NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ANWAR JOHNSON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2780 EDA 2011

Appeal from the PCRA Order September 15, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1101461-2005

BEFORE: OLSON, WECHT AND COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.: Filed: March 7, 2013

Appellant, Anwar Johnson, appeals from the order entered September 15, 2011, dismissing his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. § 9541-9546 ("PCRA"). For the following reasons, we affirm.

The PCRA court summarized the applicable factual and procedural background of this matter as follows:

> On June 20, 2004, [Appellant] and Kareem Davis were driving through West Philadelphia to drop another friend off after leaving Steve's Bar, located at 53rd and Market Streets, when they saw a mutual acquaintance, Aki Collins, also known as Richard Allen (victim or decedent). At the time [Appellant] and Davis saw the victim, [Appellant] was driving and Davis was in the front passenger seat. Davis talked briefly with the victim through the front passenger window, at which time the victim decided to ride with them to Night on Broad, a go-go bar located at Broad and Olney Streets. The victim got into the rear passenger seat of the car and rode behind Davis. After the victim got into the car, the

*Retired Senior Judge assigned to the Superior Court.

> three of them drove to 53rd and Media to stop by the Jute Club before proceeding to Night on Broad. When they arrived at the Jute Club, Davis and the victim waited in the car while [Appellant] went inside. After [Appellant] returned to the car, he and the victim began arguing about an incident with the police that had occurred several years earlier. The dispute arose because [Appellant] believed the victim had called the police on him. [Appellant] and the victim continued arguing while [Appellant] drove the car to 52nd and Walnut Streets, where he pulled over to point out a phone booth which he believed was the phone the victim had used to call the police regarding [Appellant]. [Appellant] then drove down the street to Hollywood Palace, located between 52nd and 53rd Streets, where [Appellant] again stopped the car. While driving to Hollywood Palace, [Appellant] and the victim continued to argue, at which time the victim said, "You can go to war, whatever you want to do. You can do whatever you want to do." When they got to Hollywood Palace, the victim said, "I'm rapped out, I ain't got nothing more to talk about no more." [Appellant] did not say anything in response, but pulled out a gun and began shooting the victim while the car was still moving forward. Davis looked behind him and saw the victim being shot repeatedly as [Appellant] discharged all the bullets in his gun, hitting the victim in the head repeatedly.[1] The car [Appellant] was driving eventually crashed into a house. Davis testified that he saw a gun on the victim's lap, but admitted that no shots were fired from the back of the car to the front.[2] When the car crashed, [Appellant] told Davis to get out of the car, which he did, and

---

[1] Twelve shots were fired, all from [Appellant's] firearm, 10 of them hitting the victim in the head. Twelve .9 millimeter Luger fired cartridge casings were recovered inside the vehicle and it was determined by a firearms expert that these cartridge casings were all fired from the same firearm.

[2] Davis also never testified to telling [Appellant] that the victim had a gun; nor did he testify that [Appellant] ever said anything to *him* about having seen the victim with a gun. A .25 caliber semi-automatic firearm was recovered from the vehicle – from underneath the front passenger seat. The firearm had one unfired cartridge in the chamber and four unfired cartridges in the magazine. The magazine could hold a total of seven (7) cartridges. No fired cartridge cases from this firearm were found.

> Davis then ran a few blocks to Marquita Thompson's house, his girlfriend.
>
> Davis was let into the house by Marquita's father, Jeffrey Glen. Marquita's mother, Valerie Thompson, was wiping blood off Davis' face in the upstairs bedroom when [Appellant] came into the house. [Appellant] instructed Davis to place all of his clothing in a bag, which Davis did, and [Appellant] gave the gun to Mr. Glen and instructed him to put it in a bag, which Mr. Glen did. Davis and [Appellant] then left Marquita Thompson's house and went to a girl's house that [Appellant] knew, after which Davis and [Appellant] went to Black Oak Park, also known as Malcolm X Park. After leaving this girl's house, [Appellant] told Davis to call Mr. Glen to get the gun back. Davis called Mr. Glen and got the gun back from him. Davis and [Appellant] then went back to the park, where they disposed of the clothes in different trash cans. Two days later, Davis went down to Homicide and provided them with a statement about the death of the victim.
>
> Upon learning a warrant had been issued for his arrest, [Appellant] took a bus to San Diego, California. [Appellant] stayed in San Diego until he happened to be arrested for drug dealing in California and was extradited to Philadelphia to stand trial for the murder of Aki Collins.

PCRA Court Opinion, 3/30/2012, at 3-5 (citations omitted, footnotes in original).

> On February 6, 2007, after a bench trial before [the trial court], [Appellant] was found guilty of first-degree murder (F-1), carrying a firearm without a license (F-3), carrying a firearm on public streets of Philadelphia (F-3), and possessing an instrument of crime (PIC) (M-1).[3] After the verdict, [Appellant] retained private counsel and, upon [Appellant's] request, sentencing was postponed. On May 2, 2007, [Appellant] was

---

[3] 18 Pa.C.S. §§ 2502(a), 6106, 6108, and 907(a), respectively.

> sentenced to a mandatory life sentence[4] for the crime of first-degree murder.[5]
>
> On May 14, 2007, [Appellant] filed timely post-sentence motions, which were denied by operation of law on September 11, 2007. On October 3, 2007 a timely counseled notice of appeal was filed in the Superior Court and, on March 2, 2009, judgment of sentence was affirmed.[6] Petition for Allowance of Appeal was denied on August 19, 2009.[7] On September 27, 2010, [Appellant] filed a timely counseled [PCRA] petition []. The Commonwealth responded by filing a Motion to Dismiss on February 9, 2011. On February 22, 201, [Appellant] filed a response to the Commonwealth's Motion to Dismiss. On March 22, 2011, [Appellant] filed a supplemental Memorandum addressing (1) Standard of Review Applicable to PCRA Court's Review of Errors Occurring in Non-Jury Trial Before Same Judge and (2) Additional Factors Supporting Evidentiary Hearing. On April 8, 2011, [Appellant] filed a Pre-Hearing Memorandum of Law. On April 18, 2011, [Appellant] filed a Motion to Compel Commonwealth to Provide [Appellant] with Copy of Police Report in [Appellant's] Juvenile Delinquency Matter. [Appellant] also filed Memorandum of Law Addressing Court's Inquiry Regarding Principles of Self-Defense on April 18, 2011.

---

[4] 18 Pa.C.S. § 1102(a).

[5] All the remaining sentences of incarceration were ordered to run concurrent with the first degree murder charge as follows: as to the charge of carrying a firearm without a license, [Appellant] was sentenced to not more than 18 months nor less than 84 months; as to the charge of carrying a firearm on the public streets of Philadelphia, [Appellant] was sentenced to not less than 12 months nor more than 60 months; as to the PIC charge, [Appellant] was sentenced to not less than 12 months nor more than 60 months.

[6] ***Commonwealth v. Johnson***, [972 A.2d 554 (Pa. Super. 2009) (unpublished memorandum).]

[7] ***Commonwealth v. Johnson***, [986 A.2d 149 (Pa. 2009) (table)].

> On May 4, 2011, the Commonwealth responded to [Appellant's] Pre-Hearing Memorandum and Motion to Compel. The Commonwealth filed a Supplemental Motion to Dismiss on May 5, 2011. An evidentiary hearing took place over the course of several days: May 27, 2011; June 2, 2011; June 3, 2011; and June 14, 2011. On September 15, 2011, after due consideration [the PCRA court] entered an order dismissing [Appellant's] PCRA petition. On September 19, 2011, [Appellant] filed a Motion for Reconsideration of September 15, 2011 Decision to Deny Post-Conviction Relief. [The PCRA court] denied [Appellant's] Motion to Reconsider on September 28, 2011.
>
> [Appellant] filed a *pro se* notice of appeal of October 5, 2011. On October 20, 2011 Barnaby C. Wittels, Esquire was appointed to represent [Appellant] on appeal. The [PCRA court] ordered counsel to file a Statement of Matters complained of On Appeal (Statement) pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Counsel failed to timely file the Statement. On November 15, 2011, [the PCRA court] filed an Opinion finding counsel's failure to timely file the Statement constituted a waiver of all objections to the order, ruling or other matter complained of.[8] On November 22, 2011, counsel filed a motion requesting [the PCRA court] to reconsider its November 15, 2011 opinion, which [the PCRA court] denied on December 1, 2011.
>
> On January 1, 2012, [Appellant's] case was remanded from the Superior Court, for the filing of a Statement and a Supplemental Opinion. [Appellant's] Statement was timely filed with the [PCRA court] on January 30, 2012.

---

[8] [Appellant's] counsel did submit to chambers a request for extension of time to file the Statement, on November 15, 2011, five days *after* the Statement was due. Counsel's request for extension of time was based on his position that the Notes of Testimony from PCRA listings, and the trial were unavailable. These Notes of Testimony had been available since before counsel was appointed.

Trial Court Opinion, 3/30/2012 at 1-39 (footnotes in original). On March 30, 2012, the PCRA court issued its Rule 1925(a) opinion. Therefore, this appeal is ripe for our review.

Appellant presents three issues for appeal:

> 1. Did the PCRA [c]ourt err in denying relief in this case where Appellant's evidence established that trial counsel were ineffective in their representation by failing to file and litigate a motion *in limine* to exclude Appellant['s] juvenile convictions for robbery where said error prejudiced Appellant and where said error was not based on any rational legal strategy and where counsel's performance fell below the acceptance level of competence thus denying Appellant his right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and under the Constitution and laws of the Commonwealth of Pennsylvania?
>
> 2. Did the evidence adduced at the evidentiary hearings clearly establish a reasonable probability that had Appellant testified at trial and had the evidence as to the recreation of the incident possessed by trial counsel been presented at trial the outcome would have been different?
>
> 3. Did the PCRA [c]ourt err in the standard of law it applied in this case in that in this case the PCRA [c]ourt had sat as the fact finder in a non-jury trial and as such was it therefore improper for the PCRA [c]ourt to reassess or redetermine credibility?

Appellant's Brief at 7.

Our standard of review of a PCRA court's denial of petition for relief is well-settled. We review an order of the PCRA court to determine whether the record supports the findings of the PCRA court and whether its rulings are free from legal error. ***Commonwealth v. Fiore***, 780 A.2d 704, 710 (Pa. Super. 2001), *appeal dismissed*, 813 A.2d 1080 (Pa. 2003). To be

eligible for PCRA relief, a petitioner must plead and prove, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the reasons set forth in 42 Pa.C.S.A. § 9543(a)(2). In this case, Appellant alleges that his sentence resulted from ineffective assistance of counsel, as set forth at 42 Pa.C.S.A. § 9543(a)(2)(ii).

"In order to obtain relief under the PCRA premised upon a claim that counsel was ineffective, a petitioner must establish beyond 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.'" ***Commonwealth v. Payne***, 794 A.2d 902, 905 (Pa. Super. 2002), *quoting* 42 Pa.C.S.A. § 9543(a)(2)(ii). When considering such a claim, courts presume that counsel was effective, and place upon the appellant the burden of proving otherwise. ***Id.*** at 906. "Counsel cannot be found ineffective for failure to assert a baseless claim." ***Id.***

To succeed on a claim that counsel was ineffective, Appellant must demonstrate that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) counsel's ineffectiveness prejudiced him. ***Commonwealth v. Allen***, 833 A.2d 800, 802 (Pa. Super. 2003).

Furthermore:

> [t]o demonstrate prejudice, appellant must show there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. When it is clear the party asserting an ineffectiveness claim has failed to meet the prejudice prong of the ineffectiveness test, the claim may be

> dismissed on that basis alone, without a determination of whether the first two prongs have been met. Failure to meet any prong of the test will defeat an ineffectiveness claim. Counsel is not ineffective for failing to raise meritless claims

Commonwealth v. Wright, 961 A.2d 119, 148-149 (Pa. 2008) (citations omitted); ***Commonwealth v. Albrecht***, 720 A.2d 693 (Pa. 1998) ("If it is clear that Appellant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met.").

After review of the applicable law, the certified record, the parties' submissions, and the well-reasoned and thorough analysis set forth in the PCRA court's March 30, 2012 opinion, we agree with PCRA court's analysis and conclusions. Indeed, we agree with the PCRA court's determination that: (1) Appellant waived our consideration of trial counsel's ineffectiveness in failing to litigate a motion *in limine* to exclude admission of evidence regarding Appellant's juvenile convictions because Appellant failed to preserve that issue with the PCRA court (***see*** PCRA Court Opinion, 3/30/2012, at 6-7); (2) trial counsel was not ineffective in recommending that Appellant decline to testify at trial, because such recommendation was provided as part of a reasonable trial strategy, particularly considering the

volume of incriminating evidence presented against Appellant[9] (***see id.*** at 7-11); and (3) the PCRA court did not apply the wrong standard of law in dismissing Appellant's PCRA petition as lacking merit; the credibility determinations made by the PCRA court were objectively based and supported by the record (***see id.*** at 11-12). Consequently, we affirm the denial of Appellant's PCRA petition on the basis of the PCRA court's March 30, 2012 opinion, and adopt that opinion as our own.

The parties are instructed to attach a copy of the PCRA court's March 30, 2012 opinion to all future filings regarding this appeal.

Order affirmed.

---

[9] Contrary to Appellant's assertion, at trial self-defense was a hotly contested issue, supported by evidence in Appellant's favor, even absent his testimony. Specifically, trial counsel relied upon the fact that the victim threatened Appellant, the victim was armed with his gun loaded and cocked, and Appellant crashed the car that he was driving. Considering such evidence, we agree with the PCRA court that trial counsel's recommendation that Appellant avoid the risk of testifying was part of a reasonable trial strategy.

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	
	:	CP-51-CR-1101461-2005
v.	:	
Anwar Johnson	:	Superior Court No. 2780 EDA 2011
Sarmina, J.	:	
March 30, 2012		

OPINION

PROCEDURAL HISTORY

On February 6, 2007, after a bench trial before this Court, Anwar Johnson (petitioner) was found guilty of first-degree murder (F-1), carrying a firearm without a license (F-3), carrying a firearm on public streets of Philadelphia (F-3), and possessing an instrument of crime (PIC) (M-1)[1]. After the verdict, petitioner retained private counsel and, upon petitioner's request, sentencing was postponed. On May 2, 2007, petitioner was sentenced to a mandatory life sentence[2] for the crime of first-degree murder.[3]

On May 14, 2007, petitioner filed timely post-sentence motions, which were denied by operation of law on September 11, 2007. On October 3, 2007 a timely counseled notice of appeal

[1] 18 Pa.C.S. §§ 2502(a), 6106, 6108, and 907(a), respectively.

[2] 18 Pa.C.S. § 1102(a).

[3] All the remaining sentences of incarceration were ordered to run concurrent with the first degree murder charge as follows: as to the charge of carrying a firearm without a license, petitioner was sentenced to not more than 18 months nor less than 84 months; as to the charge of carrying a firearm on the public streets of Philadelphia, petitioner was sentenced to not less than 12 months nor more than 60 months; as to the PIC charge, petitioner was sentenced to not less than 12 months nor more than 60 months.

was filed in the Superior Court and, on March 2, 2009, judgment of sentence was affirmed.[4] Petition for Allowance of Appeal was denied on August 19, 2009.[5] On September 27, 2010, petitioner filed a timely counseled petition pursuant to the Post-Conviction Relief Act (PCRA).[6] The Commonwealth responded by filing a Motion to Dismiss on February 9, 2011. On February 22, 2011, petitioner filed a response to the Commonwealth's Motion to Dismiss. On March 22, 2011, petitioner filed a supplemental Memorandum addressing (1) Standard of Review Applicable to PCRA Court's Review of Errors Occurring in Non-Jury Trial Before Same Judge and (2) Additional Factors Supporting Evidentiary Hearing. On April 8, 2011, petitioner filed a Pre-Hearing Memorandum of Law. On April 18, 2011, petitioner filed a Motion to Compel Commonwealth to Provide Petitioner with Copy of Police Report in petitioner's Juvenile Delinquency Matter. Petitioner also filed Memorandum of Law Addressing Court's Inquiry Regarding Principles of Self-Defense on April 18, 2011.

On May 4, 2011, the Commonwealth responded to petitioner's Pre-Hearing Memorandum and Motion to Compel. The Commonwealth filed a Supplemental Motion to Dismiss on May 5, 2011. An evidentiary hearing took place over the course of several days: May 27, 2011; June 2, 2011; June 3, 2011; and June 14, 2011. On September 15, 2011, after due consideration, this Court entered an order dismissing petitioner's PCRA petition. On September 19, 2011, petitioner filed a Motion for Reconsideration of September 15, 2011 Decision to Deny Post-Conviction Relief. This Court denied petitioner's Motion to Reconsider on September 28, 2011.

Petitioner filed a *pro se* notice of appeal on October 5, 2011. On October 20, 2011 Barnaby C. Wittels, Esquire was appointed to represent petitioner on appeal. The Court ordered counsel to file a Statement of Matters Complained of On Appeal (Statement) pursuant to Pennsylvania Rule of

[4] Commonwealth v. Johnson, No. 254 EDA 2007 (Pa.Super., March 2, 2009) (unpublished memorandum opinion).

[5] Commonwealth v. Johnson, No. 149 EAL 2009 (Pa., Aug. 19, 2009) (unpublished memorandum opinion).

[6] 42 Pa.C.S. § 9541 *et seq.*

Appellate Procedure 1925(b). Counsel failed to timely file the Statement. On November 15, 2011, this Court filed an Opinion finding counsel's failure to timely file the Statement constituted a waiver of all objections to the order, ruling or other matter complained of.[7] On November 22, 2011, counsel filed a motion requesting this Court to reconsider its November 15, 2011 opinion, which this Court denied on December 1, 2011.

On January 1, 2012, petitioner's case was remanded from the Superior Court, for the filing of a Statement and a Supplemental Opinion. Petitioner's Statement was timely filed with the Court on January 30, 2012.

FACTS

On June 20, 2004, petitioner and Kareem Davis were driving through West Philadelphia to drop another friend off after leaving Steve's Bar, located at 53rd and Market Streets, when they saw a mutual acquaintance, Aki Collins, also known as Richard Allen (victim or decedent). Notes of Testimony (N.T.) 2/5/2007 at 82 and 88-92. At the time petitioner and Davis saw the victim, petitioner was driving and Davis was in the front passenger seat. Id. at 90-92. Davis talked briefly with the victim through the front passenger window, at which time the victim decided to ride with them to Night on Broad, a go-go bar located at Broad and Olney Streets. Id. at 91-92. The victim got into the rear passenger seat of the car and rode behind Davis. Id. at 92. After the victim got into the car, the three of them drove to 53rd and Media to stop by the Jute Club before proceeding to Night on Broad. Id. at 96. When they arrived at the Jute Club, Davis and the victim waited in the car while petitioner went inside. After petitioner returned to the car, he and the victim began arguing about an incident with the police that had occurred several years earlier. Id. at 96-97. The dispute arose because petitioner believed the victim had called the police on him. Id. at 97-98.

[7] Petitioner's counsel did submit to chambers a request for extension of time to file the Statement, on November 15, 2011, five days *after* the Statement was due. Counsel's request for extension of time was based on his position that the Notes of Testimony from the PCRA evidentiary hearing, the PCRA listings, and the trial were unavailable. These Notes of Testimony had been available since before counsel was appointed.

Petitioner and the victim continued arguing while petitioner drove the car to 52nd and Walnut Streets, where he pulled over to point out a phone booth which he believed was the phone the victim had used to call the police regarding petitioner. N.T. 2/5/2007 at 99-103. Petitioner then drove down the street to Hollywood Palace, located between 52nd and 53rd Streets, where petitioner again stopped the car. While driving to Hollywood Palace, petitioner and the victim continued to argue, at which time the victim said, "You can go to war, whatever you want to do. You can do whatever you want to do." Id. at 102-03. When they got to Hollywood Palace, the victim said, "I'm rapped out, I ain't got nothing more to talk about no more." Id. at 105. Petitioner did not say anything in response, but pulled out a gun and began shooting the victim while the car was still moving forward. Id. at 107-08. Davis looked behind him and saw the victim being shot repeatedly as petitioner discharged all the bullets in his gun, hitting the victim in the head repeatedly.[8] Id. at 106 and 155. The car petitioner was driving eventually crashed into a house. Id. at 107, 113. Davis testified that he saw a gun on the victim's lap, but admitted that no shots were fired from the back of the car to the front.[9] Id. at 108-09, 113. When the car crashed, petitioner told Davis to get out of the car, which he did, and Davis then ran a few blocks to Marquita Thompson's house, his girlfriend. Id. at 116-119.

Davis was let into the house by Marquita's father, Jeffrey Glen. Marquita's mother, Valerie Thompson, was wiping blood off Davis' face in the upstairs bedroom when petitioner came into the

[8] Twelve shots were fired, all from petitioner's firearm, 10 of them hitting the victim in the head. N.T. 2/5/2007 at 106, 155. Twelve .9 millimeter Luger fired cartridge casings were recovered inside the vehicle and it was determined by a firearms expert that these cartridge casings were all fired from the same firearm. N.T. 2/6/2007 at 6-9, 70.

[9] Davis also never testified to telling petitioner that the victim had a gun; nor did he testify that petitioner ever said anything to *him* about having seen the victim with a gun. A .25 caliber semi-automatic firearm was recovered from the vehicle – from underneath the front passenger seat. N.T. 2/5/2007 at 168-76. The firearm had one unfired cartridge in the chamber and four unfired cartridges in the magazine. Id. at 175. The magazine could hold a total of seven (7) cartridges. N.T. 2/6/07 at 11. No fired cartridge cases from this firearm were found. N.T. 2/5/2007 at 62.

house."[9] Id. at 122. Petitioner instructed Davis to place all of his clothing in a bag, which Davis did, and petitioner gave the gun to Mr. Glen and instructed him to put it in a bag, which Mr. Glen did. Id. at 123-26. Davis and petitioner then left Marquita Thompson's house and went to a girl's house that petitioner knew, after which Davis and petitioner went to Black Oak Park, also known as Malcolm X Park. Id. at 129-32. After leaving this girl's house, petitioner told Davis to call Mr. Glen to get the gun back. Davis called Mr. Glen and got the gun back from him. Id. at 130. Davis and petitioner then went back to the park, where they disposed of the clothes in different trash cans. Id. at 132. Two days later, Davis went down to Homicide and provided them with a statement about the death of the victim. Id. at 135.

Upon learning a warrant had been issued for his arrest, petitioner took a bus to San Diego, California. N.T. 6/3/2011 at 101-103. Petitioner stayed in San Diego until he happened to be arrested for drug dealing in California and was extradited to Philadelphia to stand trial for the murder of Aki Collins. Id. at 105.

LEGAL ANALYSIS

On appeal petitioner raises the following issues:

1. The PCRA Court erred in denying relief in this case where the Appellant [sic] evidence established that trial counsel were ineffective in their representation by failing to file and litigate a motion *in limine* to exclude Appellant juvenile convictions for robbery[,] and where said error prejudiced Appellant[,] and where said error was not based on any rational legal strategy[,] and where counsel's performance fell below the acceptance level of competence. Appellant was therefore denied his right to the effective assistance of counsel as secured to

[9] Petitioner did not know Valerie Thompson and was not familiar with this house he fled to after the shooting of the victim. N.T. 6/3/2011 at 31-2.

him under the Sixth Amendment to the United States Constitution and under the Constitution and laws of the Commonwealth of Pennsylvania;

2. The evidence adduced at the evidentiary hearings clearing [sic] established a reasonable probability that had Appellant testified at trial and had the evidence as to the recreation of the incident possessed by trial counsel been presented at trial the outcome would have been different;

3. The PCRA Court erred in the standard of law it applied in this case. In this case[,] the PCRA Court had sat as the fact finder in a non-jury trial. As such[,] when sitting as the PCRA Court it is improper for the PCRA Court to reassess or redetermine credibility. The fact finder may not follow up a guilty verdict with an evaluation of whether additional information brought forth in the evidentiary hearings changes that conclusion. Rather[,] the standard of law is whether a reasonable probability existed that the outcome of the case would have been different. The role of fact finder at trial and the role of the judge in PCRA evidentiary proceeding and decision are not interchangeable[;] yet[,] in this case[,] the judge not only blurred two roles but, in essence, by passing on the credibility of the Appellant and his trial counsel, revisited her role as the finder of fact and applied the incorrect legal standard.

Ineffective Assistance of Counsel for Failure to File Motion in Limine

Petitioner alleges that trial counsel was ineffective for failure to file a motion *in limine* to exclude petitioner's juvenile record. Because petitioner failed to raise this claim at the first available opportunity, this claim is waived and therefore this Court cannot consider it.

To be eligible for post-conviction relief, a petitioner must establish that the allegation of error has not been waived. 42 Pa.C.S. § 9543(a)(3). A claim of error is waived if, for example, a petitioner could have raised the issue in a petition for post-conviction relief but failed to do so.

Commonwealth v. Peterkin, 649 A.2d 121, 124 (Pa. 1994); see also 42 Pa.C.S. § 9544(b) (determining issue is waived "if the petitioner failed to raise it and it could have been raised. . . ."). Petitioners generally should wait to raise ineffectiveness of counsel claims until collateral review; however, "any ineffectiveness claim will be waived . . . after a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity." Commonwealth v. Grant, 813 A.2d 726, 743 (Pa. 2002). Petitioner had the opportunity to claim in his PCRA petition that counsel was ineffective for failure to file a motion *in limine* to exclude petitioner's juvenile record. Petitioner, instead, argued his counsel was ineffective for failing to call petitioner as a witness. Because petitioner did not raise this claim in his PCRA petition and, instead, is raising it in the first instance on appeal, this claim is waived and will not be discussed further.

Petitioner Prejudiced for Failure to Testify

Petitioner's second claim is that trial counsel was ineffective for failure to call petitioner as a witness during his trial. Petitioner asserts that, had he testified at trial, his testimony would have been sufficient to establish a reasonable alternative to the Commonwealth's version of events, causing the outcome of petitioner's trial to be different. This claim is without merit.

According to the Pennsylvania Supreme Court in Commonwealth v. Balodis, 747 A.2d 341, 343 (Pa. 2000), counsel is presumed effective, and under 42 Pa.C.S. § 9543(a), the petitioner has the burden of proving ineffective assistance of counsel. To be eligible for PCRA relief due to ineffective assistance, a petitioner is required to prove that such assistance "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). A PCRA petitioner "must prove (1) that the underlying claim has arguable merit, (2) that counsel's conduct was without a reasonable basis designed to effectuate his or her client's interest, and (3) that counsel's ineffectiveness prejudiced the appellant." Commonwealth v. Allen, 833 A.2d 800, 802 (Pa.Super. 2003). Furthermore, "[a]ll three prongs of

this test must be satisfied. If [petitioner] fails to meet even one prong of the test, his conviction will not be reversed on the basis of ineffective assistance of counsel." Commonwealth v. O'Bidos, 849 A.2d 243, 249 (Pa.Super. 2004).

Although in his claim, petitioner focuses on the third prong of the ineffectiveness test, "to obtain relief, a petitioner must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the petitioner," Commonwealth v. Johnson, 966 A.2d 523 (Pa. 2009), *citing* Strickland v. Washington, 466 U.S. 668, 687 (1984), prior to discussing the prejudice prong, this Court will address the other two prongs because each prong "must [be] set forth and individually discuss[ed] substantively." Commonwealth v. Steele, 961 A.2d 786, 797 (Pa. 2008).

Petitioner's claim lacks arguable merit and, therefore, petitioner cannot establish an ineffective assistance of counsel claim. This Court made the determination that the testimony presented at the PCRA evidentiary hearing by Mr. Gross and Ms. Levine regarding the advice they gave to petitioner not to testify was not credible. N.T. 9/15/2011 at 4. Mr. Gross and Ms. Levine testified that they advised petitioner not to testify because they concluded that petitioner's juvenile adjudication would be admissible against him. Id. at 5-7. However, Ms. Levine's notes make clear that she was made aware of petitioner's juvenile record as early as September 28, 2006, and the Court found it incredible that she did not follow up on the matter until four days before trial. Id. at 6. This Court also did not credit their testimony because Mr. Gross's and Ms. Levine's affidavits mirrored each other so rotely and closely. Id. at 10. Furthermore, this Court concluded that Mr. Gross's and Ms. Levine's advice to petitioner not to testify was instead based on a strategic decision not to subject petitioner to rigorous cross-examination. Id. at 7. Petitioner's personal decision not to testify was made after this Court conducted a full colloquy with him and determined that his decision was made knowingly, intelligently, and voluntarily based on reasonable advice from

petitioner's counsel. N.T. 2/06/2007 at 30-2. Therefore, petitioner's ineffective assistance of counsel claim lacks arguable merit.

Petitioner also cannot demonstrate counsel's conduct in advising him not to testify was without a reasonable basis. Mr. Gross and Ms. Levine made the strategic decision to focus on the fact that petitioner had such great fear when he saw the victim's gun and heard the victim's alleged threat that petitioner acted in self-defense. N.T. 9/15/2011 at 8. This Court found it reasonable for counsel to advise petitioner not to testify and subject himself to cross-examination in light of the number of times he shot the victim and the numerous consciousness-of-guilt acts petitioner engaged in following the crime. Id. at 7-8. This Court found that attorneys Helen Levine, Esquire and Stephen Gross Esquire, had a reasonable basis for advising petitioner not to testify:

> The Court: Yes, the advice given to the defendant was not – was that he not testify, but that was because Ms. Levine concluded that the evidence, as it was elicited, gave her a sufficient basis from which to argue self-defense, and she made the strategic decision not to put the defendant on to testify; although, it was his decision to make, and he was quite aware of that, and I conducted a full colloquy with him on that; but that it was a discussion with him that he would be subject to rigorous cross-examination, which was conceded during the testimony.
>
> In light of the number of times that he shot the victim in the head and the numerous consciousness-of-guilt acts, this was not an unreasonable choice.

N.T. 9/15/2011 at 7-8. Furthermore, trial counsel "focused on and emphasized the crash. To them it showed that the defendant was more concerned with the backseat than with what was going on in the street, and they also relied on the threat, as they perceived it, from the victim, that these were fighting words." Id. at 14-15. Due to the nature of petitioner's actions, trial counsel advised petitioner not to testify. Id. This was a strategic decision made to protect petitioner from cross-examination, and was therefore reasonably made to protect petitioner's interest. Therefore, petitioner cannot demonstrate counsels' actions were unreasonable.

Even if petitioner could demonstrate prongs one and two, which he has not, petitioner fails to show that he was prejudiced by counsel's actions. To prove prejudice, petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In this instance, petitioner must show that, had he testified at trial, there was a reasonable probability that the outcome of petitioner's case would have been different. However, petitioner cannot demonstrate that his counsels' purported ineffectiveness caused him prejudice.

When presiding over PCRA evidentiary hearings, the PCRA Court is required to make credibility determinations to ensure the administration of justice. Commonwealth v. Cox, 983 A.2d 666, n. 25 (Pa. 2009); see also Commonwealth v. Lambert, 765 A.2d 306, 362 (Pa.Super. 2000) (determining PCRA Court's familiarity with case instrumental in assessing value of evidence). This Court can make credibility determinations in a PCRA evidentiary hearing to determine whether there was a reasonable probability that the outcome would have been different had petitioner testified. Commonwealth v. Johnson, 966 A.2d 523, 535 (Pa. 2009). In Johnson, it was necessary for the Court to decide the credibility of witnesses in order to determine whether their testimony created a reasonable probability that the outcome of the trial would have been different. Id.

This Court made a finding of fact that petitioner's testimony at the evidentiary hearing was incredible. This Court found petitioner's testimony which reflected that he was not mad at the decedent but mad at Kareem Davis for bringing the victim to be incredible. N.T. 9/15/2011 at 12. This Court further found petitioner's testimony to be inconsistent with Davis's testimony about the arguing between petitioner and the decedent prior to the shooting, and actions taken by petitioner following the shooting, such as whether petitioner was the one who had asked Mr. Glen for a bag to dispose his bloody clothes in and whether petitioner went directly to Malcolm X Park after disposing of the gun. Id. at 24-28. The Court further noted that Davis was not cross-examined at

trial as to whether petitioner had mentioned to Davis that the victim had a gun. Id. at 27. The Court noted that when Davis was asked whether petitioner mentioned decedent had a gun on him, petitioner's trial counsel *objected* to the question. Id. at 15, *citing to* the record of trial 2/05/2007 at 133. The Court found it incredible that petitioner, having just shot a man ten times in the head because he feared for his life after having heard decedent's words and having seen him with a gun would have failed to mention this to Davis or to Mr. Glen or Mrs. Glen. N.T. 9/15/2011 at 12. These inconsistencies between petitioner's and Davis's testimony were factors the Court considered in concluding petitioner's testimony was incredible. Therefore, petitioner is unable to demonstrate, "that counsel's ineffectiveness prejudiced the appellant." Allen, 833 A.2d at 802. No reasonable probability existed that the outcome of the case would have been different because no reasonable fact finder would believe petitioner's testimony when taken in context.

Pennsylvania's standard of review in PCRA appeals is limited to determining whether the findings of the PCRA court are supported by the record and free from legal error. Johnson, 966 A.2d at 532, *citing* Commonwealth v. Sneed, 899 A.2d 1067, 1071 n.6 (Pa. 2006) ("The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to our plenary review."). This Court's credibility determinations and findings of fact are afforded deference. Therefore, there is no probability that counsels' actions caused petitioner prejudice, because the Court found petitioner's testimony incredible. Furthermore, petitioner's trial counsel had a reasonable basis for advising petitioner not to testify. Accordingly, petitioner failed to establish any of the three necessary prongs to sustain a claim of ineffective assistance of counsel and, thus, petitioner's second claim is without merit.

PCRA Court Erred in Making Credibility Determinations

Petitioner's third claim is that this Court erred when it sat as the fact finder in a bench trial and also made credibility determinations as the presiding PCRA Court. This claim is without merit.

It is generally deemed preferable for the same court that presided over trial proceedings to preside over PCRA proceedings since the court's familiarity with the case will help in the administration of justice. Commonwealth v. Abu-Jamal, 720 A.2d 79, 90 (Pa. 1998); see also Lambert, 765 A.2d at 362 ("The PCRA Court's familiarity with the case does not put the court in a compromised position to assess the value of the PCRA evidence. If that were so, no judge could serve at a bench trial and again in PCRA proceedings in the same case. That result is simply not reasonable."). When presiding over PCRA proceedings, it is "essential" for the PCRA Court to make credibility determinations. Cox, 983 A.2d at n. 25, *citing generally* Commonwealth v. Basemore, 744 A.2d 717 (Pa. 2000). Therefore, this Court was not only allowed to make credibility determinations, but was also fulfilling its duty as the presiding PCRA Court when making credibility determinations in petitioner's case. Thus, petitioner's claim that this Court could not revisit any role as the fact finder in PCRA proceedings is without merit.

Accordingly, the dismissal of petitioner's petition should be affirmed.

BY THE COURT:

M. Teresa Sarmina

M. TERESA SARMINA, J.