COMMONWEALTH OF PENNSYLVANIA:		IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 96-11,715
	:	
THOMAS HACKENBERG,	:	
	:	
Defendant	:	PCCR

OPINION AND ORDER

The matter presently before the Court is Defendant's petition for Post Conviction Relief, filed August 9, 1999. This is Defendant's second such petition; Defendant filed a petition for Post Conviction Collateral Relief April 20, 1998.

The earlier petition raised the alleged ineffectiveness of trial counsel. By Order of Court filed June 11, 1998, this Court granted Defendant's request in allowing Defendant to file an appeal *nunc pro tunc* with the Pennsylvania Superior Court. By Opinion filed July 20, 1999, 953 Harrisburg 1998, the Superior Court found Defendant had failed to make the requisite showing necessary to establish trial counsel's ineffectiveness. Specifically, the Court found Defendant had failed to establish even the *existence* of witnesses which Defendant alleged trial counsel had failed to call in his defense. The Court stated Defendant should have produced the witnesses' full names and some indication they were available and willing to testify at trial. The judgment of sentence was affirmed.

Defendant was charged with driving under the influence. His defense was that someone else was driving. At trial, one of the troopers testified that, based upon his experience in investigation of similar traffic accidents, he concluded Defendant was alone in the car when the accident occurred. At the hospital, in response to questioning by one of the troopers, Defendant denied driving the car. He told the trooper that either "Terry Reynolds" or a woman named

"Tammy" was driving. He could provide no further information regarding these people. The troopers could not locate them. At trial, Defendant testified that, prior to the accident, he was at a party. When he left he was too drunk to drive, so people at the party took his keys. He woke up in the car after the accident. He testified two individuals were with him when the accident occurred, but could identify them only by their first names. The names he gave were "Terry" or "Chris." Defendant denied having told the trooper one of the individuals was named "Tammy."

In the Opinion of the Superior Court, at page 5, the Court noted that "appellant contends that trial counsel is ineffective for failing to investigate and call witnesses whom he identifies solely with the first names 'Terry,' 'Tammy' and *'Tina*.'" Superior Court Opinion, *supra* (emphasis supplied). The Superior Court found that such was the real issue before them, even though Defendant asserted he based his appeal on the evidence at trial being insufficient to prove beyond a reasonable doubt that he was driving his mother's vehicle at the time of the accident. In denying the initial appeal, therefore, the Superior Court has disposed of any claim that trial counsel was ineffective for "failing to follow up" with regard to locating specific witnesses. This Court believes the issues now being presented are whether the evidence presented at trial was sufficient to sustain the conviction and whether appellate counsel was ineffective because he did not follow up on that issue at the time of the initial appeal.

However, the instant PCRA again raises trial counsel's alleged ineffectiveness for failing to contact witnesses who could have testified. Having been previously been litigated, there is no merit to this claim. Moreover, a second or subsequent petition for post-conviction relief will not be entertained unless a strong *prima facie* showing is offered to demonstrate a miscarriage of justice may have occurred; the standard is met if the defendant can demonstrate

that either the proceedings resulting in his conviction were so unfair no civilized society could tolerate the miscarriage of justice, or that he is innocent of the crimes charged. ***Commonwealth v. Szuchon***, 633 A.2d 1098 (Pa. 1993).

Defendant next alleges post conviction counsel was ineffective for "failing to follow up on the issues of insufficient evidence to prove beyond a reasonable doubt that defendant was guilty of charges." ***See*** Defendant's petition for Post Conviction Collateral Relief, filed August 9, 1999, p. 3. In an ineffective assistance of counsel claim, counsel is presumed to be effective. ***Commonwealth v. Cross***, 634 A.2d 173 (Pa. 1993). To overcome this presumption, a defendant must establish three factors: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for his action or inaction; (3) counsel's ineffectiveness resulted in prejudice to the defendant -- that is, but for counsel's action or inaction, the outcome of the proceedings would have been different. ***Commonwealth v. Travaglia***, 661 A.2d 352 (Pa. 1995). Therefore, in order to establish a claim of ineffectiveness, Defendant must first demonstrate that the underlying claim is of arguable merit. Here, Defendant's claim of insufficient evidence is not supportable.

The following is a brief summary of the evidence presented at trial as set forth by the Superior Court in their Opinion of July 20, 1999: Evidence was presented that the troopers who responded to the accident scene observed Defendant being treated by medical personnel for a severe cut on his head. They further observed that a vehicle, owned by Defendant's mother, had hit a telephone pole. There was a crack on the windshield in the front of the driver's area. The driver's side door would not open; the passenger's door did open. There was a trail of

dripping blood leading over the passenger's side seat and there was no blood anywhere else in the car.

Based upon this evidence, together with Defendant's uncorroborated protestations that he was not the driver, this Court finds the jury properly concluded beyond a reasonable doubt that Defendant was the driver of the vehicle. This accident was obviously a one-car accident involving a car that shortly before the time of the accident was in the possession of and being driven by Defendant. He was the only one person at the scene and the physical evidence at the wreckage pointed to there being only one occupant of the vehicle who sustained injuries consistent with Defendant's. This is sufficient circumstantial evidence to establish that he is the driver beyond a reasonable doubt.

Moreover, the prosecution presented testimony that Defendant was drinking for sometime prior to the accident; the morning after the accident, his B.A.C. was still .11%. *See* Superior Court Opinion at pp. 1-2, 4. Clearly, the evidence supports the conclusion that Defendant was driving under the influence of alcohol when the accident occurred.

Accordingly, Defendant's claim that his conviction is based on insufficient evidence is without merit. Counsel is not ineffective for failure to raise a meritless claim. ***Commonwealth v. Jones***, 563 A.2d 161 (Pa.Super. 1989).

Defendant's last contention is that both trial and appellate counsel were ineffective for failing to appeal his change of sentence without hearing and he is being held beyond his maximum date of sentence. Defendant misconstrues the sentencing Orders.

Defendant was sentenced, upon his request, immediately after being found guilty by the jury March 11, 1997.[1] At that time, this Court did not indicate whether the sentence was a concurrent or consecutive sentence. Rule 1406 of the Pennsylvania Rules of Criminal Procedure, effective January 1, 1997,[2] provides, in pertinent part, that whenever a sentence is imposed on a defendant who is sentenced for another offense, the judge shall state whether the sentences are to run consecutively or concurrently. Defendant was incarcerated in a state correctional institution on other charges at the time of sentencing. Therefore, on May 9, 1997, to comply with the rule, this Court entered an Order directing the sentence was to be served consecutively to any other sentence Defendant was currently serving. This was the Court's original intent. Defendant's sentence was not changed; rather, the sentencing Order was clarified to comply with the Rule.

[1] The Sentencing Order was filed March 20, 1997.

[2] Prior to the 1997 amendment, Rule 1406 (a) provided that sentences so imposed were deemed to run concurrently unless the judge stated otherwise.

O R D E R

AND NOW, this 13th day of October 1999, having reviewed the record in light of Defendant's petition for Post Conviction Relief filed August 9, 1999, this Court is satisfied there are no genuine issues concerning any material fact. Defendant is not entitled to post-conviction collateral relief and no purpose would be served by any further proceedings. Therefore, it is the intention of this Court to dismiss the petition for the reasons set forth in the foregoing Opinion. Defendant may respond to the proposed dismissal within twenty (20) days of the date notice of this Order is given. Pa.R.Crim.P. Rule 1507(a).

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
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Judges
Nancy M. Snyder, Esquire
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