

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROBERT FISKE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1682 WDA 2013

Appeal from the PCRA Order Entered June 15, 2012
In the Court of Common Pleas of Potter County
Criminal Division at No(s): CP-53-CR-0000117-2009

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and OTT, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED JULY 09, 2014

Appellant, Robert Fiske, appeals from the trial court's June 15, 2012 order denying his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Additionally, Appellant's counsel, Richard W. McCoy, Esq., seeks permission to withdraw his representation of Appellant pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1998), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). For the following reasons, we quash this appeal and grant counsel's petition to withdraw.

On February 17, 2010, Appellant pled guilty to one count of aggravated assault under 18 Pa.C.S. § 2702(a)(1). Appellant's conviction stemmed from his inflicting serious bodily injury upon his six-month-old son. The injuries Appellant caused his son included fractures to the baby's skull

and arms, bruising on the baby's feet and forehead, and scratches on the baby's face.

On March 18, 2010, the court sentenced Appellant to an aggravated range term of 7 to 14 years' incarceration. Appellant filed a timely direct appeal, challenging the discretionary aspects of his sentence. This Court affirmed Appellant's judgment of sentence on March 8, 2011. ***Commonwealth v. Fiske***, 26 A.3d 1182 (Pa. Super. 2011) (unpublished memorandum). Appellant did not file a petition for permission to appeal to our Supreme Court.

On August 15, 2011, Appellant filed a *pro se* PCRA petition and Attorney McCoy was appointed to represent him. In his petition, Appellant raised various allegations of ineffective assistance of his plea/appellate counsel, Brent Petrosky, Esq. In one of those claims, Appellant alleged that Attorney Petrosky acted ineffectively by not filing a petition for permission to appeal to our Supreme Court. After conducting an evidentiary hearing, the PCRA court issued an order on June 15, 2012, granting the reinstatement of Appellant's right to seek appeal with our Supreme Court, but denying his remaining claims of Attorney Petrosky's ineffectiveness.

On June 25, 2012, the Commonwealth filed a petition for reconsideration of the court's order, to the extent that it reinstated Appellant's direct appeal rights. Ultimately, after several continuances, the PCRA court conducted a hearing on February 19, 2013, to address the Commonwealth's motion. On February 25, 2013, the court issued an order

denying the motion, and stating that Appellant had “thirty (30) days from the date of this Order to file a Petition for Allocatur with the Supreme Court.” PCRA Court Order, 2/26/13. The court’s order also directed that Appellant’s right to appeal from the June 15, 2012 denial of his other ineffectiveness claims “shall be stayed pending the exhaustion of any appellate issues [Appellant] may raise in a Petition for Allocatur.” **Id.**

On March 14, 2013, Appellant filed a petition for permission to appeal to our Supreme Court, which was denied on August 27, 2013. **Commonwealth v. Fiske**, 74 A.3d 125 (Pa. 2013). On September 18, 2013, Appellant filed a notice of appeal from the PCRA court’s June 15, 2012 order denying his substantive claims for collateral relief involving plea/appellate counsel’s ineffectiveness. The PCRA court subsequently issued an order directing Appellant to file a Pa.R.A.P. 1925(b) statement. Appellant’s counsel, Attorney McCoy, timely complied with that order, but indicated in the Rule 1925(b) statement that he intended to file a petition to withdraw and a **Turner/Finley** “no merit” letter with this Court.

Attorney McCoy filed that petition to withdraw and no merit letter with this Court on November 4, 2013. On November 25, 2013, Appellant filed a *pro se* response, arguing that Attorney McCoy “has failed to zealously represent him in this first PCRA filing.” Response to **Turner/Finley**, 11/25/13, at 1.

Before we may address Attorney McCoy’s **Turner/Finley** petition to withdraw and no merit letter, we must assess whether we have jurisdiction

to consider this appeal. “[Q]uestions of jurisdiction may be raised *sua sponte*.” ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 791 (Pa. Super. 2001) (citation omitted).

First, in its June 15, 2012 order, the PCRA court reinstated Appellant’s direct appeal rights *nunc pro tunc*, yet **also** denied his substantive collateral claims of plea counsel’s ineffectiveness. “Because the PCRA court granted Appellant reinstatement of his appellate rights *nunc pro tunc*, its consideration of Appellant’s additional issues did not result in a disposition Appellant could appeal.” ***Commonwealth v. Miller***, 868 A.2d 578, 580 (Pa. Super. 2005). In ***Miller***, we explained:

When a PCRA court grants a request for reinstatement of direct appeal rights *nunc pro tunc*, it may address, but not “reach” the merits of any remaining claims. ***Commonwealth v. Hoyman***, 385 Pa. Super. 439, 561 A.2d 756, 758 (1989). This delicate distinction has caused some confusion. **See *Commonwealth v. Pate***, 421 Pa. Super. 122, 617 A.2d 754, 757–58 (1992) (“once the PCRA court finds that the petitioner’s appellate rights have been abridged, it should grant leave to file a direct appeal and end its inquiry there.”) The PCRA court may **inquire**, but its inquiry [cannot] result in an appealable disposition.

Id. (footnote omitted; emphasis in original).

In this case, the PCRA court reinstated Appellant’s direct appeal rights, but went on to deny his claims of plea counsel’s ineffectiveness. Under the rationale of ***Miller***, the PCRA court’s ruling on Appellant’s remaining ineffectiveness claims is merely advisory; it is not an appealable disposition. Consequently, we do not have jurisdiction over this appeal.

Commonwealth v. Kennedy, 876 A.2d 939, 943 (Pa. 2005) (indicating appellate court lacks jurisdiction over non-appealable orders).

However, we emphasize that because Appellant's assertions of plea/appellate counsel's ineffectiveness were not "decided" by the PCRA court's June 15, 2012 order, those claims would not be barred as "previously litigated" under 42 Pa.C.S. § 9544(a) (emphasis added) (precluding as previously litigated claims that were "raised ***and decided***" in a prior PCRA proceeding). Thus, Appellant may subsequently file a new PCRA petition (which would be considered his first for timeliness purposes) and raise the same substantive collateral claims of plea/appellate counsel's ineffectiveness that he presented in his initial petition. ***See Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011), *order vacated on other grounds by*, 84 A.3d 1060 (Pa. 2014) (dismissing Barnett's claims of ineffective assistance of counsel, raised on direct appeal after the reinstatement of his direct appeal rights *nunc pro tunc*, without prejudice to Barnett's ability to raise them in a subsequent PCRA petition); ***Commonwealth v. Karanicolas***, 836 A.2d 940, 944 (Pa. Super. 2003) (holding that a PCRA petition brought after direct appeal *nunc pro tunc* is considered defendant's first PCRA petition for timeliness purposes).

We also note that even if the court's June 15, 2012 order disposing of Appellant's ineffectiveness claims were appealable, we would still be without jurisdiction to entertain this appeal because of its patent untimeliness. Appellant did not file his notice of appeal until **460 days** after the date of

the order from which he seeks to appeal. Pennsylvania Rule of Appellate Procedure 903(a) states: "Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). Clearly, Appellant's notice of appeal was untimely. While it is apparent from the record that Appellant's delay in filing his notice of appeal was due to the PCRA court's purported stay of the appeal period while Appellant sought *allocatur* with our Supreme Court, the PCRA court did not have the authority to extend the appeal deadline. **See Coolbaugh**, 770 A.2d at 791 (quoting **Commonwealth v. Anwyll**, 482 A.2d 656, 657 (Pa. Super. 1984) ("It is well established that '[w]hen an Act of Assembly fixes the time within which an appeal may be taken, a court may not extend time for appeal.")). Accordingly, even if the PCRA court's June 15, 2012 order denying Appellant's substantive collateral claims of plea counsel's ineffectiveness were final and appealable, we would quash his appeal as untimely.¹

¹ We acknowledge that this Court has declined to quash untimely appeals that stem from a breakdown in the function of the trial court. **See Coolbaugh**, 770 A.2d at 791 (refusing to quash appeal where trial court incorrectly stated that the appeal period would run from the date on which the court decided appellant's motion to modify his sentence, imposed after the revocation of his probation); **Pierce v. Penman**, 515 A.2d 948, 950 (Pa. Super. 1986) (finding court's failure to notify appellants' counsel of the court's adjudication represented a breakdown in the operation of the court that excused appellants' untimely notice of appeal); **Commonwealth v. Anwyll**, 482 A.ed 656, 657 (Pa. Super. 1984) (overlooking untimely notice (*Footnote Continued Next Page*))

In light of the fact that Appellant is attempting to appeal from a non-appealable order, and he is doing so in an untimely fashion, we agree with Attorney McCoy that there are no issues that Appellant could assert in the instant appeal.² We also conclude that Attorney McCoy's petition and no-merit letter have satisfied the other technical requirements of the **Turner/Finley** test to withdraw. **See Commonwealth v. Friend**, 896 A.2d 607, 615 (Pa. Super. 2006), *abrogated on other grounds by Commonwealth v. Pitts*, 981 A.2d 875, 879 (Pa. 2009) (stating the requirements for withdrawal under **Turner/Finley**). Namely, Attorney McCoy forwarded to Appellant a copy of his petition to withdraw and no-merit letter. He also sent a letter to Appellant explaining his conclusion that

(Footnote Continued) _____

of appeal and concluding it resulted from a breakdown in the court's operation because the court misstated the appeal period). However, in this case, we would not conclude that the PCRA court's improper attempt to stay the appeal period amounted to a breakdown of the operation of the court. **See Overnite Transp. Co. v. Teamster Local 107**, 779 A.2d 533 (Pa. Super. 2001), *rev'd by*, 786 A.2d 173 (Pa. 2001) (per curiam order) (Supreme Court's reversing this Court's decision to overlook the untimeliness of appellant's appeal, where the delay was based on the trial court's improper acceptance and consideration of a post-trial motion for reconsideration; Supreme Court determined that the court's intentional procedural error did not constitute fraud or a breakdown of the court's operation so as to permit our entertaining the appeal).

² However, our decision should **not** be construed as indicating that we agree with Attorney McCoy's determination that Appellant's underlying plea/appellate counsel ineffectiveness issues lack merit; we make no determination in that regard because we are without jurisdiction to do so.

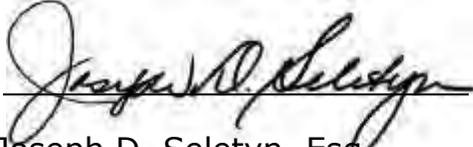
Appellant's claims are meritless and advising Appellant that he has the right to proceed with his appeal *pro se* or retain private counsel. Therefore, we grant Attorney McCoy's petition to withdraw and quash this appeal, without prejudice to Appellant's ability to reassert his substantive claims of plea/appellate counsel's ineffectiveness in a subsequent PCRA petition, which the court shall consider as his first for timeliness purposes.³ If Appellant files such a petition, new counsel must be appointed to represent him. **See** Pa.R.Crim.P. 904(c) ("Except as provided in paragraph (H) [(addressing capital cases)], when an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant's first petition for post-conviction collateral relief.").

³ Without ruling on the timeliness of a future PCRA petition Appellant may file, we note that because our Supreme Court denied his petition for permission to appeal on August 27, 2013, Appellant's judgment of sentence became final 90 days thereafter, or on November 25, 2013. **See** 42 Pa.C.S. § 9545(b)(3) (stating that a judgment of sentence becomes final at the conclusion of direct review or the expiration of the time for seeking the review); **Commonwealth v. Owens**, 718 A.2d 330, 331 (Pa. Super. 1998) (directing that under the PCRA, petitioner's judgment of sentence becomes final ninety days after our Supreme Court rejects his or her petition for allowance of appeal since petitioner had ninety additional days to seek review with the United States Supreme Court). Accordingly, it appears that Appellant has until November 25, 2014, to file a timely PCRA petition asserting his ineffectiveness claims. **See** 42 Pa.C.S. § 9545(b) (stating a PCRA petition "shall be filed within one year of the date the judgment becomes final").

J-S34027-14

Appeal quashed. Petition to withdraw granted. Jurisdiction
relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014