NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. BERNARD MICKENS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2241 EDA 2013

Appeal from the Order Entered June 28, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1303644-2006

BEFORE: BOWES, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.: **FILED JULY 15, 2014**

Appellant, Bernard Mickens, appeals from the June 28, 2013 order dismissing his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

This Court on direct appeal summarized the underlying facts of this case as follows.

> [T]he victim, L.H., who was fourteen years old at the time of the incident, testified that the thirty-six year old Appellant is her cousin. During the fall and winter of 2006, L.H. was living with her mother, older sister, boyfriend, and mother's boyfriend at 39th and Wyalusing Streets, and she saw Appellant nearly every day when he would visit her house. During this time, L.H. never had any arguments or problems with Appellant and she felt very close to him; however, L.H. was not getting along with her mother.

> On Friday, December 8, 2006, as L.H. was in the bathtub washing for school, Appellant unexpectedly walked into the bathroom without knocking on the door. L.H. covered herself with a towel and asked him to leave. Appellant left the bathroom and went downstairs, where he was talking to L.H.'s older sister. L.H. finished washing herself, went into her bedroom, put on her school uniform, and went downstairs. Appellant mentioned that L.H. was going to be late for school and suggested that, since it was a Friday, she should stay home. L.H. and her older sister got into Appellant's car and they went for food. After they were done eating, L.H.'s older sister asked to be taken back to the house because she was waiting for her boyfriend, and L.H. went to Appellant's girlfriend's house, where Appellant was staying. At the house, L.H. met Appellant's girlfriend, his girlfriend's daughter, [A.], and Appellant's children.
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> Later in the evening, L.H. went into one of the rooms, and Appellant indicated he was going to "show [L.H.] a good time." Appellant pulled out a bottle of alcohol, poured some into a plastic cup, and handed it to L.H. Appellant wanted to know if L.H. could "roll with the big dogs," so L.H. drank all of the alcohol in the plastic cup. Appellant filled the cup with more alcohol, said "you can't hang," and encouraged L.H. to "take it to the head." L.H. drank the second cup of alcohol, and Appellant handed her a Listerine strip to "take the smell off [L.H.'s] breath." Appellant told L.H. not to tell [A.] about the alcohol, and L.H. went back to playing with [A.] and the other children.
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> L.H., [A.], and the other children went downstairs for dinner, and L.H. began to feel dizzy and had difficulty standing. After taking a shower, Appellant agreed to drive L.H. back to her house to pick up some clothes and he told L.H. to "get herself together" so that no one would know that she had been drinking alcohol. Once at her home, L.H. was unable to walk up the steps to retrieve her clothes, so she asked her sister's boyfriend to get a box of

things for her and she "spit up." L.H. asked Appellant if she could stay with her boyfriend in West Philly, and Appellant yelled at L.H. and told her to get back into the car.

L.H. and Appellant returned back to Appellant's girlfriend's house, and L.H. laid down in one of the beds while still wearing her coat, shirt, pants, socks, bra, and underwear. L.H. went to sleep, and Appellant left the room. The next thing L.H. remembers is that she awoke to her pants being down around her ankles and Appellant's tongue being on her vagina. L.H. was still wearing her jacket, shirt, and bra. L.H. attempted to kick Appellant off of her but she was unable to do so. L.H. told Appellant to get off of her because she was his cousin, and he pinned down both of her arms above her head. She "told him to get off of [her], [that she] wanted to go to sleep and [to] stop." Appellant then forced his penis into L.H.'s vagina, L.H. told him to stop, L.H. reminded Appellant that she was his little cousin, and L.H. began to cry. Appellant said "he's not going to stop not if the p---y is good he's not going to stop; that's not what he do." Appellant sucked and bit L.H.'s neck, resulting in a large bruise, and he held her down for five to ten minutes until he pulled his penis out of L.H.'s vagina and ejaculated on the outside of her vagina. Almost immediately after Appellant had ejaculated, while Appellant was still on top of L.H., [A.] turned on a light in a different bedroom and went straight into the bathroom. Appellant got off of L.H., walked out of the bedroom, and walked down the hall. L.H. remained in the bed, and approximately three minutes later, Appellant returned, threw an unlit cigarette at L.H., and left the room.

L.H. went into the bathroom and washed herself repeatedly. L.H. then went back to the bedroom where she had been sleeping and sat on the bed until morning arrived. L.H. went into the room where [A.] had been sleeping and, based on a conversation between the two of them, it was apparent to L.H. that [A.] knew what had happened

> and did not help her during the rape. L.H. then went down the street and stayed at one of [A.]'s friend's houses. She called her boyfriend, and when he came for her, while walking to the bus stop, L.H. told him about the rape. They then went to a friend's house, where L.H. told her older sister about the rape. L.H. stayed at the friend's house and had sexual intercourse with her boyfriend that evening because she felt she needed to prove to him that she still loved him. The next day, L.H. went to a clinic. The nurse called the police and a rape kit was performed. L.H. did not return to her mother's house and she was placed with social services.

Commonwealth v. Mickens, 987 A.2d 820 (Pa. Super. 2009) (unpublished memorandum at 2-6) (citations to notes of testimony omitted; internal quotation marks in original), *appeal denied*, 997 A.2d 1176 (Pa. 2010).

Appellant was subsequently arrested, and on December 21, 2006, was charged with multiple offenses in connection with this incident. Appellant waived his right to a jury trial and proceeded to bench trial on October 17, 2007.[1] At the conclusion of the bench trial, Appellant was found guilty of rape, involuntary deviate sexual intercourse (IDSI), unlawful restraint, statutory sexual assault, sexual assault, indecent assault, endangering the welfare of a child, and corrupting the morals of a minor.[2] On January 23, 2008, Appellant was sentenced to 94 to 188 months' imprisonment for rape,

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[1] Appellant was represented at trial and during sentencing by Lenora R. Clayton, Esquire (Attorney Clayton).

[2] 18 Pa.C.S.A. §§ 3121, 3123, 2902, 3122.1, 3124.1, 3126, 4304, and 6301, respectively.

a concurrent mandatory sentence of five to 10 years' imprisonment for IDSI, and a consecutive term of three years' probation for corrupting the morals of a minor.[3] The trial court imposed no further sentence for the remaining convictions. The record reflects that Attorney Clayton raised an oral motion for extraordinary relief at the initial January 17, 2008 sentencing hearing, arguing, *inter alia*, that the verdict was against the weight of the evidence. ***See*** N.T., 1/17/08, at 5.[4]

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[3] Appellant was initially sentenced on January 17, 2008, but his judgment of sentence was deemed illegal by the trial court and vacated on January 23, 2008. ***See*** N.T., 1/23/08, at 4-5, 9.

[4] We note that, although "[a] motion for extraordinary relief shall have no effect on the preservation or waiver of issues for post-sentence consideration or appeal[,]" challenges to the weight of the evidence are governed by Pennsylvania Rule of Criminal Procedure 607. Pa.R.Crim.P. 704(B)(3). Rule 607 states as follows.

> **Rule 607. Challenges to the Weight of the Evidence**
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> (A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:
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> (1) **orally, on the record, at any time before sentencing**;
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> (2) by written motion at any time before sentencing; or
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> (3) in a post-sentence motion.
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> (B)(1) If the claim is raised before sentencing, the judge shall decide the motion before imposing

(Footnote Continued Next Page)

On February 19, 2008, Appellant filed a timely notice of appeal, raising multiple allegations of trial court error.[5] This Court affirmed Appellant's judgment of sentence on October 15, 2009. ***See Mickens***, ***supra***. Appellant subsequently filed a petition for allowance of appeal, which was denied by our Supreme Court on June 22, 2010. ***Id.***[6]

(Footnote Continued)

> sentence, and shall not extend the date for sentencing or otherwise delay the sentencing proceeding in order to dispose of the motion.
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> (2) An appeal from a disposition pursuant to this paragraph shall be governed by the timing requirements of Rule 720(A)(2) or (3), whichever applies.
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> > *Comment:* The purpose of this rule is to make it clear that a challenge to the weight of the evidence must be raised with the trial judge or it will be waived. Appellate review of a weight of the evidence claim is limited to a review of the judge's exercise of discretion.
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> > **When a claim is raised before sentencing, the defendant may, but need not, raise the issue again in a post-sentence motion.** ***See*** Rule 720(B)(1)(a)(iv).

Pa.R.Crim.P. Rule 607 (emphasis added; internal case citations omitted). Thus, Attorney Clayton properly preserved Appellant's weight of the evidence claim by arguing it orally prior to the trial court's sentencing of Appellant. ***See*** N.T., 1/17/08, at 5.

[5] The record reflects that Appellant and the trial court complied with Pennsylvania Rule of Appellate Procedure 1925.

[6] Appellant was represented on direct appeal by Victor Rauch, Esquire and Karl Baker, Esquire (collectively, appellate counsel).

On July 19, 2010, Appellant filed a timely *pro se* PCRA petition. The PCRA court appointed Gary S. Silver, Esquire (Attorney Silver) to represent Appellant. Thereafter, on January 25, 2012, the PCRA court removed Attorney Silver as counsel of record and appointed J. Matthew Wolfe, Esquire (Attorney Wolfe), to represent Appellant. On October 16, 2012, Attorney Wolfe filed an amended PCRA petition on Appellant's behalf, arguing that appellate counsel was ineffective for failing to challenge the weight of the evidence on appeal. ***See*** Amended PCRA Petition, 10/16/12, at ¶ 7. The Commonwealth, in turn, filed its answer to Appellant's amended PCRA petition on April 19, 2013. On April 26, 2013, the PCRA court provided Appellant with notice of its intent to dismiss his petition without a hearing, pursuant to Pa.R.Crim.P. 907. On May 9, 2013, Appellant filed a *pro se* response in "opposition to [Rule 907] Notice[.]" Thereafter, on June 28, 2013, the PCRA court held a brief hearing on Appellant's *pro se* response, at the conclusion of which it dismissed Appellant's amended petition. This timely appeal followed on July 26, 2013.[7]

On appeal, Appellant raises the following issue for our review.

> 1. Was the fact that the DNA evidence proved that [] Appellant's (sic) was not found in or on the complaining witness render the verdict against the weight of the evi[d]ence?

Appellant's Brief at 8.

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[7] Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted), *cert. denied*, ***Edmiston v. Pennsylvania***, 134 S. Ct. 639 (2013). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "[T]his Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). Moreover, we note that, "[t]he right to an evidentiary hearing on a post-conviction petition is not absolute. It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence." ***Commonwealth v. Wah***, 42 A.3d 335, 338 (Pa. Super. 2012) (internal citations omitted).

Instantly, the crux of Appellant's argument is that his appellate counsel rendered ineffective assistance by failing to pursue a weight of the evidence challenge on direct appeal. Appellant's Brief at 12, 14-15; ***see also*** Amended PCRA Petition, 10/16/12, at ¶ 7(2).

To prevail on a claim of ineffective assistance of counsel under the PCRA, a petitioner must plead and prove by a preponderance of the evidence

that counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii). A petitioner must establish "(1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) [A]ppellant was prejudiced by counsel's act or omission." ***Koehler***, ***supra*** at 132, *citing* ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987). "[C]ounsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." ***Koehler***, ***supra*** at 131 (citation omitted). Furthermore, "[i]f an appellant fails to prove by a preponderance of the evidence any of the … prongs, the Court need not address the remaining prongs of the test." ***Commonwealth v. Fitzgerald***, 979 A.2d 908, 911 (Pa. Super. 2009), *appeal denied*, 990 A.2d 727 (Pa. 2010).

Upon careful review of the record, including the parties' respective briefs and the applicable law, and in light of this Court's scope and standard of review, we discern no error on the part of the PCRA court in concluding that Appellant's ineffectiveness claim merits no relief. The record establishes that Appellant has failed to satisfy the first prong of the aforementioned ineffectiveness test, namely that the "underlying [weight of the evidence] issue has arguable merit[.]" ***See Koehler***, ***supra.***

As discussed, appellate counsel initially raised a weight of the evidence claim in the May 5, 2008 Rule 1925(b) statement they filed on Appellant's behalf, but later abandoned said claim on direct appeal to this Court. The trial court, however, addressed Appellant's weight claim in its Rule 1925(a) opinion, concluding that it was devoid of merit. Specifically, the trial court reasoned as follows.

> Appellant contends that there were inconsistencies between the complainant's testimony and the physical evidence, as well as the lack of any corroboration of the complainant's allegations and the incredibility of the complainant's version of events. Assessing the credibility of witnesses at trial is within the sole discretion of the factfinder. The finder of fact is free to believe all, part, or none of the evidence and to determine the credibility of witnesses. In the instant case [the complainant/victim] was cross-examined extensively on the events that took place on December 8, 2006.
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> Inconsistent witness statements were argued by trial counsel during trial and properly weighed by the [trial] court before reaching its verdict. A witness's credibility is solely for the fact-finder to determine. The [trial] court determined that the [complainant/victim] was credible. Therefore, the verdict does not shock the conscience.

Trial Court Opinion, 7/25/08, at 5-6. The PCRA court, in turn, indicated that it was relying on the conclusions of the trial court, and declined Appellant's request for post-conviction relief. ***See*** PCRA Court Opinion, 11/27/13, at 5.

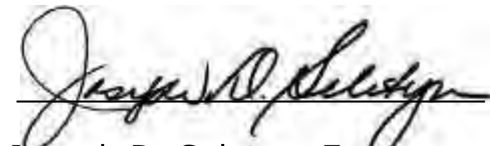
Upon review, we agree with the conclusions of the trial court, which were adopted by the PCRA court, and decline to disturb these credibility determinations on appeal. "When the challenge to the weight of the

evidence is predicated on the credibility of trial testimony, our review of the trial court's decision is extremely limited." ***Commonwealth v. Gibbs***, 981 A.2d 274, 282 (Pa. Super. 2009), *appeal denied*, 3 A.3d 670 (Pa. 2010). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." ***Spotz***, ***supra***. Accordingly, we conclude that appellate counsel was not ineffective in failing to raise this meritless weight claim on direct appeal. ***See Commonwealth v. Philistin***, 53 A.3d 1, 10 (Pa. 2012) (stating, "[f]ailure to prove any prong of th[e ***Pierce***] test will defeat an ineffectiveness claim[]") (citation omitted).[8]

Based on the foregoing, we conclude that the PCRA court properly dismissed Appellant's amended PCRA petition. Accordingly, we affirm the June 28, 2013 order of the PCRA court.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014

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[8] To the extent Appellant's argument can be construed as a challenge to the weight of the evidence, this claim is not cognizable under the PCRA. 42 Pa.C.S.A. § 9543(a)(2)-(3).