NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
HECTOR MANUEL RIVERA	:	
Appellant	:	No. 404 MDA 2026

Appeal from the PCRA Order Entered February 9, 2026
In the Court of Common Pleas of Berks County Criminal Division at
No(s): CP-06-CR-0003163-2021

BEFORE: PANELLA, P.J.E., DUBOW, J., and SULLIVAN, J.

MEMORANDUM BY SULLIVAN, J.: **FILED: NOVEMBER 19, 2026**

Hector Manuel Rivera ("Rivera") appeals from order dismissing his timely first petition filed pursuant to the Post Conviction Relief Act ("PCRA").[1] Rivera contends his direct appeal counsel's failure to preserve a discretionary aspect of sentencing claim constituted ineffective assistance of counsel *per se* and the PCRA court erred in dismissing his claim because he failed to plead or prove actual prejudice. Because counsel's omissions did not result in a complete deprivation of Rivera's direct appeal rights, and Rivera neither pleaded nor proved actual prejudice, we affirm.

The facts underlying Rivera's conviction are not pertinent to this Court's decision, and a brief summary of the relevant procedural history follows. A jury convicted Rivera of multiple counts of trafficking in individuals, involuntary servitude, prostitution, conspiracy, delivery of a controlled

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[1] ***See*** 42 Pa.C.S.A. §§ 9541-9546.

substance, and related offenses. ***See Commonwealth v. Rivera***, 312 A.3d 366, 369, 371 (Pa. Super. 2024). In May 2023, the trial court sentenced Rivera to an aggregate term of thirty-three-and-one-half to sixty-seven years of imprisonment. ***See id***. at 371. Upon Rivera's timely post sentence motion, the court merged some of the sentences, but the total sentence remained the same. ***See id***.

Rivera took a direct appeal and raised two claims, one based on the trial court's admission of expert testimony and another based on the discretionary aspects of sentencing. ***See id***. This Court addressed the evidentiary claim, rejected Rivera's arguments, and denied relief on that claim. ***See id***. at 376. As to his sentencing claim, this Court found the issue waived. ***See id***. at 377.[2] This Court affirmed the judgment of sentence in March 2024, and Rivera did not seek allowance of appeal. Rivera was represented by the same counsel ("prior counsel") through trial, sentencing, and the direct appeal.

In November 2024, Rivera timely filed a *pro se* PCRA petition. The PCRA court appointed counsel, who filed an amended petition claiming, in relevant part, prior counsel was ineffective for waiving Rivera's right to be heard on his sentencing claim, in particular the trial court's decision to impose consecutive

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[2] The Court noted that although Rivera preserved a discretionary aspect of sentencing claim in his post-sentence motion and Pa.R.A.P. 2119(f) statement, the argument section of his brief raised a different claim, which he did not preserve. ***See Rivera***, 312 A.3d at 377. Accordingly, this Court did not review the merits of Rivera's sentencing claim. ***See id***.

sentences. ***See*** Amended PCRA Petition, 12/4/25, at ¶12(a).[3] The amended petition did not assert that the outcome of the direct appeal would have been different if prior counsel preserved Rivera's sentencing claim. Instead, Rivera cited ***Commonwealth v. Lantzy***, 736 A.2d 564 (Pa. 1999), for the proposition that an unjustified failure to file a requested direct appeal constitutes the ineffective assistance of counsel *per se*. ***See id***. at ¶ 19. The Commonwealth filed a response noting that Rivera did not plead or show this Court would have granted relief on the sentencing claim. ***See*** Commonwealth's Response, 12/16/25, at 10.

In January 2026, the PCRA court heard legal arguments on the amended petition. At the hearing, Rivera asserted he suffered prejudice because this Court did not review the merits of his sentencing claim in his direct appeal, and he offered no argument or evidence that the outcome of his direct appeal would have been different. ***See*** N.T., 1/9/26, at 8-9. The court issued a Pa.R.Crim.P. 907 notice of intent to dismiss the petition as meritless. The PCRA court noted that Rivera did not show how prior counsel's omissions with respect to the waiver of the sentencing claim resulted in prejudice. ***See*** Rule 907 Notice, 4/14/26, at 10-11. Rivera did not respond, and the court

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[3] Rivera also raised a claim that prior counsel's ineffectiveness for failing to preserve a weight of the evidence claim in a post-sentence motion. ***See*** Amended PCRA Petition, 12/4/25, at ¶12(b). Rivera has abandoned this claim on appeal. ***See*** Rivera's Brief at 4 n.1.

dismissed the petition on February 9, 2026. Rivera timely appealed, and both he and the PCRA court complied with Pa.R.A.P. 1925.[4]

Rivera presents the following issues for review:

> Whether the [PCRA c]ourt erred in denying [Rivera's] PCRA petition] where [prior] counsel failed to protect [Rivera's] right to appeal the discretionary aspects of his sentence—specifically the consecutive imposition of sentence—as [prior] counsel failed to raise this specific sentencing claim in his Rule 2119(f) statement despite arguing it in his [direct appeal] brief, thereby foreclosing upon appellate review thereof?

Rivera's Brief at 4 (some formatting altered).

This Court's standard for reviewing the dismissal of PCRA relief is well settled:

> Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error. We view the record in the light most favorable to the prevailing party in the PCRA court. We are bound by any credibility determinations made by the PCRA court where they are supported by the record. However, we review the PCRA court's legal conclusions *de novo*.

Commonwealth v. Staton, 184 A.3d 949, 954 (Pa. 2018) (internal citations and quotations omitted). The "identification and application of the proper legal principles" on which to review the PCRA court's decision present questions of law subject to plenary review. ***Commonwealth v. Reaves***, 923 A.2d 1119, 1124 (Pa. 2007).

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[4] The PCRA court's Rule 1925(a) opinion relied on the reasons stated in its Rule 907 notice.

Generally, to prevail on a claim of ineffective assistance of counsel, a PCRA petitioner must demonstrate:

> (1) that the underlying claim has arguable merit; (2) that no reasonable basis existed for counsel's actions or failure to act; and (3) that the petitioner suffered prejudice as a result of counsel's error. . . . Counsel is presumed to be effective; accordingly, to succeed on a claim of ineffectiveness[,] the petitioner must advance sufficient evidence to overcome this presumption.

Commonwealth v. Johnson, 139 A.3d 1257, 1272 (Pa. 2016) (internal citations and quotations omitted). To establish prejudice in the appellate representation context, "the petitioner must show that there is a reasonable probability that the outcome of the direct appeal proceeding would have been different but for counsel's deficient performance." ***Commonwealth v. Blakeney***, 108 A.3d 739, 750 (Pa. 2014). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. ***See Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010).

However, "[i]n certain limited circumstances, including the actual or constructive denial of counsel, prejudice may be so plain that the cost of litigating the issue of prejudice is unjustified, and a finding of ineffective assistance of counsel *per se* is warranted." ***See Commonwealth v. Rosado***, 150 A.3d 425, 429 (Pa. 2016) (citing ***United States v. Cronic***, 466 U.S. 648 (1984)); ***see also Commonwealth v. Reed***, 971 A.2d 1216, 1221 (Pa. 2009) (holding that a claim of ineffective assistance of counsel *per se*, if established, presumes prejudice without requiring the petitioner to demonstrate actual prejudice). Errors by counsel that ***completely*** foreclose

appellate review constitute ineffectiveness *per se*. ***See Rosado***, 150 A.3d at 433.

As noted above, claims of ineffective assistance of counsel *per se* apply in narrow circumstances, and our Supreme Court has referred to the presumption of prejudice as an "exception" to the general rule requiring a PCRA petition to prove prejudice. ***Reed***, 971 A.2d at 1226-27 (Pa. 2009) (noting that an extension of presumed prejudice "to cases involving a defect in an appellate brief essentially would transform the exception into a rule, as many appellate briefs contain at least one arguable defect"). Our Supreme Court has further stated, "[M]aintaining the distinction between errors causing waiver of ***all*** claims and those failing to preserve particular claims appropriately prevented the exceptional doctrine of ineffective assistance of counsel *per se* from engulfing the general rule that an accused must demonstrate that counsel's errors caused him prejudice." ***Rosado***, 150 A.3d at 431-32 (emphasis in original) (citing ***Commonwealth v. Halley***, 870 A.2d 795, 801 (Pa. 2005)); ***see Commonwealth v. Pulanco***, 954 A.2d 639, 641-42 (Pa. Super. 2008) (concluding that a PCRA court erred in reinstating a PCRA petitioner's direct appeal rights by granting leave to file an amended Pa.R.A.P. 1925(b) statement *nunc pro tunc* when this Court already addressed some issues in the petitioner's direct appeal); ***accord Commonwealth v. Martinez***, 271 & 272 MDA 2025, 2025 WL 3172354, at *1, 3 (Pa. Super. Nov. 13, 2025) (non-precedential memorandum) (rejecting a claim of

ineffectiveness *per se* when counsel preserved one issue for review but waived a second issue in a direct appeal), *appeal denied*, 357 A.3d 1205 (Pa. 2026).

Rivera contends prior counsel's failure to preserve his sentencing claim in his direct appeal brief constituted ineffectiveness *per se* such that he was entitled to a presumption of prejudice. ***See*** Rivera's Brief at 14. Rivera thus claims the PCRA court erred in dismissing his claim based on his failure to plead prejudice. ***See id***. at 19.

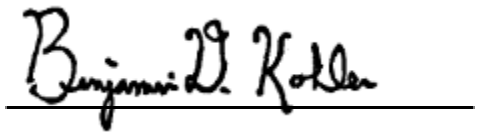
Rivera's arguments lack merit. In the present case, prior counsel's error did not result in the waiver of ***all*** claims in Rivera's direct appeal. ***See Rivera***, 312 A.3d at 376-77 (addressing, in the direct appeal, Rivera's evidentiary issue on the merits but declining to review his sentencing claim). Therefore, Rivera's invocation of a *per se* claim of the ineffective assistance of counsel in his direct appeal was misplaced, and the presumption of prejudice did not apply to prior counsel's failure to preserve a particular issue, *i.e.* Rivera's sentencing claim, for review. ***See Rosado***, 150 A.3d at 431-32; ***Pulanco***, 954 A.2d at 641-42; ***Martinez***, 2025 WL 3172354, at *3.[5] Rather, Rivera had to plead and prove prejudice—that the there is a reasonable probability that the outcome of the direct appeal proceeding would have been different but for prior counsel's deficient performance—and Rivera's failure to do so

[5] To the extent Rivera relies on ***Commonwealth v. Fink***, 24 A.3d 426 (Pa. Super. 2011), and ***Commonwealth v Franklin***, 823 A.2d 906 (Pa. Super. 2003), ***see*** Rivera's Brief at 14-15, those cases are inapt. In those cases, counsels' omissions resulted in the waiver of ***all*** issues in the direct appeals. ***See Fink***, 24 A.3d at 429; ***Franklin***, 823 A.2d at 908.

required the PCRA court to reject of his claim. ***See Blakeney***, 108 A.3d at 750; ***Martin***, 5 A.3d at 183. Thus, the PCRA court did not err when dismissing Rivera's claim that prior counsel was ineffective *per se* in his direct appeal.

Order affirmed.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/19/2026