPT EXCERPTS

4/24/12, pp. 12-27

(D. Peter Johnson - District Attorney)

APPENDIX L

App 79

THE COURT: Sure.

MR. JOHNSON: I object to any other testimony by this witness, she's not certified on this witness list.

THE COURT: Mr. Funk?

THE DEFENDANT: I have nothing after that.

THE COURT: Okay. Thank you. Anything else you need from this witness?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Johnson?

MR. JOHNSON: No, sir.

THE COURT: Thank you, ma'am. You're free to go.

THE WITNESS: Thank you.

MR. JOHNSON: Judge, the other thing I was going to ask is in regards to Claim M, Mr. Funk has subpoenaed me, he's already done cross-examination on all the other issues. I have Mr. Crossland here to stand in while I'm being questioned. It should be brief. I would ask to be able to be called to the stand initially so that I can release Mr. Crossland.

THE COURT: Mr. Funk?

THE DEFENDANT: I've also agreed with that.

THE COURT: Okay.

* * *

D. PETER JOHNSON, called as a witness, being duly sworn, testified as follows:

THE DEFENDANT: Before we start, Your Honor, there was the -- so you're aware, you are aware of the head injury I had. As a result, I'm still on medication for nerve pain. And what this medication occasionally does is shoots out inappropriate adrenalin rushes, which would make me, you know, breathe faster and have difficulty speaking at times. Usually I just stop talking for 30 seconds, drink a little water and that's fine and -- that way, we're aware. I'm not hyperventilating, I'm not having a medical condition, I just have to stop talking and --

THE COURT: Okay.

THE DEFENDANT: That's it.

DIRECT EXAMINATION

BY THE DEFENDANT:

Q Please state your name and job.

A D. Peter Johnson, I'm the district attorney of Union County.

Q And with regard to the case we're here on today, you are the prosecuting attorney?

A Yes.

Q You were the prosecuting attorney from 1998 to the present, correct?

A Yes.

Q With regard to the plea agreement offers, do you recall what the offer you made to prior counsel, Lonnie Hill, was?

A Yes.

Q What were the terms of that offer?

A That was in January of 2000, and I offered three felony charges, rape, robbery and aggravated assault, that your minimum sentences would be limited to the standard range. You had a REFEL, that's capital R, capital E, capital F, capital E, capital L, which is a prior record score for rape and robbery that is a range of 96 to 114 months, and for the aggravated assault, it was 84 to 102 months. We agreed --

THE COURT: I'm sorry. 84 to 102 --

THE WITNESS: Was the standard range.

THE COURT: On the robbery or the agg. assault?

THE WITNESS: The rape was 96 to 114 -- or excuse me, the robbery was 84 to 102 months.

THE COURT: Okay.

THE WITNESS: We agreed that -- or offered that the consecutiveness of those three sentences would be open to the Court's discretion, but it would be agreed that whatever this sentence would be, would be consecutive to the sentence he was now serving, which was the burglary conviction. In exchange for that agreement, we, upon the event of

App 80

sentencing, nolle prossed the remaining charges, that being the attempted murder. Just for the purposes of comparison, when I was speaking to Mr. Hill, I told him that the position on the attempted murder and two of the felony one's open, he was looking at a 40- to 80-year sentence.

We had intermediate discussions about open pleas to attempted murder and one of the felonies that would put him at the 30 to 60 range and came to the bottom line that was -- that I just discussed earlier.

I'm just -- Your Honor, for the record, I was asked to review our files for any written matters regarding pretrial discussions for pleas, and I recovered three memorandums, working memorandums to my office that I'm referring to. And this was the one from Mr. Hill. I don't have a direct recollection of my -- as I sit here, of my conversation with Mr. Hill.

THE COURT: Go ahead, Mr. Funk.

BY THE DEFENDANT:

Q The three written memorandums you just mentioned, do you have a time line on those, what the dates are?

A Pretrial conference with Mr. Hill, as I said, was January 4, 2000; pretrial conference with Brian Ulmer was April 17, 2000; and then a pretrial conference with Mike Suders was July of 2000. And then ongoing discussions that I don't have memorandums on occurred. And then immediately

prior to trial, there was another lengthy set of discussions that resulted in you rejecting a plea agreement.

Q The last discussion immediately prior to trial, who were those discussions with?

A Pardon me?

Q Who were the discussions with?

A Initially, between counsel, then counsel with you, and then counsel and I approached the judge to see if he would forego his normal policy of not allowing pleas on the day of trial, which he indicated he would. There was then a meeting with Mr. Suders, myself, Bill Neitz and you in my office, where you were offered a plea to the rape with a bottom of the standard range, I believe, which was 96 months to 20 years. You, in that meeting, leaned forward and said I'm going to trial and that was the end of it, and we proceeded to trial.

Q With regard to the meeting that you just testified to, are you sure that didn't occur during May or July of 2000?

A Yes. That was immediately prior to trial, that did happen.

Q Okay. And that was for 96 months?

A It was an offer 96 months to 20 years, 8 years to 20 years on the rape.

Q All right.

A And dismiss the remaining charges. My desire was to not have to have the victim testify.

Q During the course of this case, on April 24, 2000, was the Commonwealth disqualified from prosecuting?

A I'm going to -- well --

MR. CROSSLAND: I think there needs to be more of a foundation for that question, Judge. Obviously, it's clear from the record, the Commonwealth wasn't disqualified because Mr. Johnson prosecuted the case.

THE COURT: Is there a claim in your second amended pro se motion or the additional claim in which you raise this issue?

THE DEFENDANT: Yeah, Claim G. --

THE WITNESS: That was --

THE COURT: Hold on, Mr. Johnson. You're a witness.

MR. CROSSLAND: Judge, I believe this issue was probably covered previously at an earlier PCRA hearing and it's -- I wasn't present, but Mr. Johnson, in his opening comments, pointed out that he's been cross-examined by Mr. Funk on a variety of other issues. I don't have the -- let me look here. There's a --

THE COURT: Let me get the transcript. Excuse me.

MR. CROSSLAND: Sure.

(Whereupon, a recess was taken from 9:37 a.m.

until 9:43 a.m.)

AFTER RECESS

THE COURT: Mr. Funk, I understand you've come to an agreement with the Commonwealth regarding the question that you asked.

THE DEFENDANT: That is correct.

THE COURT: What is the agreement?

THE DEFENDANT: The agreement is that on April 24th, 2000, the Court entered an order disqualifying D. Peter Johnson and the office of the district attorney, and on July 26th, 2000, that ordered was rescinded.

THE COURT: Again, is that listed in your certification as to what the witness is going to testify to?

THE DEFENDANT: Well, that was with the new claim. This all pertains to the plea agreement offered. It's going to be very limited to what we just agreed.

MR. CROSSLAND: Judge, if I may, when we broke and Your Honor left the courtroom, Mr. Funk's -- my understanding is he was simply using this prior April 24th order as a frame of reference from a time standpoint to ask Mr. Johnson about other plea discussions. So he wasn't -- my understanding is he's not intending to go into that order and what that order meant and how it came about, just to pinpoint a time frame for purposes of the plea allegations he's made in this petition. So on that basis, the Commonwealth agrees he can

refer to that order for that limited purpose.

THE COURT: Okay. Thank you. Go ahead, Mr. Funk.

BY THE DEFENDANT:

Q Okay. During that time frame between April 24, 2000, and July 26, 2000, was there any discussion with me personally about a plea offer, that you recall?

A No.

THE DEFENDANT: Nothing further.

THE COURT: Mr. Crossland?

CROSS-EXAMINATION

BY MR. CROSSLAND:

Q The -- just so I'm clear, Mr. Johnson, there were three -- you referred to memorandum that detailed three different plea discussions; is that correct?

A Yes.

Q And the first one was in January of 2000 with Mr. Hill?

A Yes.

Q And was that a discussion -- the plea agreement that was discussed with Mr. Hill, was that just between you and Mr. Hill?

A Yes -- well, it was a pretrial conference between Mr. Hill and I.

Q Okay. And I believe you testified the next discussion was April 17th, 2000?

A Yeah, that was with Brian Ulmer, and we discussed the fact that Judge Woelfel was --

THE COURT: Hold on. Let me interrupt. The question was, the next discussion was with Mr. Ulmer, so let's leave it at that. He didn't ask you about the substance of the discussion.

THE WITNESS: April 17th of 2000 with Brian Ulmer.

BY MR. CROSSLAND:

Q Go ahead. What was that discussion about?

A We had a discussion about the plea agreement that I had previously offered and that remained on the table. I indicated that since Judge Woelfel was conducting this case in contrast to Judge Knight, who was conducting the burglary case, that the basic policy was there had to be a plea before actual jury selection or the plea had to be open.

Mr. Ulmer indicated to me that Mr. Funk was apparently aware of this, that was the important part to me, so he didn't think that there was something open like that. And that's when we were -- that's when I believe Mr. Funk said that he would be filing a PCRA against the public defender's office in regards to the burglary case and that that would throw that trial into a tailspin if that happened.

Q So your last comment about Mr. Funk making that statement, does that mean from your recollection, he was present?

A No, he wasn't. That was-- again, a pretrial conference with counsel was scheduled on a particular date, and since Mr. Ulmer was now on the case, that was who I sent the notice to, and he came and discussed it with a whole list of other cases.

THE COURT: Let me interrupt a minute. So at some point during your discussions with Mr. Ulmer, I believe it was on April 17th, regarding this case --

THE WITNESS: Yes

THE COURT: -- Mr. Ulmer told you that they -- that given -- that the public defender's office had represented Mr. Funk in a burglary case and that Mr. Funk had already informed Mr. Ulmer that -- or the PD's office that he intended to file a PCRA against the PD's office?

THE WITNESS: I have that he -- that Mr. Funk may be filing a PCRA.

THE COURT: Okay. But Mr. Ulmer told you that?

THE WITNESS: That was discussed between us. I don't know if I have my own recollection of that, but --

THE COURT: Okay.

BY MR. CROSSLAND:

Q Then just so I'm clear that -- and I want to make sure the record is clear -- there was a third plea discussion you referred to in your direct examination and that was a discussion with Mr. Suders; is that correct?

A Correct.

Q And what was the date that you -- or did you give a date? I have July of 2000 in my notes.

A It's July 6, 2000, is what I have on my memo.

Q Okay. And what was the -- was that a discussion, again, just between you and Mr. Suders?

A Yes.

Q And what was discussed in that meeting?

A That our bottom line proposal to Mr. Funk was that he plead guilty to the rape and the standard range of sentencing under the prior record score of REFEL, he would be required to withdraw his PCRA in the burglary case, and we discussed if he wasn't willing to do that, to make sure that we got special dates from Judge Woelfel for the trial because it was going to be a longer trial than most of our trials were.

Q Okay. And were you --

THE COURT: Let me interrupt a minute. So it was -- on the rape -- the plea would be on the rape, bottom of the standard range with a REFEL prior records score?

THE WITNESS: Yes, on July 6th, 2000, that was the discussion with Mr. Suders.

THE COURT: Go ahead.

BY MR. CROSSLAND:

Q Can you characterize, then, had the plea offer

improved, would you say then, a little bit from the first January discussion with Mr. Hill?

A It improved greatly. It went from three felony charges in the standard range to one felony charge.

Q And do you have any doubt in your mind as you testify here today about the meeting you had with Mr. Suders that he understood -- he, meaning Mr. Suders, understood what you were offering to -- for his client?

A I'm sure of that because we ended up at the moment of trial going through that same thing and putting it to Mr. Funk face-to-face between myself -- with Bill Neitz there and Mr. Suders, having gone into chambers and asked the judge if he would forego the policy that he had because I just -- I didn't want to put the victim through having to testify.

THE COURT: Let me interrupt. For the record, so that Superior Court sees it from me, at the time, I had a policy that any -- that pleas had to be entered before jury selection, negotiated plea agreements, and that after jury selection, any pleas had to be open pleas to all counts. The reasoning at the time was that we were having -- picking too many juries in too many cases only to have them crash at the last moment by the entry of -- or the entry of a plea. It was inconveniencing witnesses, in my opinion, inconveniencing counsel; although, counsel often disagreed with me on that, certainly inconveniencing jurors who had rearranged their

lives to be present, and that was the policy that I had at the time. Go ahead, Mr. Crossland.

MR. CROSSLAND: Thank you, Your Honor.

BY MR. CROSSLAND:

Q So going back to what you just said, Mr. Johnson, about you and Mr. Suders went to Judge Woelfel, just the two of you in chambers, to get, essentially, approval from the judge to see if he would waive the policy that the judge just stated on the record; is that correct?

A That's correct. And that was in December of 2000. The date -- the trial is on the first volume of the transcript, the trial transcript, I just can't remember the specific date right now, but it was December of 2000.

Q Of?

A Of 2000. This conversation with Judge Woelfel.

Q Gotcha. Okay. And do you remember --

A He told us that he would waive the policy and that's when we had our discussion in my office with Mr. Funk and Mr. Suders and Chief Neitz.

Q So the people who were present after you had the information from Judge Woelfel that he would entertain a plea agreement, then you went to your office and people present were you, Chief Bill Neitz, the Defendant, Mr. Funk, and his attorney, Mr. Suders; is that correct?

A Yes.

Q And you related the agreement to Mr. Suders at that -- or to Mr. Funk at that time -- or the offer, I should say?

A Yeah, my recollection is that I actually was showing the standard range chart from the sentencing guidelines and how beneficial this plea would be to Mr. Funk in regards to the types of sentences that he could get with consecutive sentencing. And there was not a lot from Mr. Funk other than at the end of that, he just -- I just remember him leaning forward and saying we're going to trial or words to that effect.

Q Did Mr. Funk and Mr. Suders during that meeting, did they break and want to talk privately, do you have any -- or was it just one intact meeting and not separated by any conversations they had privately?

A My recollection is that there was no break from the meeting for those discussions.

THE COURT: You said no break?

THE WITNESS: No break.

BY MR. CROSSLAND:

Q Do you have any reason to believe here today that Mr. Funk did not understand what you -- the terms of the plea agreement you were offering to him in that meeting?

A No, none at all. Mr. Funk -- my impression was that Mr. Funk was running his -- the strategy in his trial.

He was, as he's displayed here, intelligent and articulate and clearly knew what was going on.

MR. CROSSLAND: Okay. No further questions, Your Honor.

THE COURT: Redirect?

THE DEFENDANT: Yeah, briefly. First, I would like to ask to see the three documents that you testified from.

REDIRECT EXAMINATION

BY THE DEFENDANT:

Q Mr. Johnson, the discussion you had in chambers with Judge Woelfel and Mr. Suders, was I present?

A I don't believe so. And I say that with some qualification because I -- I just don't know.

Q To your recollection, did the Court state it would accept the plea offer for 96 months?

A My recollection is that the fact that the judge would allow a plea agreement prior to the trial was an indication that it would accept the plea agreement.

Q Prior to trial?

A That the judge would allow -- the fact that the judge was allowing us to put the plea agreement prior to trial was an indication that he would ultimately accept it.

Q Okay. And the pretrial conference that you had with prior counsel, Lonnie Hill, on January 4, 1999, was I present?

MR. CROSSLAND: Excuse me, I think that was January 4, 2000.

THE WITNESS: That's correct.

THE DEFENDANT: Oh, yeah.

THE WITNESS: No.

THE DEFENDANT: Okay.

BY THE DEFENDANT:

Q The discussion with Brian Ulmer on April 17th, 2000, was I present?

A No.

Q And the pretrial conference on July 6, 2000, with Mr. Suders, was I present?

A No.

Q Briefly, with the discussion that you did have that I was present with, with Officer Neitz and Mr. Suders, was I brought over from the -- your recollection, was I brought over from the Snyder County Jail to have that discussion?

A You were here for trial. We were starting our trial that day.

Q Where is here?

A In Union County court.

THE DEFENDANT: Okay. Nothing further.

MR. CROSSLAND: No further questions, Your Honor.

THE COURT: Thank you, Mr. Johnson.

THE WITNESS: Thank you.

PCRA TRANSCRIPT EXCERPTS

11/23/15, pp. 50-76

(Gerald Funk - Appellant Defendant)

physically obtained the documents that could verify what I was trying to say. And my letter to Mr. Suders was, I wanted you to file -- I didn't know what to do at the time -- I wanted you to file something with the Superior Court asking for a remand for a hearing on after-discovered evidence.

Q And that --

MR. JOHNSON: Do we have that letter in our exhibits here that you --

THE DEFENDANT: I don't believe so. I have to look. I don't know if it's --

THE COURT: The only letter in today's exhibits is the November 17, 2000.

MR. JOHNSON: I object to the verbal testimony about the contents of the letter. The letter itself should be the --

THE DEFENDANT: Well, my response would be I am the author with firsthand knowledge of it.

THE COURT: We agree with the Commonwealth. We'll sustain that objection.

THE DEFENDANT: May I go on?

THE COURT: Please.

A All right. At the time of trial several things occurred at trial from December 13 through December 18. December 13, 2000, like the hearings here, I usually get into court I'm going to say two minutes before the Judge enters. On December 13, 2000, I entered the Court on the first day of

trial and asked Mr. Suders why Judge Woelfel denied the Rule 1100 motion; and it was unknown whether he would grant that motion in a case like this, so Mr. Suders didn't file it.

And, again, I have a letter of November 17, 2000, Defendant Exhibit 5, today's date, in which I instructed him to file the Rule 1100 and that I was giving him the Rule 1100 motion and brief. In this case, the Rule 1100 motion is Defendant's Exhibit 3, today's date; the brief is Defendant Exhibit 4, and they were typed-out motions.

MR. JOHNSON: Judge, I -- way back in the day in the proceedings of this, I objected to the Rule 1100 issue as not cognizable in a PCRA proceeding. I want to make sure that that's still on the record and still -- I don't want to be waiving any objections to that.

THE COURT: When did you raise it? Was it at the last hearing in October of 2014 or --

MR. JOHNSON: I filed an answer to one of his amended motions and then did a Rule 1100 analysis. It's an answer -- Commonwealth's Answer to Motion for Post Conviction Collateral Relief, January 7, 2004, and --

THE COURT: Judge Woelfel did not rule on that?

MR. JOHNSON: No. And he --

THE COURT: Well --

MR. JOHNSON: Well, I just wanted to make sure that

as waiving that legal issue that it's not cognizable under the PCRA.

THE COURT: That will be dealt with at the appropriate time.

Go ahead, Mr. Funk.

A Thank you. Again, the letter dated November 17, 2000, I'm going to look, the last paragraph, the very bottom of the page, I write that I'm giving him the Rule 1100 motion. The one that I had -- I did mail on that date, which is a Friday, was a handwritten motion and brief. I was waiting on the typed version to be sent to me because I didn't have access to a computer at the time. The copy I have here today is the typed version of the motion and brief that I obtained from Mr. Suders' case file with -- along with this letter and the envelope. Again, they weren't filed.

Also, on December 13th immediately following that when he said that Rule 1100 motion was not filed, I immediately asked what happened to the 8 to 20 plea offer by the Commonwealth, if we could take it. Mr. Suders told me that I can take a plea agreement right now, but it has to be an open plea to all counts, sentencing up to the Judge. And that was Judge Woelfel's personal policy at the time.

I rejected that based upon the amount of time I would be facing would be a lot more than 8 to 20 and for the same reasons I refused prior pleas. An open plea to all counts

App 85

would include attempt to commit second and third degree murder, and there are no such offenses in Pennsylvania; and it would include aggravated assault with serious bodily injury, robbery with serious bodily injury based upon the allegation of a crushed larynx. The victim didn't sustain a crushed larynx, so I refused to plead to those charges.

That was the same basic situation I had starting with 2000 with the original plea offer. Mr. Hill, again, we had a contingency, if we can't get the evidence suppressed, we're going to plead. That was the idea. When evidence wasn't suppressed, Mr. Hill told me an offer of 40 to 80 was made and it was for one count of attempt to commit second or third degree, I'm not sure which, it was aggravated assault, robbery, serious bodily injury, rape. I rejected it for the same reasons.

My counteroffer for Mr. Hill to make was to drop all attempted murder charges, all serious bodily injury charges that are based on the crushed larynx.

I can't say exact date, but I'm thinking it's the first week of February, he immediately came back and said there's an offer for 30 to 60, attempt to commit second or third degree murder, I believe it's aggravated assault, serious bodily injury, and one count of rape. I rejected it. He became contemptuous. He kept trying to get me to plead to these charges that, you know, I didn't want to deal with

because I didn't think they existed and no such injury. Made it contemptuous to the point where Brian Ulmer began representing me.

Brian Ulmer spoke to me in April -- well, we spoke several times; but in April 2000, on April 24, 2000, a new omnibus hearing was ordered. Either just prior to that date or on that date, aside from our other discussions, he said there's an offer of 30 to 60 years, same terms. I believe it was the same offer that was made to Mr. Hill. I don't recall. I rejected it for the same reasons. No such offense, no such injury; and it just wasn't going to happen with those offenses.

And, again, on April 24, 2000, he was removed for conflict of interest.

On that date, the Union County District Attorney's office was also disqualified from pursuing this matter. That disqualification order remained in effect from April 24, 2000, through July 26, 2000.

My case was referred to the Attorney General. On or about May 7 or 8, 2000, the Attorney General sent letters to the Judge and us saying that he's -- or whoever in that office is declining to prosecute me.

A new hearing was ordered on July 26, 2000. Union County brought me from the state penitentiary to Snyder County in preparation for that hearing. Back then they used to bring you down three to four weeks early because they physically

drove to the prison to pick you up back then.

At Snyder County Prison I was called out and said I had an attorney phone call. Mr. Suders was on the phone. He asked me if I'm interested in a plea. I said, yes. In that case, he said, I'll have you transported to the District Attorney's office, which he did.

And I believe it was -- it was before the hearing so I'm believing it was July 6, 2000. At that meeting it was me, Mr. Suders, District Attorney Johnson, Detective William Neitz. Mr. Johnson did the talking. He said there was an offer of 8 to 20 years, one count of rape, all remaining counts withdrawn; and then he had a, you know, short prosecution monologue that I didn't really pay attention to.

At the end he asked Mr. Suders, Anything you want to discuss with Mr. Funk or talk to him about. He said, No.

So I looked at him, you know, slightly baffled. The posture of the case to me was baffling that when the plea agreement was offered, there was a disqualification order, so I didn't know if they could do that, if I could take the plea. Mr. Suders, you know, he didn't talk to me. We didn't discuss anything.

So I leaned forward, and I remember looking at Mr. Johnson, and said, I guess we're going to trial. I didn't know what to make of the situation. At that point -- that was the priors.

The trial -- December 13, 2000, went quick. I asked about the Rule 1100, got the response; asked about the plea, was told I could make an open plea to all counts; and then Judge Woelfel walked in.

Judge Woelfel informed us that a woman on the jury had contacted the Court and basically stated that someone approached her while she was attending church services, and at church that person indicated she didn't have to hear the evidence in this case to convict me. So that's obviously a problem.

I thought the jury should be sequestered and possibly a mistrial, and that was compounded in my mind by Judge Woelfel's instructions to the jury. Prior to trial, Judge Woelfel told the entire jury panel to listen to the news. And they were instructed to listen to the news for weather cancellations because it was winter and if the Lewisburg School was canceled, court was canceled; if not, testimony starts at 9. And 9:00 every day we started.

To me red flashing lights, screaming alarm bells because this was a highly mediacized case. There was extensive television, newspaper, and radio reports; and reporters were in the courtroom. Then we had the jury encounter, I mean the jury disqualification issue. That woman was, you know, quickly disqualified by Judge Woelfel for the church service thing.

At the end of the week, Friday, December 15, 2000, we

were exiting the courtroom through the back as we usually do. It was me, two deputy sheriffs. The normal procedure is we walk to the elevator. Deputy No. 1 will walk over, push the elevator button, stand there and make sure the elevator's clear, nobody's in it, while Deputy 2 and I will stand off to the side of the elevator so -- you know, obvious security reasons. And I'm handcuffed in my court clothes with the second deputy holding my arm as they escort you, and the jury started walking in just adjacent to us where the hallway door is out here which is, I'm guessing, 15 feet, 20 feet from the elevator. So this whole thing took less than I'd say two minutes.

We're standing at the elevator, the door opens, there's a guy who walks through. He's looking to a guy -- he's walking through slow and looking to a guy behind him talking. I didn't really recognize him at the time, but the second juror, the male, I recognized immediately. And the deputy who I now recall is actually the current Sheriff Ritter, he looked at me and the other deputy, and we all looked at the same time to say, Is that the jury? He said, Is that the jury? I said, Yes. And he said, Okay. He turned around, put his hands up like this towards the jury and said, No, no, you know, you can't come in here, can't get near him. Then he walked over and talked to him.

At that point I had brief eye contact with the first

juror. The second juror kept looking, you know, between the deputy and me. I'm handcuffed in the front. And as he was talking, a woman popped her head around the corner, and it was a juror. She didn't say nothing, but I looked at her. Their eyes got a little weird and I realized, oh, crap, they're looking at the handcuffs, so I knew we had a problem.

Ernie, the Sheriff that's here now, dealt with it, told them to go back in there, wait till we're gone; and then we came in.

December 18, 2000, Monday, I walked in, again, we only get a minute. I said, Mr. Suders, We got a problem. There was extensive media coverage, front page news articles showing me in my court clothes, handcuffs with, you know, multiple sheriffs holding me. I have those photographs here. And he said he's aware of the news media.

I said, Okay, well, we encountered the jury in the hallway. I was in handcuffs. The first three people, I believe, saw those handcuffs.

Mr. Suders said, Okay, you know, if you don't mind, his statement was something like, There goes the chance for a fair trial. I'm moving for a mistrial.

Judge Woelfel walked in. Judge Woelfel then announced that Deputy Ritter contacted the Court or court administrator and said that we were in the hallway and encountered the jury. I was handcuffed. I don't recall his --

he didn't testify, but that was Judge Woelfel saying this. And Mr. Suders moved for a mistrial.

Judge Woelfel said that we had to get into some fact finding proceedings. And he withdrew the mistrial motion. I mean I wanted to have the two deputies questioned and testify about the circumstances because I didn't get to explain it to anybody, including Suders. I wanted to testify and then move for a mistrial or have the three jurors be identified, question them privately about what happened to build a record; and more important to me, I wanted to know did they -- any of the three tell anybody else that I was in handcuffs because I believed that may occur. It's human nature. Like, why are we being pushed back in here? You know, dude was out there in handcuffs. I wanted to know if that occurred because I believe it was prejudicial; but there was no testimony of any kind or any questioning, so that would be in the record.

And I mean with that said, I don't believe I have anything else to add at this point.

THE COURT: Okay. Cross.

THE DEFENDANT: If we may, can I have a little bit of water?

MR. RYMSZA: Sure.

THE DEFENDANT: Thank you.

MR. RYMSZA: You bet.

THE COURT: Attorney Johnson.

MR. JOHNSON: Yes, sir.

CROSS EXAMINATION

BY MR. JOHNSON:

Q That's all the testimony that you're going to provide?

A On Direct, yes.

Q In regards to your exhibit of November 17, 2000 letter where you have the original letter attached to an envelope, where did you get that from?

A I obtained that from Mr. Suders' case file. I received an order from Judge Woelfel directing him to send me the file. It was in there along with a lot of this other stuff.

Q When did you get that file?

A I would have to look. Whatever the date of the order was is on record commanding him to produce that file, and he very rapidly provided it.

Q Do you remember generally when it was?

A I cannot say.

Q What number is this letter in your Defendant's exhibits that you marked?

THE COURT: It's D-5 for today.

BY THE COURT:

Q Mr. Funk, would you have obtained it before the -- your first PCRA was filed?

A I filed the original PCRA petition, and then I filed a request for the order to produce the case file and transcripts from Mr. Suders.

Q So it would have been after the filing of the original PCRA --

A Right, and before the amendments.

Q -- in 2006?

A I think the original --

Q Before the second amended -- oh, there were some other amendments before the 2006 --

A Yes, because at one point I was represented by Mr. Rymsza. There was an amended one.

THE COURT: Gotcha.

BY MR. JOHNSON:

Q I'm handing you the original of Defendant's No. 5 dated today and ask you to take a look at that.

A Any place specific?

Q Pardon me?

A Any place specific?

Q Well, that's the letter that you have been referring to, right?

A Correct.

Q With the Rule 1100 --

A Correct.

Q -- information?

A It's one of them, correct.

Q Are there other letters?

A I don't have anything else.

Q Okay.

A I had the Department of Corrections -- all -- almost all that wasn't attached already, legal correspondence between all counsel was in that additional file that SCI Somerset lost.

Q Okay.

A So a lot of reports, letters, some of my exhibits, the personal notes, they're all missing.

Q Okay.

A And that's that one that's subject to the lawsuit there.

Q Is it fair to say that you had Mr. Suders' original file from whenever you received it --

A At one point I did.

Q -- up until, whatever's left of it, to today?

A Correct.

Q And this particular letter, the original of Defendant's No. 5 was from that file; is that correct?

A Correct.

Q Okay. So there is highlighting on it in orange and yellow. Who made those marks?

A Those are mine.

Q And there's Wite-Out at the top left-hand corner in a

couple of squares. What is that?

A Correct. That would be other -- if you look through the back, you can see it. It says Exhibit 61. It's in reverse. That was my exhibit label at the time for these hearings; and for -- to photocopy it for you guys, I blacked all that out so it wouldn't be all messy, but you can look through the back and see what's actually written there.

Q Would you read the last sentence that's highlighted in yellow and complemented in orange also?

A "I have a motion to dismiss, Rule 1100, I will send or give to you; however, the supporting brief is not typed out. It's handwritten, but it's all up-to-date and very supportive of the motion."

Q Would you agree with me that it appears that that sentence continues and that there's something cut off from the bottom?

A No, there isn't. My signature's off to the left because there was no room on the bottom.

Q Oh, you're talking about this word, "Jerry"?

A Yeah, that was my signature you normally put at the bottom of the page, but there was no room left. That was the last sentence.

Q There is nothing in this sentence that directs him to file that motion, is there? Do you agree with me on that?

A That specifically says, I command you to --

Q I want you to file this.

A Well, yeah. It says, I will give it to you to file, doesn't it?

Q (Handing.)

A Well, it says, I have a motion to dismiss I will send or give to you, but the brief isn't typed out yet. Well, it says, The brief isn't typed out.

That would be -- why else would I give it to him? To file it.

Q That's what you're determining as direction to your attorney to file it?

A That was one of the letters, yeah. At that point I was here, so all I had was the handwritten copy, waiting on the typed version. So he had the original handwritten motion, and then when the -- we'll call it the clerk typed out these for me, those were provided.

Q Is it fair to say that you and Mr. Suders, like you and your other attorneys, had disagreements about the strategy in your case and what should be done and not done?

A As of the end of the July 26, 2000 hearing, absolutely.

Q Okay.

A But not as far as trial strategy. There wasn't -- I really didn't discuss that with him. That was his plan of action.

Q Okay. You have been testifying here about what you thought and what you thought should be done. You're saying that you did not discuss that with your attorney as far as trial strategy?

A No. I told him what I thought would be done, provided whatever exhibits, witnesses I could, you know, information for subpoenas; but him telling me what his strategy was going to be on December 13th, no. I was just along for the ride. I assumed he was going to be doing these things and doing -- you know, it's his job.

Q Okay. In terms of testifying at trial, whose decision was that?

A What do you mean?

Q You testified to a lot of different things here for yourself, direct knowledge that you have in terms of defenses; and you chose not to testify at trial.

A Oh, my -- yeah, I chose not to testify.

Q Do you agree with me that had you chosen to testify, these things would have been vetted in front of the jury?

A What things?

Q These things you testified to today about --

A I don't think they would have. I wasn't going to testify for, 1, I have that right; and, 2, I have a firm belief that any time a defendant testifies without supporting witnesses, you just slaughtered yourself.

Q Okay. And you had those -- these legal notions and this knowledge and these decisions all during the time that you were represented by all of your counsel?

A Well, I didn't have this extent of knowledge at that time. I spent 17 years studying the law to obtain where I am today. At the time, it was minimal.

Q So your testimony today is in 20/20 hindsight with the studies that you have done --

A I'm not sure I follow your -- what your question is.

Q The --

A The legal, my ability to cite case law is something I have learned over the years. Everything else that I have testified to as far as writing letters or whatever, that's what occurred back then.

Q Okay. So you had a particular strategy and attitude towards what -- how the case should be done?

A My strategy?

Q Yes.

A My strategy was --

Q I am just asking if you had one.

A -- destroy the DNA evidence or take a plea. I assumed at trial, he -- we went to trial, so I assumed he had experts to attack the DNA evidence. I didn't know until it was over when none were called. But those were my only strategies. I mean pretrial was to suppress everything.

Q So your strategy was to take a plea if the DNA was not suppressed?

A Correct, try to get a plea.

Q How many times did you have discussions with Mr. Hill regarding plea agreements?

A At least three that I personally know, that I remember.

Q And he gave you advice to the benefit and/or potential difficulties in taking a plea agreement versus a trial?

A No. Our discussion -- our plan was set. The discussion was, this is -- the Commonwealth is now offering this. And my immediate response is, I'm not taking anything with second or third degree or anything based upon that injury. That was the extent of our discussions.

It was contemptuous at that point because you weren't going to tell me to plead guilty to charges that don't exist, case law said don't exist and were vacated.

Q So you had personal knowledge about your own position in regards to these plea agreements? You didn't need your attorney's advice?

A Well, no. I needed his advice and his ability to make counteroffers with you, but I knew those charges didn't exist and we weren't doing that. You know, the remaining one count of rape and Felony 2 robbery that wasn't based on serious

injury, we could deal with that. My position was those are the only charges that should have been here or made it to trial or been part of a plea.

Q Back then that was your position?

A Oh, it's always going to be my position; but back then, yes, that was what my counteroffer was all about.

Q Okay. So you said that you made a counteroffer of what?

A Drop the attempted murder or attempt to commit second and third degree murder; drop aggravated assault, serious bodily injury; drop robbery, serious bodily injury. All remaining charges would still be in play. Well, the two remaining charges would be in play.

Q And would you have pled to those for a 20- to 40-year sentence?

A No. We didn't get that far.

Q What was your counterproposal? You said that you --

A I didn't have --

Q -- had a counterproposal.

A That was the counterproposal. The time was to be negotiated.

Q Was the counterproposal ever posited to the Commonwealth?

A I would have no idea. That's the attorneys talking, not me. I made my counteroffer, and it's their job -- just

like you didn't talk to me, you talked to Mr. Hill and Mr. Ulmer.

Q Now, you said that there was a plea negotiation prior to the first day of trial where 8 to 20 years was offered.

A In July 2000, yes.

Q And that's with Mr. Suders?

A That was with me, Mr. Suders, you, and Detective Neitz.

Q I'm just talking about who was representing you.

A Suders was representing me, yeah.

Q Mr. Ulmer had represented you prior to that also?

A Correct.

Q How much did he discuss plea agreements with you?

A Do you mean how often or just what it was?

Q How often?

A We had one brief we'll call it an aside note while we were preparing for the April 24, 2000 hearing. He said, Are you aware that there's a 30- to 60-year offer for these specific charges? And I said, Yeah. I'm not doing that, for the same reasons I rejected the prior one.

Q Okay. So your rejection of that plea agreement was with finality to your attorney, there's no reason for him to continue to give you advice on that?

A For advice.

Q Yeah.

A There's only advice if the counteroffer was accepted.

Q Okay. So you had made a decision for yourself?

A From Brian Ulmer -- well, for those specific charges, yes.

Q Did you relate a counteroffer to Brian Ulmer?

A Yeah. I said make the same offer. He was quite aware of what it was.

Q So you're saying there was an offer related by you to Brian Ulmer to plead to two felonies and accept a sentence of 20 to 40 years?

A No. The counteroffer I made was not to plead to specific offenses for time. The counteroffer was, Tell them to drop the attempt to homicide charges and the serious bodily injury charges, and then we'll negotiate a plea on what's remaining.

Q So you --

A Those two charges would be in play, but it doesn't mean I would plead to both. I might just plead to one.

Q So you weren't giving a counteroffer for disposition of the case, you were basically demanding those other charges be dismissed?

A No. That was my counteroffer for a negotiated plea. Eliminate these charges, and we'll negotiate a deal on the remaining offenses.

Q But not to plead to both?

A I don't know. We never got that far. You didn't drop the charges. You know what I mean?

Q So you had a condition of any plea agreement requiring that those other charges be dropped?

A Yes.

Q And if that wasn't going to happen, there's no reason to discuss it?

A Correct.

Q Okay. So when you had this meeting at my office regarding a plea to the rape of 8 to 20 years, and you said you leaned over to me and said, I guess we're going to trial.

A Yes.

Q Was that because we had not withdrawn the other charges?

A No. You withdrew. Your offer to me that you told me was 8 to 20 years, plead to one count of rape, all remaining offenses will be withdrawn.

Q Okay. And you have a specific memory of that sitting here today from July of what year?

A 2000.

Q Okay. You're saying --

A Absolutely.

Q Okay. Do you have a specific recollection of the same plea offer being made the day of trial?

A There was no plea offer the day of trial. We walked

in, dealt with several motions and disqualification issue and then immediately to testimony.

Q Okay. So you don't -- you're saying you don't recall what --

A I'm saying it never happened, Mr. Johnson.

Q Okay. So the testimony that I gave in regards to a plea on that very day and the basis for your amended charge, your amended count of the PCRA you think did not happen at all?

A Not on that date. We didn't even have -- the transcripts themselves will show we didn't have time for all these discussions you said occurred in the Judge's chambers, then to your office, then to negotiate.

Q So you're saying as far as your amended motion is concerned, there's no factual basis for that motion?

A I said no such thing. My claim is at the day of trial when I asked for the 8 to 20 -- first, in July 2000, Mr. Suders didn't discuss anything with me, let me in a confused state about the posture of the case and whether I could take a plea because you were disqualified.

It was my understanding from Mr. Suders -- and the case he told me is that pursuant to Commonwealth v. Stafford, when you were disqualified and the Attorney General refused to prosecute me, this case was dismissed. And he asked me, Do you want to entertain a plea if things go sour? That's what that July -- I believe it's July 6th, 2000 meeting was about. But

he didn't tell me anything, explain can I even do this at this point, so that was irrelevant.

I asked at trial because at trial you're obviously back on the case and we can see what happened; but I didn't want to go to trial. As soon as they hear evidence, that's a conviction. That's always been my position. So there was no discussion. I was never told that you guys had some kind of a meeting because I had never spoke to Judge Woelfel outside the courtroom.

Q You're saying that --

A I was never told that he would accept this deal and waive his policy of open plea to all counts at trial. I was just given that ultimatum.

Q So you're saying that it just didn't happen?

A It didn't happen on your date. What you guys did -- the meeting we had was in July of 2000 while I was at the Snyder County Jail.

Q So why did you file the motion --

A I can answer that if you want.

Q Yeah, go ahead. Why did you file the motion if you in fact believed that that never happened?

A That's not what the motion is based on. During one of our proceedings, you told me that there was a discussion between you, Suders, Judge Woelfel, and you thought at the time I may have been in chambers, at the time of trial on

December 13 that when we walked in, this discussion went on, then we went to your office and had this long discussion, came back, further discussions; and that never happened. But you told me that Judge Woelfel was going to accept the plea and waive his "open plea to all count" policy. That is the first time I ever heard that he was willing to waive that policy and accept this deal.

The fact that I was told that I have to take an open plea to all charges is the reason I rejected that on December 13th. That's the basis of ineffectiveness. Nobody told me you guys had these discussions, or alleged, and that he was going to accept it.

Q Maybe I can make -- I will try and make this simpler. In your motion you say, Mr. Suders at no time -- this is the motion filed January 3rd which was granted to amend your petition on the PCRA. It says, Mr. Suders at no time informed me -- informed the Defendant the plea offer in fact remained available nor that the Court indicated it would accept the plea agreement.

So that is an allegation from which one would infer you believed that it happened, and he just never told you about it. Now you're saying it never happened.

A No. I'm saying the conversation you claim to have had with me on December 13th never happened on December 13th.

Q Never happened?

A That was July, I'm assuming it was the 6th, July 6th, 2000. You and I didn't discuss anything at trial about a plea nor did we have time to.

Q Well, your allegation is that Mr. Suders was ineffective for failing to inform you that the offer was in fact available to the Defendant.

A Well, aside from the poorly written fashion it's in, let me make my -- tell you what I'm saying. It translates either way. My allegation is on December 13, 2000, Mr. Suders did not inform me that the 8- to 20-year offer can be accepted and that Judge Woelfel was willing to accept it. I was told it had to be an open plea to all counts per Judge Woelfel's policy.

Q Okay. So depending on how the Judge finds the testimony, that -- the testimony by myself that there was a meeting with you on December 13th, you're saying that that just never happened?

A Correct, not on that date.

Q Okay. So your allegation that this was somehow a new issue to you because you didn't remember --

A Well, I didn't say I didn't remember. I'm saying it didn't happen the way you're saying it did.

Q All right.

MR. JOHNSON: Excuse me for one second, Judge.

(Pause.)

BY MR. JOHNSON:

Q What was Mr. Suders' plan for trial for strategy?

A I don't know. I believed it was to attack the DNA evidence with expert testimony and to show that other evidence, non-DNA evidence was favorable to me.

Q So all of these allegations that you make about his ineffectiveness could be seen as Mr. Suders -- strike that -- could be seen as you disagreeing now with what Mr. Suders had as a plan of action at that time?

A None of these claims fit that description or position.

Q Okay. Well, you're saying that you wanted him to bring in these other witnesses, right, to testify about the shirt and those sorts of things, correct?

A Of course.

Q And in terms of the testimony that you were going to provide, you recall the witnesses that you brought in, some of them actually didn't support your position; is that right?

A You have to be pretty specific because no witness really refuted anything that I had. They were supporting my position.

Q Well, you're saying that you actually said to your client -- or to your attorney those are people that you want to have as witnesses and to call them in for trial, that those specific individuals --

PCRA TRANSCRIPT EXCERPTS

11/24/15, pp. 172-178

(Michael Suders - Trial Counsel)

is I subpoenaed her every single hearing we've had in this case and she showed up, and when the time came she didn't testify, without any objection.

MR. JOHNSON: Counsel [sic] means he had the opportunity to ask her this question then.

THE DEFENDANT: Well, I didn't represent myself prior to trial, Mr. Suders did.

THE COURT: We're going to sustain your objection, Attorney Johnson.

THE DEFENDANT: Next claim. Plea agreement representation, which is the final Claim M.

MR. JOHNSON: Okay.

BY THE DEFENDANT:

Q. July 26 -- no, not July 26 -- July 6, 2000, did Mr. Johnson at a pretrial conference make a plea offer?

A. Whatever the date was there was a plea offer made.

Q. And did you have the Sheriff's Department take me to the District Attorney's office to hear that plea offer on that date?

A. I don't recall the specifics of that date, but the plea offers were always communicated to you.

App 93

Q. And would you have done that in -- would that have been in July of 2000 before the --

MR. JOHNSON: I'm going to object. Asked and answered. He doesn't remember the date.

THE DEFENDANT: I'm not asking for a specific.

BY THE DEFENDANT:

Q. Was it before the July 26th, 2000 pretrial hearing?

A. The record should speak for itself on that, what the date was.

Q. Was that the eight- to 20-year offer for one count of rape, withdraw all remaining charges?

A. I remember it came down to something like that, yeah.

Q. And do you know if I rejected any prior plea offers?

A. You rejected all of the offers, eventually.

Q. On December 13th, 2000 at trial, did you tell me that Judge Woelfel has a policy that at trial all pleas are open pleas to all charges?

A. I probably told you that at some point, but I think they waived that, and that was the -- one of the reasons why the sentence of 40 to 60 --

40 to 80, whatever it was originally, was a surprise, because he agreed to just the eight years or whatever it was at trial. So he was going to waive that at that point.

Q. So if I would have taken a plea at trial, Judge Woelfel was willing to impose the eight to 20; is that what you just said?

A. Right. Yeah, he was willing to not accept an open plea.

THE DEFENDANT: I have no further questions.

THE COURT: Now, before we get started with cross, will you be finished within a half hour?

MR. JOHNSON: I seriously doubt it, Judge.

THE COURT: Then I don't know that I want to start your cross examination now and come back to it at some point in the future.

MR. JOHNSON: Could I just take a little bit of time with just this last issue while it's fresh?

THE COURT: Sure. Then we'll have some discussions about where we go from here.

MR. JOHNSON: All right.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. Mr. Suders, do you remember that it was the day trial began that I offered a plea to just the rape, eight years to 20 years, and that we went and discussed with the Judge, Judge Woelfel, whether or not he would forego his policy, and that the Judge said that he would? Do you remember that?

A. I remember it was -- it was -- there was before-the-trial negotiations, and right after that the trial. I remember going down there, yeah.

Q. And then after we did that, we brought Mr. Funk into my office with yourself, me, Detective Neitz, and offered -- I offered to him the eight to 20 years. Do you remember that's -- that we sat together in the office just before trial?

THE DEFENDANT: I'm going to object.

THE COURT: On what basis?

THE DEFENDANT: I'm going to object to the form of the question even though he can lead. I had Mr. Johnson testify to this under oath. And the way he's wording it now seems like he's

attempting to testify again and then have Mr. Suders agree to it.

Perhaps he can say, didn't we take -- you know, did we take Mr. Funk into the office, and let him testify from his own memory.

THE COURT: Well, I think that you are correct when you state that on cross Attorney Johnson may lead. Certainly this is a leading question. I see no objection with the question as posed, so we overrule the objection. You may answer the question, if you can.

THE WITNESS: I remember that there were discussions like that. I'm not sure whether that was -- was the actual day of trial. I remember the last time talking to him I think I was downstairs, I don't know.

BY MR. JOHNSON:

Q. Do you remember during the discussions Mr. Funk hearing the offer clearly and then indicated -- leaned over, that he would -- said that he would -- I guess we're going to trial or we're not going to -- I'm not going to plead; he rejected it?

A. Yeah, I believe --

Q. In this meeting.

App 94

A. To my recollection that might have been like the day before. And then the day of -- the day of trial he reoffered it, and I went down and talked to him to see if, you know, he was really going to make this mistake, basically.

Q. So you advised him about the eight to 20 offer and that it was open?

A. Right. And the reason I remember it is because I said something about nerve, are you losing your nerve.

Q. About the -- about the offer?

A. About going to trial.

Q. And what did he say about going to trial versus the offer?

A. Versus the eight years; he was rejecting the eight years. So I --

Q. Did he understand the offer, what the offer was?

A. Yes, he understood. That's -- that -- and he understood the fact of, I said, if you would be convicted, and that the only real issue is, on appeal, whether the search warrant, whether they had enough facts for the search warrant of the body search, but that that would be the only real concrete issue on appeal.

Q. So --

A. And facing all that, he's -- he didn't even -- he didn't want to take -- he was going back and forth, but, you know, most people would lose their nerve when they're headed up to the opening statements, and take the plea. He didn't --

Q. He didn't?

A. He wanted to go.

Q. Isn't it true, in fact, that Mr. Funk was, as he's demonstrated, articulate and intelligent?

A. I don't think he's articulate and I don't think he's intelligent. I think he's psychotic.

Q. Okay. Do you think he understands what he's doing?

A. I think he's operating under delusions and exaggerations. And given those delusions -- self delusions, I think he's operating rationally according to his false beliefs about himself.

Q. So he has a belief about himself that he can -- that he's right in the way that he thinks and that's what he's going to pursue, notwithstanding your advice?