

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
STEVEN GUZIEWICZ,	:	
	:	
Appellant	:	No. 1340 MDA 2012

Appeal from the PCRA Order June 28, 2012,
Court of Common Pleas, Lackawanna County,
Criminal Division at Nos. CP-35-CR-0001883-2005,
CP-35-CR-0001884-2005, CP-35-CR-0001885-2005
and CP-35-CR-0001886-2005

BEFORE: DONOHUE, ALLEN and OTT, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED MAY 15, 2013

Steven Guziewicz (“Guziewicz”) appeals from the June 28, 2012 order entered by the Court of Common Pleas, Lackawanna County, dismissing his petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-9546. We vacate the PCRA court’s order and remand with instructions.¹

¹ The certified record transmitted to this Court is atrocious. There are many documents and orders absent that the docket reflects were filed of record. On April 10, 2013, this Court issued an Order to the PCRA court, requesting various documents from Guziewicz’s appearance in treatment court, none of which was sent. We learned that Guziewicz’s court file was somehow lost by the lower court, and it is clear that attempts made to reconstruct the record were not complete. Because of the manner by which we dispose of this appeal, however, the lower court’s failure to send a complete certified record does not prohibit us from reaching a resolution.

On October 7, 2005, Guziewicz pled guilty to four counts of acquiring or obtaining possession of a controlled substance by fraud, misrepresentation, forgery, deception or subterfuge and four counts of conspiracy to commit the same after conspiring with his father, Raymond Guziewicz, to obtain prescription narcotics from multiple pharmacies.² Guziewicz was accepted into the treatment court program.³ Guziewicz was terminated from treatment court based upon his commission of additional drug-related offenses. On March 29, 2007, he was sentenced on his original charges to an aggregate term of imprisonment of 21-63 months followed by two years of probation.⁴

On March 25, 2008, Guziewicz filed a *pro se* PCRA petition. The PCRA court, which also served as the trial court, appointed Attorney Kurt Lynott to represent Guziewicz. The PCRA court held a hearing on the petition on

² 35 P.S. § 780-113(a)(12); 18 Pa.C.S.A. § 903(a)(1).

³ The record contains no information regarding when Guziewicz was accepted into treatment court, what the program entailed, or what was required of Guziewicz to participate.

⁴ Guziewicz states that he was sentenced to an aggregate term of imprisonment of 24 to 72 months. Guziewicz's Brief at unnumbered 3. Our review of the sentencing orders and the criminal docket sheets contained in the record, however, reveal the above calculation of his prison sentence for the charges at issue.

Guziewicz also states that March 29, 2007 was the first time he was sentenced on these charges. Neither the Commonwealth nor the PCRA court contradicts that statement. The criminal dockets suggest that this was his first sentencing, but the record contains no documents to verify this. Once again, because of the manner we resolve this appeal, the absence of these documents do not prevent us from reaching our determination.

February 9, 2009, at which Guziewicz and his plea counsel testified. At the conclusion of the hearing, the PCRA court stated that it hoped to render a decision “within the next 30 days[.]” N.T., 2/9/09, at 34.

On May 29, 2012, Guziewicz filed a *pro se* motion to compel the PCRA court to enter a decision on his March 25, 2008 PCRA petition. Therein, Guziewicz indicated that although Attorney Lynott was aware that no ruling had been entered, he “abstains from participation in the instant motion via correspondence, or lack thereof, with [Guziewicz].” Motion to Compel Ruling, 5/29/12, at ¶ 6.⁵ On June 28, 2012, more than three years after the PCRA hearing, the PCRA court entered an order dismissing Guziewicz’s PCRA petition, finding that “it has been rendered moot by the completion of his sentence relative to the above charges.” PCRA Court Order, 6/28/12.

Guziewicz filed a timely *pro se* notice of appeal to this Court on July 23, 2012. The PCRA court did not order him to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). On August 30, 2012, Guziewicz filed a copy of his *pro se* appellate brief in the lower court. Although the PCRA court no longer had jurisdiction to do so, that

⁵ Guziewicz also file a *pro se* Writ of Mandamus in the Pennsylvania Supreme Court seeking relief. The criminal docket states that the Writ was docketed on July 2, 2012, and Guziewicz states he filed the Writ on June 15, 2012. Guziewicz appended to his appellate brief a letter from the Pennsylvania Supreme Court addressed to Attorney Lynott, forwarding Guziewicz’s *pro se* pleading to him as counsel of record. **See** Pa.R.A.P. 3304; Pa.R.Crim.P. 122(c)(3). None of these documents are contained in the certified record.

same day it *sua sponte* entered an order vacating its June 28 order dismissing Guziewicz's PCRA petition as moot and entering an order dismissing his PCRA petition "due to lack of merit." PCRA Court Order, 8/30/12; **see** Pa.R.A.P. 1701(a). The PCRA court did not file a Pa.R.A.P. 1925(a) opinion.

On appeal, Guziewicz raises the following issues for our review:

- A. Does the appropriate judicial remedy in the circumstances of this particular case lay in vacating the challenged convictions, and either remanding for trial or discharging [Guziewicz], or was the granting of relief dependent upon whether [Guziewicz's] sentences were active or expired as suggested by the PCRA [c]ourt?
- B. If so, did the PCRA [c]ourt abuse its discretionary authority, and thus prejudice [Guziewicz's] ability to obtain practical relief, by refusing to issue a ruling upon the PCRA claims until the relative sentences expired, and then dismissing those claims as moot?
- C. Was plea counsel ineffective in failing to advise [Guziewicz] of a viable factual defense to the conspiracy counts and in misrepresenting the [t]reatment [c]ourt plea process?
- D. Did the [p]lea [c]ourt commit reversible error in failing to establish a factual basis for the conspiracy charges prior to accepting a guilty plea thereon?

Guziewicz's Brief at unnumbered 2.⁶

In his first issue, Guziewicz contends that the PCRA court erred by dismissing his petition based upon its belief that he was no longer serving

⁶ We reordered the issues for ease of disposition.

his sentence.⁷ *Id.* at unnumbered 9. Guziewicz sets forth his sentence for the underlying crimes in detail, and asserts that he is still serving his sentence, and thus is eligible for relief under the PCRA. *Id.*; *see* 42 Pa.C.S.A. § 9543(a)(1)(i) (stating that to be eligible for PCRA relief, the petitioner must be “serving a sentence of imprisonment, probation or parole for the crime” at the time relief is granted). We agree.

Our review of the record reveals that Guziewicz received the following sentences relevant to this appeal:

- At criminal docket 1883-2005: 6 to 18 months of incarceration for obtaining possession of a controlled substance by misrepresentation and 3 to 9 months of incarceration for conspiracy;
- At criminal docket 1884-2005: 3 to 9 months of incarceration for obtaining possession of a controlled substance by misrepresentation and 3 to 9 months of incarceration for conspiracy;
- At criminal docket 1885-2005: 3 to 9 months of incarceration for obtaining possession of a controlled substance by misrepresentation and 3 to 9 months of incarceration for conspiracy;
- At criminal docket 1886-2005: 1 year of probation for obtaining possession of a controlled substance by misrepresentation and 1 year of probation for conspiracy.

⁷ In its responsive brief on appeal, the Commonwealth contends that Guziewicz’s appeal from the June 28 order “is moot and should be dismissed as such” because the PCRA court vacated that order and Guziewicz did not file a notice of appeal from the August 30 order. Commonwealth’s Brief at 3. This argument completely overlooks the fact that the PCRA court entered the August 30 order after Guziewicz filed his notice of appeal. Thus, the PCRA court was without jurisdiction to enter the August 30 order, rendering that order a nullity. *Bell v. Kater*, 839 A.2d 356, 357 (Pa. Super. 2003); Pa.R.A.P. 1701(a).

All of Guziewicz's sentences were ordered to run consecutively. Although the record does not reflect when his sentences for these crimes began to run, there is no possibility that his sentence could have expired before June 28, 2012. Even if his sentence was given a retroactive start date of June 13, 2005 – the date of the issuance of the criminal complaint – his sentence would not have expired until September of 2012.⁸ As such, there is no question that the PCRA court erred by dismissing Guziewicz's PCRA petition on this basis.

Based upon the record before us, we are unable to examine the merits of the remaining issues raised on appeal. In addition to the record being sparse and incomplete, we have no fact-finding by the PCRA court regarding the merits of Guziewicz's claims. More importantly, as noted above, Guziewicz is proceeding *pro se* in the instant appeal, which stems from the dismissal of his first PCRA petition. "Pursuant to the rules of criminal procedure and interpretive case law, a criminal defendant has a right to representation of counsel for purposes of litigating a first PCRA petition through the entire appellate process." ***Commonwealth v. Robinson***, 970 A.2d 455, 457 (Pa. Super. 2009) (*en banc*) (citations omitted). If a PCRA

⁸ Guziewicz states that his sentence was given a retroactive start date of April 7, 2006 to account for time-served, and thus his sentence does not expire until July of 2013. Guziewicz's Brief at unnumbered 9. This is not verifiable from the record, but we have little reason to doubt Guziewicz, as he is the only party thus far who has portrayed the procedural history of this case with any accuracy.

petitioner seeks to represent himself, and counsel has not properly withdrawn, a **Grazier**⁹ hearing must be held to ensure his waiver is knowing, voluntary, and intelligent. *Id.* at 456, 457.

In the case before us, there is no indication that Attorney Lynott properly withdrew from representation, that Guziewicz expressed a desire to proceed *pro se*, and even if he did, that a **Grazier** hearing was ever held. To the contrary, it appears that Attorney Lynott abandoned Guziewicz following the February 9, 2009 PCRA hearing. Moreover, it is unclear whether Guziewicz was even aware that he had a right to representation on appeal. As such, we are compelled to remand the case for the appointment of new counsel, or, if Guziewicz expresses a desire to represent himself on appeal, for the PCRA court to conduct a **Grazier** hearing. **Commonwealth v. Figueroa**, 29 A.3d 1177, 1182-83 (Pa. Super. 2011), *appeal denied*, ___ Pa. ___, 46 A.3d 715 (2012).

At this point, more than five years have passed since Guziewicz filed his PCRA petition, and it has been over four years since the PCRA hearing. This is unacceptable. Unfortunately, we have no option available to us other than remand. On remand, the PCRA court shall promptly decide Guziewicz's PCRA petition and appoint new counsel to represent Guziewicz, or, in the alternative, hold a **Grazier** hearing to ensure his waiver of counsel is knowing, voluntary, and intelligent.

⁹ **Commonwealth v. Grazier**, 552 Pa. 9, 713 A.2d 81 (1988).

Order vacated. Case remanded with instructions. Jurisdiction relinquished. Motion denied.¹⁰

¹⁰ On April 30, 2013, Guziewicz filed an Application for Emergency Relief in this Court. Therein, Guziewicz explained that he had been incarcerated since February 1, 2012 by order of the Pennsylvania Department Probation and Parole for violations committed after completing his term of imprisonment on the charges at issue in this case. He sought permission in the lower court to attend the funeral of his father, who passed away on March 18, 2013, but whose funeral was delayed because of his family's inability to access the necessary funds until April 22, 2013. According to Guziewicz, the lower court found it lacked the authority to grant his request based upon "the underlying parole detainer." Application for Emergency Relief, 4/30/13, at 1. Guziewicz further avers that his parole agent "would not entertain any notion of temporarily lifting [Guziewicz's] parole detainer or otherwise facilitating [Guziewicz's] temporary release in order to attend his father's funeral." *Id.* at 1-2. Guziewicz asserts that "because the relief requested on appeal, if granted, would cause the retroactive termination of [Guziewicz's] term of parole to a date preceding his initial arrest, and thus the quashal [*sic*] of the [parole detainer]," this Court should grant one of the following alternative forms of relief:

- (1) Expedited issuance of any order granting relief, either in part or in whole, with an accompanying opinion in support, or
- (2) expedited issuance of any order granting relief, either in part or in whole, in advance of an accompanying opinion in support, or
- (3) a furlough upon the cases underlying 1340 MDA 2012 for the purpose of attending [his father's] funeral service.

Id. at 2. Our disposition of this appeal does not afford Guziewicz with the relief requested under either (1) or (2). Furthermore, with respect to the alternative relief requested under (3), this is beyond the scope of the review that we are permitted to undertake. In an appeal from the denial of a PCRA petition, "our duty as an error correcting court is to determine if the PCRA [c]ourt's decision is legally correct and fully supported by the certified record." ***Commonwealth v. Glover***, 738 A.2d 460, 466 (Pa. Super. 1999). Guziewicz has not appealed from the order denying his request for furlough. As such, we are unable to grant him the relief requested.

J-S15013-13

Judgment Entered.

Mary A. Graybill
Deputy Prothonotary

Date: 5/15/2013