

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ANDRE BASSETT

Appellant

No. 1847 EDA 2013

Appeal from the PCRA Order June 13, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007313-2010

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and WECHT, J.

MEMORANDUM BY LAZARUS, J.:

FILED JUNE 19, 2014

Defendant Andre Bassett appeals from the order of the Court of Common Pleas of Philadelphia County denying his request to reinstate his direct appeal rights *nunc pro tunc*. After careful review, we vacate and remand.

On October 3, 2011, a jury found Bassett guilty of carrying a firearm without a license, carrying a firearm in public in Philadelphia, carrying a firearm despite being ineligible to do so, and receiving stolen property. On November 22, 2011, Bassett received a total sentence of 12 years and 8 months to 26 years' incarceration. No direct appeal or post-sentence motions were filed.

Three months later, on February 21, 2012, Bassett filed a petition under the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"),

alleging he had requested his trial counsel file a direct appeal, but counsel failed to do so. PCRA counsel was appointed, and he filed an amended petition seeking reinstatement of Bassett's appellate rights *nunc pro tunc*.

On June 13, 2013, the PCRA court held an evidentiary hearing. Bassett and his trial counsel, George Yacoubian, Esquire, each testified. Bassett testified that during a meeting in the courtroom immediately following his sentencing he requested Yacoubian file a direct appeal, but that Yacoubian advised him against it because the judge might increase the length of his sentence. N.T. Evidentiary Hearing, 6/3/13, at 9. Bassett also testified that he wrote to Yacoubian and requested he file a direct appeal, a copy of which he included with his PCRA petition. ***Id.***

Conversely, Yacoubian testified that Bassett never requested he file an appeal, and that he assumed Bassett was pursuing a claim of ineffective assistance of counsel against him with another attorney since there had been discussions about retaining different counsel before trial. ***Id.*** at 17-18, 20. Yacoubian also testified that his only conversation concerning Bassett's appellate rights occurred during the post-sentencing colloquy at the sentencing hearing, however, he could not recall if that testimony occurred on the record. ***Id.*** at 23.

Following the hearing, the PCRA court stated:

I find Mr. Yacoubian to be a credible witness. I find Mr. Bassett to be not a credible witness. . . I don't believe that conversation [in the courtroom following sentencing, as testified to by Bassett] ever took place between Mr. Bassett and Mr. Yacoubian.

Id. at 34-35.

The court did not believe the testimony that Bassett requested Yacoubian file an appeal within 30 days either. **Id.** Based on these findings, the PCRA court denied Bassett's petition for *nunc pro tunc* reinstatement of direct appeal rights.

On review, we must decide "[w]hether the determination of the PCRA court is supported by the evidence of record and is free of legal error." **Commonwealth v. Carter**, 21 A.3d 680, 682 (Pa. Super. 2011).

In **Commonwealth v. Lantzy**, 736 A.2d 564, 571-72 (Pa. 1999), the Pennsylvania Supreme Court recognized an attorney's failure to file an appellant's direct appeal "meet[s] the prejudice requirement" of the PCRA statute. **Id.** at 571-72. Subsequently, in **Commonwealth v. Touw**, 781 A.2d 1250 (Pa. Super. 2001), we adopted the Supreme Court holding in **Roe v. Flores-Ortega**, 528 U.S. 470 (2000), recognizing an ineffective assistance of counsel claim where an attorney fails to consult with his client concerning the client's right to file a direct appeal from his judgment of sentence. **Id.** at 1254-55.

Where a petitioner alleges his counsel failed to file a direct appeal, the PCRA court must first determine, "whether counsel in fact consulted with the defendant about an appeal." **Roe**, 528 U.S. at 478. A consult takes place where the attorney "advis[es] the defendant about the advantages and disadvantages of taking an appeal, and mak[es] a reasonable effort to discover the defendant's wishes." **Id.** The PCRA court must make a specific

“finding as to whether a discussion” between the attorney and defendant concerning “the advantages and disadvantages of taking an appeal” occurred. **Touw**, 781 A.2d at 1255. If counsel has, in fact, consulted with the defendant, his performance can only be deficient “by failing to follow the defendant’s express instructions with respect to an appeal.” **Roe**, 528 U.S. at 478.

If, however, counsel has not consulted with the defendant, the court must answer a second question: “whether counsel’s failure to consult with the defendant itself constitutes deficient performance.” **Id.** The Court determined counsel has performed deficiently where he neglects to:

consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination courts must take into account all the information counsel knew or should have known.

Id. at 480.

However, counsel’s “deficient failure” to consult “does not automatically entitle the defendant to reinstatement of his or her appellate rights;” rather, a defendant “must show prejudice.” **Commonwealth v. Touw**, 781 A.2d at 1254. To show prejudice, a defendant must demonstrate “there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.” **Id.** In **Touw**, the defendant’s attorney believed “an appeal was not likely to yield Appellant a new sentence,” but “acknowledged that a

reduced sentence was a possibility.” **Id.** at 1255. Therefore, “there was reason to believe that a rational defendant would want to appeal.” **Id.**

Here, Bassett received the maximum sentence for two of the three convictions, and nearly the maximum sentence for the third conviction. N.T. PCRA Hearing, 6/3/13, at 25-26. Additionally, the Commonwealth failed to produce fingerprint or DNA evidence against Bassett during the trial. **Id.** at 22. Bassett never confessed to the crime. **Id.** A reasonable defendant would likely want to pursue an appeal, or at least a post-sentence motion, in this scenario, yet Yacoubian testified he did neither. **Id.**

To guide a reviewing court on these issues, a PCRA court “must make factual findings regarding whether trial counsel adequately consulted with a criminal defendant regarding the advantages and disadvantages of filing an appeal.” **Carter**, 21 A.3d at 684. These factual findings “must be based on testimony from trial counsel at an evidentiary hearing.” **Id.** Furthermore, where the PCRA court fails to “make adequate findings of fact to permit appellate review,” the appellate court should remand for the PCRA court to make the required findings. **Touw**, 781 A.2d at 1254. Where the PCRA court is “unable to make the required findings based on the existing record, a new hearing will be necessary.” **Id.**

In the present case, the PCRA court failed to make such findings. The court merely stated it did not believe Bassett’s testimony regarding the conversation that took place in the courtroom following sentencing. It is unclear whether the PCRA court did not believe Yacoubian and Bassett spoke

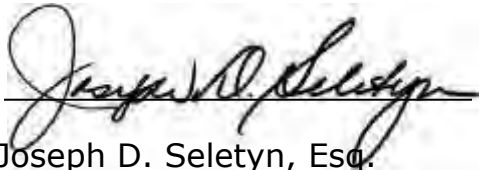
at all after the sentencing, or whether the PCRA court specifically did not believe Yacoubian advised Barrett against appealing because the court might lengthen his sentence. If the conversation did not occur at all, then, based on Yacoubian's testimony, no consultation ever took place, and the PCRA court must further engage in the ineffective counsel evaluation. N.T. PCRA Hearing, 6/13/2013, at 22. As such, we find it necessary to vacate the PCRA court's order and remand to allow the PCRA court to make the necessary factual findings and, if necessary, hold an additional hearing. We relinquish jurisdiction to permit the issuance of a dispositive order and to ensure briefing in the event of a further appeal.

Order vacated. Case remanded with instructions.

Jurisdiction relinquished.

FORD ELLIOTT, P.J.E., files a Dissenting Memorandum Statement.

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: 6/19/2014