

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MICHAEL JOHNSON,	:	
	:	
Appellant	:	No. 643 EDA 2011

Appeal from the PCRA Order December 27, 2011,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0903190-2006

BEFORE: GANTMAN, DONOHUE and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: January 4, 2013

Michael Johnson (“Johnson”) appeals from the order of court entered on December 27, 2011 denying his petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The PCRA court summarized the relevant factual and procedural history as follows:

Following a waiver trial before this court, [Johnson] was found guilty of possession of a controlled substance with intent to deliver, firearms not to be carried without a license, and possession of an instrument of crime. Sentencing was deferred pending a pre-sentence report and mental health evaluation. On July 17, 2008, this court imposed a mandatory sentence of not more than five (5) nor less than ten (10) [sic] years of incarceration on the charge of possession of a controlled substance with intent to deliver and a concurrent sentence of one (1) to two (2) years of incarceration on the charge of firearms not to be carried without a license. No further penalty was imposed

*Retired Senior Judge assigned to the Superior Court.

[Johnson] filed a [n]otice of [a]ppeal on July 29, 2008. On November 9, 2009, judgment of sentence was affirmed by the Superior Court. On July 7, 2010, the Pennsylvania Supreme Court denied [Johnson's] [p]etition for [a]llowance of [a]ppeal. No further appeal was taken. On September 10, 2010, [Johnson] filed a *pro se* petition under the Post Conviction Relief Act (PCRA)

David Rudenstein, Esquire, was appointed counsel on behalf of [Johnson]. On June 10, 2011, Attorney Rudenstein filed an [a]mended [p]etition raising a claim of ineffective assistance of counsel for failing to file a post-sentence motion. After conducting a review of the record, this court dismissed [Johnson's] motion on December 27, 2011. [Johnson] filed a timely [n]otice of [a]ppeal.

PCRA Court Opinion, 5/16/12, at 1-2.

On appeal, Johnson presents the following question for our review:

Did the Honorable PCRA [c]ourt err when it dismissed [Johnson's] PCRA [p]etition without an [e]videntiary [h]earing even though [Johnson] properly pled and would have been able to prove that trial counsel was ineffective when he failed to file a [p]ost [s]entence [m]otion to preserve the issue of the weight of the evidence?

Appellant's Brief at 3.

"This Court's standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in

the certified record.” **Commonwealth v. Walls**, 993 A.2d 289, 294-95 (Pa. Super. 2010) (internal citation omitted). In addition,

[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. 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.

Id. at 295 (internal citations omitted).

Johnson contends that the PCRA court erred in denying his PCRA petition without a hearing because he alleged a claim of ineffective assistance of counsel that entitled him to relief. When reviewing a claim of ineffective assistance of counsel, we begin with the assumption that counsel was effective. **Commonwealth v. O'Bidos**, 849 A.2d 243, 249 (Pa. Super. 2004). In order to overcome this presumption, a claimant must establish “that (1) the underlying claim is of arguable merit; (2) that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate the appellant's interest; and finally, (3) that counsel's action or inaction was prejudicial to the client.” **Id.** “In order to establish prejudice, an appellant must demonstrate that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different.” **Commonwealth v. Meadows**, 567 Pa. 344, 356, 787 A.2d 312,

319 (2001). If the claimant fails to establish any one of these three prongs, his challenge must fail. *O'Bidos*, 849 A.2d at 249.

Johnson is claiming that his trial counsel was ineffective in failing to file a post-sentence motion raising a challenge to the weight of the evidence, thereby failing to preserve the claim for direct appeal. Appellant's Brief at 7-8. However, Johnson did raise a weight claim in his statement of matters complained of on appeal in the direct appeal process, and the trial court thoroughly addressed this claim in its opinion pursuant to Pa.R.A.P. 1925(a). **See** Statement of Matters Complained of on Appeal, 8/26/08; Trial Court Opinion, 9/4/08, at 5-7. In rendering our decision on Johnson's direct appeal, although we first found the issue waived because of Johnson's failure to raise it in a post-sentence motion, we proceeded to consider the merits of the issue and concluded that we would find no merit to the claim based upon the reasoning provided in the lower court. *Commonwealth v. Johnson*, 988 A.2d 721 (Pa. Super. 2009) (unpublished memorandum). Thus, because we addressed the weight claim despite trial counsel's error, Johnson is unable to establish that but for trial counsel's alleged ineffectiveness, the outcome of his appeal would have been different.

Moreover, among the requirements a petitioner must establish in order to be entitled to PCRA relief, he must prove that the claim he seeks to raise has not been previously litigated. 42 Pa.C.S.A. § 9543(a)(3). "An issue has been previously litigated if the highest appellate court in which the petitioner

was entitled to review as a matter of right has ruled on the merits of the issue.” ***Commonwealth v. Steele***, 599 Pa. 341, 359, 961 A.2d 786, 796 (2008). Because we ruled on the merits of Johnson’s weight claim, this claim has been finally litigated. ***See Commonwealth v. Reed***, 601 Pa. 251, 264, 971 A.2d 1216, 1220 (2009) (holding that Superior Court’s alternative holding on direct appeal that defendant’s claim was meritless, even if the claim had not been waived, was a binding holding constituting law of the case).

For both of these reasons, we find no error in the PCRA court’s denial of Johnson’s petition.

Order affirmed.

Platt, J. concurs in the result.