

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RAYMOND D. DAVIS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3184 EDA 2011

Appeal from the PCRA Order November 23, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0700471-2006

BEFORE: STEVENS, P.J., BOWES, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.:

Filed: February 21, 2013

Raymond Davis appeals from the November 23, 2011 order denying him PCRA relief. We affirm.

On May 27, 2005, Appellant broke into the home of ZaZa Moueddene on 102 North Van Pelt Street, Philadelphia. While threatening to kill the victim with a knife, Appellant demanded money. The victim did not have cash but offered Appellant her checkbook. Appellant became enraged and stabbed Ms. Moueddene in the face with the weapon. The victim started to defend herself, and, as the two struggled, the door to her home opened. She screamed for help, and Appellant fled.

* Former Justice specially assigned to the Superior Court.

The victim's neighbor, Rebecca Gigli, heard the screaming and saw Appellant leave the house. Another neighbor, Mark Kochanowicz, also heard the victim's cries and came out onto Van Pelt Street, and he and Ms. Gigli chased Appellant while Mr. Kochanowicz telephoned police. They cornered Appellant in an alcove under a bridge and awaited the police, who arrested Appellant at the scene. Appellant was charged with robbery, aggravated assault, attempted theft, possession of an instrument of crime, terroristic threats, simple assault, and reckless endangerment.

Following a May 15, 2007 nonjury trial, Appellant was convicted of all charges, and, on September 13, 2007, he was sentenced to ten to twenty years imprisonment followed by ten years probation. On appeal, Appellant raised three contentions: that his Rule 600 motion should have been granted, that the verdict was against the weight of the evidence, and that he was improperly sentenced as a second-strike recidivist. We ruled that he waived his first position by failing to file a written petition but also continued by addressing the merits of the Rule 600 issue, which the trial court had considered and rejected. We concluded that his weight claim was waived and that his final contention was meritless since he stipulated at sentencing that he committed a prior offense that triggered the recidivist statute. Thus, on February 24, 2009, we affirmed, *Commonwealth v. Davis*, 970 A.2d 466 (Pa.Super. 2009) (unpublished memorandum), and Appellant's petition

for allowance of appeal was denied on August 21, 2009. ***Commonwealth v. Davis***, 985 A.2d 970 (Pa. 2009).

Appellant filed a timely PCRA petition on July 27, 2010, and counsel was appointed and filed an amended petition. This appeal followed the November 23, 2011 dismissal of that petition, following proper notice, without a hearing. Two contentions are raised on appeal: "I. Whether the judge was in error in denying the Appellant's PCRA petition without an evidentiary hearing on the issues raised in the amended PCRA petition regarding trial counsel's ineffectiveness. II. Whether the judge was in error in not granting relief on the PCRA petition alleging counsel was ineffective." Appellant's brief at 8.

Initially, we observe, "Our standard for reviewing PCRA orders is to determine whether the court's rulings are supported by the record and free of legal error. It is an appellant's burden to persuade us that the PCRA court erred and that relief is due." ***Commonwealth v. Turner***, 2012 PA Super 282, 2012 WL 6642792, 2 (citation omitted). Since the right to an evidentiary hearing is dependent upon an analysis of the merits of the issues raised, as discussed more fully *infra*, we address Appellant's contentions in reverse order.

Appellant raises five allegations of ineffective assistance of counsel. The three elements that a defendant must satisfy to demonstrate trial counsel's ineffectiveness are often reiterated. "To plead and prove

ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." ***Commonwealth v. Rykard***, 55 A.3d 1177, 1189-90 (Pa.Super. 2012). Counsel's competence is presumed, placing the burden of proving ineffectiveness on the defendant. ***Commonwealth v. Bennett***, A.3d ___, 2012 WL 6720862, 9 (Pa. 2012).

Appellant's first position is that, if trial counsel had filed a written rather than oral motion to dismiss his charges under Rule 600, that motion would have been granted. In light of the rulings rendered herein, this position cannot be sustained. When counsel made the oral motion to dismiss under Rule 600, the trial court held a hearing, ruled on the merits, and concluded that Rule 600 was not violated. Thus, there can be no finding that a written motion would have been granted by the trial court.

Furthermore, on appeal, we indicated that a written motion should have been filed, but we also concluded that the trial court's resolution of the Rule 600 claim was correct. We analyzed the merits of Appellant's position that his case should have been dismissed under Rule 600. We ruled that Rule 600 was not violated in this matter based on the existence of excludable time and the Commonwealth's exercise of due diligence. Thus, it is evident that Appellant would not have prevailed on appeal with his Rule 600 position even if a written motion had been filed. In light of the

foregoing, we reject Appellant's allegation that trial counsel was ineffective for failing to file a written Rule 600 motion since such a motion would have been granted.

Appellant also proffers that prior counsel was ineffective in three respects during sentencing:

Appellant contends that his counsel stipulated to his prior convictions with out informing Appellant that he could challenge those convictions as they invoked the recidivist statute.

He also asserts that his counsel was ineffective for failing to request that the sentences for robbery and aggravated assault merged for sentencing purposes.

Finally, he contends that his counsel failed to object when the court silenced Appellant during the hearing. He contends that he wished to challenge his criminal history and the court would only allow him to talk about certain things.

Appellant's brief at 20.

This quotation is the extent of Appellant's extrapolation on these contentions. He does not indicate the nature of his prior conviction and why it did not fall within the parameters of the recidivist statute, which he does not cite. Similarly, Appellant fails to outline the pertinent law governing merger and to substantiate why his robbery and aggravated assault convictions should merge under that precedent. Undeveloped allegations of ineffectiveness will not satisfy a defendant's burden of proof and will not be entertained. ***Commonwealth v. Steele***, 961 A.2d 786, 797 (Pa. 2008); ***Commonwealth v. Faulk***, 21 A.3d 1196, 1203 (Pa.Super. 2011). In this

instance, Appellant's positions regarding counsel's representation during sentencing are wholly undeveloped and will not be considered.

Appellant's final allegation of ineffectiveness concerns this Court's conclusion, during direct appeal, that counsel waived his challenge to the weight of the evidence. In this appeal, Appellant posits that the weight-of-the-evidence contention was preserved by means of a post-sentence motion for extraordinary relief. Appellant continues that, since our ruling during the prior appeal was erroneous, counsel should have pursued relief by means of a motion for panel reconsideration. However, Appellant has neglected to establish the merits of the underlying position, *i.e.*, in what manner his convictions were against the weight of the evidence.

Indeed, "[A] trial court's denial of a post-sentence motion 'based on a weight of the evidence claim is the least assailable of its rulings.'" ***Commonwealth v. Sanders***, 42 A.3d 325, 331 (Pa.Super. 2012) (partially quoting ***Commonwealth v. Diggs***, 949 A.2d 873, 880 (Pa. 2008)); ***accord Commonwealth v. Brown***, 648 A.2d 1177, 1189-90 (Pa. 1994) ("One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence[.]") (citation omitted). In this setting, "an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim."

Sanders, supra at 331 (quoting **Commonwealth v. Champney**, 832 A.2d 403, 408 (Pa. 2003)). We reverse the trial court's ruling only if the verdict "is so contrary to the evidence as to shock one's sense of justice." **Sanders, supra** at 331 (quoting **Champney, supra** at 408). Herein, the verdict does not shock one's sense of justice, Appellant would not have prevailed in a motion for reconsideration, and counsel was not ineffective for failing to further pursue the matter.

Having disposed of Appellant's allegations of ineffectiveness, we now direct our attention to his first allegation, which is that he should have been accorded an evidentiary hearing. The applicable law is:

The right to an evidentiary hearing on a post-conviction petition is not absolute. **Commonwealth v. Jordan**, 772 A.2d 1011, 1014 (Pa.Super. 2001). 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. **Id.** It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing. **Commonwealth v. Hardcastle**, 549 Pa. 450, 454, 701 A.2d 541, 542–543 (1997).

Commonwealth v. Wah, 42 A.3d 335, 338 (Pa.Super. 2012) (quoting **Commonwealth v. Turetsky**, 925 A.2d 876, 882 (Pa.Super. 2007)).

After consideration of the issues raised herein, we conclude that the PCRA court did not err in deciding that there were no genuine issues of material fact and that Appellant is not entitled to PCRA relief. We therefore uphold its decision to decline to hold an evidentiary hearing.

J-S09017-13

Order affirmed.