

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

MELISSA DEE BAKER

Appellant

No. 1235 MDA 2012

Appeal from the PCRA Order May 22, 2012  
In the Court of Common Pleas of Lackawanna County  
Criminal Division at No(s): CP-35-CR-0000582-2006

BEFORE: MUNDY, OLSON and STRASSBURGER,\* JJ.

MEMORANDUM BY OLSON, J.:

**FILED MAY 07, 2013**

Appellant, Melissa Dee Baker, acting *pro se*, appeals from the order entered May 22, 2012, denying her petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"). For the reasons that follow, we vacate the PCRA court's May 22, 2012 order and remand the matter to the PCRA court for additional proceedings consistent with this memorandum.

The certified record reflects the factual and procedural background of this matter as follows.

On November 21, 2006, after a five-day jury trial, Appellant was found guilty of aggravated assault, endangering the welfare of children, and simple assault because of her abuse of her two minor stepchildren. On February

\*Retired Senior Judge assigned to the Superior Court.

20, 2007, the trial court sentenced Appellant to an aggregate term of seven and one-half to 16 years' imprisonment.

On December 19, 2008, our Court affirmed Appellant's judgment of sentence. **Commonwealth v. Baker**, 963 A.2d 495 (Pa. Super. 2008) (unpublished memorandum). Thereafter, on April 7, 2010, the Supreme Court of Pennsylvania denied Appellant's petition for allowance of appeal. **Commonwealth v. Baker**, 992 A.2d 885 (Pa. 2012) (table).

On May 13, 2011, Appellant initiated a timely *pro se* PCRA petition. On December 7, 2011, the PCRA court entered an order appointing Kurt Lynott, Esquire, to represent Appellant for PCRA purposes. On January 6, 2012, the Commonwealth filed an answer to Appellant's PCRA petition, and on May 22, 2012, the PCRA court dismissed Appellant's PCRA petition without a hearing.<sup>1</sup> Specifically, the May 22, 2012 order read as follows:

[U]pon review of the [Appellant's] P.C.R.A. Petition, chiefly, the issues raised and the validity and sufficiency thereof, and counsel's **Turner-Finley**<sup>[2]</sup> letter of no merit which was served on the [Appellant], this Court HEREBY ORDERS as follows:

The Post Conviction Relief Act Petition is DISMISSED without a hearing.

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<sup>1</sup> The PCRA court order was dated May 21, 2012 but filed May 22, 2012. We refer to May 22, 2012 as its operative date.

<sup>2</sup> Referring to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988) and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

The [Appellant] has a right to appeal this final Court Order, and must exercise [her] appeal rights within thirty days of the date of this Order.

Order, 5/22/2012.

Following entry of the PCRA court's order, Appellant, acting *pro se*, sent a letter to the Lackawanna County Prothonotary, inquiring as to how to initiate an appeal of the order dismissing her PCRA petition. The Prothonotary interpreted Appellant's letter as a timely notice of appeal of the PCRA court's May 22, 2012 order, and filed that notice on June 14, 2012.

Following the initiation of her appeal, the PCRA court did not order Appellant to submit a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), and the PCRA court did not issue a Rule 1925(a) opinion. On October 10, 2012, Appellant filed a *pro se* brief in support of appeal, and on November 5, 2012, the Commonwealth filed an opposition brief. Therefore, technically, this matter is ripe for our consideration.

Based upon our review of the certified record, however, there are a number of documents missing from the record and several potential procedural errors, depending on the content of and reason for the missing documents, that the PCRA court must remedy and/or clarify prior to our Court's consideration of this appeal. Consequently, we vacate the PCRA court's dismissal of Appellant's PCRA petition and remand the matter to the PCRA court for proceedings consistent with this memorandum opinion.

To assist with understanding the importance of the missing documents and potential errors in this matter, we provide an explanation of the applicable law. Specifically, under Pennsylvania law, an unrepresented petitioner who is indigent has a right to court-appointed counsel to represent him or her for the petitioner's first PCRA petition. **See Commonwealth v. Albrecht**, 720 A.2d 693, 700-701 (Pa. 1998). Where a petitioner has been denied the right to court-appointed counsel for his or her first PCRA petition, Supreme Court precedent directs that we vacate the order dismissing the PCRA petition and remand for appointment of counsel. **Id.** at 699 ("The denial of PCRA relief cannot stand unless the petitioner was afforded the assistance of counsel."), citing **Commonwealth v. Duffey**, 713 A.2d 63 (Pa. 1998); **see also Commonwealth v. Kutnyak**, 781 A.2d 1259, 1262 (Pa. Super. 2001).

Court appointed counsel, however, is not obligated to pursue a PCRA petition that, upon review by counsel, lacks meritorious claims. Rather, **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), and their progeny set forth both the procedural mechanisms and substantive standards by which appointed counsel may seek to withdraw from meritless PCRA representation. Specifically:

[c]ounsel petitioning to withdraw from PCRA representation...must review the case zealously. **Turner/Finley** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of

counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Counsel must also send to the petitioner: (1) a copy of the "no-merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.

***Commonwealth v. Wrecks***, 931 A.2d 717, 721 (Pa. Super. 2007) (internal citations omitted).

"[W]here counsel submits a petition and no-merit letter that [] satisfy the technical demands of ***Turner/Finley***, the court – trial court or this Court – must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief." ***Id.*** Under such circumstances, the PCRA court is entitled to deny the PCRA petition without a hearing. ***See*** Pa.R.Crim.P. 907(2).

Prior to denying relief without a hearing, however, Pennsylvania Rule of Criminal Procedure 907(1) obligates the PCRA court to provide the petitioner with notice of its intent to dismiss the petition and an opportunity to respond to that notice. Specifically, Rule 907(1) sets forth as follows:

If the judge is satisfied from [his/her] review [of the petition] 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.

Pa.R.Crim.P. 907(1).

The Rule 907 notice is mandatory<sup>3</sup> and particularly important in cases where a once represented petitioner would like to assert claims alleging the ineffectiveness of PCRA counsel. Indeed, pursuant to our Supreme Court's decision in ***Commonwealth v. Pitts***, 981 A.2d 875 (Pa. 2009), for a petitioner to preserve his or her appeal of issues challenging the adequacy of PCRA counsel, that petitioner must first raise the issue with the PCRA court. ***Id.*** at 877. Therefore, in matters where PCRA counsel has been permitted to withdraw pursuant to ***Turner/Finley***, and the PCRA court intends to dismiss the petition without a hearing, to preserve appeal of challenges to PCRA counsel's effectiveness, a petitioner is obligated to raise those issues in response to the PCRA court's Rule 907 notice of intent to dismiss. ***See id.***; ***Commonwealth v. Ousley***, 21 A.3d 1238, 1240-1241 (Pa. Super. 2011). Without a Rule 907 notice, and an opportunity to respond thereto, the petitioner would have no opportunity to assert his or her claims with regard to PCRA counsel's effectiveness.

Additionally, it is imperative that the PCRA court is specific with its issuance and docketing of orders with regard to PCRA counsel's motion to withdraw representation pursuant to ***Turner/Finley***. Under

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<sup>3</sup> ***See Commonwealth v. Guthrie***, 749 A.2d 502, 503 (Pa. Super. 2000).

**Turner/Finley**, counsel is obligated to file **both** a “no-merit” letter and a separate motion to withdraw representation. **See Wrecks**, 931 A.2d at 721. Correspondingly, the PCRA court must rule upon **both** the PCRA petition itself and the motion to withdraw. Without an order granting a motion to withdraw representation, appointed counsel remains attached to a case through appeal of the denial of the PCRA petition.

Moreover, where appointed counsel seeks to withdraw pursuant to **Turner/Finley**, the PCRA court must conduct a thorough independent review of the record prior to permitting PCRA counsel to withdraw and prior to dismissing the PCRA petition. **See Wrecks**, 931 A.2d at 721. Upon completion of that review, the PCRA court may not explain its reasons for dismissing the PCRA petition by summarily incorporating counsel’s “no-merit” letter. **See Commonwealth v. Glover**, 738 A.2d 460, 466 (Pa. Super. 1999). As explained in **Glover**, our Supreme Court has “condemned the wholesale adoption of a party’s brief in lieu of filing a PCRA opinion on the grounds that the independent role of the judiciary is not properly served absent some autonomous judicial expression of the reasons for dismissing the PCRA petition.” **Id.**, citing **Commonwealth v. Williams**, 732 A.2d 1167, 1176 (Pa. 1999); **see also Commonwealth v. Fulton**, 876 A.2d 342 (Pa. 2002) (Rule requiring remand for an independent opinion, where the PCRA court adopts counsel’s “no-merit” letter rather than setting forth its reasons for dismissal in its own opinion, applies equally to non-capital criminal cases). Indeed, in cases where counsel has been permitted to

withdraw pursuant to **Turner/Finley**, without an independent opinion from the PCRA court, our Court is left only to speculate on the adequacy of the PCRA court's independent review of the merits of the case. **See id.**

A separate opinion from the PCRA court is also required where the petitioner appeals the dismissal of the PCRA petition. Specifically, pursuant to Pa.R.A.P. 1925(a):

upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

Pa.R.A.P. 1925(a). Where, however, a PCRA court fails to issue a Rule 1925(a) opinion explaining its reasons for the order on appeal, and the reasons are not readily apparent from a review of the record, our Court remands the matter to the trial court for preparation of a proper opinion. **See, e.g., Glover**, 738 A.2d at 466. Indeed, without an independent opinion from the PCRA court, our Court is left only to speculate as to the reasons for dismissal of the PCRA petition.

Against this backdrop, we identify the multiple deficiencies in the certified record and procedural errors in this matter. Initially, we note that as the certified record currently stands, there is no evidence that Appellant has been afforded representation in this, her first PCRA petition. Specifically, the certified record reflects that, on December 7, 2011, the



PCRA court entered an order appointing Mr. Lynott to serve as Appellant's PCRA counsel. According to the docket before us, however, Mr. Lynott has not filed anything in this matter, made any appearances on Appellant's behalf, or in any way represented Appellant for PCRA purposes. Indeed, while the PCRA court's May 22, 2012 order references that Mr. Lynott filed a no-merit letter pursuant to **Turner/Finley**, the filing of that letter is not memorialized on the docket, and there is no copy of the letter within the certified record. Given the PCRA court's reference to a **Turner/Finley** letter, we presume that such a letter exists, but are concerned about its absence from the record, particularly given Appellant's right to representation for her first PCRA petition. This hole in the record must be filled before we are able to determine whether Appellant received representation for her first PCRA.

Additionally, presuming that Mr. Lynott filed a **Turner/Finley** no-merit letter, we also presume that Mr. Lynott contemporaneously filed a motion to withdraw as counsel. However, there is no copy of that motion within the certified record. Moreover, within the certified record there is no order from the PCRA court granting Mr. Lynott permission to withdraw as Appellant's PCRA counsel. Therefore, though proceeding *pro se* in this appeal, as the certified record now stands, Appellant is still represented by Mr. Lynott. Considering our Supreme Court's strict directive against hybrid representation, we are foreclosed from considering Appellant's appeal until

the status of her representation is clarified and properly documented by the PCRA court.<sup>4</sup>

Adding to the errors in this matter, though the PCRA court dismissed Appellant's PCRA petition without a hearing, the certified record reflects that the PCRA court failed to issue Appellant a Rule 907 notice of its intention to dismiss her petition. Appellant, therefore, had no opportunity to respond to PCRA counsel's no-merit letter, assuming that such a letter exists. Moreover, one of the issues that Appellant seeks to raise in this appeal is the effectiveness of her PCRA counsel. However, without a Rule 907 notice, and an opportunity to respond thereto, Appellant had no chance to preserve those issues with the PCRA court.

Finally, in its order dismissing Appellant's PCRA petition, the PCRA court adopted PCRA counsel's no-merit letter, and did not provide any independent analysis or explanation. Adding on to its lack of clarity, when Appellant initiated a *pro se* appeal of the PCRA court's dismissal order, the PCRA court failed to provide our Court with a Rule 1925(a) opinion explaining its reasons for dismissal. Therefore, nowhere within the certified record has the PCRA court provided us with evidence of an independent

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<sup>4</sup> **See *Commonwealth v. Ellis***, 626 A.2d 1137, 1139 (Pa. 1993) (affirming that "there is no constitutional right to hybrid representation either at trial or on appeal.")

evaluation of the merits of Appellant's case, or with an explanation of the reasons for its dismissal order. This, too, must be remedied on remand.

Having set forth an explanation of the multitude of errors in this matter, we vacate the PCRA court's May 22, 2012 order dismissing Appellant's PCRA petition, and remand for the PCRA court to conduct a hearing to correct and/or clarify the deficiencies in the record. Specifically, within that hearing, the PCRA court is instructed to resolve whether PCRA counsel complied with the requirements of ***Turner/Finley***, and to clarify the status of counsel's current attachment to this case.

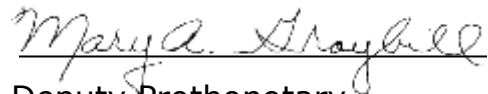
If, upon completion of that hearing, it is determined that PCRA counsel complied with ***Turner/Finley*** procedures, and if, after a thorough independent review, the PCRA court believes that there are no meritorious issues in the matter, the PCRA court may grant counsel's motion to withdraw and may dismiss the PCRA petition without a hearing. Prior to dismissing the PCRA petition, however, the PCRA court is instructed to issue Appellant a Rule 907 notice of intent to dismiss.

In that event, after the passage of the requisite time under Rule 907, the PCRA court is instructed to either address, with any necessary proceedings, issues raised by Appellant in response to the Rule 907 notice, or, in the event that it deems dismissal of the petition appropriate, the PCRA court is instructed to issue an order and opinion explaining its reasons for dismissal.

Upon the issuance of that order, Appellant or counsel on her behalf (as appropriate), may re-initiate her appeal, to which we trust that the PCRA court will comply with its obligations under Rule 1925.

Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

  
Deputy Prothonotary

Date: 5/7/2013