

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JOHN JAMES ROBBINS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 153 MDA 2012

Appeal from the Order December 19, 2011
In the Court of Common Pleas of Bradford County
Criminal Division at No.: CP-08-CR-0000304-2009

BEFORE: BOWES, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

FILED AUGUST 09, 2013

Appellant, John James Robbins, appeals from the order of December 19, 2011, denying his first petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. Counsel has filed a **Turner/Finley**¹ letter. For the reasons discussed below, we deny counsel's request to withdraw, vacate the Order of December 19, 2011, and remand with instructions to appoint new counsel.

On August 26, 2009, following a jury trial, Appellant was convicted of burglary and simple assault. Appellant did not file any post-trial motions.

* Retired Senior Judge assigned to the Superior Court.

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

On October 8, 2009, the court sentenced Appellant to a term of incarceration of not less than seven nor more than twenty years. Appellant did not file any post-sentence motions.

Represented by trial counsel, Appellant filed a timely appeal. However, counsel filed an **Anders** brief. **See Anders v. California**, 386 U.S. 738 (1967). On October 22, 2010, this Court remanded the matter to the trial court because counsel failed to comply with the requirements of **Anders**. (**See Commonwealth v. Robbins**, 15 A.3d 538 (Pa. Super. 2010) (unpublished memorandum). On January 11, 2011, after the filing of a new **Anders** brief, this Court affirmed the judgment of sentence after finding both of Appellant's issues on appeal waived because of counsel's failure to preserve them at trial,² and granted counsel's request to withdraw. (**See Commonwealth v. Robbins**, 1933 MDA 2009, unpublished memorandum at *5-7 (Pa. Super. filed January 11, 2011)). Appellant did not seek leave to appeal to the Pennsylvania Supreme Court.

On July 20, 2011, Appellant, acting *pro se*, filed the instant PCRA petition. Counsel was appointed but subsequently withdrew. Replacement counsel was then appointed but also subsequently withdrew. New counsel, Richard Jennings, Esq., appointed after the withdrawal of replacement

² This Court did alternately address the merits of Appellant's weight of the evidence claim. (**See Robbins, supra** at *6-7).

counsel, filed a **Turner/Finley** letter. On October 24, 2011, the PCRA court directed Appellant to respond to the **Turner/Finley** letter by November 9, 2011.³ On November 10, 2011, based on Appellant's alleged failure to respond to counsel's **Turner/Finley** letter, the PCRA court issued notice of its intent to dismiss the petition pursuant to Pennsylvania Rule of Criminal Procedure 907(1).⁴ On November 29, 2011, the PCRA court granted Attorney Jennings's request to withdraw. The PCRA subsequently dismissed the petition on December 19, 2011.

Appellant filed the instant, timely appeal and sought appointment of counsel. The PCRA court reappointed Richard Jennings, Esq., to represent Appellant on appeal. On February 23, 2012, Attorney Jennings refiled his original **Turner/Finley** letter. Appellant filed a response to the

³ Appellant was unable to file a timely response because, for reasons not apparent from the record, the Prothonotary did not mail the letter until November 9, 2011. (**See** Appellant's Table of Exhibits, Exhibit 22). Appellant alleges that he sent a letter to the PCRA court notifying it of the problem and seeking additional time to respond to the notice, (**See id.** at Exhibit 24). However, it is not clear whether the PCRA court ever received the letter, which is not listed on the docket.

⁴ Appellant is incarcerated out-of-state. While the PCRA court mailed the Rule 907(1) notice in a timely fashion, the date-stamp on the envelope demonstrates that it was not received until after the twenty-day period had expired. (**See** Appellant's Table of Exhibits, Exhibit 26). Appellant again alleges that he advised the PCRA court by letter of the problem and sought additional time, but again, it is not apparent that the PCRA court ever received the letter, which is not listed on the docket. (**See id.** at Exhibit 27).

Turner/Finley letter on March 21, 2012. The PCRA court denied this motion to withdraw as counsel on appeal on April 11, 2012.⁵

Preliminarily, we note that the instant matter presents in a very problematic fashion. It is evident that, because of an apparent breakdown in the operations of the PCRA court and difficulties with either or both of the United States Postal Service and the prison mail system, Appellant did not have an adequate opportunity to respond to either counsel's **Turner/Finley** letter or the Rule 907(1) notice.

Further, despite granting counsel's first request to withdraw, the PCRA court reappointed counsel to represent Appellant on appeal and then denied his second request to withdraw. This was in contravention of this Court's holding in **Commonwealth v. Maple**, 559 A.2d 953, 956 (Pa. Super. 1989) ("[W]hen counsel has been appointed to represent a petitioner in post-conviction proceedings as a matter of right under the rules of criminal procedure and when that right has been fully vindicated by counsel being permitted to withdraw under the procedure authorized in [**Turner/Finley**], new counsel shall not be appointed and the petitioner, or appellant must

⁵ It does not appear that the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On January 3, 2012, the PCRA court issued a Statement of the Court in Lieu of a Statement under Pa.R.A.P. 1925(a). On January 25, 2013, counsel filed a concise statement of errors complained of on appeal. On January 30, 2013, the PCRA court issued a supplementary 1925(a) statement. **See** Pa.R.A.P. 1925(a).

thereafter look to his or her own resources for whatever further proceedings there might be.”).

In addition, it is not apparent to this Court why the PCRA court then reappointed the same counsel to represent Appellant on appeal, knowing that counsel believed that the matter was frivolous. This action ignores the spirit of this Court’s decision in ***Commonwealth v. Willis***, 29 A.3d 393, 399 (Pa. Super. 2011) (faulting the PCRA court for not appointing new counsel when it became apparent that counsel was unwilling to act as an advocate for the petitioner and finding error in holding a PCRA hearing without first ruling on counsel’s petition to withdraw, thus pitting counsel and the petitioner against one another).

If the PCRA court believed the instant matter to be frivolous, it should not have appointed counsel on appeal. If the PCRA court had changed its mind and believed the appeal to have some arguable merit, it should not have appointed counsel who it knew would not act as Appellant’s advocate.

In any event, Appellant’s court-appointed counsel has petitioned to withdraw and has submitted a ***Turner/Finley*** letter, which is procedurally proper for counsel seeking to withdraw from a PCRA. Appellant has responded to the petition to withdraw, contesting the adequacy of counsel’s representation both in this Court and in the PCRA court. (***See*** Appellant’s *Pro Se* Response, 4/17/13, at pages 1-9).

Counsel petitioning to withdraw from PCRA representation must proceed . . . under [***Turner, supra*** and ***Finley, supra***

and] . . . 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 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.

* * *

[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.

Commonwealth v. Doty, 48 A.3d 451, 454 (Pa. Super. 2012) (citations omitted).

Here, as he did in the PCRA court, (**see Turner/Finley** Letter, 10/17/11, at unnumbered pages 2-3), counsel fails to list each of the issues that Appellant wants to have reviewed and does not explain why those unlisted issues lack merit. (**See** Petition to Withdraw, 3/22/13, at unnumbered pages 4-5). Counsel addresses three issues in his letter: (1) whether trial counsel was ineffective for not objecting to Appellant being escorted to the witness stand during trial by an uniformed sheriff’s deputy or to Appellant’s wearing a shock belt; (2) whether trial counsel was ineffective for not objecting to the largely female composition of the jury; and (3) whether the trial court erred in allowing a jury selection process resulting in

a largely female jury and for requiring Appellant to wear a shock belt and allowing a deputy sheriff to escort him to the witness stand. (**See id.** at unnumbered pages 2-3).

Our review of the PCRA petition demonstrates that Appellant only raised the first two issues in the context of ineffective assistance of trial counsel. (**See** PCRA Petition, 7/20/11, at unnumbered pages 3-10). However, Appellant raises numerous other allegations of ineffective assistance of trial counsel: (1) counsel failed to investigate evidence that would have shown that the crime could not have happened in Pennsylvania during the time frame in question; (2) counsel failed to object to perjured testimony by the victim; (3) counsel failed to object to testimony regarding a text message where the Commonwealth failed to lay a proper foundation; (4) counsel failed to object to improper police testimony regarding the victim's cell phone; (5) counsel failed to object to an improper Commonwealth request for a continuance that prejudiced Appellant; (6) counsel improperly attempted to induce Appellant to accept a guilty plea; (7) counsel failed to file requested post-trial and post-sentence motions; and (8) Appellant was denied the right to counsel on direct appeal when the trial court refused to appoint new counsel to represent him. (**See id.**).

While two of the three issues raised by counsel may be Appellant's stronger arguments, **Turner/Finley** requires that counsel review and

discuss all the issues. **See Doty, supra** at 454. Therefore, we must deny counsel's request to withdraw. **See id.**

Normally, we would remand this matter for the filing of either a merits brief or a new **Turner/Finley** letter. **See id.** However, as discussed above, we are faced with a situation where counsel filed two inadequate **Turner/Finley** letters in the PCRA court, one of which was wrongly granted, and where Appellant raised this issue at the first available opportunity: the instant appeal. We are also concerned that, because of the apparent difficulties with the delivery of mail, Appellant never had the opportunity to respond to either counsel's initial request to withdraw or the Rule 907(1) notice. Accordingly, in the interest of justice, we will vacate the Order of December 19, 2011, and remand this matter to the trial court with instruction to appoint new counsel for the filing of an amended PCRA petition or a complaint **Turner/Finley** letter. **See Willis, supra** at 399-400; **see also Commonwealth v. Bellamy**, 380 A.2d 429, 430-31 (Pa. Super. 1977) (denying counsel's inadequate request to withdraw but remanding for the appointment of new counsel, where counsel demonstrated an unwillingness to advocate effectively for the appellant).

Request to withdraw as counsel denied. Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

Mary A. Straybell
Deputy Prothonotary

Date: 8/9/2013