

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BERRY PETION,	:	
	:	
Appellant	:	No. 1220 EDA 2012

Appeal from the PCRA Order March 28, 2012  
In the Court of Common Pleas of Chester County  
Criminal Division No(s): CP-15-CR-0004922-2009

BEFORE: DONOHUE, OLSON, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.:

Filed: March 5, 2013

Appellant, Berry Petion, appeals *pro se* from the order entered in the Chester County Court of Common Pleas dismissing his timely, first Post Conviction Relief Act<sup>1</sup> ("PCRA") petition. He alleges that PCRA counsel was ineffective because counsel's *Turner/Finley*<sup>2</sup> letter was inadequate and the PCRA court erred in dismissing his petition. We affirm.

We state the facts and procedural history as set forth by the PCRA court:

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 42 Pa.C.S. §§ 9541-9546.

<sup>2</sup> *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988).

This case stems from two burglaries that took place on the date of November 17, 2009 . . . . Following a three-day jury trial . . . [Appellant] was found guilty of [burglary,<sup>3</sup> criminal trespass,<sup>4</sup> theft by unlawful taking,<sup>5</sup> receiving stolen property,<sup>6</sup> and criminal mischief.<sup>7</sup>]

[Appellant] was sentenced on March 23, 2011. [Appellant] was sentence to fifteen (15) to thirty (30) months incarceration on the charge of Theft by Unlawful Taking and was found eligible for RRRI minimum sentence of eighteen (18) months. In addition, [Appellant] was sentenced to five (5) years of probation to be served consecutive to parole. On the charge of Burglary, [Appellant] was sentenced to nine (9) to eighteen (18) months incarceration and three (3) months probation served consecutive to parole. [Appellant] was found RRRI eligible for a minimum sentence of eighteen (18) months.

Notice of Intent To Dismiss PCRA Petition Pursuant to PA.R.Crim.P. 907(1), 12/23/11, at 2 n.1. Appellant received no penalty for the criminal mischief conviction and the remaining charges merged into burglary.

Appellant did not file a direct appeal of his conviction or sentence. On May 11, 2011, he filed a timely *pro se* PCRA petition.<sup>8</sup> Appellant claimed he was entitled to relief because unspecified transcripts were lost, his co-

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<sup>3</sup> 18 Pa.C.S. § 3502(c)(1).

<sup>4</sup> 18 Pa.C.S. § 3503(a)(1)(ii).

<sup>5</sup> 18 Pa.C.S. § 3921(a).

<sup>6</sup> 18 Pa.C.S. § 3925(a).

<sup>7</sup> 18 Pa.C.S. 3304(a)(5).

<sup>8</sup> The record does not reflect when Appellant placed the petition in the mail. **See Commonwealth v. Wilson**, 911 A.2d 942, 944 n.2 (Pa. Super. 2006) (discussing prisoner mailbox rule).

defendants were unreliable, his co-defendants' statements were used against him, his co-defendants received "deals" in exchange for cooperation, and that a co-defendant gave testimony different from a prior written statement. Appellant's *Pro Se* PCRA Pet., 5/11/11. Appellant also raised generalized allegations that his trial counsel ignored him. *Id.*

The PCRA court appointed counsel, who filed a petition to withdraw on November 16, 2011. On December 23, 2011, the PCRA court issued a Pa.R.Crim.P. 907 notice of intent to dismiss Appellant's PCRA petition. Appellant did not file a response to the Rule 907 notice. On March 28, 2012, the court dismissed Appellant's PCRA petition and granted appointed counsel's petition to withdraw.

On April 13, 2012, Appellant filed a timely, *pro se* notice of appeal. On April 23, 2012, the PCRA court ordered Appellant to comply with Pa.R.A.P. 1925(b). Appellant timely filed his Rule 1925(b) statement on May 10, 2012.<sup>9</sup>

Appellant raises the following issues:

Whether PCRA counsel was incompetent where counsel failed to apply his expertise in order to litigate the issues set forth in . . . Appellant's *pro se* PCRA petition in an amended petition, but rather placed the onus on . . . Appellant to present a petition as one drafted by an attorney and thus used . . . Appellant's lack of expertise in order to erroneously determine that . . . Appellant's claims were without merits [sic].

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<sup>9</sup> The court docketed Appellant's Rule 1925(b) statement on May 14, 2012. *See Wilson*, 911 A.2d at 944 n.2.

Whether the PCRA court abused its discretion and denied . . . Appellant his right to due process of law, where the court unreasonably determined that . . . Appellant's claims were without merits [sic] and permitted counsel to withdraw based on an inadequate no-merit letter.

Appellant's *pro se* Brief at iii.

We summarize Appellant's arguments for both of his issues. Appellant claims his PCRA counsel filed an inadequate no merit letter. *Id.* at 1. He claims PCRA counsel failed to review the record, interpret facts correctly, and construe his claims properly. Appellant suggests the PCRA court erred by permitting PCRA counsel to "withdraw based on an inadequate no-merit letter." *Id.* at vi. We hold Appellant is not entitled to relief.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1267 (Pa. 2008). In *Commonwealth v. Ford*, 44 A.3d 1190 (Pa. Super. 2012), this Court noted our Supreme Court's admonishment of this Court for addressing an issue not properly preserved for appeal:

Our Supreme Court rebuked this Court for *sua sponte* addressing the propriety of a *Turner/Finley* no-merit letter where that specific issue was not raised on appeal and in two separate footnotes addressed waiver of claims related to both challenging the adequacy of a no-merit letter and PCRA counsel's effectiveness. In footnote three of its opinion, the *Pitts* Court opined, "The Commonwealth asserts Pitts waived any issue pertaining to the adequacy of PCRA counsel's no-merit letter by failing to raise it

during Rule 907's 20-day response period. We agree, finding Pitts's failure to challenge PCRA counsel's withdrawal upon his receipt of counsel's no-merit letter or within the 20-day period telling." [*Commonwealth v. Pitts*, 981 A.2d 875, 879 n.3 (Pa. 2009)]. Similarly, in footnote four of the decision, the Court reasoned:

Pitts's failure, prior to his PCRA appeal, to argue PCRA counsel's ineffectiveness for not raising the direct appeal issue results in waiver of the issue of PCRA counsel's ineffectiveness. Pitts's attempt to obtain review, on collateral appeal, of an issue not raised in the proceedings below amounts to a serial PCRA petition on PCRA appeal. Although Pitts asserts his PCRA appeal was the first opportunity he had to challenge PCRA counsel's stewardship because he was no longer represented by PCRA counsel, he could have challenged PCRA counsel's stewardship after receiving counsel's withdrawal letter and the notice of the PCRA court's intent to dismiss his petition pursuant to Pa.R.Crim.P. 907, yet he failed to do so. Thus, the issue of whether PCRA counsel was ineffective for failing to raise the direct appeal issue was waived, and the Superior Court should not have reached it.

*Pitts, supra* at 880 n.4. As the *Pitts* footnotes indicate, when counsel files a *Turner/Finley* no-merit letter to the PCRA court, a petitioner must allege any claims of ineffectiveness of PCRA counsel in a response to the court's notice of intent to dismiss.

*Ford*, 44 A.3d at 1197-98 (footnote omitted). The *Ford* Court held that "claims of PCRA counsel ineffectiveness cannot be raised for the first time after a notice of appeal has been taken from the underlying PCRA matter." *Id.* at 1201.

Instantly, Appellant did not file a response in opposition to the Rule 907 notice. *See id.* at 1197-98. Instead, Appellant opted to raise

J. S70040/12

allegations of PCRA counsel's ineffectiveness for the first time on appeal. **See id.** at 1201. Both **Pitts** and **Ford** mandate that we cannot review Appellant's claims for the first time on appeal. **See id.** Accordingly, we affirm the order dismissing Appellant's first PCRA petition. **Cf. Abu-Jamal**, 941 A.2d at 1267.

Order affirmed.