

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LAQUAYE HAMILTON,	:	
	:	
Appellant	:	No. 1586 EDA 2009

Appeal from the PCRA Order May 5, 2009
 In the Court of Common Pleas of Lehigh County
 Criminal Division No(s): CP-39-CR-0001419-2007

BEFORE: GANTMAN, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 6, 2013

Appellant, Laquaye Hamilton, appeals *pro se* from the order entered in the Lehigh County Court of Common Pleas denying his timely, first Post Conviction Relief Act¹ ("PCRA") petition. He contends that the PCRA court, by considering his *pro se* amended PCRA petition, improperly permitted hybrid representation. Appellant also alleges appointed counsel was ineffective for failing to file an amended PCRA petition. We affirm.

We set forth the facts as stated by the PCRA court:

[A]ppellant's convictions stem from events that unfolded on February 22, 2007, after members of the

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

Allentown Police Department responded to the report of a shooting in the vicinity of 221 North 16th Street.^[2] When the police arrived, they were told that an individual involved in the shooting entered the residence at 221 North 16th Street. The police also found a blood trail leading to the residence. The victim of the shooting was discovered laying outside, on the ground, and was transported to the hospital for treatment.

A protective sweep of 221 North 16th Street was executed, and after doing so, the officers did not conduct a more detailed search. Instead, a search warrant was secured seeking "weapons, ammunition, bloody clothing, identifying documents." During the execution of the search warrant, the officers found approximately three hundred and two (302) grams of cocaine, a loaded nine (9) millimeter Glock firearm, an electronic scale, and a variety of drug paraphernalia. [A]ppellant was disqualified from possessing the firearm due to an aggravated assault conviction in New York.

Following the execution of the search warrant, the police contacted Ms. Lacoot, who is the lessee of the residence, and asked her to come to police headquarters. She did so, and while there[,] she contacted [A]ppellant by telephone. [A]ppellant, with knowledge that the police were participants to the conversation, told them, "[t]he drugs, the guns, everything that you found is mine."

PCRA Ct. Op., 7/26/11, at 4-5 (footnotes omitted). Appellant was arrested.³

On January 29, 2008, Appellant entered a negotiated plea of guilty to persons not to possess firearms,⁴ possession with intent to deliver a

² According to the affidavit of probable cause, Appellant resided at that address. Aff. of Probable Cause, 2/23/07, at 3.

³ Ms. Lacoot was tried separately.

⁴ 18 Pa.C.S. § 6105.

controlled substance,⁵ and conspiracy to deliver a controlled substance.⁶ The plea agreement provided that the Commonwealth would not pursue a mandatory sentence under 42 Pa.C.S. § 9712.1 and not refer this case to the federal authorities for prosecution. In exchange, Appellant agreed to a sentence of five to ten years in prison, waiver of a presentence investigation report, and a delay of two weeks before surrendering to authorities to begin his sentence. Appellant was formally sentenced to five to ten years' imprisonment on January 29, 2008, and he did not file a direct appeal.

On May 30, 2008, the court docketed Appellant's first, timely *pro se* PCRA petition.⁷ On June 3, 2008, the court ordered the public defender's office to represent Appellant and "that counsel shall have ninety (90) days from this date to submit an Amended PCRA Petition[.]" Order, 6/3/08. Counsel did not file an amended PCRA petition.

The court, however, docketed a *pro se* amended PCRA petition on August 25, 2008.⁸ The record does not reflect that this was forwarded to counsel pursuant to Pa.R.Crim.P. 576(A)(4). Appellant's *pro se* amended

⁵ 35 P.S. § 780-113(a)(30).

⁶ 18 Pa.C.S. § 903.

⁷ The record does not reflect when the petition was placed into the mail. **See Commonwealth v. Wilson**, 911 A.2d 942, 944 n.2 (Pa. Super. 2006) (discussing prisoner mailbox rule).

⁸ The record does not indicate when Appellant deposited the amended petition into the mail. **See Wilson**, 911 A.2d at 944 n.2.

petition raised four claims. Appellant first alleged that trial counsel improperly coerced him to plead guilty when there was no factual basis. Appellant's Am. PCRA Pet., 8/25/08, at 8. Second, he alleged that counsel was ineffective for failing to investigate and prepare a defense, which led counsel to advise him to plead guilty. *Id.* Third, Appellant claimed that counsel was ineffective for failing to file a motion to suppress the evidence recovered from 221 North 16th Street. Lastly, he asserts that he asked counsel to file a direct appeal and counsel was ineffective for failing to file a notice of appeal. *Id.* at 9.

On November 17, 2008,⁹ the court held a hearing at which counsel appeared on Appellant's behalf. At the hearing, Appellant, his trial counsel, and Ms. Lacoot testified. Appellant's PCRA counsel raised and argued the last two claims of his *pro se* amended petition. N.T. PCRA Hr'g, 11/17/08, at 6-7. The court also permitted Appellant's PCRA counsel to request the notes of testimony from Ms. Lacoot's trial and submit a post-hearing memorandum of law. The certified record contained the notes of testimony from Ms. Lacoot's trial but not a post-hearing memorandum. On May 5, 2009, the court denied Appellant's PCRA petition.

⁹ The notes of testimony are dated November 18, 2008. The court, however, refers to the date of the hearing as November 17, 2008. N.T. PCRA Hr'g, 11/17/08, at 60. The record also reflects that the hearing was rescheduled to November 17, 2008. Order, 10/28/08.

On May 18, 2009,¹⁰ Appellant timely filed a *pro se* notice of appeal.¹¹ The record did not reflect the withdrawal of Appellant's counsel and did not indicate that the notice of appeal was forwarded to Appellant's counsel. **See** Pa.R.Crim.P. 576(A)(4). On May 27, 2009, the PCRA court served an order on both Appellant and his counsel requesting compliance with Pa.R.A.P. 1925(b).

On June 17, 2009, Appellant's counsel filed a Rule 1925(b) statement. The statement alleged trial counsel was ineffective for failing to file a motion to suppress the evidence recovered from 221 North 16th Street. Appellant's Concise Statement of Matters Complained on Appeal, 6/17/09, at 1. Appellant's counsel also alleged trial counsel was ineffective for not filing a direct appeal and motion to withdraw the guilty plea. **Id.**

On April 9, 2010, Appellant filed a *pro se* application to stay the appeal and remand to the PCRA court for a **Grazier**¹² hearing, as he wished to proceed *pro se*. The PCRA court held the **Grazier** hearing on June 22,

¹⁰ The PCRA court incorrectly states that Appellant filed his notice of appeal on May 21, 2009. **See Wilson**, 911 A.2d at 944 n.2.

¹¹ This Court is permitted to accept Appellant's *pro se* notice of appeal as if it was filed by counsel. **See** Pa.R.Crim.P. 576(A)(4).

¹² **Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998).

2010.¹³ Because the PCRA court held that Appellant's request to proceed *pro se* was knowing, intelligent, and voluntary, another panel of this Court permitted Appellant's counsel to withdraw on August 4, 2010.

Appellant subsequently filed, and this Court granted, several motions for relief to supplement the certified record with additional documents. A panel of this Court also ordered the PCRA court to permit Appellant to file a *pro se* Rule 1925(b) statement. On June 10, 2011, the PCRA court ordered Appellant to file a *pro se* Rule 1925(b) statement within twenty-one days. On July 1, 2011, Appellant timely filed a Rule 1925(b) statement.¹⁴

Appellant, in his *pro se* brief, raises the following issues:

Was [Appellant's] *pro se* post conviction petition effectively uncounseled because his appointed counsel did not file an amended petition on his behalf as ordered by the PCRA court?

Did not a legal nullity occur when the PCRA court improperly permitted hybrid representation of [Appellant] by entertaining an unauthorized *pro se* amended PCRA petition despite that [sic] he was represented by appointed counsel?

¹³ The certified record did not include a transcript of the June 22nd hearing. The certified record, however, includes a written colloquy executed by Appellant waiving the assistance of counsel. Written Colloquy, 6/22/10.

¹⁴ The PCRA court docketed Appellant's Rule 1925(b) statement on July 6, 2011. The statement was timely, however, because it was mailed on July 1, 2011. **See Wilson**, 911 A.2d at 944 n.2. The certified record includes the postmarked envelope enclosing Appellant's Rule 1925(b) statement. **See id.**

Appellant's Brief, 5/23/12,¹⁵ at 5 (reordered to facilitate disposition).¹⁶

We summarize Appellant's arguments for both of his issues. First, he insists the PCRA court erred by failing to investigate why his PCRA counsel did not file an amended PCRA petition within ninety days. Appellant interprets the PCRA court's June 3, 2008 order as requiring PCRA counsel to file an amended petition. Second, Appellant contends the PCRA court erred by considering his *pro se* amended PCRA petition, which was filed while he was still represented by counsel. He complains that the court's June 3, 2008 order permitting counsel to file an amended PCRA petition within ninety days precluded his *pro se* filing. 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).

[C]ounsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his or her conduct; and (3) Appellant was prejudiced by counsel's action or omission. To demonstrate prejudice, an appellant must prove that a reasonable probability of acquittal existed but

¹⁵ Appellant averred a service date of May 23, 2012, in his certificate of service.

¹⁶ To the extent Appellant elected not to argue in his appellate brief the other issues raised in his Rule 1925(b) statement, he has waived those issues on appeal. ***See generally*** Pa.R.A.P. 2119.

for the action or omission of trial counsel. A claim of ineffective assistance of counsel will fail if the petitioner does not meet any of the three prongs. Further, a PCRA petitioner must exhibit a concerted effort to develop his ineffectiveness claim and may not rely on boilerplate allegations of ineffectiveness.

Commonwealth v. Perry, 959 A.2d 932, 936 (Pa. Super. 2008)

(punctuation marks and citations omitted).

Pennsylvania Rule of Criminal Procedure 905 states:

(A) The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.

(B) When a petition for post-conviction collateral relief is defective as originally filed, the judge shall order amendment of the petition, indicate the nature of the defects, and specify the time within which an amended petition shall be filed. If the order directing amendment is not complied with, the petition may be dismissed without a hearing.

(C) Upon the entry of an order directing an amendment, the clerk of courts shall serve a copy of the order on the defendant, the defendant's attorney, and the attorney for the Commonwealth.

(D) All amended petitions shall be in writing, shall comply substantially with Rule 902, and shall be filed and served within the time specified by the judge in ordering the amendment.

Pa.R.Crim.P. 905(A)-(D).

Instantly, with respect to Appellant's first issue, the PCRA court ordered "that counsel shall have ninety (90) days" to file an amended PCRA petition. Order, 6/3/08. The court's language did not **require** counsel to

file an amended PCRA petition. Further, nothing in Rule 905 requires PCRA counsel to file an amended petition unless the court held the initial petition was defective. **See** Pa.R.Crim.P. 905. The instant PCRA court did not rule that Appellant's initial *pro se* petition was defective. **See id.** Thus, PCRA counsel was not ineffective. **See Perry**, 959 A.2d at 936.

With respect to Appellant's second contention—that the PCRA court erred by reviewing his *pro se* amended petition—our Supreme Court in **Commonwealth v. Jette**, 23 A.3d 1032 (Pa. 2011) opined:

[w]e will accept for filing *pro se* appellate briefs, but we will not review a *pro se* brief if a counseled brief has been filed, either before, simultaneously with, or after the *pro se*, due to the judicial confusion and delay that ensues. . . . If a *pro se* brief is filed in a counseled appeal, we direct the prothonotary to send the *pro se* brief on to counsel who is best able to determine in her professional judgment which of the *pro se*'s issues should be presented for our review. Counsel may argue such pertinent issues in her brief to the court, or if the appellate brief has been filed, she may file a supplemental brief addressing those same issues.

Id. at 1037-38 (approvingly quoting **Commonwealth v. Ellis**, 581 A.2d 595, 600-01 (Pa. Super. 1990)). The doctrine of hybrid representation bars **courts** from considering a defendant's *pro se* brief while that defendant is represented by counsel. **Commonwealth v. Ellis**, 626 A.2d 1137, 1141 (Pa. 1993).

Instantly, because Appellant's PCRA counsel argued the last two claims of Appellant's *pro se* amended petition, we may conclude counsel was aware of the petition. **See** N.T. PCRA Hr'g, 11/17/08, at 6-7. Instead of filing an

amended PCRA petition, however, Appellant's PCRA counsel opted to argue two of the issues she found pertinent before the PCRA court. **Cf. Jette**, 23 A.2d at 1037-38. Thus, the PCRA court did not improperly consider Appellant's *pro se* amended PCRA petition. **See Ellis**, 626 A.2d at 1141. Rather, the PCRA court heard PCRA counsel advocate two claims that were raised in Appellant's *pro se* amended petition and, "in her professional judgment," worthy of consideration by the court. **See** N.T. PCRA Hr'g, 11/17/08, at 6-7; **Jette**, 23 A.3d at 1038. Hybrid representation did not occur because counsel argued those claims. **Cf. Ellis**, 626 A.2d at 1141. Accordingly, having discerned no legal error, **Abu-Jamal**, 941 A.2d at 1267, we affirm the order denying Appellant's timely, first PCRA petition.

Order affirmed.