IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH	:	**CRIMINAL TRIAL DIVISION**
	:	
	:	
vs.	:	
	:	
	:	**CP-51-CR-0105771-1997**
STRATTON PEAY a/k/a	:	**CP-51-CR-1207221-1996**
STRATTON CONOVER	:	**EDA 2008**

O P I N I O N

POSERINA, J.

The Petitioner has appealed this Court's order dismissing his petition filed pursuant to the Post Conviction Relief Act, 42 Pa. C.S.A. § 9541 *et seq*.

I. PROCEDURAL/FACTUAL HISTORY

Shortly after midnight on May 7, 1996, Petitioner was drinking at Jarrett's Lounge, located at Ogontz and Cheltenham Avenues in Philadelphia. Petitioner and a couple of friends were standing in front of the bar when a man approached walking two pit bulls. One of the dogs barked at or lounged toward the Petitioner, and words were exchanged between Petitioner and the owner of the dogs, James Hart. At that point, according to Petitioner, he believed Hart was reaching for a gun. Petitioner then shot and killed James Hart.

Later on the same day, Petitioner was arrested while he was a passenger in a car stopped by police for traffic violations. At that time, he was in possession of a .38 caliber, unlicensed handgun. As the police had no knowledge of Petitioner's connection with the Hart murder

earlier in the day, Petitioner was charged with two violations of the Uniform Firearms Act and was released from custody. [1]

Over seven months later, on December 27, 1996, Petitioner was again arrested pursuant to an outstanding warrant. He was subsequently questioned by detectives concerning the killing of James Hart and an unrelated homicide.[2] After knowingly, intelligently and voluntarily waiving his Fifth Amendment rights, Petitioner gave a statement admitting to both homicides.

In January of 1998, Petitioner was tried by a jury before the Honorable John J. Poserina and was convicted of 3rd degree murder and related charges.

II. STANDARD OF REVIEW

The purpose of the Post-Conviction Relief Act (hereinafter the Act) is to afford collateral relief to those individuals convicted of crimes they did not commit and those serving illegal sentences. 42 Pa.C.S.A. § 9542. To successfully assert ineffective assistance of counsel which resulted in an unjust conviction or sentence, a petitioner must set forth that the underlying claim has arguable merit, counsel's act or omission was not reasonably designed to advance the petitioner's interests and a reasonable probability that but for the errors of counsel the result would have been different. 42 Pa. C.S.A. § 9543(a)(2)(ii); Commonwealth v. Pierce, 537 Pa. 514; 645 A.2d 189, 1994 Pa.LEXIS 272.

Beginning with the assumption that trial counsel was effective; a petitioner's claims must be evaluated using the three-prong test from Pierce outlined above. Commonwealth v. Breakiron, 556 Pa. 519; 729 A.2d 1088, 1999 Pa.LEXIS 983. A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. Commonwealth v. Hudson, 2003 Pa. Super.

[1] These charges were lodged on a separate bill of information from the murder charge. The bills were consolidated for trial, however, as the handgun found in Defendant's possession was the murder weapon in the killing of James Hart.

[2] This second murder took place only eleven days after the killing of James Hart. Approximately one year after trial in the instant case, Petitioner was tried by a jury before the same trial judge and was

104, 820 A.2d 720, 2003 Pa.Super. LEXIS 410. In addition, an ineffectiveness claim may be dismissed on the failure to meet the "prejudice" prong alone. Commonwealth v. Travaglia, 541 Pa. 108, 118-19; 661 A.2d 352, 1995 Pa.LEXIS 468. Thus, if a petitioner cannot show how the results of his trial would have been different had counsel not erred, the petition must fail. Furthermore, counsel will not be deemed ineffective for failing to raise a meritless issue. Commonwealth v. Peterkin, 538 Pa. 455, 649 A.2d 121, 1994 Pa.LEXIS 504.

III. FACTUAL HISTORY

> On June 9, 2001, an assailant shot Sean Morgan two times in his left side while he stood outside of his vehicle at Belfield and Lindley Avenues in Philadelphia. Mr. Morgan attempted to run away after being shot, but he collapsed in a nearby gas station parking lot.
>
> Officer Lisa Heil arrived on the scene and observed Mr. Morgan covered in blood with his hands over his wounds. She asked him if he could identify his attacker. With labored speech, Mr. Morgan told Officer Heil that he knew his attacker by his street name, "Black." He described Black as a black male, 5'4" and wearing a purple Lakers jersey and short set and a matching Lakers hat. Officer Heil testified that Mr. Morgan kept saying he was shot and needed to get to a hospital. She recalled that Mr. Morgan only partially answered some questions and others he did not answer at all because he was complaining about the pain. An ambulance transported Mr. Morgan to a hospital, where he died approximately eight hours later.
>
> When the shooting occurred, there was a party going on at a nearby park. Diane Branch was at the party. Shortly after Ms. Branch arrived at the party, appellant approached her and asked for her name and phone number. Ms. Branch did not tell appellant her real name and told him that she would take his number instead. She testified that appellant wrote down his phone number and told her that his name was Black. Ms. Branch also testified that she had known of appellant for about one year and recognized him because she would drive her girlfriend to the neighborhood where appellant frequented. After appellant gave Ms. Branch his phone number and name, Ms. Branch walked away and went to a store across the street to get a sandwich. When she returned to the park, she saw Mr. Morgan, who she knew as Saleem, drive up in his blue Jeep. Ms. Branch testified that Mr. Morgan got out of the driver's side and walked around to the passenger side of the vehicle. According to Ms. Branch, it was at that point that appellant walked up to Mr. Morgan. She gave the following testimony:

> And he [appellant] walked up to Saleem and said, "Remember me," and Saleem was like, "Yeah, "he like, "You always used to fuck with me all the time," and Saleem said, "I'm not fucking with you now," but he was like laughing like it was a joke or something, and that's when [appellant] pulled out his gun and that's when I – I turned around and just ducked behind the car. N.T., 7/23/2003, at 105. Ms. Branch stated that she heard two or three gunshots as she turned around to duck.

Ms. Branch testified that appellant was wearing a Kobe Bryant, No. 8 Lakers jersey and a matching Lakers hat at the time of the shooting. There is some dispute as to whether she saw appellant wearing black jeans or black jean shorts. After the shooting, Ms. Branch picked appellant's photograph out of a photo spread. She told police officers that the picture was of appellant, but at the time of the shooting he had more hair and a beard.

Vernetta Kea was also at the party when the shooting occurred. Ms. Kea had known the victim, Sean Morgan, for a few years at that time. She knew Mr. Morgan by his given name and by Saleem. Ms. Kea did not see the shooting, but afterwards she found Mr. Morgan laying on the ground at the gas station. Mr. Morgan told Ms. Kea that he had been shot by Black and that Black was wearing a purple and yellow Lakers jersey.

(*September 23, 2004 Pennsylvania Superior Court Opinion affirming the Judgment of Sentence, pp.1-3).*

IV. DISCUSSION

In the Amended PCRA petition, the following issues are raised in support of the request for post-conviction relief:

1) INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT PRESERVING A CHALLENGE TO THE WEIGHT OF THE EVIDENCE;

2) INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT PRESERVING AND THEREAFTER RAISING THE ISSUE OF THE COURT'S FAILURE TO DELIVER A KLOIBER CHARGE TO THE JURY;

3) INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO PROPERLY OBJECT AND TO THEREAFTER PRESERVE THE ISSUE OF THE PROSECUTOR'S MISCONDUCT IN CLOSING WHEN THE PROSECUTOR MOST IMPROPERLY REFERENCED THE WAR IN IRAQ AND WHERE COUNSEL FAILED TO RAISE THAT ISSUE ON DIRECT APPEAL;

4) THE DEFENDANT MUST BE AWARDED A NEW TRIAL AS THE RESULT OF INEFFECTIVENESS OF TRIAL COUNSEL WHO FAILED TO OBJECT TO DETECTIVE PATTERSON'S TESTIMONY WHICH ANNOUNCED THAT "BLACK" WAS A SUSPECT

5) BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE DEFENDANT FAILED TO REQUEST THAT CHARACTER WITNESSES BE CALLED ALTHOUGH THEY WERE READY AND AVAILABLE AND ONLY BECAUSE COUNSEL ERRONEOUSLY TOLD THE DEFENDANT THAT THE CRIME OF REAP WOULD COUNT AS A CRIME OF VIOLENCE AND THAT THE DEFENDANT COULD BE IMPEACHED WITH SAME, AND ALL WHERE COUNSEL WAS SIMPLY INCORRECT AND EVEN IF CORRECT, THE BENEFIT OF PRESENTING THE CHARACTER EVIDENCE FAR OUTWEIGHED THE CHANCE OF PREJUDICE FROM A PRIOR REAP CONVICTION.

WEIGHT OF THE EVIDENCE

Petitioner's allegation of trial counsel's ineffectiveness for failing to preserve a weight of the evidence claim is without merit. Petitioner has not satisfied the first prong of the ineffectiveness test, i.e., a claim with arguable merit, since his conviction was clearly not against the weight of the evidence. Of interest is the fact that on direct appeal the Superior Court rejected Petitioner's argument that the evidence was insufficient to sustain his conviction due to the "incredible" testimony of Ms. Branch's; he raises the same argument via his weight of the evidence claim.

This Court recognizes the distinction between a sufficiency of the evidence and a weight of the evidence challenge, as the former confines the tribunal to accept the evidence produced by the prosecution in the most favorable light, whereas the latter permits a trial court to make an independent assessment of the credibility of the prosecution's case. *See* Commonwealth v. Vogel, 461 A.2d 604; 501 Pa. 314; 1983 Pa. LEXIS 527. When an independent assessment is necessary, a trial court may grant a new trial on the basis that the verdict was against the weight of the evidence only if the verdict is so contrary to the evidence as to shock one's sense of

justice. Commonwealth v. Washington, 2003 PA Super 206, 825 A.2d 1264, 2003 Pa. Super. LEXIS 1299, *citing* Commonwealth v. Gibson, 553 Pa. 648, 720 A.2d 473 (1998), *cert. denied* 528 U.S. 852, 120 S.Ct. 132, 145 L.Ed. 2d 111 (1999).

As noted by Commonwealth v. Brown, *supra.*, a challenge to the weight of the evidence is a matter left to the discretionary power of the trial court and will only be reversed on appeal where there has been an abuse of that discretion. A trial court may

> grant a new trial when it believes the verdict was against the weight of the evidence and resulted in a miscarriage of justice. Although a new trial should not be granted because of a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion, a new trial should be awarded when the jury's verdict is *so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. citing* Thompson v. City of Philadelphia, 507 Pa. 592, 598, 493 A.2d 669, 672 (1985)

648 A.2d 1177 at 1189.

On direct appeal, the Superior Court held that the weight of the evidence issue had been waived by Petitioner since he raised it for the first time in his 1925(b) Statement. This Court, however, addressed the claim in its 1925 opinion and concluded that the issue was without merit since the judgment was clearly not so contrary to the evidence as to shock one's sense of justice and make the award of a new trial patently imperative. Contrary to Petitioner's claim that he was convicted "on the basis of scant, if any, evidence,"[3] an eye witness to the crime, Diane Branch, who had known the Petitioner prior to the shooting, positively identified him through a photographic array and at trial as the shooter. Additionally, the victim had identified his assailant as "Black" to Officer Heil and Ms. Kea. On direct appeal, the Superior Court held that the trial court had correctly held the statements to qualify as a dying declaration.

[3] Amended PCRA Petition, p. 9.

In addition to identifying the shooter as “Black”, the victim provided a description, including the fact that the perpetrator was wearing a purple and yellow Kobe Bryant Lakers’ jersey. Ms. Branch had testified that the Petitioner’s nickname was “Black” and that he was wearing a Kobe Bryant Lakers jersey at the time of the shooting.

Moreover, contrary to Petitioner’s assertions, the Commonwealth was not required to produce “scientific” proof via fingerprint, hair or DNA analysis nor was the lack of a murder weapon dispositive of the case against him. As noted by our appellate courts “When the challenge to the weight of the evidence is predicated on the credibility of the trial testimony, our review of the trial court's decision is extremely limited. Generally, unless the evidence "is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture," Commonwealth v. Farquharson, 467 Pa. 50, 60, 354 A.2d 545, 550 (1976) (citations omitted), these types of claims are not cognizable on appellate review. Id. See also Commonwealth v. Nelson, 514 Pa. 262, 271 n. 3, 523 A.2d 728 n. 3 (1987) (except in cases where penalty of death is imposed, appellate court should not entertain challenge to weight of evidence because examination is confined to "cold record"), citing Commonwealth v. Ingram, 404 Pa.Super. 560, 591 A.2d 734, 1991 Pa. Super. LEXIS 1414.

As trial counsel emphasized alleged inconsistencies in the eye witness’ testimony and extensively cross-examined and challenged the evidence presented by the Commonwealth, there is no basis to discredit the jury’s finding. Moreover, their finding does not shock this jurist’s sense of justice, and viewing the eyewitness testimony, along with the additional evidence presented by the Commonwealth, this Court concludes that there was no basis to grant relief at the appellate stage on a weight of the evidence challenge. Accordingly, post-conviction relief is not warranted on this claim.

KLOIBER CHARGE

Petitioner also claims entitlement to post-conviction relief on the basis of appellate counsel's failure to pursue the trial court's refusal to give a Kloiber charge; alleging that Ms. Branch could not clearly observe the shooter as she was "hiding" behind a motor vehicle. Petitioner's assertions mischaracterize the testimony by Ms. Branch, who never waivered in her identification of the Petitioner as the shooter.

With respect to identification evidence, it is essential that the identity of the accused be proven beyond a reasonable doubt to convict a person of the crime or crimes charged. Identification evidence, however, is not required to be beyond all doubt. Any indefiniteness in an identification is a factor to be weighed by the fact finder in reaching a verdict. Commonwealth v. Pickron, 297 Pa.Super. 615; 442 A.2d 338; 1982 Pa.Super. LEXIS 3337.

The Pennsylvania Supreme Court set forth the following guidelines for identification evidence:

> Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony as to identification need not be received with caution – indeed the cases say that 'his positive testimony as to identity may be treated as a statement of fact.' …
>
> On the other hand, where the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution.

Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820, 1954 Pa.LEXIS 607, *citations omitted.*

It is axiomatic that as with other evidence, the acceptance or rejection of an identification lies within the province of the fact finder. In carrying out this duty, a fact finder is required to make an assessment of the credibility of and the weight to be given any identification.

As noted by the Pennsylvania Superior Court in Commonwealth v. Cleveland, 703 A.2d 1046, 1997 Pa. Super. LEXIS 3851, there is a "distinction between opportunity to observe and quality of observation. …. once the opportunity to observe is established it becomes defense counsel's cross-examination, not the court's *Kloiber* charge, which must highlight any problems with the quality of a witness's observation." 703 A.2d at 1049. Instantly, the eye witness knew the Petitioner prior to the shooting as she had seen him in the neighborhood and as he had introduced himself to her, calling himself "Black. She witnessed him confront the victim and draw a gun, pointing it at the victim. Ms. Branch ducked to avoid the bullets that she heard immediately thereafter; her actions did not in any way diminish the strength of her identification.

As a Kloiber charge instructing the jury to consider an identification charge with caution is only necessary when the identification is somehow qualified or doubtful, the circumstances of this case clearly indicate that a Kloiber cautionary charge was not warranted. Any questions regarding the quality of the witness' observation should have been addressed on cross-examination, which they were. Accordingly, the trial court did not error in not giving the requested charge and appellate counsel cannot be deemed ineffective for failing to raise the issue on direct appeal.

PROSECUTORIAL MISCONDUCT

Likewise, Petitioner's allegation that counsel was derelict in his duties for failing to raise the issue of prosecutorial misconduct regarding the Commonwealth's closing argument is without merit, and thus Petitioner cannot satisfy the prong of the ineffectiveness standard that the claim has arguable merit. Petitioner alleges that the prosecutor's reference to military service and

the Iraq war was "mostly unfairly and impermissibly pandering to the emotions and fears of the jury"[4], and that trial counsel should have objected.

Initially, this Court notes that the jury was instructed prior to the commencement of closing arguments that the arguments of counsel were not evidence, but should be considered by the jury as a guide in their deliberations. The jury was further instructed that they were not bound by counsels' recollection of the evidence and that they should have resolved any discrepancies by relying upon their own collective recollection. (N.T. 07/25/03, pp. 8-9).

The court reviewing claims of prosecutorial misconduct seeks to determine if a defendant received a fair trial, not a perfect one. Commonwealth v. Miguel Rios, 554 Pa. 419; 721 A.2d 1049; 1998 Pa. Lexis 2508.

"*A prosecutor is permitted to vigorously argue his case as long as his comments are supported by evidence and contain inferences that are reasonably derived from the evidence. To constitute reversible error, the language must be such that its unavoidable effect would be to prejudice the jury, forming in their minds fixed bias or hostility towards the defendant, so that they could not weigh the evidence and render a true verdict.*" Id. 554 Pa. at 431; 721 A.2d at 1055.

Petitioner's current objection to the prosecutor's reference to military service and war fail to recognize that they were made in response to the defense's repeated mantra about reasonable doubt; such a response is permissible. *See* Commonwealth v. Abu-Jamal, 553 Pa. 485; 720 A.2d 79; 1998 Pa. LEXIS 2364. The prosecutor, in an attempt to explain the concept of reasonable doubt, noted that all decisions, including military service, have ramifications, but just because there are serious ramifications or doubts does negate the necessity of making a decision.

[4] Amended PCRA Petition, p. 14.

After evaluating the challenged remarks, this Court finds that the Commonwealth's closing argument did not deny the Petitioner a fair trial. The challenged remarks did not have the requisite unavoidable effect of prejudicing the jury to the extent that they would have formed a fixed bias or hostility towards him. Nor would the remarks have prevented the jury from properly weighing the evidence and rendering a true verdict. Again, post-conviction relief is not warranted.

CHALLENGED TESTIMONY[5]

Petitioner also claims post-conviction relief on the basis that trial counsel was ineffective for failing to object to alleged "testimonial hearsay" during the direct testimony of Detective Grady Patterson.[6] In support of his allegation, Petitioner references the United State Supreme Court decision of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). Crawford is inapplicable and factually distinguishable from this matter as it involved the prosecution playing a tape-recorded statement of the defendant's wife describing her husband's stabbing of the victim during his trial for assault and attempted murder. Due to the state's marital privilege that barred one spouse from testifying against the other without the other's consent, the wife did not testify at trial. The United States Supreme Court held that the state's action violated the husband's Sixth Amendment right to confront the witnesses against him.

Contrary to Petitioner's assertion, the testimony at hand is nothing like the "testimonial hearsay" at issue in Crawford, and this Court is of the opinion that it was not hearsay at all as the

[5] The PCRA Court addresses the challenge to Detective Patterson's testimony as that is the issue "briefed" in the Amended PCRA Petition; a challenge to Officer Rone's testimony was identified in paragraph 13 (c) of the Amended Petition but was not substantiated with argument or legal analysis resulting in the allegation being fatally undeveloped, and thereby subject to dismissal. *See* Commonwealth v. Bond, 572 Pa. 587, 819 A.2d 33, 2002 Pa.LEXIS 1753 and Commonwealth v. Jones, 571 Pa. 112, 811 A.2d 994, 2002 Pa.LEXIS 2491. Additionally, a review of Officer's Rone's testimony (N.T. 07/24/03, pp120-144), including the trial court's directive to the jury to consider him a ballistics' expert, underscores the lack of validity to any claim concerning his testimony.

[6] The testimony of Officer Patterson appears at N.T.07/24/03, pp. 81-119.

Detective's reference to "Black" as it appeared on the crime scene log merely documented the steps Detective Patterson took to investigate the murder once he received the assignment. Assuming there is some merit to Petitioner's contention that the testimony was hearsay, the failure to object was harmless error as the reference was cumulative of testimony provided by the eye witness, Diane Branch, and the dying declaration made by the victim to Officer Heil and Vernetta Kea. Accordingly, there is no basis to provide post-conviction relief based upon the detective's testimony.

CHARACTER TESTIMONY

The final contention Petitioner raises as providing a basis for post-conviction relief is that trial counsel was ineffective in advising Petitioner to forgo the presentation of character witnesses; arguably via an incorrect legal analysis.

Out of the presence of the jury, Petitioner was colloquied regarding his decision to not present character witnesses. During the colloquy, defense counsel recapped his discussions with the Petitioner that, as had been the trial court's ruling in one of the earlier trials resulting in a mistrial, the trial court would permit the Commonwealth to cross-examine any character witnesses presented as to his reputation for being a peaceful, non-violent and law-abiding citizen with his prior conviction for REAP, indicating that the trial court had stated that the REAP conviction was "a crime of violence". This advice was sound, although perhaps the proper nomenclature was not used.

The relevant portions of the Rules of Evidence that govern the presentation of character evidence in criminal trials are as follows:

> **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes**
>
> (a) Character evidence generally. Evidence of a person's character or a trait of

character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same. If evidence of a trait of character of the alleged victim of the crime is offered by an accused and is admitted under subsection (2), evidence of the same trait of character of the accused is admissible if offered by the prosecution.

Rule 405. Methods of proving character

(a) Reputation evidence. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination of the reputation witness, inquiry is allowable into specific instances of conduct probative of the character trait in question, except that in criminal cases inquiry into allegations of other criminal misconduct of the accused not resulting in conviction is not permissible.

In Commonwealth v. Fletcher, 580 Pa. 403; 861 A.2d 898; 2004 Pa. LEXIS 2847, the defendant argued that the trial court had erred in allowing the Commonwealth to cross-examine his mother during the penalty phase regarding his prior criminal convictions. He was on trial for two murders, one attempted murder, robbery and related offenses. In finding that it was not error to do so, the Pennsylvania Supreme Court referenced Rules 404 and 405 of the Pennsylvania Rules of Evidence and noted:

> As a general matter, Pennsylvania Rule of Evidence 404(a) pronounces a broad prohibition on using evidence of an accused's bad character to establish "action in conformity therewith" during a criminal proceeding. Nonetheless, pursuant to Pa.R.E. 404(a)(1), an accused may choose to offer evidence of his or her good character. In order to prove this trait of good character, the accused may opt to introduce evidence of his or her reputation among associates or within a particular community. Pa.R.E. 405(a). However, if the accused offers such reputation evidence, the Commonwealth is permitted to cross-examine the character witness regarding "specific instances of conduct probative of the character trait in question . . . ." Id.

861 A.2d at 915.

On direct examination during the penalty phase, the defendant's mother testified that her son was not "that type of person to go around harming people. In response, during cross-examination, the prosecutor questioned the defendant's mother regarding her knowledge of the defendant's prior convictions for assault and robbery. In finding that the cross-examination was permissible, the Pennsylvania Supreme Court held:

> Initially, we note that "the scope of cross-examination is a matter within the discretion of the trial court and will not be reversed absent an abuse of that discretion." Commonwealth v. Gibson, 547 Pa. 71, 688 A.2d 1152, 1167 (Pa. 1997), cert. denied, 522 U.S. 948, 139 L. Ed. 2d 284, 118 S. Ct. 364 (1997). This Court has consistently repeated the principle that "although evidence of good character may not be rebutted by evidence of specific acts of misconduct, a character witness may be cross-examined regarding his or her knowledge of particular acts of misconduct by the defendant to test the accuracy of his or her testimony and the standard by which he or she measures reputation." Commonwealth v. Busanet, 572 Pa. 535, 817 A.2d 1060, 1069 (Pa. 2002), cert. denied, 540 U.S. 869, 157 L. Ed. 2d 126, 124 S. Ct. 192 (2003); Commonwealth v. Smith, 539 Pa. 128, 650 A.2d 863, 866 (Pa. 1994), cert. denied, 514 U.S. 1085, 131 L. Ed. 2d 726, 115 S. Ct. 1799 (1995); Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373, 382-83 (Pa. 1986), cert. denied, 479 U.S. 1070, 93 L. Ed. 2d 1010, 107 S. Ct. 962 (1987). By presenting reputation evidence as to his character for peacefulness and non-violence, Appellant "opened the door" for the Commonwealth to cross-examine his character witness regarding specific instances of conduct probative of the character trait in question. Pa.R.E. 405(a). As a result, the Commonwealth was entitled to cross-examine Jones concerning her degree of knowledge of Appellant's character. Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693, 702 n.10 (Pa. 1998) ("where the defense presents evidence of the defendant's reputation for peacefulness, the prosecution is permitted to test that testimony by inquiry into whether the witness is aware of convictions which tend to refute that reputation").

Id. 915-916.

Although PCRA counsel may have correctly noted that a REAP conviction does not fall under the definition of a "crime of violence" for purposes of the mandatory sentencing statute for repeat offenders; counsel is incorrect in claiming that trial counsel was ineffective for advising the Petitioner that any character witnesses would have been subjected to cross-examination regarding their knowledge of his prior REAP conviction. Rather than use the terminology of the

Rules of Evidence, i.e. character and reputation evidence, trial counsel indicated that his REAP conviction constituted a "crime of violence". Regardless of the nomenclature used, trial counsel's advice was legally sound since obviously the trait or reputation that defense would have presented via character witnesses would have been one of non-violence or peacefulness. Thus, trial counsel was correct in advising Petitioner that the REAP conviction would have properly been the subject of cross-examination of any character witnesses presented.

V. CONCLUSION

For the reasons set forth above, post-conviction relief was properly denied. [7]

BY THE COURT:

_____
John J. Poserina, Jr., J.

DATE:_____

[7] As this Court concluded that there existed no genuine issues of material fact concerning the issues raised in Petitioner's PCRA Petition, it was proper to dismiss the petition without an evidentiary hearing. *See Commonwealth v. Payne*, 2002 PA Super. 62; 794 A.2d 902; 2002 Pa Super LEXIS 278.