

**Franklin County Legal Journal**  
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**Commonwealth v. Norris**

**Commonwealth of Pennsylvania v.**  
**Donald C. Norris, Defendant**  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch Criminal Action No. 912-2012, 965-2012

HEADNOTES

*Post Conviction Relief Act; Ineffective Assistance of Counsel*

1. Where the effectiveness of counsel is at issue, counsel is presumed to be effective and a petitioner will bear the burden of proving otherwise.
2. To satisfy the burden of establishing that counsel was ineffective at trial, a PCRA petitioner must prove that their claim has merit, that counsel did not have a reasonable basis for his act or omission, and that the petitioner suffered prejudice as a result.
3. Failure to satisfy one prong of the test for ineffectiveness, results in a failed claim of ineffective assistance of counsel.
4. A claim of ineffective assistance of counsel for conduct that occurred at the preliminary hearing stage is not a cognizable claim under the PCRA as it does not pertain to the truth determining process. Commonwealth v. Lassen, 659 A.2d 999, 1007 (Pa. Super. 1995).

Appearances:

Todd Sponseller, Esq. - PCRA Counsel, Appearance Withdrawn  
Donald C. Norris, Pro Se - Petitioner

OPINION

Before Herman, J.

**Procedural History**

Petitioner was charged with multiple charges including burglary and robbery in cases 912-2010 and 965-2010. On October 26, 2010, an evidentiary hearing was held to determine the merits of a motion to suppress evidence. Prior to the Court being able to render a decision on that motion, Petitioner entered in to a plea agreement on November 1, 2010. Petitioner filled out and signed a standard guilty plea written colloquy which was supplied to the Court. The Court held a hearing on that date wherein the Petitioner admitted his offenses, and the Court, subsequently accepted the plea agreement.

Petitioner filed a petition for relief under the Post Conviction Relief Act (PCRA) on March 3, 2011. Counsel was appointed to represent the Petitioner. Following some delay, on February 8, 2013, PCRA counsel filed a Petition for Leave of Court to Withdraw as Counsel along with a letter submitted in accordance with Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988); and Commonwealth v. Finley, 550 A.2d 213 (Pa. 1988). The matter is ready for decision.

**Discussion**

“Counsel is presumed to be effective and petitioner has the burden of proving otherwise.” Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999). In determining whether counsel was ineffective, we are guided by the standard set forth in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987). First, the underlying claim must be of arguable merit. Second, there was no reasonable basis that existed for counsel’s act or failure to act. Third, the prejudice prong, but for the act or omission, it is reasonably probable that the outcome would have been different.

Commonwealth v. Abu Jamal, 720 A.2d 79, 88 (Pa. 1998). Failure to satisfy one prong is a failure of the entire claim of ineffective assistance of counsel. Therefore, we will not address all three prongs as to each issue raised. Rather, we will only address which prong has not been established.

### 1. Failure of Counsel to File a Motion for Bail Reduction

Petitioner was held on \$500,000 bail and trial counsel did not file a motion to reduce this amount. Here, we note that Petitioner has failed to establish any indication of prejudice. The prejudice prong requires that but for trial counsel's omission the outcome of the proceeding would have been different. We see no indication or suggestion as to how reduced bail could have affected the end result of this case, especially since Petitioner entered a plea of guilty. Additionally, we note that the general standard for a claim of ineffectiveness of counsel under the PCRA requires that the ineffectiveness undermines the truth determining process – this claim does not.

### 2. Motion for Change of Venue

Petitioner argues that he could not receive a fair and impartial trial because one of the victims was a Franklin County Probation Officer. He now argues that trial counsel was ineffective because he did not file a motion for change of venue. As to the merits of this claim, we note that simply because a victim was a county employee and a part of law enforcement does not automatically, per se, give rise to disqualification of a venue. No other factors such as heightened media attention or impartial conduct on the part of the court were present in this case, nor were they ever alleged. This lack of merit of the claim could also be an explanation for trial counsel's failure to file such a motion, thereby demonstrating that counsel had a reasonable basis for his actions. As to the prejudice prong, we once again note that Petitioner entered a plea of guilty. If a motion for change of venue were filed, the above-mentioned lack of merit would have caused the motion to be denied and Petitioner would be in the same position as he is now.

### 3. Motion for Sentence Modification

Petitioner alleges that he requested trial counsel to file a motion to modify his sentence. The claim for relief fails as it has no merit. Further, because it has no merit, Counsel had a reasonable basis for refusing to file the motion. Petitioner's sentence was agreed to as part of the plea agreement. The plea agreement was entered into and signed by Petitioner who accepted that his sentence minimum would be 78 months. Not only did he enter this agreement for a minimum of 78 months, but the Court discussed this sentence with him during the oral colloquy. (Tr. Sent. Hr'g, 11/1/10 at 6). Additionally, the sentence was not only within the guidelines set forth by the Sentencing Commission, the sentence minimum was at the lowest range allowable without having a mitigating circumstance present.

There was no basis for a sentence modification, therefore, Petitioner's claim is meritless and counsel had a reasonable basis for not seeking modification.

### 4. Motion for Suppression of Statements

Petitioner argues that trial counsel should have filed a motion to suppress the inconsistent statements of his co-defendants. First, we find that there is no merit to this claim as inconsistency is not grounds for suppression and merely go to the weight of the evidence when presented to the trier of fact. Further, we note that Petitioner was not prejudiced by trial counsel's failure to seek suppression of these statements because he entered a guilty plea prior to disposition of his motion to suppress evidence. Had counsel raised this issue, it would have been waived by the Petitioner when he entered his guilty plea. Therefore, he would be in the same position as the one he is in now.

### 5. Guilty Plea was Unlawfully Induced

Petitioner's recollection of what happened on November 1, 2010, set forth in his pro se petition, is quite different than what is reflected in the Sentencing Transcript of that day's proceeding. It should be noted that the Court accepted the defendant's plea and sentenced him on the same date, November 1, 2010. Petitioner states that the Court inquired as to whether petitioner is truly guilty of the crime to which he pled guilty. He then claims that he was "at a loss for words" because he believed he was innocent. Due to his inability to answer he claims that the Court recommended a brief recess for Petitioner to confer with his counsel. Petitioner then claims that a discourse between him and his attorney occurred, wherein his attorney instructed him to lie, and that Petitioner complied

because he was “frightened and misled.” The transcript clearly does not reflect any such recess. Nor does it reflect any reluctance, on Petitioner’s part, to allocute. We additionally note that Petitioner’s claim of inducement is highly suspect because even after the Court accepted the plea bargain and sentenced Petitioner, he continued to express remorse for his actions and even requested permission to write a letter of apology to the victims. This conduct does not coincide with someone who claims that he only said what he said for the sake of persuading the court to accept his plea.

Additionally, the written Plea Agreement invokes additional doubt as to Petitioner’s claim that he merely entered the plea because his attorney forced him to midway through the sentencing hearing. The Plea Agreement form would have been filled out prior to the commencement of the sentencing hearing. The form, which Petitioner filled out and signed indicates that his plea is voluntary and that he admits to the charge for which he was sentenced. This form was then presented to the Court, prior to imposition of the sentence, whereupon Petitioner had another opportunity to express his hesitation or express any displeasure with counsel. He did neither.

We find no merit to Petitioner’s claim of unlawful inducement. The sentencing court properly accepted Petitioner’s knowing, voluntary, and intelligent plea after conducting a thorough oral colloquy, on the record, and also reviewing the written colloquy contained in the Plea Agreement form.

#### 6. Quality of the Omnibus Pretrial Motion

Defendant again raises the effectiveness of trial counsel, this time arguing that the quality of the omnibus pretrial motions filed was insufficient. This claim for relief fails this prejudice prong because Defendant entered in to a plea before the omnibus motions could be decided. Regardless of the quality of the motion, Petitioner would be in the same position as he is now. Therefore, Counsel could not be ineffective due to the quality of the motion.

#### 7. The Fact that an Omnibus Pretrial Motion was Filed in the First Place

Defendant also seems to claim that trial counsel was ineffective for having filed an omnibus pretrial motion at all, arguing that it would have suppressed exculpatory evidence. Although evident in each of the claims Petitioner seeks to raise, this claim make it especially clear that Petitioner has no meritorious claims for relief and is merely attempting to argue every possible aspect of his case because he is suffering from a case of “buyer’s remorse” in regards to his plea agreement. In the previous issue, he complains that his omnibus pretrial motion was insufficient. Now he is trying to argue that counsel should not have even filed a motion.

Regardless of Petitioner’s contradictory arguments, we will still address this claim. Petitioner’s pro se petition for relief states that the omnibus pretrial motion “would have suppressed the [testimony] of state witnesses: Christy Breeden and Kiera Widdows, which in fact destroys mitigating evidence to prove defendant’s innocence.” We do not know if this is true because the motion was never decided. We find, as we did in the previous issue, that Petitioner has no claim for relief regarding the filing of an omnibus pretrial motion because he entered into a plea agreement prior to the disposition of the omnibus pretrial motion. Therefore, trial counsel could not have been ineffective because no prejudice occurred.

#### 8. Defendant Requested New Counsel

Petitioner’s next argument is that he did not receive a fair trial because his trial counsel was a former Assistant District Attorney for Franklin County. Petitioner merely alleges that this is a conflict of interest, citing to nothing in particular. Further, PCRA counsel found no issues where trial counsel would have had a conflict. In fact, trial counsel had not been employed by the District Attorney’s office for some time prior to his representation of Petitioner. It appears that Petitioner merely wanted a new attorney. An indigent defendant is entitled to competent counsel, not the counsel of his choice. Commonwealth v. Tyler, 360 A.2d 617 (Pa. 1976).

#### 9. Jail Telephone Transcripts

Petitioner argues that counsel was ineffective for failing to obtain transcripts of jail phone calls because they contained exculpatory evidence. Once again, Petitioner fails to satisfy the prejudice prong because he pled guilty to his charges. Any evidence obtained or not obtained would place Petitioner in no other position than the one he is now in.

#### 10. District Attorney “Coaching” Witnesses

Petitioner argues that his attorney was ineffective for failing to object when defendant observed the District Attorney directing his witness by nodding his head when he wanted to elicit a particular answer. Whether this actually occurred, we do not know. However, we can still dispose of this issue. The PCRA requires that counsel be so ineffective as to undermine the truth determine process. See 42 Pa.C.S. § 9543(a)(2)(ii). Here, the alleged ineffectiveness occurred at the preliminary hearing which merely determines if there is enough evidence to proceed with the matter. No determination of credibility as to the evidence is made. Therefore, counsel’s effectiveness at a preliminary hearing is not a cognizable claim under the PCRA. Commonwealth v. Lassen, 659 A.2d 999, 1007 (Pa. Super. 1995).

#### 11. Pretrial Incarceration

Petitioner claims that the conditions of his pretrial incarceration induced him into accepting the plea and, therefore, his plea was not voluntary. The conditions which Petitioner complains of, based upon his October 5, 2011 letter to PCRA counsel, appear to be the standard conditions associated with administrative segregation. Additionally, Petitioner was asked during his written colloquy and his oral colloquy whether anything was inducing him to accept the plea agreement. Petitioner made no indication that this was the case. Therefore, this claim has no merit.

#### 12. Excessive Bail

Petitioner additionally argues that his bail was excessively high. It appears that he makes this request for relief under 42 Pa.C.S. § 9543(a)(2)(i) which provides relief where a constitutional violation has occurred. This section, however, requires that the violation undermined the truth-determining process. Issues of bail are not a part of the truth-determining process, therefore, Petitioner is not entitled to relief.

#### 13. False Testimony at Preliminary Hearing

Petitioner argues that he was denied his right to due process where a witness falsely testified at the preliminary hearing. This claim is not cognizable under the PCRA because a defective preliminary hearing is not a part of the truth-determining process. Commonwealth v. Lyons, 568 A.2d 1266 (Pa. Super. 1989).

#### 14. District Attorney Directing Witness to Falsely Testify at Preliminary Hearing

Petitioner makes the same argument as in Issue 13, but this time claims the District Attorney directed the false testimony. We find for the same reason, that this is not a cognizable claim under the PCRA. See Commonwealth v. Lyons, 568 A.2d 1266 (Pa. Super. 1989).

#### 15. District Attorney Withheld Exculpatory Evidence

Here, Petitioner argues that his right to due process was violated at the suppression hearing, when the District Attorney threatened witness, Christy Breedon, preventing her from testifying in a manner which was favorable to Mr. Norris. This appears to be a mischaracterization of events. Reflected in the transcript of the October 26, 2010 Suppression Hearing, at pages 81-86, it is apparent that Ms. Breedon made the decision, at the advice of her own counsel, that she should not testify on account of the possibility that she may incriminate herself. This claim for relief is without merit.

#### 16. Defendant Was Not Aware of His Right to a Jury Trial

Defendant claims his plea was not knowing and voluntary because he was not aware of the right to a jury trial. The transcript of the November 1, 2010 guilty plea colloquy, at page 5 reflects that Petitioner answered “Yes” when the Court asked him if he understood that he was giving up his right to a trial by jury. Additionally, the written colloquy filed on that same date reflects the same response by the Petitioner at question 5(a). This claim for relief is without merit.

17. Defendant Was Not Aware of His Appeal Rights

Defendant claims his plea was not knowing and voluntary because he was not made aware of his appeal rights at the time he entered his plea. The written colloquy at question 8 signed by Petitioner informs him of his right to appeal. This claim for relief is without merit.

18. Defendant Was Not Aware of the Presumption of Innocence

Defendant claims his plea was not knowing and voluntary because he was not made aware that he was presumed innocent until proven guilty. The written colloquy at question 6(a) signed by Petitioner informs him of this presumption. This claim for relief is without merit.

**Conclusion**

Upon review of the record, as well as the Turner/Finley letter provided by PCRA counsel, we have determined that Petitioner has made no meritorious claim for relief under the PCRA. Petitioner's claims are merely reflective of his remorse for entering in to a plea which, at the time, he was fully aware of the ramifications and consequences of entering such a plea. At the November 1, 2010 sentencing hearing, Petitioner stated that he was "one hundred percent" satisfied with his counsel's performance until that point. He also admitted his guilt, and expressed his remorse for his actions, going as far as to request the permission to write a letter of apology to the victims of this crime. Now, Petitioner would have this Court believe that he was railroaded by the District Attorney and left unassisted by his own incompetent counsel. The record does not reflect such a circumstance. The petition for relief will be denied.

ORDER OF COURT AND NOTICE OF INTENTION TO DISMISS  
WITHOUT A HEARING PURSUANT TO PENNSYLVANIA  
RULE OF CRIMINAL PROCEDURE 907(1)

**NOW THIS** 7th day of August 2013, upon review and consideration of Petitioner's petition for relief pursuant to the Post Conviction Relief Act (PCRA) and the court-appointed counsel's Motion for Leave to Withdraw as Counsel submitted in accordance with Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988) (hereinafter "Turner/Finley Letter") and it appearing to the Court there are no further genuine issues of material fact requiring a hearing on the Petition, and further based on a review of the record, and the relevant portions of the PCRA, the Court hereby notifies the petitioner of the Court's intention to dismiss the Petition without further hearing pursuant to Rule 907(1). A discussion of our reasoning is contained in the attached opinion.

**IT IS FURTHER ORDERED** that counsel's Motion to Withdraw is **GRANTED**.

**THE PETITIONER IS NOTIFIED THAT HE HAS THE RIGHT PURSUANT TO PENNSYLVANIA RULE OF CRIMINAL PROCEDURE RULE 907 TO RESPOND TO THIS PROPOSED DISMISSAL, INCLUDING THE RIGHT TO FILE AN AMENDED PETITION, WITHIN TWENTY (20) DAYS OF RECEIPT OF THIS ORDER.**

**THE PETITIONER IS NOTIFIED THAT THE FAILURE TO RESPOND OR TO FILE AN AMENDED PETITION WITHIN TWENTY (20) DAYS OF RECEIPT OF THIS ORDER MAY RESULT IN THE DISMISSAL OF THIS PETITION WITH PREJUDICE.**

*In the event the petitioner does file an Amended Petition within twenty (20) days of receipt of this Order, the Commonwealth is granted thirty (30) days after receipt of any such Amended Petition to file an Answer before the grant of a hearing date.*

*Pursuant to Pennsylvania Rules of Criminal Procedure 114, the Clerk of Courts shall immediately docket this Order and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Order, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.*