UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1363

MICHAEL JAMES FRENCH,
Appellant

VS.

WARDEN, S.C.I. ROCKVIEW

(D.C. Civ./Crim. No. 3-21-cv-00097)

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

*At the time the petition for rehearing was submitted to the en banc panel, Judge McKee was an active judge of the Court. 3rd Cir. I.O.P. 9.5.2.

[Appendix A 2 PAGES]

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/ David J. Porter
Circuit Judge

Date: November 3, 2022
PDB/cc: Michael James French
All Counsel of Record

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

September 8, 2022

C.A. No. 22-1363

MICHAEL JAMES FRENCH,
Appellant

VS.

WARDEN, S.C.I. ROCKVIEW

(W.D. Pa. Civ. No. 3-21-cv-00097)

Michael James French
Rockview SCI
Box A
Bellefonte, PA 16823

RE: Michael French v. Warden Rockview
Case Number: 22-1363
District Court Case Number: 3-21-cv-00097

ENTRY OF JUDGMENT

Today, **September 08, 2022** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

[Appendix B 4 Pages]

BLD-195

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-1363**

MICHAEL JAMES FRENCH,
Appellant

VS.

WARDEN, S.C.I. ROCKVIEW

(W.D. Pa. Civ. No. 3-21-cv-00097)

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

Submitted are:

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

(2) Appellant's memorandum in support, filed July 29, 2022;

(3) "Annotated Statutes by Appellant with memorandum of law," filed August 8, 2022; and

(4) Appellant's letter regarding prior filings

in the above-captioned case.

Respectfully,

Clerk

ORDER

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2). When claims have been dismissed on procedural grounds, a certificate of appealability may issue only if reasonable jurists would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the District Court correctly ruled on the procedural issue. See Slack v. McDaniel, 529 U.S. 473, 484

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

cc:
Brandy S. Lonchena

(2000). In this case, jurists of reason would not debate the District Court's dismissal of the petition because French failed to state a valid claim of the denial of a constitutional right. Several of his claims challenge pre-trial issues that are non-jurisdictional and do not attack the validity of his plea. See Tollett v. Henderson, 411 U.S. 258, 267 (1973) (explaining that when a criminal defendant pleads guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea"). French's claim concerning delay in the PCRA proceedings is not cognizable. See Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998). French's assertions are otherwise foreclosed by the entry of his knowing and voluntary guilty plea, see Boykin v. Alabama, 395 U.S. 238, 243 & n.5 (1969), and a failure to show that his plea counsels' advice was unreasonable and that, but for that advice, he would not have pleaded guilty and would have proceeded to trial, see Hill v. Lockhart, 474 U.S. 52, 59 (1985).

By the Court,

s/David J. Porter
Circuit Judge

Dated: September 8, 2022
PDB/cc: Michael James French
All Counsel of Record

A True Copy:

Patricia A. Dodszuweit

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

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

MICHAEL JAMES FRENCH, Petitioner,	:	
v.	:	Case No. 3:21-cv-97-KAP
BOBBI JO SALAMON, WARDEN S.C.I. ROCKVIEW, Respondent	:	

Order

Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his custody on the 1-8 year sentence imposed in Commonwealth v. French, CP-17-CR-345-2017 (C.P. Clearfield). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) contains a statute of limitations at 28 U.S.C. § 2244(d) that, with limited exceptions, requires a petition for a writ of habeas corpus under 28 U.S.C. § 2254 to be filed within one year of the date the petitioner's judgment of sentence becomes final:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D).

That 1-year limitations period is tolled when a properly filed application for state collateral review is "pending." 28 U.S.C. § 2244(d)(2). In addition to that statutory tolling, the Supreme Court recognizes equitable tolling of the limitations period in habeas cases if petitioner can show extraordinary circumstances, that is: 1) petitioner has been pursuing his rights with reasonable diligence and some extraordinary circumstance (such as serious attorney misconduct) prevented the timely filing of the petition, Holland v.

[Appendix C 6 PAGES]

Florida, 560 U.S. 631, 649 (2010); or 2) petitioner offers a "credible" or "convincing" claim of actual innocence. McQuiggin v. Perkins, 569 U.S. 383 (2013).

In its memorandum in support of the affirmance of the dismissal of petitioner's first PCRA petition, the Pennsylvania Superior Court set forth the relevant dates and procedural history of petitioner's criminal case as follows:

> On September 28, 2017, [petitioner] entered a negotiated guilty plea to aggravated assault and indecent assault with a person with a mental disability. In exchange for [petitioner's] plea, the Commonwealth withdrew charges of involuntary deviate sexual intercourse, indecent exposure, disorderly conduct, and open lewdness. Additionally, the parties agreed to a minimum term of 12 months' imprisonment for each count, with the maximum term to be decided by the court. On the date of the guilty plea, the court conducted an oral colloquy to confirm [petitioner's] plea was knowing, intelligent, and voluntary. The court accepted the guilty plea and deferred sentencing pending a pre-sentence investigation report. On November 21, 2017, the court sentenced [petitioner] to an aggregate term of 1 to 8 years' imprisonment. [Petitioner] timely filed a post-sentence motion on November 27, 2017, which the court denied following a hearing on December 19, 2017.
>
> On December 21, 2018, [petitioner] timely filed a PCRA petition. The court appointed counsel, who filed a "no-merit" letter and request to withdraw on May 8, 2019. On that same date, the court issued notice of its intent to dismiss the petition without a hearing per Pa.R.Crim.P. 907. The court granted counsel's request to withdraw on May 10, 2019. By order dated November 6, 2019 but not docketed until November 26, 2019, the court denied PCRA relief. [Petitioner] timely filed a notice of appeal on December 16, 2019. On April 2, 2020, the court ordered [petitioner] to file a concise statement of errors per Pa.R.A.P. 1925(b); [petitioner] timely complied on April 13, 2020.

Commonwealth v. French, 240 A.3d 161 (Pa. Super. 2020) (table) text at 2020 WL 4727426, *1-2 (footnote omitted).

The Superior Court affirmed the PCRA court's order on the basis that petitioner had waived all of his claims on appeal by failing to develop them adequately. Id. Petitioner filed a petition for allowance of appeal that the Pennsylvania Supreme Court denied without opinion on April 6, 2021. Commonwealth v. French, 252 A.3d 237 (Pa. 2021). Petitioner's habeas petition was received in this Court on May 19, 2021, after petitioner placed it in the prison mailing system on May 13, 2021. ECF no. 1 at 16. Petitioner never sought to proceed *in forma pauperis*; the $5 filing fee was received from inmate accounts on May 25, 2021.

Petitioner's judgment of sentence was final on January 18, 2018, 30 days after the denial of his post-sentence motion on December 19, 2017, *i.e.*, at the expiration of time to

file an appeal from the judgment of sentence. Pa.R.A.P. 903; Pa.R.Crim.P. 720(A)(2)(a). Petitioner tolled the limitations period when he filed his PCRA petition on December 21, 2018. At that time, 337 days had run in the limitations period.

The PCRA petition was pending through April 6, 2021, when the Pennsylvania Supreme Court denied the petition for allowance of appeal. It was not pending after that date: an application for state collateral review is not pending during the time a prisoner has to seek review of a decision by a state's highest court by filing a petition for certiorari to the United States Supreme Court. Lawrence v. Florida, 549 U.S. 327, 332 (2007); Jenkins v. Superintendent of Laurel Highlands, 705 F.3d 80, 85 n.5 (3d Cir. 2013). The limitations period began to run again on April 6, 2021 with 28 days remaining and expired on May 4, 2021.

The habeas petition can be considered filed at the earliest on May 13, 2021, the date petitioner placed it in the prison mailing system. (Although the filing fee was not received until May 25, 2021, and without the filing fee or a motion to proceed *in forma pauperis* the simple delivery of a petition or complaint to the district court does not constitute filing of the petition or complaint, *see* Truitt v. County of Wayne, 148 F.3d 644, 647 (6th Cir. 1998), no delay on this point can be attributed to petitioner because he had to rely on inmate accounts.) Thus, the petition is untimely by 9 days.

Even if the complaint were timely, this court could not grant petitioner a writ of habeas corpus because petitioner has not exhausted any claims, they cannot now be exhausted because they have been procedurally defaulted, and there is no excuse for the procedural default.

Under AEDPA, this court cannot grant a writ of habeas corpus unless the petitioner has exhausted the remedies available in the state courts, shows there is no available state corrective process or that circumstances exist that render it ineffective, or the state expressly waives exhaustion. 28 U.S.C.§ 2254(b)(1),(3). Exhaustion requires fair presentation of a federal claim under the normal rules that permit review of claims in the state courts. See Castille v. Peoples, 489 U.S. 346, 350-51 (1989).

Because the Pennsylvania Superior Court found petitioner's claims to be waived, although the exhaustion requirement is literally satisfied (because petitioner is time-barred from filing another PCRA petition), the doctrine of procedural default bars review of the claims in a habeas proceeding. See Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000); Lines v. Larkins, 208 F.3d 153, 160 (3d Cir.2000).

Procedural default can be excused if the petitioner can demonstrate either cause for the default and actual prejudice as a result of the alleged violation of federal law, or

shows that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991). To demonstrate "cause" a petitioner typically must show some objective factor external to the defense that impeded any effort to comply with proper procedures. Murray v. Carrier, 477 U.S. 478, 488 (1986). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically show "actual innocence:" that absent the claimed constitutional error no reasonable juror would have found him guilty. Schlup v. Delo, 513 U.S. 298, 327-28 (1995).

Petitioner cannot show cause for his own failure to effectively appeal from the denial of his PCRA petition. Petitioner argues that the state courts "forced" him to proceed *pro se* in violation of the Constitution, ECF no. 7 at 16, 18, but that is incorrect: there is no constitutional right to counsel in PCRA proceedings. There is a rule-based right to counsel in PCRA proceedings under state law, but when counsel is permitted to withdraw following the procedure set forth in Commonwealth v. Turner, 544 A.2d 927 (Pa.1998), and Commonwealth v. Finley, 550 A.2d 213 (Pa.Super.1988), the PCRA petitioner has been accorded the full protection of that right.

Petitioner asserts that he is indeed "actually innocent," but he cannot excuse his default on that ground because he misconstrues that term. His assertion that there was no factual basis to support his conviction of aggravated assault is contradicted by his statements at his plea colloquy, ECF no. 7 at 62-63. His account of the events surrounding the criminal charges in the memorandum in support of the instant petition, ECF no. 7 at 19-21, belies any claim that no reasonable juror could have found petitioner guilty: petitioner substantially admits all the elements of either a charge of indecent assault (a first degree misdemeanor) or of involuntary deviate sexual intercourse (a first degree felony) except for the lack of mental capacity of the victim, and although he personally opines that he does not believe in the victim's disability, he offers no evidence that a rational jury could not have found the victim incapable of consent. This is significant because "actual innocence" requires a showing of factual innocence of the charges he pleaded guilty to and also of the charges that the Commonwealth forwent in the course of plea bargaining. *See* Bousely v. United States, 523 U.S. 614, 624 (1998).

A certificate of appealability should not be issued unless a habeas petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court held in Slack v. McDaniel, 529 U.S. 473, 484 (2000), that:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jurists of reason would not debate the Superior Court's finding of procedural default or that the petition is untimely. No certificate of appealability is issued.

The petition is denied. The Clerk shall mark this matter closed.

DATE: January 26, 2022

Keith A. Pesto,
United States Magistrate Judge

Notice by ECF to counsel of record and by U.S. Mail to:

Michael James French NF-2309
S.C.I. Rockview
Box A
1 Rockview Place
Bellefonte, PA 16823

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

MICHAEL JAMES FRENCH, Petitioner,	:	
v.	:	Case No. 3:21-cv-97-KAP
BOBBI JO SALAMON, WARDEN S.C.I. ROCKVIEW, Respondent	:	

Order

Petitioner has filed two identical motions, ECF no. 13 and ECF no. 14, that ask for additional time to file objections to a report and recommendation. The pleadings appear to have been prepared by a third party who is unaware that this is a consent case. The consents are at ECF no. 5 (petitioner's) and ECF no. 9 (respondent's). I entered a final appealable order, not a recommendation, on January 26, 2022, at ECF no. 12.

On the chance that what petitioner meant was to file a motion to alter or amend the judgment, *see* Fed R. Civ. P. 59(e), such a motion would be timely. I treat the pleadings at ECF no. 13 and ECF no. 14 as motions under Rule 59 (because otherwise petitioner would be almost out of time to file a notice of appeal), and deny them as meritless. Under Fed. R. App. P. 4, petitioner should treat this as a final order for purposes of computing his time to appeal to the Court of Appeals.

DATE: February 25, 2022

Keith A. Pesto,
United States Magistrate Judge

Notice by ECF to counsel of record and by U.S. Mail to:

Michael James French NF-2309
S.C.I. Rockview
Box A
1 Rockview Place
Bellefonte, PA 16823

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent v. MICHAEL JAMES FRENCH, Petitioner	No. 310 WAL 2020 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 6th day of April, 2021, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Patricia Nicola
As Of 04/06/2021

Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

[Appendix D 1 Page]

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

COMMONWEALTH OF PENNSYLVANIA Appellee v. MICHAEL JAMES FRENCH Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 154 WDA 2020

Appeal from the PCRA Order Entered November 26, 2019
In the Court of Common Pleas of Clearfield County
Criminal Division at No(s): CP-17-CR-0000345-2017

BEFORE: OLSON, J., KING, J., and PELLEGRINI, J.*

MEMORANDUM BY KING, J.: **FILED AUGUST 14, 2020**

Appellant, Michael James French, appeals *pro se* from the order entered in the Clearfield County Court of Common Pleas, which dismissed his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

The relevant facts and procedural history of this case are as follows. On September 28, 2017, Appellant entered a negotiated guilty plea to aggravated assault and indecent assault with a person with a mental disability.[2] In exchange for Appellant's plea, the Commonwealth withdrew charges of

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* Retired Senior Judge assigned to the Superior Court.

[1] 42 Pa.C.S.A. §§ 9541-9546.

[2] Appellant engaged in oral sex with Victim, an adult male who suffers from Autism and Cerebral Palsy, and has the mental capacity of a child.

[Appendix E FRONT AND BACK 6 PAGES]

involuntary deviate sexual intercourse, indecent exposure, disorderly conduct, and open lewdness. Additionally, the parties agreed to a minimum term of 12 months' imprisonment for each count, with the maximum term to be decided by the court. On the date of the guilty plea, the court conducted an oral colloquy to confirm Appellant's plea was knowing, intelligent, and voluntary. The court accepted the guilty plea and deferred sentencing pending a pre-sentence investigation report. On November 21, 2017, the court sentenced Appellant to an aggregate term of 1 to 8 years' imprisonment. Appellant timely filed a post-sentence motion on November 27, 2017, which the court denied following a hearing on December 19, 2017.

On December 21, 2018, Appellant timely filed a PCRA petition. The court appointed counsel, who filed a "no-merit" letter and request to withdraw on May 8, 2019. On that same date, the court issued notice of its intent to dismiss the petition without a hearing per Pa.R.Crim.P. 907. The court granted counsel's request to withdraw on May 10, 2019. By order dated November 6, 2019 but not docketed until November 26, 2019, the court denied PCRA relief. Appellant timely filed a notice of appeal on December 16, 2019. On April 2, 2020, the court ordered Appellant to file a concise statement of errors per Pa.R.A.P. 1925(b); Appellant timely complied on April 13, 2020.

Appellant raises two issues for our review:

> Was discretion abused and error of law committed by the PCRA court when it did not examine Appellant and his properly proffered witnesses....

> Is the alleged [Victim] ... related to any court officials or any influential attorneys of Clearfield County[, thereby] creating bias.

(Appellant's Brief at 7).

Our standard of review of the denial of a PCRA petition is limited to examining whether the record evidence supports the court's determination and whether the court's decision is free of legal error. ***Commonwealth v. H. Ford***, 947 A.2d 1251 (Pa.Super. 2008), *appeal denied*, 598 Pa. 779, 959 A.2d 319 (2008). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). We give no such deference, however, to the court's legal conclusions. ***Commonwealth v. J. Ford***, 44 A.3d 1190 (Pa.Super. 2012). Further, a petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact, the petitioner is not entitled to PCRA relief, and no purpose would be served by any further proceedings. ***Commonwealth v. Wah***, 42 A.3d 335 (Pa.Super. 2012).

HOW ABOUT MATERIAL FACT FOR THE CRIME OF AGG. ASS. 6/5BI

On appeal, Appellant argues his guilty plea was invalid. Appellant asserts there was no factual basis to support his conviction for aggravated assault. Appellant claims he had no knowledge that Victim suffered from any mental or intellectual disabilities. Appellant maintains he procured two statements from witnesses who could testify that Victim was "out and about"

DOES NOT CONSTITUTE AGG ASS 6/5BI

soliciting sex acts prior to Appellant's encounter with Victim. Appellant insists counsel was ineffective for failing to investigate these witnesses. Appellant concludes this Court must vacate the order denying PCRA relief and permit Appellant to withdraw his plea.[3] We disagree.

As a preliminary matter, we observe:

> [A]ppellate briefs and reproduced records must materially conform to the requirements of the Pennsylvania Rules of Appellate Procedure. ... Although this Court is willing to liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit upon the appellant. To the contrary, any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing.
>
> I WAS FORCED TO ACT PRO SE

Commonwealth v. Adams, 882 A.2d 496, 497-98 (Pa.Super. 2005) (internal citations omitted). ***See also*** Pa.R.A.P. 2119(a) (stating argument shall be divided into as many sections as there are questions presented, followed by discussion with citation to relevant legal authority).

Instantly, Appellant's brief fails to cite any legal authority to support his claims. Although Appellant argues his guilty plea was invalid, references "after-discovered evidence" in the form of witness statements, and alleges ineffective assistance of counsel, Appellant supplies no case law whatsoever[4]

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[3] Notwithstanding the phrasing of Appellant's second issue in his statement of questions presented, Appellant does not articulate any argument suggesting that Victim is related to any of the court officials or attorneys involved in Appellant's case. LAST NAME Bell (PRESUMED) NOT ANSWERED

[4] Appellant's sole reference to law is one mention of Pa.R.Crim.P. 590, without pertinent analysis of that rule of procedure.

and fails to apply any law to the facts of his case. Appellant's failure to develop his claims adequately with citation to relevant legal authority constitutes waiver of his issues on appeal. ***See*** Pa.R.A.P. 2119(a); ***Commonwealth v. Brown***, 161 A.3d 960 (Pa.Super. 2017), *appeal denied*, 644 Pa. 365, 176 A.3d 850 (2017) (holding appellant's failure to properly develop claim and to set forth applicable case law to advance it in argument portion of his brief renders issue waived on appeal).[5] Accordingly, Appellant's issues are waived and we affirm the order denying PCRA relief.

Order affirmed. Citing Case Law and Legal Commontary does not change the fact that there is still no MATERIAL FACT or FACTUAL BASIS in this Ruling, by the Superior Court. Where is the Violent crime of Aggravated Assault W/SBI.?

[5] Moreover, the PCRA court explained in its Rule 1925(a) opinion: (1) at the time of Appellant's guilty plea, the court conducted a thorough oral plea colloquy to confirm Appellant's plea was knowing, intelligent, and voluntary; Appellant also executed a written guilty plea colloquy; the plea colloquies comported with the requirements of Rule 590 and the case law interpreting that rule; Appellant admitted there was a factual basis for the charges he was pleading guilty to; thus, Appellant's claim that his plea was not voluntary, knowing or intelligent lacks merit; (2) regarding Appellant's proffered witness statements, the fact that those witnesses might have engaged in sexual acts with Victim does not mean those witnesses could have offered expert opinion on Victim's ability to consent where Victim suffers from mental disabilities; more importantly, those witnesses would not be available to aid Appellant at trial because Appellant waived his right to trial by entering the negotiated guilty plea; at the time of his plea colloquy, Appellant testified that he did not want to go to trial and understood all of the rights he was giving up by entering a plea; Appellant merely speculates that counsel was unprepared to call his proffered witnesses had Appellant proceeded to trial; Appellant fails to meet his burden to prove counsel was ineffective. (***See*** PCRA Court Opinion, filed May 1, 2020, at unnumbered pages 4-6; 10-11). The record supports the PCRA court's analysis. ***See H. Ford, supra***. Thus, even if Appellant had preserved his claims on appeal, they would merit no relief.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/14/2020

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	*	NO. CP-17-CR-315-2017
VS.	*	
MICHAEL JAMES FRENCH	*	

ORDER

NOW, this 25th day of November, 2019 the Court being in receipt of the Defendant's Motion for Entry of Final Order dated October 7, 2019 and resubmitted October 28, 2019 as well as the Application to President Judge for Motion for Entry of Final Order dated November 12, 2019. The first two Motions requesting Judge Paul E. Cherry enter a final order on the Defendant's PCRA in order that the Defendant may file an appeal. The letter application is requesting the President Judge to intervene.

The Court now being aware that Judge Paul E. Cherry has issued an Order dismissing the Defendant's PCRA, but the Defendant has not yet received it due to processing delay at the Clerk's Office (see attached letter of November 22, 2019 from Court Administrator to the Defendant). Accordingly, since an Order has now been issued the Defendant's Motions and Application as DISMISSSED as moot.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

I hereby certify this to be a true and attested copy of the original statement filed in this case

NOV 26 2019

A TRUE COPY
ATTEST: _____
PROTHONOTARY-CLERK

[Appendix F 13 PAGES]

DA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-17-CR-345-2017
vs.	:	
MICHAEL JAMES FRENCH, Defendant.	:	

OPINION and ORDER

I. SUMMARY OF FACTS AND PROCEDURAL HISTORY

This case revolves around Michael James French's (hereinafter "Defendant") Petition for Post Conviction Relief. On April 10, 2017, a complaint was filed against Defendant charging him with Involuntary Deviate Sexual Intercourse, 18 Pa.C.S.A. § 3123(a)(5); Indecent Assault, 18 Pa.C.S.A. §3126(a)(6); Indecent Exposure, 18 Pa.C.S.A. § 3127(a); Disorderly Conduct, 18 Pa.C.S.A. § 5503(a)(4); and Open Lewdness, 18 Pa.C.S.A. § 5901. The factual basis set forth in the complaint alleges that Defendant had the victim, an intellectually disabled adult, perform oral sex on him in an outdoor public area. The Commonwealth contends that due to the victim's diagnosis of Pervasive Development Disorder, Attention Deficit Hyperactivity Disorder; Autism, and Cerebral Palsy, the victim was unable to consent to any sexual contact with Defendant.

On April 19, 2017 a preliminary hearing was held, where Defendant was represented by the Public Defender's Office and the charges were held for court. After the case was moved into the Common Pleas Court, the Public Defender's Office filed a motion to compel discovery. That request was granted, and the Commonwealth was order to provide defense with all mandated discovery. Several months later Defendant's counsel filed pre trial motions

requesting a psychological examination of the victim and requesting the Commonwealth be compelled to provide additional discovery. Following argument by counsel, this Court denied both of Defendant's requests. Jury selection occurred on August 17, 2017, and with the help of counsel, Defendant selected a jury which was empanelled to hear the trial on October 2, 3, and 4, 2017. Prior to trial Defendant's counsel filed a Motion in Limine requesting the Commonwealth be prohibited from presenting expert testimony and opinions at trial. Argument on the issue was scheduled for September 28, 2017.

On September 28, 2017, Defendant withdrew his Motion in Limine and presented the Court with a guilty plea colloquy. As part of the plea, the Commonwealth moved to add an additional count of Aggravated Assault, 18 Pa.C.S.A. §2702(a)(1), to the information. The negotiated plea agreement called for Defendant to plead guilty to one count of Aggravated (WITH NO FACTUAL BASIS/MATERIAL FACT OF THIS CRIME
Assault, 18 Pa.C.S.A. § 2702(a)(1), a felony of the first degree and one count of Indecent Assault, 18 Pa.C.S.A. § 3126(a)(6), a misdemeanor of the first degree. In exchange for Defendant entering a plea of guilty to those two counts, the Commonwealth would withdraw all remaining charges. According to the plea agreement Defendant would serve a minimum of twelve months incarceration for both counts; the remaining terms of the sentencing, including the maximum term, would be in the discretion of the Court. This Court questioned
8 YEARS ?
Defendant on whether he understood the terms of the negotiated plea and the factual basis of those charges; Defendant acknowledged he understood. (Transcript 9/28/2017 pp. 5-7). This Court also questioned if Defendant understood his right to proceed to the scheduled jury trial; Defendant acknowledged he wished to move forward with his plea and cancel the jury trial. (Transcript 9/28/2017 pp. 7-8). Further, this Court questioned whether Defendant understood that a new charge was added to the information, which Defendant was entering a plea to;

Defendant affirmed he understood the additional charge and discussed the issue with his attorney. (Transcript 9/28/2017 p. 7). UNDER DIRECTION OF COUNSEL, YET NO INFORMATION OF AGGRAVATED ASSAULT W/SBI

After a pre-sentence investigation and an assessment from the Sexual Offenders Assessment Board were completed, sentencing was scheduled for November 21, 2017. Upon consideration of the pre-sentence investigation and the terms of the plea agreement, Defendant was sentenced to a period of incarceration for one to eight years on the count of Aggravated Assault, and he was sentenced to a period of incarceration to run concurrent for one to two years on the count of Indecent Assault. Defendant filed a Post-Sentence Motion for Reconsideration of Sentence, specifically requesting reconsideration of the maximum given for the Aggravated Assault. After argument on the issue, this Court denied Defendant's Motion for Reconsideration.

Defendant filed a Petition for Post Conviction Relief (hereinafter "PCRA Petition") on December 21, 2018. Attorney Lavelle was appointed to represent the Defendant on his PCRA Petition. In his PCRA Petition, Defendant alleges three claims for relief: 1) violation of a Constitutional right, 2) ineffective assistance of counsel, and 3) a plea of guilty unlawfully induced. After review of the record and discussions with Defendant, Attorney Lavelle filed a Motion to Withdraw as counsel and a No Merit Letter. Attorney Lavelle was granted permission to withdraw as counsel, and a Notice of Intent to Dismiss was sent to Defendant.

Subsequently, Defendant filed a Motion for Entry of Final Order. On November 5, 2019, after review of the record and counsel's No Merit Letter, this Court filed an Order dismissing the PCRA Petition. A Notice of Appeal was filed on December 16, 2019. Following Order of this Court compelling a Concise Statement of Matters Complained of on Appeal, Defendant filed the following matters on April 13, 2020:

I. Unlawfully induced plea and excessive sentence;

II. Suppressed Evidence, motion in limine, and ineffective counsel;

III. Failure to located and secure valid witnesses for trial and ineffective assistance of counsel; and

IV. Governmental interference and inordinate delay.

II. ANALYSIS OF MATTERS COMPLAINED OF ON APPEAL

Matter I: Unlawfully Induced Plea and Excessive Sentence

Defendant contends that there was no evidence to support his guilty plea to Aggravated Assault, 18 Pa.C.S.A. § 2702(a)(1), and he only entered the plea because of the "advice and badgering of counsel, to a defendant under extreme [d]uress [t]here days before [t]rial." (Concise Statement of Matters Complained of). He also argues that he was sentenced to an excessive term of incarceration creating a miscarriage of justice.

Defendant elected to enter a plea to one count of Aggravated Assault, which was added to the information the day of his plea. The addition of the Aggravated Assault was in favor of the Defendant as it removed the lifetime registration on SORNA, 42 Pa.C.S.A. § 9799.15, which was required by the other counts on the information. At the time of the plea, Defendant was extensively colloquied about the addition of this charge. Defendant was asked if he understood that an additional charge was added to the information in exchange for withdrawal of the other charges, and he was asked whether he discussed the new charge with his attorneys. (Transcript 9/28/2017 p. 7). To both questions, Defendant responded affirmatively. This Court also explained to Defendant that if a plea was entered his jury trial would be cancelled; when asked how Defendant wanted to proceed he stated, "No, I don't

want to go to trial, no." (Transcript 9/28/2017 pp. 7-8). In addition to being colloquied by this Court, Defendant submitted a seven page guilty plea colloquy. Each page was initialed by Defendant, with the last page being signed. All of the questions regarding Defendant's trial rights were answered affirmatively. When questioned by this Court if the Defendant understood all of the questions in the colloquy and discussed them with his attorney, Defendant answered that he did. (Transcript 9/28/2017 pp. 5-6). In order to establish that his guilty plea was unlawfully induced, Defendant would have to establish that the plea was not knowing, voluntary, and intelligent.

> 'An attempt to withdraw a plea of guilty after sentencing will only be granted where the defendant is able to show that his plea was the result of manifest injustice.' Commonwealth v. Holbrook, 427 Pa.Super. 387, 394, 629 A.2d 154, 158 (1993). To establish manifest injustice, a defendant must show that his plea was involuntary or was given without knowledge of the charge. Id. The decision to plead guilty must be personally and voluntarily made by a defendant. Commonwealth v. Fluharty, 429 Pa. Super. 213, 632 A.2d 312 (1993). Pa.R.Crim.P. 319 [current Rule 590] mandates that the guilty plea be offered in open court, and, in order to determine the voluntariness of the plea and whether the defendant acted knowingly and intelligently, the trial court must, at a minimum, inquire into the following six areas:
>
> > (1) Does the defendant understand the nature of the charges to which he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the defendant understand that he has the right to trial by jury? (4) Does the defendant understand that he is presumed innocent until he is found guilty? (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged? (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

> Commonwealth v. Fluharty, supra at 216, 632 A.2d at 314; Comment to Pa.R.Crim.P. 319 [current Rule 590]. The trial court must determine if there is a factual basis for the plea [*i.e.*, whether the facts acknowledged by the defendant constitute the offense(s) charged]. Commonwealth v. Fluharty, supra. The aforementioned constitute the only required inquiries regarding a guilty plea. Id.

Commonwealth v. Blackwell, 647 A.2d 915, 921 (Pa.Super. 1994).

The court's inquiry and the Defendant's testimony during the guilty plea hearing, and the Defendant's answers to the questions on the written Guilty Plea Colloquy, reveal that each of the six questions listed in the Fluharty opinion and in the Comment of Rule 590 were answered in the affirmative, or would be answered in the affirmative based upon the record. Consequently, the required inquiry was satisfied, and the record supports a determination that the Defendant's guilty plea was knowing, intelligent, and voluntary. "The longstanding rule of Pennsylvania law is that a defendant may not challenge his guilty plea by asserting that he lied while under oath...." (Commonwealth v. Pollard, 832 A.2d 517, 523 (Pa. Super. 2003)(citing Commonwealth v. Cappelli, 340 Pa.Super. 9, 19-20, 489 A.2d 813, 819 (1985)). A defendant is not permitted to make false statements under oath, and later withdraw his plea on a basis that contradicts his previous statements. (Commonwealth v. Pollard, 832 A.2d 517, 523 (Pa. Super. 2003)(*citing* Commonwealth v. Stork, 737 A.2d 789, 790 (Pa. Super 1999). Under oath Defendant acknowledged he understand all of the questions in both the verbal and written colloquy; he cannot now claim that he did not understand those rights in order to withdraw his plea. Within the colloquy, Defendant admitted there was a basis of fact for the charges he was pleading to. Defendant's claim that his plea was not voluntary, knowing, or intelligent has no merit.

With respect to the sentence being excessive, this issue also has no merit. The plea agreement rendered by Defendant called for a period of incarceration for a minimum of twelve months with the maximum being in the discretion of the Court. Defendant entered a plea to Aggravated Assault, 18 Pa.C.S.A. § 2702(a)(1), a felony of the first degree, which holds a maximum of up to twenty years of incarceration. He also entered a plea to Indecent Assault, 18 Pa.C.S.A. § 3126(a)(6), a misdemeanor of the first degree, which holds a maximum of up to five years of incarceration. For the count of Aggravated Assault, Defendant was sentenced to a term of incarceration of one year to eight years, and for the count of Indecent Assault, Defendant was sentenced to a term of incarceration of one year to two years, running concurrent with the Aggravated Assault sentence.

"Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." Commonwealth v. Burkholder, 719 A.2d 346, 350 (Pa. Super 1998)(*citing* Commonwealth v. Anderson, 552 A.2d 1064, 1072 (Pa. Super. 1988)). An abuse of discretion will only be found if the "record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." Burkholder, 719 A.2d at 350 (*citing* 42 Pa.C.S.A. § 9781).

This Court considered the protection to the public, gravity of the offense, and the rehabilitative needs of Defendant as required by 42 Pa.C.S.A. § 9721(b). In this situation, the victim in this case had multiple diagnoses which lead to his intellectual disability. The sexual offense occurred in a public setting, with no regard to the safety of the victim. Defendant had a criminal background with multiple offenses. Defendant was sentenced in accordance with the plea agreement as far as his minimum term of incarceration. The maximum sentence

imposed by this Court was well below the statutory limitation. The nature of the offense as well as the offenses themselves call for a longer period of supervision to ensure Defendant does not commit any future offenses and completes all required counseling. Defendant's sentence was not excessive, and this Court did not abuse its discretion when handing down the sentence.

WITNESS STATEMENTS WARRANTED NEW EVALUATION OF MR BELL

Matter II: Suppressed Evidence, Motion in Limine, and Ineffective Counsel

In Defendant's second issue he claims there was ineffective assistance of counsel to secure a new psychological evaluation of the victim, and there was new evidence provided to counsel before trial commenced. Defendant also complains that his Motion in Limine was denied by this Court.

The Pennsylvania Supreme Court has established the standard for proving the claim of ineffective assistance of counsel.

> To prevail on an ineffective assistance of counsel claim, the defendant bears the burden of establishing: 1) an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Carpenter, 555 Pa. 434, 725 A.2d 154, 161 (Pa. 1999). Counsel is presumed to have been effective. Commonwealth v. Balodis, 560 Pa. 567, 747 A.2d 341, 343 (Pa. 2000). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Commonwealth v. Sneed, 587 Pa. 318, 899 A.2d 1067, 1076 (Pa. 2006).

Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007).

Defendant has failed to establish that there was no reasonable basis for counsel's act when attempting to secure a new psychological evaluation. Because he cannot meet at least

one prong, his ineffectiveness claim fails. Defense counsel filed an omnibus pre-trial motion which included a request for a psychological evaluation of the victim. Argument on this motion was heard by this Court where counsel argued that a new evaluation was necessary to rebut the Commonwealth's claim that the victim was unable to consent to sexual contact. This Court denied Defendant's request. The Court's denial of the request does not equate to ineffective assistance of counsel. As stated in Attorney Lavelle's No Merit Letter "the denial may have created a preserved issue for appellate review had the case gone to trial. However, because the petitioner waived his right to trial, the issue is not now justiciable." Defendant has not shown that he was prejudiced by counsel's inability to secure a new evaluation nor has he shown that it was counsel's act or omission that caused the denial of the motion. This claim is without merit.

Next, Defendant claims that counsel was ineffective because new information was provided to counsel prior to trial. Defendant stated that he saw counsel with a notarized statement of a potential witness. Defendant does not claim that counsel withheld this evidence from him, failed to review the evidence, or refused to present this evidence at trial. Counsel did not have the ability to present this evidence which may have been exculpatory to the fact finder because the trial was cancelled due to Defendant entering a guilty plea. This claim is not ripe for review. Simply having possession of evidence does not cause counsel to be ineffective. An omission or act regarding that evidence would cause ineffectiveness, but because counsel had no opportunity to act, Defendant cannot meet the burden of ineffective assistance of counsel.

Lastly in this issue, Defendant argues the Court denied his Motion in Limine. Counsel filed a Motion in Limine to prevent the Commonwealth's expert from testifying at

trial. Argument on this Motion was scheduled on September 28, 2017. However, prior to the argument, Defendant's Motion was withdrawn and a guilty plea was entered instead. The Motion was never denied by this Court as it was withdrawn prior to this Court rendering a decision on the matter. This issue is meritless.

Matter III: Failure to Locate Witnesses and Ineffective Counsel

Defendant's third claim is that counsel was ineffective because counsel failed to locate and secure valid witnesses for trial. Defendant claims that these witnesses also engaged in sexual acts with the victim. These witnesses are not able to provide an expert opinion in regards to the victim's ability to consent. In fact, Defendant claims one witness is in the custody of the Department of Corrections, and the other witness is on supervision for his own crimes. Attorney Lavelle appropriately examined this issue in his No Merit Letter, and this Court finds his analysis to be accurate. In the No Merit Letter, Attorney Lavelle correctly states that "[Defendant] obviously fails to recognize that if, in fact, those witnesses had engaged in sexual conduct with this victim, they too would be liable for criminal prosecution, undermining his assertion that such witnesses would be willing to testify to such facts." However, the bigger issue with Defendant's claim is that a trial did not occur because Defendant waived his right to a trial and to present evidence and witnesses to the jury when he entered his guilty plea. These matters were explained to him at the time Defendant entered his plea. During the oral colloquy, Defendant testified he did not wish to go to trial and understood all of the rights he was giving up by entering a plea. (Transcript 9/28 /2017 pp. 5-8). This is also evidenced by the written colloquy submitted by Defendant. Trial was not set to commence for several days. Defendant is only speculating that his counsel was

not prepared to call witnesses. However, it is entirely possible that counsel would have called those witnesses at the close of Commonwealth's case if counsel deemed it necessary.

Applying the test for ineffective counsel as cited above, Defendant cannot meet all three prongs of the test because counsel did not have the opportunity to act or fail to act. Therefore, he cannot meet the burden of proving his counsel was ineffective for failure to call witnesses at trial. This claim is without merit.

Matter IV: Governmental Interference and Inordinate Delay

Defendant next complains that he requested a copy of his pre-sentence investigation report, but was not provided a copy because the Clerk of Courts does not keep those reports on file. Because he was not sent a copy of the report, Defendant contends one was not completed. The Pennsylvania Rules of Criminal Procedure, Rule 703 states that "[a]ll pre-sentence reports and related psychiatric and psychological reports shall be confidential, and not of public record." This Court ordered a pre-sentence investigation the same date the guilty plea was entered. The report would have been available to the Commonwealth and Defense counsel prior to sentencing for review. As required by Rule 703, the report remains confidential and not of public record, which means it would not be available for copying by the Clerk of Courts. Defendant's assumption that a report that he cannot copy must not exist is inaccurate, and his claim is meritless.

Defendant also argues that because the Court was delayed in issuing a final order he was prejudiced. However, had Defendant filed his appeal prior to the entry of the final order, it would have been treated as a valid appeal. Pa. R.A.P. Rule 905(a)(5). Defendant received this Court's Notice of Intent to Dismiss after receipt of counsel's No Merit Letter. There was

an announcement of determination by this Court. After Defendant's Motions for Entry of Final Order, the President Judge of this Court filed an Order that stated an Order had been filed by this Court, but was not yet received by Defendant due to processing delay. (Order 11/25/19). This issue was resolved at the request of Defendant. It did not prevent Defendant from meeting his deadline to file an appeal, nor did it prevent Defendant from filing an appeal upon this Court's announcement of its determination. Any error on this Court's part was resolved and did not result in Defendant losing any of his appellate rights. This issue is moot and meritless.

CONCLUSION

For the reasons stated above, this Court finds that it there is no merit to Defendant's claims of an unlawfully induced plea, ineffective assistance of counsel, abuse of discretion, and inordinate delay.

BY THE COURT,

/s/Paul E. Cherry

May 1, 2020

PAUL E. CHERRY,
JUDGE

I hereby certify this to be a true and attested copy of the original statement filed in this case.

MAY 01 2020

A TRUE COPY
ATTEST:
PROTHONOTARY-CLERK