

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ERIC STEWARD,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 48 WDA 2014

Appeal from the PCRA Order December 24, 2013
in the Court of Common Pleas of Erie County
Criminal Division at No.: CP-25-CR-0001483-2005

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.:

FILED JUNE 27, 2014

Appellant, Eric Steward, appeals *pro se* from the order of December 24, 2013, which dismissed as untimely his first petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. For the reasons discussed below, we vacate the order and remand this case with instructions.

On June 29, 2005, Appellant pleaded guilty to two counts of indecent assault and one count of corruption of minors.¹ On August 17, 2005, the trial court sentenced Appellant to a term of seven years' probation. Appellant did not file a direct appeal.

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. §§ 3126(a)(1) and 6301(a)(1), respectively.

On January 30, 2008, the Commonwealth detained Appellant for violation of probation. On February 28, 2008, following a **Gagnon II**² hearing, the trial court found Appellant in violation and revoked his probation. The trial court sentenced Appellant to an aggregate term of incarceration of not less than two nor more than seven years. Appellant filed a timely direct appeal. On April 3, 2008, in response to the trial court's order directing Appellant to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), counsel filed a statement of intent to file an **Anders**³ brief, which she served on Appellant. Subsequently, counsel filed an **Anders** brief and a petition for leave to withdraw as counsel with this Court. On August 5, 2008, in response to counsel's request, this Court discontinued the entire appeal without acting on the petition to withdraw.

On October 18, 2013, Appellant, acting *pro se*, filed the instant PCRA petition, claiming ineffective assistance of appellate counsel and seeking reinstatement of his direct appeal rights. (**See** PCRA Petition, 10/18/13, at 2-3). The PCRA court appointed PCRA counsel on October 23, 2013. On

² **See Gagnon v. Scarpelli**, 411 U.S. 778 (1973).

³ **See Anders v. California**, 386 U.S. 738 (1967); **Commonwealth v. McClendon**, 434 A.2d 1185 (Pa. 1981).

November 15, 2013, counsel filed a **Turner/Finley**⁴ letter. On November 27, 2013, the PCRA court issued notice of its intent to dismiss the petition pursuant to Pennsylvania Rule of Criminal Procedure 907(1). On December 24, 2013, the PCRA court dismissed Appellant's PCRA petition, however, the PCRA court did not rule on counsel's request to withdraw. On December 27, 2013, while represented by counsel, Appellant filed a *pro se* notice of appeal. On January 6, 2014, the PCRA court issued an order directing Appellant to file a Rule 1925(b) statement; in that order, the PCRA court **denied** counsel's request to withdraw "pending the conclusion of [Appellant's] appeal." (Order, 1/06/14, at unnumbered page 1).

On January 13, 2014, Appellant filed a *pro se* petition requesting that the PCRA court permit counsel to withdraw and seeking leave to proceed *pro se* on appeal. The PCRA court properly forwarded the petition to counsel but otherwise did not take any action. **See Commonwealth v. Jette**, 947 A.2d 202, 204 (Pa. Super. 2008) (citing **Commonwealth v. Ellis**, 626 A.2d 1137, 1139 (Pa. 1993)) (hybrid representation not permitted in Pennsylvania).

On January 17, 2014, Appellant attempted to file a *pro se* Rule 1925(b) statement, which the PCRA court also forwarded to counsel. On January 27, 2014, counsel filed a Rule 1925(b) statement. On January 28,

⁴ **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

2014, the PCRA court issued an opinion pursuant to Rule 1925(a) finding all of Appellant's issues waived on appeal for failure to file a Rule 1925(b) statement. On January 31, 2014, the PCRA court issued a second opinion, finding that the first opinion had been in error and directing this Court to its Rule 907 notice for a discussion of the merits of Appellant's claim. (**See** Memorandum Opinion and Order, 1/31/14, at unnumbered page 1).

Counsel never filed his appearance in this Court. On April 1, 2014, Appellant filed a *pro se* brief. Counsel did not file a brief.

On appeal, Appellant raises a single question:

A. Did the PCRA court erred [sic] in dismissing [Appellant's] PCRA petition were [sic] the petition invoked and [sic] exception to the one year limitation rule?

(Appellant's Brief, at 2).

Appellant appeals from the denial of his PCRA petition. Our standard of review is long settled. "Our standard of review from the grant or denial of post-conviction relief is limited to examining whether the PCRA court's determination is supported by the evidence of record and whether it is free of legal error. We will not disturb findings that are supported by the record." **Commonwealth v. Ousley**, 21 A.3d 1238, 1242 (Pa. Super. 2011), *appeal denied*, 30 A.3d 487 (Pa. 2011) (citations omitted). "The court's scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party." **Commonwealth v. Duffey**, 889 A.2d 56, 61 (Pa. 2005)

(citation omitted). Further, to be eligible for relief pursuant to the PCRA, Appellant must establish that his conviction or sentence resulted from one or more of the enumerated errors or defects found in 42 Pa.C.S.A. § 9543(a)(2). He must also establish that the issues raised in the PCRA petition have not been previously litigated or waived. **See** 42 Pa.C.S.A. § 9543(a)(3). An allegation of error “is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” 42 Pa.C.S.A. § 9544(b).

For the reasons discussed below, we decline to address the substance of Appellant’s claim but remand this case with instructions.

An indigent, first-time PCRA petitioner is entitled to counsel throughout PCRA proceedings, including any appeal to this Court. **See Commonwealth v. White**, 871 A.2d 1291, 129-23 (Pa. Super. 2005). If a PCRA petitioner wishes to proceed without the assistance of counsel, the PCRA court must conduct an on-the-record colloquy, **see Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998), to determine if the petitioner’s waiver is knowing, intelligent and voluntary. When, as here, it appears that an indigent, first-time PCRA petitioner fails to make a proper waiver of his right to counsel, this Court can raise the error *sua sponte* and remand the case to the PCRA court to determine if Appellant is knowingly, intelligently and voluntarily

waiving his right to counsel. **See Commonwealth v. Stossel**, 17 A.3d 1286, 1290 (Pa. Super. 2011).

Appellant is indigent and the instant PCRA petition is his first. Thus, he is entitled to appointed counsel throughout the proceedings. The PCRA court, as previously noted, appointed counsel for Appellant and expressly denied counsel's request to withdraw. Despite this, counsel appears to have abandoned Appellant on appeal. While Appellant did file a petition seeking leave to proceed *pro se* on appeal, there was no **Grazier** hearing to determine whether Appellant knowingly, intelligently and voluntarily waived his right to counsel on this appeal.

Based on the above, we find Appellant has been denied his right to counsel for this appeal. **See Commonwealth v. Bennett**, 930 A.2d 1264, 1274 (Pa. 2007). Accordingly, we remand this case to the PCRA court. If, it appears to the PCRA court on remand that Appellant wishes to proceed *pro se* on this appeal, the PCRA court shall promptly conduct a **Grazier** hearing. If Appellant knowingly, intelligently and voluntarily waives his right to appellate counsel pursuant to **Grazier**, the PCRA court shall ensure that a transcript of the **Grazier** hearing is made a part of the certified record. No further briefs need to be filed if Appellant validly chooses to proceed *pro se*. However, if the PCRA court determines that Appellant does not wish to proceed *pro se* on appeal, the PCRA court shall appoint new counsel for Appellant within ten days of this memorandum. Appointed counsel shall file

either an advocate's brief, or a **Turner/Finley** "no merit" letter, within thirty days of being appointed; the Commonwealth may file a responsive brief within thirty days of when appointed counsel files a brief for Appellant. The PCRA court shall ensure that the certified record is thereafter returned to the Prothonotary of this Court sixty days after the date of this memorandum.

Order vacated. Case remanded with instructions. Panel jurisdiction retained.