

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MICHAEL KERAK,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2579 EDA 2015

Appeal from the Order entered July 14, 2015
in the Court of Common Pleas of Lehigh County
Criminal Division, at No(s): CP-39-CR-0001091-2012

BEFORE: PANELLA, J., OTT, J., and FITZGERALD*, J.

JUDGMENT ORDER BY PANELLA, J.

FILED MAY 02, 2016

Michael Kerak ("Appellant") appeals from the order denying Appellant's *pro se* "Motion for Modification/Reconsideration of Sentence (*Nunc Pro Tunc*)," and "Motion to Terminate Probation." We reverse and remand with instructions.

On May 14, 2012, Appellant entered a guilty plea to Driving Under the Influence ("DUI"), highest rate of alcohol, second offense. **See** 75 Pa.C.S.A. 3802(c). That same day, the trial court sentenced Appellant to a term of six to twenty-three months of incarceration, and a consecutive three-year probationary term. Appellant filed neither a post-sentence motion nor a direct appeal. On July 7, 2015, Appellant filed the motions at issue. The trial

* Former Justice specially assigned to the Superior Court.

court denied relief. In doing so, the court treated the *pro se* filings as untimely post-sentence motions, and determined that no extraordinary circumstances existed to permit their filing *nunc pro tunc*.¹ **See** Order, 7/14/15, at 1 n.1. This timely appeal follows.²

Within its appellate brief, the Commonwealth aptly concedes that Appellant's *pro se* motions should have been treated as a petition filed pursuant to the Post Conviction Relief ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We agree. **See generally Commonwealth v. Taylor**, 65 A.3d 462 (Pa. Super. 2013). Moreover, as the filing would constitute Appellant's first PCRA petition, and he has *in forma pauperis* status, Appellant is entitled to the appointment of counsel. **See** Pa.R.Crim.P. 904.

Thus, we remand for the appointment of counsel to either file an amended petition on Appellant's behalf or to comply with the requirements to withdraw pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). **See Commonwealth v. Smith**, 818 A.2d 494, 500-01 (Pa. 2003) (concluding that "Rule 904 mandates that an indigent petitioner, whose first PCRA petition appears untimely, is entitled to the assistance of counsel in

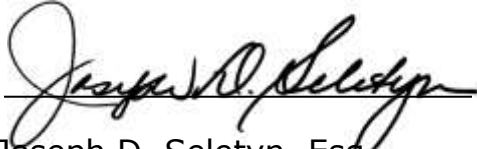
¹ Although Appellant filed two separate motions, the trial court dismissed them together.

² After review, we are satisfied that Appellant's notice of appeal was timely filed. **See generally Commonwealth v. Jones**, 700 A.2d 423 (Pa. 2007).

order to determine whether any of the exceptions to the [PCRA's] one-year time limitation apply").

Order reversed. Case remanded for proceedings consistent with this judgment order. 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: 5/2/2016