

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

KEVIN DAVID ROBERTS

Appellant

No. 1376 WDA 2012

Appeal from the PCRA Order August 27, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0002061-2010

BEFORE: GANTMAN, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.

FILED SEPTEMBER 05, 2013

Kevin David Roberts appeals from the order entered on August 27, 2012, in the Allegheny County Court of Common Pleas, dismissing his first petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. On December 16, 2010, Roberts entered a negotiated guilty plea to the charge of criminal trespass.¹ On appeal, Roberts asserts the following: (1) the PCRA court erred and infringed upon his right to represent himself by appointing counsel and failing to hold a **Grazier**² hearing when Roberts had

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S. § 3503(a)(1)(ii).

² **Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998).

indicated that he wanted the court to appoint standby counsel; (2) Roberts' guilty plea was involuntary and resulted from plea counsel's ineffectiveness in failing to provide Roberts with discovery materials; and (3) the PCRA court erred by failing to hold a hearing on the claim that his guilty plea was involuntary. Roberts' Brief at 2. After a thorough review of the record, the parties' briefs, and applicable law, we affirm.

The facts and procedural history of the case are as follows. On January 15, 2010, Roberts broke into a home that he was not privileged or licensed to enter. Originally, he was charged with burglary and criminal mischief. The matter proceeded to trial. On December 15, 2010, during the jury selection process, Roberts waived his right to counsel and acted *pro se* with an attorney appointed as standby counsel. The following day, however, he decided to enter a guilty plea pursuant to an agreement with the Commonwealth. In accordance with the terms of the agreement, the burglary charge was amended to a criminal trespass charge and the Commonwealth recommended a sentence of three-and-one-half to seven years' incarceration to be followed by a term of probation to be set by the court. Roberts also agreed to pay restitution in the amount of \$325.00. Following his plea, Roberts waived his right to a presentence investigation report and the court sentenced him to a term of imprisonment set forth in

the agreement.³ Roberts did not file post-sentence motions or a direct appeal.

On March 11, 2011, Roberts filed a *pro se* PCRA petition. Counsel was appointed and filed an amended PCRA petition on February 22, 2012. The PCRA court entered a Pennsylvania Rule of Criminal Procedure 907 notice of intent to dismiss without a hearing on June 22, 2012. Roberts filed a response through counsel on June 28, 2012. By order of the court entered on August 27, 2012, Roberts' PCRA petition was dismissed. This appeal followed.⁴

We begin with our well-settled standard of review:

We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. ***Commonwealth v. Burkett***, 2010 PA Super 182, 5 A.3d 1260, 1267 (Pa. Super. 2010). This review is limited to the findings of the PCRA court and the evidence of record. ***Id.*** We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. ***Id.*** This Court may affirm a PCRA court's decision on any grounds if the record supports it. ***Id.*** Further, we grant great deference to the factual findings of

³ The summary offense of criminal mischief was withdrawn.

⁴ On September 14, 2012, counsel filed a petition for leave to withdraw appearance due to a conflict of interest in an unrelated matter. The court granted the petition and appointed new counsel to represent Roberts in this appeal.

On November 16, 2012, the PCRA court ordered Roberts to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), within 90 days. Roberts filed a concise statement on December 10, 2012. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on January 10, 2013.

the PCRA court and will not disturb those findings unless they have no support in the record. **Commonwealth v. Carter**, 2011 PA Super 113, 21 A.3d 680, 682 (Pa. Super. 2011). However, we afford no such deference to its legal conclusions. **Commonwealth v. Paddy**, 609 Pa. 272, 15 A.3d 431, 442 (Pa. 2011); **Commonwealth v. Reaves**, 592 Pa. 134, 923 A.2d 1119, 1124 (Pa. 2007). Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary. **Commonwealth v. Colavita**, 606 Pa. 1, 993 A.2d 874, 886 (Pa. 2010).

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012), *appeal denied*, 54 A.3d 347 (Pa. 2012).

[A] petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings.

Commonwealth v. Taylor, 933 A.2d 1035, 1040 (Pa. Super. 2007), *appeal denied*, 951 A.2d 1163 (Pa. 2008).

In Roberts' first argument, he claims the PCRA court erred by failing to hold a **Grazier** hearing. Specifically, he states that in his *pro se* PCRA petition, he indicated that he wanted standby counsel appointed. He states that "[n]o hearing was held on whether he wanted to exercise his right to represent himself in this PCRA proceeding. Instead, counsel was appointed." Roberts' Brief at 9. He claims he did not change his mind but that "after his request to represent himself was ignored ... he may have determined that he had no[] choice but to allow prior PCRA counsel to represent him and sign the necessary document(s) to avoid defaulting his claims for PCRA relief." **Id.** at 10.

The Rules of Criminal Procedure, in relevant part, require the PCRA Court to “appoint counsel to represent the defendant on the defendant’s first petition for post-conviction collateral relief.” Pa.R.Crim.P. 904(C). Nevertheless,

a defendant still retains the right to waive the appointment of counsel and proceed *pro se*. ***Commonwealth v. Brady***, 1999 PA Super 272, 741 A.2d 758, 762 (Pa. Super. 1999); ***see also*** Pa.R.Crim.P. 121(A) (formerly Rule 318). “When a waiver of the right to counsel is sought at the post-conviction and appellate stages, an on-the-record determination should be made that the waiver is a knowing, intelligent, and voluntary one.” ***Commonwealth v. Grazier***, 713 A.2d 81, 82 (Pa. 1998).

Commonwealth v. Powell, 787 A.2d 1017, 1020-1021 (Pa. Super. 2001).

See also Commonwealth v. Stossel, 17 A.3d 1286 (Pa. Super. 2011).

However,

“in order to invoke the right of self representation, the request to proceed *pro se* must be made timely and not for purposes of delay and must be clear and unequivocal.” ***Commonwealth v. Davido***, 582 Pa. 52, 64, 868 A.2d 431, 438 (2005) (citations omitted) (emphasis added). In ***Davido***, our Supreme Court emphasized that a defendant’s request to proceed *pro se* should be analyzed based on the totality of the circumstances to determine whether it was unequivocal:

While this court has not considered when a request to proceed *pro se* is deemed “unequivocal,” a review of federal case law reveals that the courts generally consider a myriad of factors in concluding whether a request was unequivocal including: whether the request was for hybrid representation or merely for the appointment of standby or advisory counsel, the trial court’s response to a request, whether a defendant has consistently vacillated in his request, and whether a request is the result of an emotional outburst. The essence of these cases is that the inquiry surrounding whether a request to proceed

pro se is unequivocal is fact intensive and should be based on the totality of the circumstances surrounding the request.

Id. at 65-66, 868 A.2d at 438-39 (citations omitted).

Commonwealth v. Faulk, 21 A.3d 1196, 1201 (Pa. Super. 2011), *appeal denied*, ___ A.3d ___, 2011 Pa. LEXIS 3041 (Pa. Dec. 15, 2011).

Here, the PCRA court found the following:

[Roberts] asserts that he informed the Court on page 7, number 16, of the standard PCRA form provided to prisoners that: "I request that the Court appoint standby counsel to assist me." [Roberts], however, did not check number 16(A)(2) that read: "I do not want a lawyer to represent me." More importantly, [Roberts] signed an Affidavit that was attached to the amended PCRA petition filed by counsel that stated: "The attorney who filed the said Petition on my behalf, William C. Kaczynski, Esq., is authorized by me to file the Petition on my behalf." At no time during the nearly year-long representation of [Roberts] by counsel did [Roberts] write to the Court that he did not want counsel to represent him. [Roberts] waited until new counsel filed a Concise Statement of Matters Complained of on Appeal before informing the Court of his desire to proceed *pro se*.

PCRA Court Opinion, 1/20/2013, at 2-3 (footnote omitted).⁵

Having carefully reviewed the record, the arguments of Roberts, and the relevant case law, we are led to agree with the PCRA court's

⁵ We note that pages 6 and 7 of Roberts' *pro se* PCRA Petition were not included in the original record. It is the responsibility of the appellant, and not this Court, to ensure that the record is complete for review. **See Commonwealth v. Peifer**, 730 A.2d 489, 492 n.3 (Pa. Super. 1999); Pa.R.A.P. 1911(a). Nevertheless, Roberts does not contest that in the standardized petition, he handwrote his request for the court to appoint standby counsel and that he did not check Number 16(A)(2) that read, "I do not want a lawyer to represent me."

determination. Accepting that Roberts made a written request for standby counsel in his *pro se* petition, he thereafter authorized appointed counsel to file the amended PCRA petition on his behalf as evidenced by his affidavit attached to the petition and accepted counsel's representation. Moreover, he did not subsequently ask the PCRA court to proceed *pro se*, he did not direct counsel to advocate for his right to self-representation, and he did not file any *pro se* motions, raising the right to invoke self-representation. Based on the totality of the circumstances, we conclude Roberts cannot claim the PCRA court erred in failing to conduct a **Grazier** hearing. **See Faulk, supra**. Accordingly, Roberts' first argument is unavailing.

Based on the nature of Roberts' second and third arguments, we will address them together. In his second issue, Roberts asserts that standby counsel was ineffective during his guilty plea proceeding. Specifically, Roberts states: "[S]tandby counsel failed to provide [Roberts] with all of the discovery materials in this matter. Standby counsel had no reasonable basis for not providing those materials to [Roberts]. If [Roberts] received those materials, he wouldn't have pled guilty but, instead, would have pled not guilty and proceeded to trial." Roberts' Brief at 12. In Roberts' third issue, he contends that because he presented material issues of fact regarding standby counsel's ineffectiveness, the PCRA court erred in failing to hold an evidentiary hearing on the matter. **Id.** at 13-14.

To prevail on a claim that counsel was constitutionally ineffective, the [petitioner] must overcome the presumption of

competence by showing that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different. A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.

Commonwealth v. Hammond, 953 A.2d 544, 556 (Pa. Super. 2008) (citation omitted), *appeal denied*, 964 A.2d 894 (Pa. 2009). "The law does not require that an appellant be pleased with the results of the decision to enter a guilty plea; rather '[a]ll that is required is that [appellant's] decision to plead guilty be knowingly, voluntarily and intelligently made.'"

Commonwealth v. Brown, 48 A.3d 1275, 1277 (Pa. Super. 2012), *quoting Commonwealth v. Moser*, 921 A.2d 526, 528-29 (Pa. Super. 2007).

Most relevant here, the appointment of standby counsel does not imply or authorize some sort of hybrid representation. ***See Commonwealth v. Ellis***, 534 Pa. 176, 626 A.2d 1137, 1138-39 (Pa. 1993) (agreeing with the Superior Court that "there is no right of self-representation together with counseled representation ('hybrid representation') ... although standby counsel may be appointed to give the defendant legal advice."). When a defendant elects to proceed at trial *pro se*, the defendant -- and not standby counsel -- is in fact counsel of record and is responsible for trying the case. This understanding of the limited role of standby counsel is essential to satisfy the United States Supreme Court's directive that a defendant's choice to proceed *pro se* "must be honored out of 'that respect for the individual which is the lifeblood of the law'" even when the defendant acts to his or her own detriment. This understanding also underlies our prior holding that a defendant who chooses to represent himself cannot obtain relief by raising a claim of ineffectiveness of counsel or standby counsel.

Commonwealth v. Spatz, 47 A.3d 63, 83 (Pa. 2012) (some citations omitted).

Here, the PCRA court noted the following:

As to the second and third issues raised in the Concise Statement, [Roberts] here is clearly not happy with the result of his plea, despite having negotiated the terms of the plea agreement himself. Unfortunately for [Roberts], the law does not require that he be satisfied with the outcome of his decision to admit his guilt.

. . .

In examining the record in this matter, [Roberts'] plea was knowing, voluntary, intelligent, and valid. No basis exists in either law or fact to justify permitting [Roberts] to withdraw his plea of guilty.

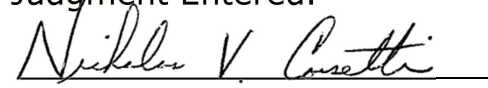
PCRA Court Opinion, 1/20/2013, at 3.

We agree with the PCRA court's rationale. Moreover, we emphasize that Roberts chose to represent himself at the guilty plea proceeding. Therefore, in accordance with **Spotz, supra**, he cannot obtain relief by raising a claim of ineffectiveness of standby counsel. Accordingly, we conclude there is no arguable merit to Roberts' claim of ineffective assistance of standby counsel for failing to provide Roberts with certain discovery material. Furthermore, with respect to this claim, the PCRA court did not err in failing to hold an evidentiary hearing because there was no genuine issue of material fact. Therefore, Roberts' second and third arguments fail.

Order affirmed.

J-S23020-13

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Cusetti", is written over a horizontal line.

Deputy Prothonotary

Date: 9/5/2013