

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

VICTOR CHRISTMAS

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 177 EDA 2016

Appeal from the PCRA Order December 9, 2015  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0013153-2009

BEFORE: BENDER, P.J.E., LAZARUS, J., and FITZGERALD, J.\*

MEMORANDUM BY LAZARUS, J.:

**FILED APRIL 27, 2017**

Victor Christmas appeals from the order, entered in the Court of Common Pleas of Philadelphia County, dismissing, without a hearing, his petition filed under the Post-Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.

Following a waiver trial on May 24, 2009, the Honorable Charles J. Cunningham found Christmas guilty of numerous charges of violation of the Uniform Firearm Act, namely, possession of a firearm prohibited,<sup>1</sup> carrying a firearm without a license,<sup>2</sup> and carrying firearms on public streets or public

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 18 Pa.C.S.A. § 6105(a)(2)(i).

<sup>2</sup> 18 Pa.C.S.A. § 6106(a)(1).

property in Philadelphia,<sup>3</sup> as well as possession of an instrument of crime,<sup>4</sup> terroristic threats,<sup>5</sup> and simple assault.<sup>6</sup>

On September 24, 2010, the court sentenced Christmas to an aggregate term of imprisonment of 11 years to 25 years. On October 15, 2010, the trial court denied Christmas' motion for reconsideration of sentence after hearing argument from his trial attorney, Daniel Connor, Esquire, who was subsequently permitted to withdraw his appearance at the conclusion of the hearing. On August 15, 2011, a panel of this Court affirmed the trial court's judgment of sentence. ***Commonwealth v. Christmas***, 32 A.3d 833 (Pa. Super. 2010) (unpublished memorandum). On December 29, 2011, the Supreme Court of Pennsylvania denied allowance of appeal. ***Commonwealth v. Christmas***, 34 A.3d 825 (Pa. 2011) (table).

Christmas then filed a *pro se* PCRA petition on May 23, 2013. The PCRA court appointed counsel, who then filed an amended petition on February 8, 2015, claiming that trial counsel was ineffective for failing to file a post-verdict motion challenging the weight of the evidence. On October

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<sup>3</sup> 18 Pa.C.S.A. § 6108.

<sup>4</sup> 18 Pa.C.S.A. § 907(a).

<sup>5</sup> 18 Pa.C.S.A. § 2706(a)(1).

<sup>6</sup> 18 Pa.C.S.A. § 2701(a).

22, 2015, the PCRA court issued notice of its intent to dismiss Christmas' petition, and, after no response was filed, formally dismissed his petition on December 9, 2015.

Christmas, through his current counsel, Peter A. Levin, Esquire, raises the following issues on appeal:<sup>7</sup>

I. Whether the court erred in denying [Christmas'] PCRA petition without an evidentiary hearing on the issues raised in the amended PCRA petition regarding trial counsel's ineffectiveness.

II. Whether the court erred in not granting relief on the PCRA petition alleging counsel was ineffective [for failing to file a motion that the verdict was against the weight of the evidence].

Appellant's Brief, at 8.

After careful review of Christmas' arguments, the record, and relevant case law, we conclude that the Honorable Charles J. Cunningham properly disposed of Christmas' claims. **See** PCRA Opinion, 5/19/2016. Accordingly, we affirm the order dismissing Christmas' PCRA petition, and we direct the

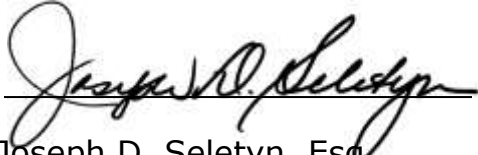
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<sup>7</sup> We note that the amended PCRA petition does not properly address a layered ineffectiveness claim. **See Commonwealth v. Paddy**, 15 A.3d 431 (Pa. 2011). However, Christmas' *pro se* petition explicitly laid out a layered ineffectiveness claim. Motion for Post-Conviction Collateral Relief, 5/25/2012. We therefore find that the issue was not waived, but the underlying claim of ineffectiveness is still without merit. **Paddy, supra** at 443 ("If the petitioner cannot prove the underlying claim of trial counsel ineffectiveness, then petitioner's derivative claim of appellate counsel ineffectiveness of necessity must fail, and it is not necessary for the court to address the other two prongs of the **Pierce** test as applied to appellate counsel.").

parties to attach a copy of Judge Cunningham's opinion in the event of further proceedings.

Order affirmed.

Judgment Entered.

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Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/27/2017

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

VICTOR CHRISTMAS

177 EDA 2016

CP-51-CR-0013153-2009  
(PCRA)

**FILED**

MAY 19 2016

Criminal Appeals Unit  
First Judicial District of PA

OPINION

STATEMENT OF THE CASE

After being found guilty on various related weapons and assault charges arising out of his discharge of a firearm on the streets of Philadelphia, Defendant's convictions were sustained on direct appeal. Defendant subsequently filed a *pro se* petition, pursuant to the Post Conviction Relief Act (PCRA), alleging counsel was ineffective for failing to challenge the weight of the evidence leading to his conviction. Defendant is now appealing the Court's dismissal of his meritless PCRA Petition without an evidentiary hearing.

PROCEDURAL HISTORY

On May 24, 2009, at the conclusion of his waiver trial before the Court, Defendant was found guilty on various related weapons and assault charges. On

September 24, 2010, Defendant was sentenced to a total period of confinement of eleven to twenty-five years in a state correctional facility. On October 15, 2010, after the Court denied his post sentence motions, Defendant filed a Notice of Appeal at 261 EDA 2010. By order dated August 15, 2011, the Pennsylvania Superior Court affirmed Defendant's conviction and sentence. By order dated December 29, 2011, the Pennsylvania Supreme Court denied Defendant's petition for allowance of appeal.

On May 23, 2012, Defendant timely filed the instant *pro se* PCRA Petition pursuant to 42 Pa.C.S.A. §9541, et. Seq. On May 13, 2013, Peter A. Levin, Esq., was appointed as counsel to represent Defendant for the purposes of his PCRA Petition. On February 8, 2015, Mr. Levin filed an amended PCRA petition on Defendant's behalf. On July 15, 2015, the Commonwealth filed a motion to dismiss Defendant's PCRA petition. The Court, on October 22, 2015, after a careful review of the record issued its notice, pursuant to Rule 907 of the Pennsylvania Rules of Criminal Procedure (Pa. R. Crim. P.), advising Counsel and Defendant that it intended to dismiss Defendant's petition within twenty days of issuance. On December 9, 2015, having received no response from Defendant, the Court entered an Order dismissing Defendant's PCRA Petition as being without merit.

On January 7, 2016, Defendant timely filed the instant *pro se* appeal to the Superior Court of Pennsylvania. On January 25, 2016, this Court filed and served on Defendant an Order pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, directing Defendant to file and serve a Statement of Errors Complained of on Appeal, within twenty-one days of the Court's Order. On February 7, 2016, Defendant filed his timely Statement of Errors Complained of on Appeal.

In his Statement of Errors Complained of, Defendant raises two issues, namely:

- “1. The Court was in error in denying defendant’s PCRA without an evidentiary hearing.
2. The Court was in error in denying the amended PCRA. The issue in the amended PCRA was the following:  
‘Trial counsel was ineffective for failing to file a motion that the verdict was against the weight of the evidence.’”

The Court will discuss Defendant’s complaints in reverse order. Defendant’s complaints are without merit.

#### **DISCUSSION OF THE ISSUE RAISED**

##### **I. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO RAISE A CLAIM THAT THE VERDICTS WERE AGAINST THE WEIGHT OF THE EVIDENCE.**

Defendant, in his second complaint, avers that trial counsel was ineffective for failing to challenge the weight of the evidence in post-trial motions, thus failing to preserve the issue on direct appeal. Defendant’s complaint is without merit.

When the issue of the ineffectiveness of counsel is raised; “Counsel is presumed to have been effective and the defendant has the burden of proving otherwise.” *Commonwealth v. Tilley*, 780 A.2d 649, 652 (Pa. 2001) A “mere allegation will not suffice; the burden is on an appellant to plead and prove that his request for an appeal was ignored or rejected by trial counsel.” *Commonwealth v. Harmon*, 738 A.2d 1023, 1024 (Pa.Super.1998) (internal citations and punctuation omitted) “The burden of proving counsel’s ineffectiveness never shifts from the party alleging it.” *Commonwealth v. Bailey*, 322 Pa. Super. 249, 469 A.2d 604 (1983) (Internal citations omitted) In addition, Defendant “must present the facts supporting each issue asserted ... and if they

do not appear on the record ... must identify affidavits, documents, or other evidence proving the alleged facts.” *Commonwealth v. Collins*, 687 A.2d 1112, 1115 (Pa.1996). (Internal citation omitted)

Our Supreme Court, in *Commonwealth v. Lesko*, 15 A.3d 345, 373 (Pa. 2011), reaffirmed its previously enunciated *Strickland/Pierce*<sup>1</sup> test, which established that in order to prevail in his complaint that counsel was ineffective Defendant must satisfy a three prong test. That is, he must establish: “(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.” A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.” *Commonwealth v. Watson*, 835 A.2d 786, 793 (Pa. Super. 2003) (Citations omitted)

“A claim challenging the sufficiency of the evidence is a question of law.” Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.” *Commonwealth v. Fisher*, 47 A.3d 155, 157 (Pa. Super. 2012) citing *Commonwealth v. Widmer*, 744 A.2d 745, 751-52 (Pa. 2000) The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.” *Commonwealth v. Hennigan*, 753 A.2d 245, 253 (Pa. Super. 2000)

Defendant’s complaint that “[t]rial counsel was ineffective for failing to file a motion that the verdict was against the weight of the evidence,” is addressed to the

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975 (1987)



discretionary power of the Court. *Commonwealth v. Widmer*, 744 A.2d 745, (Pa. 2000) “Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. 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 and that a new trial should be granted in the interest of justice.” *Id.* at 753 (Internal citations omitted)

Our Supreme Court has held that “The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses.” *Commonwealth v. Champney*, 832 A.2d 403, 408 (Pa. 2003) The Superior Court of Pennsylvania, in *Commonwealth v. Rossetti*, 863 A.2d 1185, 1191 (Pa. Super., 2004) citing *Commonwealth v. Hunter*, 381 Pa. Super. 606, 554 A.2d 550 (Pa. Super., 1989), also held that: “Before a trial court may award a new trial on the grounds that the verdict is against the weight of the evidence, it must appear that the verdict was so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative.” Furthermore, “appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.” *Champney*, at 408

As noted above, despite Defendant's representation to the contrary, our Superior Court has ruled that the evidence leading to Defendant's convictions was sufficient as a

matter of law.<sup>2</sup> Defendant is now again rearguing that trial testimony was insufficient to sustain his convictions by pointing to what he describes are fatal discrepancies in his new challenge to the weight of the evidence.

After a careful review of the record, the Court finds that Defendant's complaint has no arguable merit, counsel's conduct was reasonable under these particular circumstances and had trial counsel filed a timely motion challenging the weight of the evidence, he would not have succeeded in it. Since the Court, in its prior opinion, has thoroughly reviewed the trial testimony it will not belabor the minutia of Defendant's current complaint. The Court sitting as the trier of fact in Defendant's waiver trial, found the Commonwealth's witnesses to be credible. Furthermore, Defendant has failed to advance any new evidence to support his complaint with affidavits or other evidence to challenge the Court's determination as to the credibility of the witnesses before it. Defendant, other than arguing a reinterpretation of the testimony, has utterly failed to meet his burden.

## II. DEFENDANT WAS NOT ENTITLED TO AN EVIDENTIARY HEARING.

Defendant first complains the Court erred in "denying defendant's PCRA without an evidentiary hearing." Defendant's complaint is without merit.

The Pennsylvania Rules of Criminal Procedure (Pa. R. Crim. P.) provide in relevant part at Rule 907 that "the judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the

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<sup>2</sup> Although Defendant argued on direct appeal that the verdicts were against both the weight and sufficiency of the evidence, our Superior Court found his complaint that the verdicts were against the weight of the evidence waived, thus the genesis of his instant PCRA petition.

defendant's claim(s). If the 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. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge, thereafter, shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue."

"The controlling factor in determining whether a petition may be dismissed without a hearing is the status of the substantive assertions in the petition."

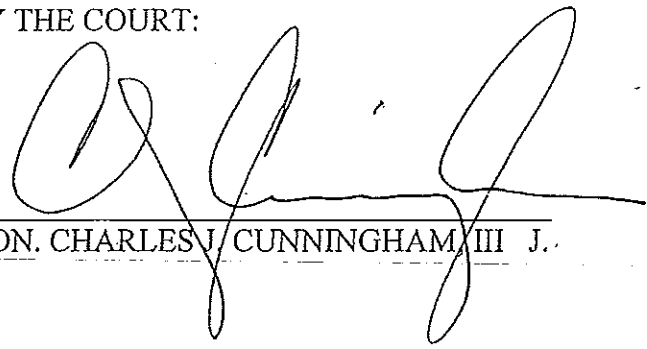
*Commonwealth v. Weddington*, 514 Pa. 46, 50, 522 A.2d 1050, 1052 (1987) "The right to an evidentiary hearing on a post-conviction petition is not absolute. A PCRA court may decline to hold a hearing if the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence." *Commonwealth v. Payne*, 794 A.2d 902, 906-07 (Pa. Super. 2002), citing *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001) (internal citations omitted).

After a careful review of the record, and for the reasons stated above, the Court finds it was appropriate to Dismiss Defendant's PCRA petition without an evidentiary hearing.

**CONCLUSION**

After a careful review of the record, the Court finds Defendant's petition for PCRA relief is wholly frivolous and without merit.

BY THE COURT:

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HON. CHARLES J. CUNNINGHAM III J.

May 19, 2016