

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
SAM PHUM,	:	
	:	
Appellant	:	No. 1257 EDA 2011

Appeal from the PCRA Order entered on April 14, 2011
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No. CP-51-CR-0905901-2000

BEFORE: MUSMANNO, WECHT and PLATT*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: April 25, 2013

Sam Phum ("Phum") appeals from the Order denying his first Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA").¹ We reverse and remand for further proceedings.

On January 28, 2003, the trial court sentenced Phum to an aggregate prison term of 18 to 36 years, and ordered Phum to pay \$10,000 in restitution. On February 26, 2003, Phum's trial attorney, Stephen P. Patrizio, Esquire ("Attorney Patrizio"), filed a Notice of appeal on Phum's behalf. Subsequently, Attorney Patrizio withdrew his appearance, after

¹ 42 Pa.C.S.A. §§ 9541-9546.

*Retired Senior Judge assigned to the Superior Court.

which an appearance was entered by Richard F. Ostriak, Esquire (“Attorney Ostriak”).²

The trial court ordered Phum to file a Pennsylvania Rule of Appellate Procedure 1925(b) concise statement of matters complained of on appeal. Unfortunately, the trial court sent its Order to Attorney Patrizio, rather than Attorney Ostriak. No concise statement was filed on behalf of Phum. Regardless, the trial court issued an Opinion addressing the issues that it believed would be presented for review: challenges to the weight and sufficiency of the evidence.

On direct appeal, filed at No. 752 EDA 2003, this Court entered an Order remanding the matter. This Court’s Order required the following actions to be undertaken on remand: (a) that Phum file a Rule 1925(b) concise statement; (b) that Phum’s counsel file a concise statement; and (c) that the trial court file an opinion addressing the issues raised in Phum’s concise statement. ***Commonwealth v. Phum***, No. 752 EDA 2003, unpublished memorandum at 5 (Pa. Super. filed September 9, 2005).

On remand, the trial court failed to follow this Court’s directive. Notwithstanding, Phum filed his Concise Statement on November 18, 2005. The trial court filed its Opinion on January 12, 2007, addressing the three claims raised by Phum. On appeal, however, this Court was unable to

² Phum filed a *pro se* PCRA Petition on May 27, 2003. The trial court dismissed that Petition, as Phum’s direct appeal was pending before this Court.

address the merits of the claims raised by Phum, as the necessary transcripts were not included in the certified record. ***Commonwealth v. Phum***, No. 752 EDA 2003, unpublished memorandum at 3 (Pa. Super. filed March 8, 2007). Accordingly, this Court entered an Order dismissing Phum's appeal. ***Id.***, unpublished memorandum at 4.

On June 25, 2007, Phum filed a *pro se* PCRA Petition. Appointed counsel filed an Amended PCRA Petition, a Supplemental Amended PCRA Petition and a Second Supplemental PCRA Petition. Phum sought the reinstatement of his direct appeal rights, *nunc pro tunc*, based upon direct appeal counsel's failure to include the transcripts necessary to secure appellate review of his claims. Phum additionally sought the reinstatement of his right to file post-sentence motions, *nunc pro tunc*. The Commonwealth agreed to the reinstatement of direct appeal rights, *nunc pro tunc*, but objected to the reinstatement of Phum's right to file post-sentence motions. Brief for the Commonwealth at 3. After appropriate Notice, the PCRA court entered an Order denying Phum's PCRA Petition without an evidentiary hearing. PCRA Court Order, 4/14/11. This appeal followed.

Phum presents the following claim for our review:

[Whether] the PCRA court erred in denying relief without a hearing where in his Amended PCRA petition[,] thereby [*sic*] depriving [Phum] of his constitutionally right to a judicial review of the judgment of sentence[?]

Brief for Appellant at 4.

As this Court is unable to discern the issue raised by Phum in his Statement of Questions Involved, we could deem his claim waived. **See** Pa.R.A.P. 2116(a) (providing that “[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.”). In the Argument section of his appellate brief, Phum asserts the following:

In [Phum’s] Amended [PCRA] Petition[, the] record clearly established that the appeal was filed on behalf of [Phum] and remanded by the Superior Court as the result of a procedural defect. Further, the Amended [PCRA] Petition established that any issue[] of potentially arguable merit had been waived. This was followed by a Commonwealth Motion to Dismiss in which it was conceded [that Phum] w[a]s entitled to reinstatement of his appellate rights. However, the Commonwealth continued to argue additional issued [*sic*] that had bee[n] raised by [Phum] which are not the subject of this appeal. Ultimately[,] the [PCRA] court dismissed the entire matter on April 14, 2011[,] without a hearing[,] giving rise to this appeal[,] which is limited to the issue of the reinstatement of [Phum’s] appellate rights *nunc pro tunc*.

Brief for Appellant at 10. While Phum’s appellate brief is woefully deficient, we are able to discern that Phum challenges the denial of the reinstatement of his direct appeal rights, *nunc pro tunc*, without an evidentiary hearing.

Id.

An appellate court’s standard of review regarding an order denying a PCRA petition is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Kretchmar***, 971 A.2d 1249, 1251 (Pa. Super. 2009). The PCRA court’s findings will not be disturbed unless there is no support for the findings in

the certified record. *Commonwealth v. Treadwell*, 911 A.2d 987, 989 (Pa. Super. 2006).

Pennsylvania Rule of Criminal Procedure 907 provides that

[i]f the [PCRA] judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal.

Pa.R.Crim.P. 907(2). Our Supreme Court has emphasized, “[a] PCRA petitioner is not entitled to an evidentiary hearing as a matter of right, but only where the petition presents genuine issues of material fact.... A PCRA court’s decision denying a claim without a hearing may only be reversed upon a finding of an abuse of discretion.” *Commonwealth v. Walker*, 36 A.3d 1, 17 (Pa. 2011).

Phum claims that the PCRA court erred in denying his Petition without a hearing, as his Petition asserted material issues of fact. Brief for Appellant at 10. Based upon our review of the record, and the PCRA court’s own Opinion indicating that it had intended to grant the reinstatement of Phum’s direct appeal rights, we agree.

As this Court observed in its Memorandum dismissing Phum’s direct appeal, the transcripts necessary for appellate review of the issues raised by Phum were not included in the certified record:

At the outset, we are compelled to admonish counsel, as transcripts of the proceedings were not included in the record

before our September 9, 2005 remand; and the certified record has yet to be supplemented with the necessary documents. The Commonwealth's original brief in this matter, filed March 28, 2005, highlighted this deficiency. As over a year has passed since our remand, we can hardly ignore the disparity. Nor will we pursue these transcripts as it is clear the record provided was inadequate for meaningful review.

Phum, No. 752 EDA 2003, unpublished memorandum at 3 (emphasis in original).

In its Opinion, the PCRA court indicated that it previously had filed an Order reinstating Phum's direct appeal rights, *nunc pro tunc*, on September 10, 2010. PCRA Court Opinion, 2/23/12, at 2. The PCRA court stated that Phum's "*nunc pro tunc* appeal of judgment [of sentence], and timely appeal of the PCRA denial now follow." **Id.** The PCRA court then addressed Phum's direct appeal claims. **Id.** at 5-8.

Contrary to the PCRA court's assertion, there is no order of record reinstating Phum's direct appeal rights, *nunc pro tunc*. Further, the docket does not reflect the PCRA court's entry of any order on September 10, 2010. Our review of the record discloses that the PCRA court filed a Notice of its intent to dismiss Phum's PCRA Petition, in its entirety and without an evidentiary hearing, on March 17, 2011. PCRA Court Order, 3/17/11. The record further reflects that on April 14, 2011, the PCRA court entered an Order dismissing Phum's PCRA Petition in its entirety. PCRA Court Order, 4/11/11. The present appeal is from the PCRA court's April 14, 2011 Order denying PCRA relief.

Thus, we agree with Phum that the PCRA court improperly dismissed his Petition without an evidentiary hearing. Phum raised a genuine issue of material fact as to whether his direct appeal counsel rendered ineffective assistance “to the extent th[at] no meaningful appellate review of the judgment of sentence in the matter could be had.” Amended PCRA Petition at 2; *see Phum*, No. 752 EDA 2003, unpublished memorandum at 3 (holding that “the record provided [by Phum] was inadequate for meaningful review”). Because Phum asserted a genuine issue of material fact, the PCRA court abused its discretion in denying relief without first conducting an evidentiary hearing. *See Walker*, 36 A.3d at 17 (recognizing that a petitioner is entitled to an evidentiary hearing where the petition presents genuine issues of material fact).

Accordingly, we reverse the Order of the PCRA court. We remand this matter for further proceedings on Phum’s claim of ineffective assistance of direct appeal counsel, and consideration of his request for reinstatement of his direct appeal rights, *nunc pro tunc*.

Order reversed; case remanded for further proceedings consistent with this Memorandum; Superior Court jurisdiction relinquished.