

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
Appellee :
: v. :
: SAMUEL GONZALEZ, :
Appellant : No. 1146 WDA 2012

Appeal from the PCRA Order June 27, 2012,
Court of Common Pleas, Erie County,
Criminal Division at No. CP-25-CR-0001139-2006

BEFORE: FORD ELLIOTT, P.J.E, BOWES and DONOHUE, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: February 5, 2013

Samuel Gonzalez (“Gonzalez”) appeals from the order entered on June 27, 2012, denying his petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-9546. In this appeal, Gonzalez contends that the PCRA court erred by failing to hold an evidentiary hearing to determine his capacity to understand the English language. After careful review, we affirm.

The PCRA court summarized the factual and procedural histories of this case as follows:

On July 6, 2006, [Gonzalez] pled guilty at Count 1, to Terroristic Threats, 18 Pa.C.S.A. § 2706(a)(1), and Count 2, to Recklessly Endangering Another Person, 18 Pa.C.S.A. § 2705, before the Honorable John Bozza. The docket reflects [Gonzalez] did not file a Notice of Need for Interpreter form for this proceeding. *See Court Exhibit ‘A,’ Notice of Need for Interpreter Form and Order.* Under oath, [Gonzalez]

signed a 'Defendant's Understanding of Rights Prior to Guilty or No Contest Plea' form, in English, and filed July 6, 2006.

On September 6, 2006, [Gonzalez] was sentenced at Count 1 to 11 ½ to 23 months of incarceration and three years of probation and, at Count 2, to two years of probation consecutive to Count 1. [Gonzalez] was represented by counsel at this proceeding. The docket reflects [Gonzalez] did not file a Notice of Need for Interpreter form for the sentencing.^{[FN]1} [Gonzalez] did not appeal the sentence.

[Gonzalez] was paroled on February 20, 2007, to Gaudenzia, an in-patient drug and alcohol treatment program. Upon discharge from Gaudenzia, [Gonzalez] was referred to the Stairways Behavioral Health out-patient dual diagnosis treatment program on April 2, 2007, to address his mental health and drug and alcohol issues. [Gonzalez] successfully completed this program and was referred to the individual counseling program at Stairways.

In November of 2007, [Gonzalez] reported to his parole officer, Craig Montgomery, he was missing medication check-up appointments and dual diagnosis counseling appointments at Stairways. [Gonzalez] complained of increased depression and stress.

[Gonzalez] continued communications with the

^{[FN]1} The Erie County Courthouse has a Notice of Need for Interpreter form available and maintains a list of certified interpreters for non-English-speaking or hearing-impaired defendants. When an interpreter is requested and appointed in a criminal case, the Notice of Need for Interpreter and Order appointing the interpreter are filed with the Clerk of Records.

parole officer throughout 2008 regarding his parole plan and the services in place to address his mental health and drug and alcohol treatment needs. *Revocation Summary, January 22, 2009, pp. 1, 2.*

In August of 2008, [Gonzalez] incurred new charges of Retail Theft at Docket Number 2440 of 2008. [Gonzalez] entered a guilty plea to the retail theft on January 22, 2009, before this [c]ourt and was sentenced to five years of probation. Under oath, [Gonzalez] signed a 'Defendant's Statement of Understanding of Rights Prior to Guilty or No Contest Plea' form. The form is in English. [Gonzalez] did not file a Notice of Need for Interpreter form for this proceeding. [Gonzalez] was represented by counsel. [Gonzalez] did not appeal this sentence.

Also on January 22, 2009, [Gonzalez's parole and probation] [were] revoked [...] as he incurred new charges, admitted to abusing marijuana and alcohol, and failed to attend his med-check and individual mental health counseling sessions. [Gonzalez] signed the Violation Admission Statement form, in English, admitting to violating the terms of parole and probation.

The terms of the original sentence were re-imposed. However, in recognition of [Gonzalez]'s dual diagnosis treatment needs, [Gonzalez] was admitted into the Erie County Treatment Court program at this proceeding. [Gonzalez] was represented by counsel at this proceeding. The docket reflects [Gonzalez] did not file a Notice of Need for Interpreter form. [Gonzalez] did not appeal the revocation or the sentence.

[Gonzalez] was paroled the following day, January 23, 2009, to Deerfield for a twenty-one day, in-patient drug and alcohol treatment program and continued with weekly Treatment Court proceedings. [Gonzalez] did not file a Notice of Need for an Interpreter for any of the Treatment Court proceedings. On March 30, 2009, [Gonzalez] was

placed in the Dr. Snow Recovery Program, a residential program where he remained for one month.

Due to violating the rules of the Snow House program, [Gonzalez] was detained on April 30, 2009, and held until the revocation proceeding on June 25, 2009.

During this time period, [Gonzalez] communicated with his parole officer, Stacey Rhoades. [Gonzalez] continued with weekly appearances at Treatment Court. There is no indication [that] a language barrier was an impediment to [Gonzalez]'s participation in Treatment Court proceedings, in communications with this [c]ourt or members of the Treatment Court team.

On June 25, 2009, [Gonzalez's parole and probation] [were] revoked a second time [...] as he violated the rules of the Dr. Snow Recovery program by continuing contact with the victim of the original charges. The terms of the original sentence at this docket were re-imposed. [Gonzalez's parole and probation] also [were] revoked at Docket Number 2440 of 2008 and [he was] sentenced to 9 to 24 months of incarceration consecutive to Docket Number 1139 of 2006. [Gonzalez] was represented by counsel at this proceeding. The docket reflects [Gonzalez] did not file a Notice of Need for Interpreter. [Gonzalez] did not appeal the revocation or the sentence.

On May 31, 2011, [Gonzalez] was paroled from SCI Fayette to Gaudenzia, an in-patient dual-diagnosis program. [Gonzalez] was unsuccessfully discharged from Gaudenzia on June 27, 2011. [Gonzalez] was arrested for retail theft on July 23, 2011, pled guilty on November 29, 2011, and was sentenced on January 18, 2012, to 16 to 32 months of incarceration by the Honorable Ernest DiSantis at Docket Number 2525 of 2011. The docket reflects [Gonzalez] did not file a Notice of Need for

Interpreter for either the plea or sentencing proceedings. Under oath, [Gonzalez] signed a 'Defendant's Statement of Understanding of Rights Prior to Guilty or No Contest Plea' form. The Statement of Understanding of Rights is in English. [Gonzalez] did not appeal this sentence.

On February 17, 2012, [Gonzalez's probation] again was revoked [...] for a third time. [Gonzalez] was sentenced at Count 1 to 12 — 24 months of incarceration consecutive to Docket Number 2525 of 2011 and at Count 2 to two years of probation consecutive to Count 1. [Gonzalez] was not represented by counsel at this proceeding. The docket reflects [Gonzalez] did not file a Notice of Need for Interpreter. [Gonzalez] signed a 'Right to Counsel Waiver' form, in English and an 'Acknowledgement of Post-sentencing and Appellate Rights' form, in English, at the revocation/sentencing proceeding. After a comprehensive colloquy conducted by the District Attorney and this [c]ourt, [Gonzalez] unequivocally indicated he understood he was giving up his right to be represented by counsel and that he understood the proceedings. *Revocation Transcript, February 17, 2012, pp. 7 — 11.* [Gonzalez filed a motion to modify his sentence, which the trial court denied.] [Gonzalez] did not appeal the revocation or the sentence.

On April 11, 2012, [Gonzalez] filed a *pro se* [PCRA petition]. Attorney William Hathaway was appointed to file a Supplemental Petition. A [**Turner/Finley**¹] 'no-merit' letter was filed on June 4, 2012. [Gonzalez] did not file a Notice of Need for Interpreter when he filed the instant PCRA Motion.

Notice of Intent to Dismiss, 6/6/2012, at 1-5.

¹ ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988); ***Commonwealth v. Finley***, 550 A.2d 213 (1988) (*en banc*).

In his *pro se* PCRA petition, Gonzalez sought the modification of his February 17, 2012 sentence imposed following the revocation of his probation. Specifically, Gonzalez requested that the two year period of probation at count two be imposed concurrent to instead of consecutive to count one, and he requested that the 12 to 24 month period of incarceration at count one be imposed concurrent to instead of consecutive to his prior sentence. According to Gonzalez, he was entitled to relief because his “counsel” was ineffective because Gonzalez does not read, write, or understand the English language.²

On June 6, 2012, the PCRA court issued notice of its intent to dismiss Gonzalez’s PCRA petition without a hearing pursuant to Pa.R.Crim.P. 907. Therein, the PCRA court provided its reasons for dismissing Gonzalez’s petition and informed Gonzalez that he had 20 days to file any objection to the notice of intent to dismiss. The PCRA court made no determination regarding counsel’s request to withdraw representation. Gonzalez did not respond to the Rule 907 notice, and the PCRA court dismissed his petition on June 27, 2012.

Gonzalez filed a timely *pro se* notice of appeal, which the clerk of court forwarded to counsel. In response, instead of requesting this Court’s permission to withdraw pursuant to the *Turner/Finley* protocol, counsel

² As previously noted, Gonzalez proceeded *pro se* at the February 17, 2012 revocation of probation and re-sentencing hearing.

filed a timely notice of appeal on Gonzalez's behalf followed by a court-ordered Pa.R.A.P. 1925(b) statement. On August 3, 2012, the PCRA court filed a Pa.R.A.P. 1925(a) opinion, in which it relied on its June 6, 2012 notice of intent to dismiss.

On appeal, Gonzalez raises the following issue for our review: "Whether the PCRA court erred in failing to find that the appellant stated a colorable claim for relief as to ineffective assistance of counsel relating to the failure to secure a[n] interpreter to assist [Gonzalez] and in failing to afford [Gonzalez] with an evidentiary hearing as to said claim." Appellant's Brief at 2.

"Our 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." ***Commonwealth v. Johnson***, 600 Pa. 329, 345, 966 A.2d 523, 532 (2009) (citation omitted). "We must accord great deference to the findings of the PCRA court, and such findings will not be disturbed unless they have no support in the record." ***Commonwealth v. Scassera***, 965 A.2d 247, 249 (Pa. Super. 2009), *appeal denied*, 603 Pa. 709, 985 A.2d 219 (2009) (citation omitted). Furthermore,

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).

When reviewing a claim of ineffective assistance of counsel, we begin by presuming that counsel was effective. ***Commonwealth v. Pierce***, 515 Pa. 153, 159, 527 A.2d 973, 975 (1987). In order to be entitled to relief, “a petitioner must show: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel’s action or inaction; and (3) counsel’s error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error.” ***Commonwealth v. Sileo***, 32 A.3d 753, 757 (Pa. Super. 2011) (citations omitted).

In his appellate brief, Gonzalez points to his claim that “he was afforded ineffective assistance [of counsel] for failure to secure an interpreter to assist [him] in understanding counsel and the nature of the legal proceeding.” Appellant’s Brief at 4. Without citation to authority, Gonzalez contends the following:

[G]iven the legal import of this claim and the fundamental fairness and necessity to protect and ensure the integrity and validity of the legal proceeding in dealing with a Spanish speaking

defendant, it was prudent and incumbent upon the PCRA [c]ourt to afford Mr. Gonzalez with an evidentiary hearing at a minimum to permit him to establish the parameters and capacity as to his ability to sufficiently understand the English language without the assistance of an interpreter.

Id. Thus, according to Gonzalez, this Court should remand this case to the PCRA court for a hearing on his ability to understand the English language.

Id. at 5.

The PCRA court concluded that Gonzalez's claim was wholly frivolous.

See Notice of Intent to Dismiss, 6/6/2012, at 13. The PCRA court reasoned:

[Gonzalez's] claim [that] he does not read, write or understand English is nothing more than a self-serving hoax. There is no truth to [Gonzalez's] bogus posturing [that] he cannot understand the spoken or written English language. [Gonzalez's] claim is belied by the record. Under oath, [Gonzalez] indicated he had no questions regarding the revocation[] proceedings and that he [could] read, write and understand the English language. *State Probation Revocation Transcript, February 17, 2012, p. 10.* ('THE COURT: And you can read and write and understand the English language; is that correct? THE DEFENDANT: Yes, Your Honor.')

Furthermore, [Gonzalez's] claim of ineffective assistance of counsel challenges his *pro se* representation at the revocation and sentencing proceeding of February 17, 2012. The claim is not cognizable under the PCRA.

Where, as here, a defendant who knowingly and intelligently waives his right to counsel cannot seek post conviction relief asserting his own ineffective assistance. ***Com[monwealth] v. Bryant***, 855 A.2d 726, 736 (Pa. 2004); ***Com[monwealth] v. Berry***, 877 A.2d 479 (Pa. Super. 2005).

Objective evidence further negates [Gonzalez's] claim. [Gonzalez] related he was born in Puerto Rico in 1976. Pre-Sentence Investigative Report, August 11, 2006. [Gonzalez] has been here since he was a child. [Gonzalez] recounted he received counseling as a child in Connecticut and attended and graduated from high school in Connecticut. *Id.*

When [Gonzalez] was 18 years old, he promptly began living a criminal lifestyle, incurring charges in Connecticut in 1994, 1996 and 1998. *Id.* [Gonzalez] is now thirty-six years old. [Gonzalez] has been in this country in excess of twenty years. [Gonzalez] has filed *pro se* Motions at this docket in English; therefore, he can write the English language. Under oath, [Gonzalez] has signed documents written in English and filed at this docket indicating he understood what those documents stated. Therefore, [Gonzalez] can read the English language.

[Gonzalez] is no stranger to the criminal justice system in Pennsylvania. Over the course of the last twelve years, [Gonzalez] has incurred criminal charges at Pennsylvania Docket Numbers 5113 of 2000, 641 of 2003, 1139 of 2006, 2440 of 2008 and 2525 of 2011. [Gonzalez] filed applications for court-appointed counsel in English. [Gonzalez] never requested the services of a court-appointed interpreter and/or appeared at any of the proceedings with a privately retained interpreter.

[Gonzalez] has been provided a plethora of drug and alcohol treatments including various in-patient programs. [Gonzalez] never had a language barrier in these programs.

[Gonzalez] was admitted into the Erie County Drug Treatment Program in 2009. [Gonzalez] never exhibited any difficulty communicating in English with this [c]ourt and/or any members of the Treatment Court team. [Gonzalez] never indicated he did not understand the proceedings. Therefore,

[Gonzalez's] actions indicate he can understand the English language.

The record confirms [Gonzalez's] ability to converse in the English language.

Notice of Intent to Dismiss, 6/6/2012, at 9-11 (footnote omitted). Our review of the record confirms that Gonzalez's claims are frivolous.

Regarding Gonzalez's ineffectiveness claim, our Supreme Court has stated that when a criminal defendant knowingly and intelligently waives his right to counsel, a court will not consider claims of ineffectiveness that arise from the decision to forego the benefit of counsel. ***Commonwealth v. Bryant***, 579 Pa. 119, 136-38, 855 A.2d 726, 736-37 (2004). On February 17, 2012, after a thorough colloquy by the Commonwealth and the trial court, Gonzalez waived his right to counsel prior to the revocation of his probation. ***See*** N.T., 2/17/2012, at 2-11. Thus, Gonzalez's underlying ineffectiveness claim, which challenges his self-representation at the February 17, 2012 revocation and resentencing hearing, warrants no relief.

Furthermore, as previously stated, a PCRA petitioner is not entitled to an evidentiary hearing where his claim is frivolous and unsupported by the record. ***Wah***, 42 A.3d at 338. In the instant case, the record demonstrates that Gonzalez's claim that he lacked the capacity to understand the English language is unsupported and frivolous.

Our review of the February 17, 2012 hearing belies Gonzalez's claim that he was in need of an interpreter so that he could understand the

proceedings. Not only did Gonzalez testify, under oath, that he could read, write, and understand the English language (N.T., 2/17/2012, at 10), but he also engaged in a meaningful, cogent discussion with the trial court regarding his violation of probation:

The Court: Okay. I also want to review this history with you. You were paroled from the State prison in Fayette on May 31st of 2011; is that correct?

[Gonzalez]: Yes, sir.

The Court: And that was for you to participate in the Gaudenzia program, dual diagnosis program in Erie, correct?

[Gonzalez]: Yes, Your Honor.

The Court: And according to this, you were discharged, and it was unsuccessful, on June 27th of 2011, because you left the program without staff approval; is that correct?

[Gonzalez]: Yes, Your Honor.

The Court: It also indicates in here you made no payments on your supervision fees; is that correct?

[Gonzalez]: There was deductions when I was up state, Your Honor.

The Court: Okay.

[Gonzalez]: They were taking out 20% total, \$60 for the victim fund and 10% towards my court costs and fines.

The Court: All right. This is the supervision fee?

[Gonzalez]: Supervision fee? The \$25, you mean? I didn't get to start it.

The Court: All right. Well, based on the public record as to the retail theft, as well as the recognition by Mr. Gonzalez that, in fact, he committed that offense, I'll revoke the sentence imposed at docket number 1139 of 2006, Count 1 and Count 2. Mr. Gonzalez, is there anything you want to say for sentencing purposes?

[Gonzalez]: Your Honor, um, I got – I have a problem. So the reason, --I mean, I keep stealing, Your Honor – I mean, something in me. I asked for the help and I did find now that Stairways treats for that, you know? And, um, I'm looking forward to that when I get out. I can attend that service to seek more help, you know? Um, I'm serving right now 16 to 32 months, Your Honor, up state and um, I know that you have the thing about, you know, me and Karen Rivas. Your Honor, she's only got maybe two more years to live, you know, and I messed that up by going back to prison, you know? And I'm hoping that – now in November I'm supposed to seek parole and I'm hoping to see if I can come home. But I'm asking, Your Honor, please, if there's any possible way, you know what I mean?

The Court: I'm looking at the revocation summary and it indicated – you correct me if I'm wrong, but it said that you stole the perfume because you had an old drug debt that you needed to pay?

[Gonzalez]: Yes. Can I explain what happened there, Your Honor?

The Court: Sure.

[Gonzalez]: I have three kids of my own and my oldest came to live with me and, um, this guy named David Rivera seen me out, you know what I mean? So he came up – he went up to my house, to me, he said, yo, what's up with the debt you owe me? I says, look man, I just got out, I'm done with it. He came out, Your Honor, and he threatened, basically my son. You know, he pulled a gun out and everything, Your Honor. And the first thing I thought, get this debt settled, you know what I mean? So I went down, Your Honor, and acted the way I did and I got caught. And there is a police report on that because Karen Rivas called the cops when David Rivera went and put the gun on my son's head. He's 18 years old. My son is, um, graduating. He's going to state college in Florida right now. He moved back to Florida. Your Honor, if it wasn't for that, I would have never revoked Ms. Vanessa Booker. I know she took my urines, my urines have been clean. I haven't had no problems besides that, Your Honor. That's what I'd like to say, Your Honor.

Id. at 14-17.

Thus, contrary to his claim, the record indisputably establishes that Gonzalez understood the English language, as demonstrated by the exchange set forth above. Because the record clearly supports the PCRA court's conclusion that Gonzalez's claim is frivolous and because Gonzales

fails to convince us otherwise, by pointing to any evidence or legal authority in support of his claim, we affirm the PCRA court's dismissal of Gonzalez's PCRA petition without a hearing.

Order affirmed.