NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LOUIS GENE DEMORA	:	
Appellant	:	No. 2972 EDA 2022

Appeal from the PCRA Order Entered October 26, 2022
In the Court of Common Pleas of Bucks County Criminal Division at
No(s): CP-09-CR-0003841-2017

BEFORE: BOWES, J., NICHOLS, J., and KING, J.

MEMORANDUM BY NICHOLS, J.: **FILED JANUARY 23, 2024**

Appellant Louis Gene Demora appeals from the order denying his first Post Conviction Relief Act[1] (PCRA) petition. Appellant's counsel (Current Counsel) has filed a petition to withdraw and a ***Turner***/***Finley*** brief.[2] For the reasons that follow, we affirm the PCRA court's order and grant Current Counsel's petition to withdraw.

A previous panel of this Court summarized the facts of this case as follows:

> [On December 20, 2016, Appellant] was driving a minimum [speed] of 88 MPH on River Road, in Bucks County, Pennsylvania, which was posted with a 25 MPH speed limit. At the time, [Appellant] was under the influence of heroin, cocaine, and Xanax,

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[1] 42 Pa.C.S. §§ 9541-9546.

[2] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

> with thoughts of suicide. Meanwhile, Jenna Richards, 22 years old, was on her way to the gym, driving [at a speed of] approximately 15 MPH, when she made a left hand turn into [Appellant's] lane of travel; [Appellant] struck the passenger side of Richards' car. The force from the impact catapulted Richards' car into the air. Richards' car landed on top of a parked car some distance away, which was pushed into another parked vehicle. Richards was killed instantly. When the police arrived on the scene, [Appellant] was walking around, unsteady on his feet, saying "I was just trying to kill myself." [A few months later, a]fter an investigation, [Appellant] was arrested and charged [with murder of the third degree and related offenses].

Commonwealth v. Demora, 1466 EDA 2018, 2019 WL 3064871, at *1 (Pa. Super. filed July 12, 2019) (unpublished mem.).

We add that at trial, both Appellant and the Commonwealth presented testimony from experts in the field of accident reconstruction. Officer Charles Winik of the Bristol Township Police Department testified that Appellant's high rate of speed and driving under the influence were "direct and substantial causes" of the crash. ***See*** N.T. Trial, 11/1/17, at 42. Appellant presented testimony from James Halikman, who opined that if Richards had not started her left turn when she did, the collision would not have occurred. ***See id.*** at 99-100, 114, 118-21.

The prior panel summarized the ensuing procedural history of this case:

> Following a four-day trial, a jury convicted [Appellant] of [third-degree murder, homicide by vehicle while driving under the influence, homicide by vehicle, and driving under the influence of a controlled substance[3] (DUI)]. For third degree murder, the trial court sentenced [Appellant] to 17 ½ to 40 years of incarceration;

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[3] 18 Pa.C.S. § 2502(c), 75 Pa.C.S. §§ 3735, 3732, and 3802(d)(ii), respectively.

> the trial court imposed sentences on the other convictions to run concurrently with this sentence.
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> [Appellant] filed a post-sentence motion and a motion for reconsideration of his sentence. The trial court denied both.

Demora, 2019 WL 3064871, at *1.

This Court affirmed the judgment of sentence, and our Supreme Court denied Appellant's petition for allowance of appeal on February 11, 2020. ***See id.*** at *8, *appeal denied*, 224 A.3d 1260 (Pa. 2020). Michael Lascon, Esq. (Trial Counsel) represented Appellant at trial and on direct appeal.

On May 10, 2021, Lonny Fish, Esq. (Prior PCRA Counsel) filed a timely PCRA petition on Appellant's behalf. Appellant raised multiple claims of ineffective assistance of counsel related to both his trial and his direct appeal. Prior PCRA Counsel filed an amended PCRA petition on July 2, 2022.

The PCRA court held an evidentiary hearing on July 20, 2022. Trial Counsel was the only witness who testified. On October 26, 2022, the PCRA court denied Appellant's petition. Appellant filed a timely notice of appeal. Prior PCRA Counsel also filed a motion to withdraw as counsel.

On December 9, 2022, the PCRA court granted Prior PCRA Counsel's motion to withdraw and appointed Stuart Wilder, Esq. (Current Counsel) to represent Appellant on appeal. Current Counsel filed a timely court-ordered Rule 1925(b) statement, in which he raised, for the first time, three claims of ineffective assistance of Prior PCRA Counsel. The PCRA court issued a Rule 1925(a) opinion addressing the claims raised in Appellant's Rule 1925(b) statement.

On appeal, Current Counsel filed a petition to withdraw and a ***Turner***/***Finley*** brief stating that he thoroughly reviewed the case, believed that an appeal would be wholly frivolous, notified Appellant of his intent to withdraw, and provided Appellant with a copy of his brief. Appellant subsequently filed a *pro se* appellate brief responding to the ***Turner***/***Finley*** brief on August 28, 2023.

Before addressing the merits of the matters raised in PCRA Counsel's ***Turner***/***Finley*** brief, we must first consider whether PCRA Counsel met the technical requirements for withdrawing from representation. ***Commonwealth v. Muzzy***, 141 A.3d 509, 510 (Pa. Super. 2016). This Court has explained:

> [c]ounsel petitioning to withdraw from PCRA representation must proceed under [***Turner*** and ***Finley***] and must review the case zealously. ***Turner***/***Finley*** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.
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> Counsel must also send to the petitioner: (1) a copy of the "no merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.
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> Where counsel submits a petition and no-merit letter that satisfy the technical demands of ***Turner***/***Finley***, the court—trial court or this Court—must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief.

Id. at 510-11 (citations omitted and formatting altered).

Here, PCRA Counsel filed his petition to withdraw indicating that he reviewed the record and determined that there were no meritorious issues to raise on appeal. Pet. to Withdraw, 4/6/23, at 1-2 (unpaginated). Further, PCRA Counsel filed a copy of the letter that he sent to Appellant, which indicates that he sent Appellant a copy of the ***Turner***/***Finley*** brief and advised Appellant that he may immediately proceed *pro se* or retain private counsel to raise any additional issues he believes should be brought to this Court's attention. Pet. to Withdraw, 4/6/23, at Ex. A. Appellant subsequently filed a *pro se* appellate brief. On this record, we conclude that PCRA Counsel has met the technical requirements of ***Turner*** and ***Finley***, and we now proceed to address the issues PCRA Counsel identified in the ***Turner***/***Finley*** brief. ***See Muzzy***, 141 A.3d at 510-11.

In the ***Turner***/***Finley*** brief, PCRA Counsel identifies the following issues:

> 1. Appellant is entitled to relief from his conviction and sentence because [Trial] Counsel was ineffective for failing to request an instruction on voluntariness of [Appellant's] confession.
> 2. [Prior] PCRA Counsel was ineffective for failing to allege [Trial] Counsel's ineffectiveness for not challenging the admission of [Appellant's] prior [DUI] conviction at trial.
> 3. [Trial] Counsel was ineffective for failing to cross-examine the Commonwealth's witness concerning a misstatement regarding the presence of a road marking at the time of the accident, and [Prior] PCRA Counsel was ineffective for filing to raise the issue in the amended PCRA petition.
> 4. [Prior] PCRA Counsel was ineffective for failing to allege Trial Counsel's infectiveness for failing to argue his innocence, as Appellant instructed him.

See Turner*/*Finley Brief at 11, 16-18.[4]

In his *pro se* brief, Appellant raises the following issues, which we reorder as follows:

> 1. Whether the [PCRA] court erred in not finding Trial Counsel ineffective for failing to request an instruction on the voluntariness of Appellant's statements to police, as that failure was neither strategic nor informed, but rather because [Trial] Counsel did not know he could request the instruction?
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> 2. Trial Counsel was ineffective and denied Appellant for failing to preserve for appeal his objection to the admission of Appellant's prior conviction for [DUI] as in the circumstances of this case, the admission of the conviction was unfairly prejudicial and unduly inflammatory, and the object of its admission to show Appellant attended a safe driving course could have been achieved by less inflammatory means and for failing to raise the issue in his amended PCRA petition.
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> 3. Whether Trial Counsel was ineffective for failing to adduce, identify, mark as exhibit, and move into evidence photographic evidence . . . that a white dash at the intersection where the accident occurred was present when the accident occurred, squarely disproving and discrediting the testimony of Commonwealth rebuttal witness [Charles] Winik and bolstering the testimony of defense witness James Halikman, and [Prior] PCRA Counsel was ineffective.
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> 4. Whether Trial Counsel was ineffective for failing to argue Appellant's complete innocence as requested and directed by

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[4] Current Counsel's ***Turner*/*Finley*** brief does not contain a statement of questions presented as required by the Rules of Appellate Procedure. ***See*** Pa.R.A.P. 2111(a)(4), 2116. We derive these issues from the headings of the argument section of Current Counsel's ***Turner*/*Finley*** brief.

Current Counsel's ***Turner*/*Finley*** brief also discusses nine additional claims that Appellant did not raise in his Rule 1925(b) statement. Therefore, those claims are waived. ***See*** Pa.R.A.P. 1925(b)(4)(vii) (stating that "[i]ssues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived").

> Appellant . . . and [Prior] PCRA Counsel was ineffective, for failing to raise this issue in his amended PCRA petition?
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> 5. Whether pursuant to ***Commonwealth v. Bradley***, 261 A.3d 381, 405 ([Pa.] 2021) . . . [w]as [Current] Counsel's motion to withdraw pursuant to ***Turner***-***Finley*** premature?

Appellant's *Pro Se* Brief at iv-v (some citations omitted and some formatting altered).

Jury Instruction Regarding Appellant's Statement

The first preserved issue that Current Counsel identifies is Appellant's claim that Trial Counsel was ineffective for failing to request a jury instruction regarding the voluntariness of Appellant's statements. ***Turner***/***Finley*** Brief at 11-12. Current Counsel notes that statements that a defendant makes to the police while the defendant is receiving medical care are not involuntary merely because the defendant is in pain or has been given medication. ***Id.*** at 12. Current Counsel also observes that Trial Counsel testified that he did not request that jury instruction because there was no evidence that Appellant's statements were involuntary. ***Id.*** at 11 (citing N.T. PCRA Hr'g, 7/20/22, at 28).

Appellant argues that he was in a questionable state of mind when he made those statements. Appellant's *Pro Se* Brief at 1-6 (citing, *inter alia*, Pennsylvania Suggested Standard Criminal Jury Instructions ("Pa. SSJI (Crim)") 3.01-3.05). Specifically, Appellant contends that he made several statements to a police officer and other persons in the area immediately after the crash and gave a statement to another police officer while recovering in

the hospital and under the influence of pain medication. ***Id.*** at 2-3, 5. Appellant also contends that the police officers never read him ***Miranda***[5] warnings before questioning him. ***Id.*** at 5. Therefore, Appellant concludes that Trial Counsel was ineffective for failing to request a jury instruction regarding the voluntariness of Appellant's statements.

> In reviewing the denial of a PCRA petition, our standard of review
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> is limited to examining whether the PCRA court's determination is supported by the evidence of record and whether it is free of legal error. The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a *de novo* standard of review to the PCRA court's legal conclusions.
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> Furthermore, to establish a claim of ineffective assistance of counsel, a defendant must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. The burden is on the defendant to prove all three of the following prongs: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.
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> Boilerplate allegations and bald assertions of no reasonable basis and/or ensuing prejudice cannot satisfy a petitioner's burden to prove that counsel was ineffective. Moreover, a failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness.

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[5] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Commonwealth v. Sandusky, 203 A.3d 1033, 1043-44 (Pa. Super. 2019) (citations omitted and formatting altered). Additionally, "[c]ounsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Davis***, 262 A.3d 589, 596 (Pa. Super. 2021) (citation omitted).

Our Supreme Court has stated:

> The United States Supreme Court has held that, before law enforcement officers question an individual who has been in taken into custody or has been deprived of his freedom in any significant way, the officers must first warn the individual that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed. ***Miranda***, 384 U.S. at 478-79. In determining whether a suspect is in custody, two discrete inquiries are essential: (1) an examination of the circumstances surrounding the interrogation; and (2) a determination of whether, given those circumstances, would a reasonable person have felt that he or she was at liberty to terminate the interrogation and leave. . . . [A] person is in custody for ***Miranda*** purposes only when he is physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation. Statements not made in response to custodial interrogation are classified as gratuitous and not subject to suppression for lack of ***Miranda*** warnings. Whether an encounter is deemed "custodial" must be determined by examining the totality of the circumstances.

Commonwealth v. Yandamuri, 159 A.3d 503, 519-20 (Pa. 2017) (some citations omitted); ***see also Commonwealth v. Ganjeh***, 300 A.3d 1082, 1090 (Pa. Super. 2023) (explaining that "[t]his Court has long recognized that not every statement made by an individual during a police encounter amounts

to an interrogation. Volunteered or spontaneous utterances by an individual are admissible even without ***Miranda*** warnings" (citation omitted and formatting altered).

This Court has explained:

> Despite a pretrial ruling that a confession is voluntary, . . . a criminal defendant nonetheless is entitled to a second opportunity to test the voluntariness of his statement by introducing evidence at trial relating to voluntariness [of the defendant's waiver of his ***Miranda*** rights] and have the jury consider the question. In this situation, the jury may not assess the evidentiary weight of the confession until it first makes an independent finding that the confession was voluntarily made. . . .

Commonwealth v. Cameron, 780 A.2d 688, 693 (Pa. Super. 2001) (citations and footnotes omitted and some formatting altered); ***see also*** Pa. SSJI (Crim) 3.04D (stating that "[i]n determining voluntariness, you should also consider whether there was any violation of the requirements of the U.S. Supreme Court case of ***Miranda v. Arizona***").[6]

Here, the PCRA court explained:

> Appellant is seemingly referring to Pa. SSJI (Crim) 3.04B as the instruction that should have been requested. Notably, the first paragraph of that instruction states that "A defendant's statement is always regarded as voluntary if it is made spontaneously, that is, not in response to police questioning. This is true even though the defendant is intoxicated, mentally ill, or influenced by some internal compulsion to speak." Pa. SSJI (Crim) 3.04B(1). As Appellant[']s statements to Officer Lyons were spontaneous — the

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[6] Our Supreme Court has explained that the Pa. SSJI (Crim) "themselves are not binding and do not alter the discretion afforded trial courts in crafting jury instructions; rather, as their title suggests, the instructions are guides only." ***Commonwealth v. Eichinger***, 108 A.3d 821, 845 (Pa. 2014) (citation omitted). Here, Pa. SSJI (Crim) 3.04B and 3.04D are relevant to our analysis.

> testimony of Officer Lyons suggests that Appellant was not fully aware and was not responding to Officer Lyons asking if Appellant was hurt — there would have been no effect in requesting the instruction for the statements made immediately after the crash.
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> With respect to the statements made in the hospital two days after the crash, Officer Polistina credibly testified that at no point was it a custodial interrogation of Appellant. Rather, Officer Polistina explained that he was merely following up investigating the crash — before it was a criminal investigation — and wanted to speak to Appellant as he was the occupant of one of the vehicles. Officer Polistina explained that not only did he assess Appellant's lucidity by asking him questions and purposefully repeating incorrect information to elicit Appellant correcting him, but also at no point did Appellant seem reluctant or hesitant to answer any question. Appellant did not refuse to speak with the Officer, nor did he ask for an attorney. Appellant was not handcuffed or ***Mirandized*** at the time of the statements. Neither of the two alternatives in Pa. SSJI (Crim) 3.04B(2) would suggest that this interaction resulted in involuntary statements.
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> * * *
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> As Appellant was not in custody either shortly after the crash . . . or made while in the hospital two days after the crash . . . no ***Miranda*** rights had attached to Appellant. Trial Counsel was not ineffective for failing to request an instruction on the voluntariness of Appellant's statements to police, as there would have been no merit in requesting [that instruction].

PCRA Ct. Op., 3/20/23, at 9-11 (some citations omitted).

Following our review, we conclude that the PCRA court's conclusions are supported by the record and free of legal error. ***See Sandusky***, 203 A.3d at 1043. Even if Appellant was in a state of shock after the crash, none of the standard suggested jury instructions that Appellant has cited apply to the statements he made to individuals who were not police officers. ***See*** Pa. SSJI (Crim) 3.04B (stating that "[a] defendant's statement is always regarded as voluntary if it is made spontaneously, that is, not in response to police

questioning. This is true even though the defendant is intoxicated, mentally ill, or influenced by some internal compulsion to speak"). Therefore, that jury instruction is not applicable to any of Appellant's statements made to persons other than the police because such statements are always considered to be voluntary. ***See id.*** Additionally, we agree with the PCRA court that Appellant was not in custody for the purposes of ***Miranda*** at the time he made the statements to Officer Lyons and Officer Polistina. ***See Yandamuri***, 159 A.3d at 520; ***Ganjeh***, 300 A.3d at 1090 (stating that "not every statement made by an individual during a police encounter amounts to an interrogation" (citation omitted)). Therefore, Appellant was not entitled to have the jury consider whether his statements to the police were voluntary. ***See Cameron***, 780 A.2d at 693; ***see also*** Pa. SSJI (Crim) 3.04D (stating that "[i]n determining voluntariness, you should also consider whether there was any violation of the requirements of" ***Miranda***). For these reasons, this ineffectiveness claim lacks arguable merit, and Appellant is not entitled to relief on this claim.

Admission of Appellant's Prior DUI Conviction

The next issue that Current Counsel identifies is Appellant's layered ineffectiveness claim related to Trial Counsel's failure to preserve a challenge to the admission of Appellant's prior DUI conviction for appeal. ***Turner***/***Finley*** Brief at 16-17. Current Counsel explains that Appellant's prior DUI conviction was admitted at trial to establish that Appellant was required to attend safe

driving classes as part of his sentence, and therefore Appellant was aware of the dangers of driving under the influence. ***Id.*** Although Appellant identified this issue in his statement of questions presented in his *pro se* brief, he does not provide any argument regarding this issue.

"Where a petitioner alleges multiple layers of ineffectiveness, he is required to plead and prove, by a preponderance of the evidence, each of the three prongs of ineffectiveness relevant to each layer of representation." ***Commonwealth v. Parrish***, 273 A.3d 989, 1004 n.11 (Pa. 2022) (citation omitted).

Specifically, our Supreme Court has explained:

> To be eligible for relief on [layered claims of ineffective assistance of counsel, a petitioner] must plead and prove that: (1) trial counsel was ineffective for a certain action or failure to act; and (2) [subsequent] counsel was ineffective for failing to raise trial counsel's ineffectiveness. As to each relevant layer of representation, [a petitioner] must meet all three prongs of the ***Pierce***[7] test for ineffectiveness. A failure to satisfy any of the three prongs of the ***Pierce*** test requires rejection of a claim of ineffective assistance of trial counsel, which, in turn, requires rejection of a layered claim of ineffective assistance of [subsequent] counsel.
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> Thus, if the petitioner cannot prove the underlying claim of trial counsel ineffectiveness, then petitioner's derivative claim of [subsequent] counsel ineffectiveness of necessity must fail, and it is not necessary for the court to address the other two prongs of the ***Pierce*** test [*i.e.*, the reasonable basis and prejudice prongs] as applied to [subsequent] counsel.

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[7] ***Commonwealth v. Pierce***, 527 A.2d 973, 975-76 (Pa. 1987); ***see also Sandusky***, 203 A.3d at 1043 (same).

Commonwealth v. Chmiel, 30 A.3d 1111, 1128 (Pa. 2011) (citations omitted and formatting altered).

In ***Bradley***, our Supreme Court adopted a new rule allowing PCRA petitioners to "raise claims of ineffective PCRA counsel at the first opportunity, even if on appeal." ***Bradley***, 261 A.3d at 405. In reaching that conclusion, the ***Bradley*** Court emphasized the need to preserve a petitioner's right to effective PCRA counsel. ***Id.***

The ***Bradley*** Court also reaffirmed the Court's preference for evidentiary hearings, and explained:

> In some instances, the record before the appellate court will be sufficient to allow for disposition of any newly-raised ineffectiveness claims. However, in other cases, the appellate court may need to remand to the PCRA court for further development of the record and for the PCRA court to consider such claims as an initial matter. Consistent with our prior case law, to advance a request for remand, a petition would be required to provide more than mere boilerplate assertions of PCRA counsel's ineffectiveness; however, where there are material facts at issue concerning claims challenging counsel's stewardship and relief is not plainly unavailable as a matter of law, the remand should be afforded.

Id. at 402 (citations and footnote omitted and formatting altered).

Following ***Bradley***, our Supreme Court held that a defendant "adequately raised and preserved his layered claim of the ineffective assistance of trial and initial PCRA counsel by raising it at the first opportunity to do so, specifically in his Corrected 1925(b) Statement and in his [appellate] brief . . . ." ***Parrish***, 273 A.3d at 1002.

In ***Commonwealth v. Diehl***, 140 A.3d 34 (Pa. Super. 2016), this Court considered whether a defendant's prior DUI conviction and DUI education classes as part of his sentence was admissible under Pa.R.E. 404(b) to prove malice for a third-degree murder charge. ***Diehl***, 140 A.3d at 41.

After examining decisions from federal courts and the courts of other states, the ***Diehl*** court concluded:

> The reasons relied upon by other jurisdictions to admit prior DUI convictions and education classes as inferential evidence of a driver's state of mind are compelling . . . . This conflict within the evidence enhanced the need for and potency of the Rule 404(b) evidence as a means to infer [the defendant's] state of mind leading up to and including the time of the accident. His past experience with DUI and leaving the scene of an accident, and the special instruction he received on the dangers of drinking and driving were, therefore, highly probative to the question of whether he, more than the typical driver, knew better than to drink and drive and to leave the scene of any accident.
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> The trial court tempered any potential for unfair prejudice by instructing the jury that the evidence was admitted for the "very limited purpose" of "tending to show what the [d]efendant's knowledge was of the hazards of drinking and driving. The evidence must not be considered by you in any other way other than for the purpose that I just stated." . . . Accordingly, concluding that the probative value of [the defendant's] 2005 DUI conviction and participation in DUI classes exceeded its potential for prejudice, we discern no reversible error in the court's evidentiary ruling.

Id. at 43-44 (citation omitted).

Here, the PCRA court explained:

> Appellant asserts that Trial Counsel was ineffective due to his failure to preserve for appeal an objection to the admission of Appellant's prior DUI conviction. Trial Counsel filed a pre-trial motion *in limine* to preclude evidence of Appellant's DUI conviction from 2011 and related completion of the Alcohol Highway Safety

> Program which was denied by this court. As a result, the objection to the admission of Appellant's prior DUI conviction was preserved for appeal.
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> This court explained when ruling on the pre-trial motions that the then recent Superior Court guidance made it exceedingly clear that Appellant's prior DUI conviction was required to be admitted into evidence. The guidance provided by ***Commonwealth v. Diehl***, decided just over a year before the hearings on the pre-trial motions, and its reference to similar rulings in other jurisdictions, is quite explicit . . . .
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> Appellant's assertion is an incorrect recitation of fact and resultingly Appellant has failed to establish any of the three ***Pierce*** prongs for ineffective assistance of counsel.

PCRA Ct. Op. at 16-17.

Following our review, we conclude that the PCRA court's conclusions are supported by the record and free of legal error. ***See Sandusky***, 203 A.3d at 1043. We agree with the PCRA court that the record belies Appellant's ineffectiveness claim because Trial Counsel did seek to exclude Appellant's prior DUI conviction. ***See*** Omnibus Pre-Trial Mot., 9/15/17, at 5-7 (unpaginated). Further, we conclude that the claim that Trial Counsel was ineffective lacks arguable merit because Appellant's prior DUI conviction was admissible for the purpose of demonstrating Appellant's knowledge of the dangers of driving under the influence. ***See Diehl***, 140 A.3d at 43-44. Because the underlying claim of Trial Counsel's ineffectiveness fails, Appellant's derivative claim of Prior PCRA Counsel's ineffectiveness also fails. ***See Chmiel***, 30 A.3d at 1128 (noting that if the petitioner cannot prove the underlying claim of trial counsel ineffectiveness, then the petitioner's

derivative claim of subsequent counsel's ineffectiveness fails). Therefore, Appellant is not entitled to relief on this claim.

Impeaching Commonwealth's Expert

The next issue that Current Counsel identifies is Appellant's layered ineffectiveness claim related to Trial Counsel's failure to impeach Officer Winik, the Commonwealth's accident reconstruction expert. ***Turner***/***Finley*** Brief at 17-18. Specifically, Current Counsel describes this as a claim that Trial Counsel was ineffective for failing to introduce photographs of the road at the scene of the crash which contradicted Officer Winik's testimony that a white line on the road was not present on the date of the crash. ***Id.*** at 14-15, 17-18. Further, Current Counsel explains that Appellant contends that Prior PCRA Counsel was ineffective for failing to introduce the photographs at the PCRA hearing. ***Id.*** at 18.

In his *pro se* brief, Appellant argues that Current Counsel has mischaracterized Appellant's claim. Appellant's *Pro Se* Brief at 16-19. Appellant contends that Trial Counsel and Prior PCRA Counsel were ineffective for failing to introduce those photographs to establish that Richards caused the fatal crash by making an illegal left turn. ***Id.***

Rule of Evidence 607 states:

> **(a) Who May Impeach a Witness.** Any party, including the party that called the witness, may attack the witness's credibility.
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> **(b) Evidence to Impeach a Witness.** The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules.

Pa.R.E. 607.

Further, counsel's decision to not present additional evidence is not ineffective assistance where that evidence is not relevant to the defense being presented or is cumulative of other evidence. ***See, e.g.***, ***Commonwealth v. Laird***, 119 A.3d 972, 990-91 (Pa. 2015) (holding that the defendant was not prejudiced by his trial counsel's failure to introduce the defendant's medical records about his multiple head injuries to support a diminished capacity defense where the defense had already presented expert psychiatric testimony and it was not relevant to the diminished capacity defense if the defendant had suffered one or multiple head injuries); ***Commonwealth v. Zook***, 887 A.2d 1218, 1227-29 (Pa. 2005) (concluding that defendant's trial counsel was not ineffective for failing to present medical evidence regarding the victim's lack of injury in a sexual assault case where the forensic pathologist admitted on cross-examination that he did not find any signs of injury on the victim's body that were consistent with sexual assault).

Here, the PCRA court concluded:

> Appellant asserts that Trial Counsel was ineffective for not entering in two pictures into evidence to refute the Commonwealth expert Officer Winik's testimony regarding the presence of a "white dash" on the road at the time of the crash. The significance of this dash was explained by Trial Counsel and Defense expert James Halikman as follows: "Q. And in negotiating a left turn, would it be fair to say you want to get as close to that hash mark as possible? A. Reasonably close, yes." N.T. 11/01/2017, p. 115. However, Mr. Halikman's expert report is devoid of any reference to the "white dash / hash mark."
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> [The Commonwealth recalled Officer Winik and] asked about the white dash/line, and [he] stated that it had been placed after the

> accident. N.T. 11/01/2017, p. 194. Appellant asserts that Trial Counsel should have introduced two pictures from the crash scene showing the white line existed at the time of the accident, thus contradicting Officer Winik's testimony.
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> However, there was no reason for Trial Counsel to do so. As Trial Counsel explained at the PCRA Hearing, the white line did not have any real significance in the matter. N.T. 07/20/2022, pp. 32-34; 44-46. The existence or nonexistence of the white line does not change the events leading to Jenna Richards's death. The fundamental dispute between the Commonwealth and [Appellant] at trial was as to the causation of the crash, and the causation determination made by Mr. Halikman as reflected in his expert report did not reference the white line at all. As such, whether there was a white line on the road at the time of the crash, or if it was placed there later, is an entirely collateral issue to the matter. Officer Winik confidently stated that the white line was placed after the crash, which logically means that the white line was not a factor in his determination of causation. N.T. 11/01/2017, p. 194.
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> Trial Counsel's decision to not impeach the Commonwealth's expert on an entirely collateral issue cannot be deemed ineffective assistance. Pa.R.E. 607(a) states that a witness can be impeached by evidence relevant to an issue in dispute. As the existence of the white dash at the time of the accident was of no significant consequence to the investigation, or the expert testimony offered, the evidence neither has a tendency to make a fact more or less probable nor is it of consequence in determining the action, evidence regarding the white line was minimally relevant, if at all. Pa.R.E. 401. As such, the pictures Appellant asserts that should have been introduced to impeach Officer Winik's testimony were of limited relevance and thus not necessarily admissible in the first place. Therefore, Appellant's assertion that Trial Counsel should have attempted to impeach Officer Winik lacks arguable merit.

PCRA Ct. Op. at 14-15 (some citations omitted).

Based on our review of the record, we agree with the PCRA court that the presence of the white line on the date of the crash was not relevant impeachment material because it would not have affected Officer Winik's

credibility or his conclusions about Appellant causing the crash. ***See*** Pa.R.E. 607.

Additionally, we find that Appellant's claim that Trial Counsel was ineffective for failing to present evidence that Richards was at fault for causing the crash lacks support in the record. Trial Counsel presented Halikman's expert testimony, and Halikman opined that the timing of Richards' left turn caused the crash. ***See*** N.T. Trial, 11/1/17, at 99-100, 114, 118-21. Trial Counsel's failure to present cumulative evidence is not ineffective assistance. ***See Laird***, 119 A.3d at 990-91; ***Zook***, 887 A.2d at 1227-29. Further, Appellant has only offered a bald assertion of prejudice, claiming that the photograph was "a critical piece of evidence" and has not explained how its omission affected the outcome of the trial. Therefore, Appellant is not entitled to relief on this claim. ***See Sandusky***, 203 A.3d at 1043-44.

Complete Innocence Defense

The final issue that Current Counsel identifies is Appellant's layered ineffectiveness claim related to Trial Counsel's failure to present a defense based on complete innocence. ***Turner***/***Finley*** Brief at 18-20. Unlike the other claims addressed in the ***Turner***/***Finley*** brief, Current Counsel does not conclude that this claim is meritless. ***Id.*** Instead, Current Counsel argues that this Court should remand this matter to the PCRA court to hold an evidentiary hearing regarding Appellant's layered ineffectiveness claim. ***Id.*** Specifically, Current Counsel argues that Trial Counsel was required to follow Appellant's instructions to present a defense based on Appellant's complete

innocence. ***Id.*** at 19 (citing ***McCoy v. Louisiana***, --- U.S. ---, 138 S.Ct. 1500 (2018)). Current Counsel asserts that if this Court remands this matter to the PCRA court, Appellant will testify about his conversations with Trial Counsel and Prior PCRA Counsel about his defense strategy. ***Id.*** at 20. Current Counsel argues that Prior PCRA Counsel was ineffective for failing to call Appellant as a witness at the PCRA hearing. ***Id.***; ***see also*** Appellant's *Pro Se* Brief at 12-15.[8]

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[8] It is well-established that "[w]hen appointed, counsel's duty is to **either** (1) amend the petitioner's *pro se* petition and present the petitioner's claims in acceptable legal terms, **or** (2) certify that the claims lack merit by complying with the mandates of ***Turner***/***Finley***." ***Commonwealth v. Cherry***, 155 A.3d 1080, 1083 (Pa. Super. 2017) (footnote omitted, some formatting altered, and emphases added). Here, Current Counsel's brief improperly contains advocacy on the part of Appellant and conclusions that many of the issues that Appellant raised in his PCRA filings lack merit. ***See, e.g.***, ***Commonwealth v. Morrison***, 173 A.3d 286, 290-93 (Pa. Super. 2017) (concluding that the defendant's counsel erred by filing a brief that contained aspects of both an advocate's brief and an ***Anders*** brief by arguing that the defendant's challenge to the legality of his sentence was meritless); ***Commonwealth v. Plummer***, 2042 EDA 2018, 2020 WL 1548510, at *5-7 (Pa. Super. filed Apr. 1, 2020) (unpublished mem.) (explaining that it was improper for PCRA counsel to file "a partial ***Turner***/***Finley*** letter" regarding claims that the defendant wished to include in an amended PCRA petition that counsel, in his professional judgment, deemed unworthy of pursuit" (citing ***Morrison***, 173 A.3d at 292-93)). We note that we may cite to non-precedential cases filed after May 1, 2019, for their persuasive value. ***See*** Pa.R.A.P. 126(b).

Here, Current Counsel expressed concern about how to comply with ***Turner***/***Finley*** procedure where Appellant wished to raise claims of Prior PCRA Counsel's ineffectiveness under ***Bradley***. ***See Turner***/***Finley*** Brief at 1-2. We note that Current Counsel preserved those claims by raising them at the earliest possible opportunity, in Appellant's Rule 1925(b) statement. ***See Bradley***, 261 A.3d at 405. Under these circumstances, we will reach the

(Footnote Continued Next Page)

In ***McCoy***, the defendant argued that his trial counsel erred by pursuing a trial strategy of admitting the defendant's guilt during a murder trial in an attempt to avoid a death sentence. ***McCoy***, 138 S.Ct. at 1505-06. The United States Supreme Court awarded the defendant a new trial, holding that "counsel's admission of a client's guilt over the client's express objection is error structural in kind. Such an admission blocks the defendant's right to make the fundamental choices about his own defense." ***Id.*** at 1511.

Here, the PCRA court explained that

> the transcripts of the entire trial proceeding confirm that a primary strategy of the Appellant as advanced by his Trial Counsel was in fact that Appellant was not guilty. Essentially a key component of the defense was that Appellant was not legally responsible for [Richards'] death. Trial Counsel retained a well-respected accident reconstruction expert in our local area, James Halikman, and that expert rendered an expert opinion in his testimony to the jury that the Appellant was not responsible for causing the accident. Accordingly, on its face, this contention is directly inconsistent with the record. Clearly, the implication was that it was [Richards'] having made a left-hand turn in front of the Appellant's vehicle that caused the accident which resulted in [Richards'] death. The fact is, the jury rejected this testimony and this argument does not render Trial Counsel ineffective. Moreover, Trial Counsel apparently recognized that the facts of the case were so negative, and Appellant's driving so egregiously reckless, that the suggestion that [Richards] was the one responsible for the accident and her own death might very well have been categorically rejected [by] the jury. Thus, Trial Counsel's tactical choice to instead argue in the alternative is not ineffective assistance.

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merits of the claims of ineffective assistance of Prior PCRA Counsel that Current Counsel has developed in his brief. However, we caution Current Counsel to comply with the procedures set forth in ***Turner***/***Finley*** and their progeny in the future.

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> Furthermore, . . . this court rejects the contention that Trial Counsel did not pursue an argument that the Appellant was innocent or "not guilty" as the entire record clearly establishes a primary component of the defense was that Appellant was not legally responsible or at fault in the accident, and thus not criminally responsible for [Richards'] tragic death.

PCRA Ct. Op. at 12-13.[9]

Based on our review of the record, we agree with the PCRA court that Trial Counsel did not concede Appellant's guilt at trial. Because the certified record is sufficiently developed for this Court to address this claim, remand is not appropriate here. ***See Bradley***, 261 A.3d at 402. As stated above, Trial Counsel called Halikman as an expert on accident reconstruction and Halikman opined that Richards, not Appellant, caused the crash. ***See*** N.T. Trial, 11/1/17, at 99-100, 114, 118-21. During closing arguments, Trial Counsel referred to Halikman's expert opinion and argued that even though Appellant was speeding, Appellant's car did not leave his lane of travel. ***See*** N.T. Trial (Closing Arguments), 11/1/17, at 6-7. Trial Counsel did not concede Appellant's guilt during closing arguments. ***See id.*** at 3-8.

Further, Trial Counsel explained at the PCRA hearing that his defense strategy was focused on obtaining an acquittal on the charge of third-degree murder, and he believed that Appellant would have been satisfied if the jury found him guilty of the remaining counts. ***See*** N.T. PCRA Hr'g, 7/20/22, at

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[9] The PCRA court concluded in the alternative that ***McCoy*** was not applicable here because Appellant did not maintain his innocence throughout the pre-trial proceedings. ***See*** PCRA Ct. Op. at 12-14.

26-27, 40. However, Trial Counsel also explained the theory he presented at trial was that Appellant did not cause the crash. ***See id.*** at 39-40.

For these reasons, we conclude that Appellant's ineffectiveness claim is based on a mischaracterization of the record. Although Trial Counsel was focused on obtaining an acquittal on the charge of third-degree murder, he did not concede Appellant's guilt regarding any other offense at trial. Therefore, ***McCoy*** is not applicable to the facts of this case, and Appellant's claim of Trial Counsel's ineffectiveness lacks arguable merit. ***See Sandusky***, 203 A.3d at 1043. Because the underlying claim of Trial Counsel's ineffectiveness fails, Appellant's derivative claim of Prior PCRA Counsel's ineffectiveness also fails and Appellant is not entitled to relief on this claim. ***See Chmiel***, 30 A.3d at 1128.

Appellant's *Pro Se* Claims

Lastly, Appellant raised two additional ineffectiveness claims in his *pro se* brief. First, Appellant raises a layered ineffectiveness claim related to Trial Counsel's failure to seek the exclusion of urine test results under the Confrontation Clause. Appellant's *Pro Se* Brief at 20-23. Appellant also argues that Current Counsel was ineffective for filing a ***Turner***/***Finely*** brief instead of developing Appellant's claims of Prior PCRA Counsel's ineffectiveness. ***Id.*** at 7-11.

It is well-established that a petitioner has a rule-based right to counsel in litigating a first PCRA petition which must be honored even when the claims appear on their face to lack merit. Pa.R.Crim.P. 904(C); ***Cherry***, 155 A.3d at

1082. Appointed counsel has a duty to either amend the *pro se* petition and litigate the claims on the merits or seek to withdraw by complying with the mandates of ***Turner***/***Finley***. ***Cherry***, 155 A.3d at 1083. "If appointed counsel fails to take either of these steps, our courts have not hesitated to find that the petition was effectively uncounseled." ***Id.***

Appellant's layered ineffectiveness claim regarding the exclusion of the urine test results was not included in his brief's statement of questions; therefore, it is waived. ***See*** Pa.R.A.P. 2116(a) (stating that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby"); ***see also Commonwealth v. Hodge***, 144 A.3d 170, 172 n.4 (Pa. Super. 2016). Even if not waived, Appellant's claim is belied by the record because Prior PCRA Counsel included a claim that Trial Counsel was ineffective for failing to move for the exclusion of the urine test results. ***See*** Am. PCRA Pet., 7/2/22, at 5-6. Therefore, we conclude that even if not waived, this claim lacks arguable merit.

As discussed herein, we have concluded that all of the issues Appellant sought to raise on appeal are meritless. Therefore, Appellant's claim that Current Counsel was ineffective for filing a ***Turner***/***Finley*** brief fails because counsel cannot be ineffective for failing to pursue a meritless claim. ***See Davis***, 262 A.3d at 596.

For the reasons we have discussed, our independent review of the record confirms that there is no merit in Appellant's request for PCRA relief. ***See Muzzy***, 141 A.3d at 511. Accordingly, we discern no error of law or

abuse of discretion in the PCRA court's denial of Appellant's PCRA petition, and Current Counsel is permitted to withdraw from representing Appellant.

Order affirmed. Petition to withdraw as counsel granted. Jurisdiction relinquished.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/23/2024