

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MARK E. PERRY,	:	
	:	
Appellant	:	No. 1189 WDA 2012

Appeal from the PCRA Order July 9, 2012,
Court of Common Pleas, Erie County,
Criminal Division at No. CP-25-CR-0003293-2009

BEFORE: FORD ELLIOTT, P.J.E, BOWES and DONOHUE, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: February 5, 2013

Appellant, Mark E. Perry ("Perry"), appeals from the order dated July 9, 2012, dismissing his petition for relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46 ("PCRA"). For the reasons that follow, we affirm.

In its Pa.R.A.P. 1925(a) opinion, the trial court summarized the complex procedural history of this case:

On June 17, 2010, [Perry] was scheduled to enter a plea. On June 24, 2010, the plea hearing was canceled. On July 7, 2010, [Perry's] trial counsel, Julia Bagnoni, Esquire, moved to continue the trial from the July to the September 2010 term of court. The motion was granted and the case was listed for September 10, 2010. However, on August 30, 2010, counsel scheduled a plea for September 1, 2010. When [Perry] failed to appear on that date, a bench warrant was issued by the Honorable Michael E. Dunlavey of this court. Trial was canceled pending the bench warrant. [Perry] was

apprehended and on September 13, 2010, Judge Dunlavey conducted a bench warrant review hearing. At the conclusion of the hearing, he vacated the bench warrant. Trial was scheduled for November 8, 2010. A trial subpoena was issued on October 27, 2010. On November 2, 2010, trial counsel moved to continue the trial and Judge Dunlavey granted the continuance on November 2, 2010. On December 17, 2010, trial counsel once again requested a continuance and Judge Dunlavey granted that continuance on December 21, 2010. Trial was scheduled for March 14, 2011. On that day, [Perry] failed to appear and, for the reasons set forth on the record, trial commenced in his absence before this Court. N.T., 3/14/11 Trial at 3-4. At the conclusion of the trial, the jury found [Perry] guilty of possessing a small amount of marijuana and corruption of minors (non-sexual). The trial evidence indicated that on July 4, 2009, [Perry] provided his son with marijuana. *Id.* at 15-49. At the conclusion of the trial, this Court set sentencing for May 18, 2011.

A bench warrant was issued for [Perry's] failure to appear. He was apprehended and this Court conducted a bench warrant review hearing on March 15, 2011. The bench warrant was lifted and bond was set at ten thousand dollars (\$10,000.00), cash or property bond. ... On March 16, 2011, [Perry] posted bail. On March 24, 2011, trial counsel filed a motion for a new trial that was denied by this Court on March 25, 2011. On May 18, 2011, sentence was imposed in [Perry's] absence when he failed to appear for sentencing. As the record indicates, the sentence was in the standard range of the sentencing guidelines. Based upon [Perry's] prior record score of five, the guidelines for the corruption charge were significant in spite of the fact that the offense itself was not the most serious. On May 27, 2011, trial counsel filed a motion for modification of sentence and a motion to withdraw as counsel. On May 31, 2011, this Court denied the motion for modification of sentence, and granted counsel's motion to withdraw. On June 10, 2011,

[Perry] appealed. At that time he was represented by new counsel, Eric V. Hackwelder, Esquire. On July 13, 2011, Attorney Hackwelder moved to withdraw from the case due to a conflict. The Court granted his request. Keith H. Clelland, Esquire, was appointed. He filed a petition for leave to file an appeal *nunc pro tunc* because the appeal had not been docketed. This Court granted his request. Attorney Clelland filed a notice of appeal on August 24, 2011. On September 6, 2011, he filed a statement of intent to file an Anders Brief. On September 9, 2011, he filed a motion to withdraw as counsel. On December 15, 2011, the Honorable Pennsylvania Superior Court remanded the record and directed this Court to conduct a colloquy pursuant to [Perry's] request that he be allowed to proceed *pro se*. The Court conducted that colloquy on January 4, 2012, permitted [Perry] to represent himself and allowed Attorney Clelland to withdraw. While his appeal was pending, [Perry] filed a PCRA petition which this Court denied on April 20, 2012. On April 23, 2012, the Honorable Superior Court denied [Perry's] motion for appointment of counsel and granted his motion for dismissal of direct appeal so that he can proceed to raise his claims through the PCRA.

Trial Court Opinion, 6/18/2012, at 1-3 (footnotes omitted).

On April 27, 2012, Perry filed a new PCRA petition, at which time the PCRA court appointed counsel for Perry. On June 12, 2012, an amended counseled PCRA petition was filed. On July 9, 2012, the PCRA court dismissed Perry's PCRA petition. This appeal followed, in which Perry raises the following question for our consideration and determination:

Whether the [PCRA] court erred in denying PCRA relief without the provision of an evidentiary hearing in regard to the underlying issues of fact as to counsel's alleged responsibility for [Perry's] failure to appear at time of trial.

Perry's Brief at 2.

We review an order dismissing a PCRA petition in the light most favorable to the prevailing party at the PCRA level. *Commonwealth v. Burkett*, 5 A.3d 1260, 1267 (Pa. Super. 2010). Our review is limited to the findings of the PCRA court and the evidence of record. *Id.* We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. *Id.* This Court may affirm a PCRA court's decision on any ground where the record supports the PCRA court's decision. *Id.*

Perry's PCRA claim raises an issue of ineffective assistance of counsel. In Pennsylvania, counsel is presumed to be effective, and the burden is on the petitioner to prove to the contrary. *Commonwealth v. King*, __ A.3d __, 2012 WL 6015050 (Pa., November 26, 2012). To prove ineffectiveness, a petitioner must show that: (1) the claim of counsel's ineffectiveness has merit; (2) counsel had no reasonable strategic basis for his action or omission; and (3) that the error of counsel prejudiced the petitioner so that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *See, e.g., Commonwealth v. Natividad*, 595 Pa. 188, 207, 938 A.2d 310, 321 (2007). The PCRA court may deny an ineffectiveness claim if the petitioner fails to satisfy any one of these three prongs. *Id.*

In this case, the PCRA court found that Perry's claim of ineffectiveness lacked merit without a PCRA evidentiary hearing. However, an evidentiary

record was previously established on this precise issue at the warrant review hearing held the day after his failure to appear at trial. Based upon that record, the PCRA court found Attorney Bagnoni's explanation of events regarding her efforts to notify Perry of his trial date to be credible, and Perry's contrasting explanation for his failure to appear to be incredible. Perry contended that the notification by mail must have been sent to the wrong address, and that his cell phone had been turned off during the days immediately before trial. N.T., 3/15/11, at 3. He further stated that he left a message for Attorney Bagnoni at around 8:30 a.m. on the day of the trial, thinking that her secretary would get the message to her, but that she did not return the call until 3:00 p.m. that afternoon. *Id.* at 3-4. Perry informed the court that, but for the lack of notice, he was fully prepared to attend and participate in the jury trial. *Id.*

In contrast, Attorney Bagnoni offered the following explanation of events:

I had a telephone number for him, and I did tell him that I needed to contact him within this two week period of time. I called the telephone number, it was invalid. I had a couple different numbers from the times before trying to locate my client, invalid, disconnected, addresses as well invalid. I asked – also asked Mr. Perry for a valid address, a location where I could locate him so I could go there physically knowing that – knowing the history of not being able to locate him by telephone, and he couldn't give me a valid address other than a valid mailing address. He did say that he was a student at the Erie Business Center and that he was there every single day. So in addition to trying to contact him

via telephone, I called the Erie Business Center that morning, and at 8:30 Mr. Perry did call my office as recorded on my answering machine at approximately 8:40.

Id. at 4-5.

On appeal, Perry contends that the PCRA court erred in not conducting a separate evidentiary hearing after the filing of his PCRA petition so that he could “create a factual foundation” in support of his claims and provide “a factual record that may be taken up for prospective appellate review.” Perry’s Brief at 3-4. Based upon the unique circumstances of this case, we disagree. The certified record on appeal contains adequate support for the PCRA court’s findings of fact, including its finding that Attorney Bagnoni was not ineffective in her efforts to notify Perry of his trial date. Both Perry and Attorney Bagnoni offered the PCRA court with their contrasting explanations of events, and the PCRA made credibility determinations based upon these explanations. Because the PCRA court’s decision is supported by evidence of record and is free of any legal error, we have no basis to disturb it on appeal. Requiring the PCRA court to conduct another evidentiary hearing, the outcome of which would be a foregone conclusion, would be a waste of judicial resources and is unnecessary under the circumstances presented here.

Order affirmed.