

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

STANFORD ALLEN RUSSELL, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 300 WDA 2015

Appeal from the PCRA Order January 28, 2015
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0001756-2005

BEFORE: BOWES, OLSON and STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J.:

FILED FEBRUARY 02, 2016

Appellant, Stanford Allen Russell, Jr., appeals from the order entered on January 28, 2015 dismissing his third petition filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541-9546. Appellant's court-appointed counsel filed both an application to withdraw as counsel and an accompanying brief pursuant to **Commonwealth v. McClendon**, 434 A.2d 1185 (Pa. 1981), and its federal predecessor, **Anders v. California**, 386 U.S. 738 (1967).¹ We conclude that Appellant's counsel basically

¹ Counsel seeking to withdraw from post-conviction representation must satisfy the requirements of **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). However, "[b]ecause an **Anders** brief provides greater protection to a defendant, this Court may accept an **Anders** brief in lieu of a [brief pursuant to **Turner/Finley**]." **Commonwealth v. Widgins**, 29 A.3d 816, 817 n.2 (Pa. Super. 2011) (citation omitted). Although counsel refers to the appellate brief submitted in this case as an "**Anders**" brief, we shall refer to (*Footnote Continued Next Page*)

* Retired Senior Judge assigned to the Superior Court

complied with the procedural requirements necessary to withdraw. Furthermore, after independently reviewing the record, we conclude that the appeal is without merit. We, therefore, grant counsel's application to withdraw and affirm the order dismissing Appellant's PCRA petition.

This Court previously outlined the factual background of this case as follows:

On the evening of November 18, 2004, a group of police officers from the Connellsville Police Department teamed with officers from the Fayette County Drug Task Force, the Pennsylvania State Police, Troop B Vice Unit[,] and other Pennsylvania State Police to execute a search warrant at the apartment of Melissa Hall. . . . The warrant was obtained after five separate trash pulls from the apartment revealed evidence that there was drug use and sales taking place therein. On the evening of the search, six officers were assembled to be the entry team. As the lead officer knocked on the door to announce their presence and purpose, the door came open. Once the officers were in view of the interior of the apartment, they entered and commenced the search. Two adult females were found on the couch in the living room, three adult males, two adult females[,] and one child were found in the kitchen, and one adult male was found fleeing to the upstairs level of the apartment. . . . One of the females in the kitchen also attempted to flee but was stopped by armed policemen at the back door.

Appellant was one of the males in the kitchen. He was the only adult sitting at the kitchen table at the time of the search. The police recovered two bags of drugs from under the kitchen table; one was later confirmed as containing cocaine and the other heroin. Several of the adults[,] including Appellant[,] were arrested that evening[.]

(Footnote Continued) _____
his submission as a "**Turner/Finley**" brief, reflecting the correct line of authority under which it is filed.

Commonwealth v. Russell, 918 A.2d 791 (Pa. Super. 2006) (unpublished memorandum), at 1-2.

This Court previously outlined the procedural history of this case as follows:

On February 8, 2006, following a jury trial, Appellant was convicted of two counts each of possession of a controlled substance^[2] and possession with intent to deliver a controlled substance.³ Appellant was sentenced to seven to fourteen years' incarceration. Appellant filed a timely appeal, and this Court affirmed the judgment of sentence on December 19, 2006.

Appellant *pro se* filed his first PCRA petition on January 11, 2007. The PCRA court appointed counsel and ultimately dismissed the petition without a hearing on November 20, 2007. Appellant timely appealed.

On April 17, 2008, while awaiting disposition of his appeal, Appellant received an affidavit, dated March 20, 2008, from a co-defendant in the underlying case, Antwuan Bush ["Bush"]. Bush stated that the drugs involved in Appellant's case belonged to Bush and that a written statement he had prepared for police falsely accused Appellant of possessing controlled substances.

Upon receiving the affidavit, Appellant filed a motion for a new trial with the PCRA court and sent a letter to this Court, seeking a stay of his collateral appeal, pending disposition of his motion for a new trial. On May 2, 2008, this Court denied Appellant's request. On May 8, 2008, the PCRA court denied Appellant's motion for a new trial. On September 2, 2008, this Court affirmed the PCRA court's dismissal of Appellant's first petition.

Commonwealth v. Russell, 32 A.3d 832 (Pa. Super. 2011) (unpublished memorandum), at 1-2.

² 35 P.S. § 780-113(a)(16).

³ 35 P.S. §[780-113(a)(30)].

On September 8, 2008, Appellant filed a second *pro se* PCRA petition. Counsel was eventually appointed and, on March 12, 2012, Appellant's second PCRA petition was denied. On November 5, 2014, Appellant filed this, his third, *pro se* PCRA petition. The PCRA court held an evidentiary hearing. At that hearing, Appellant requested the appointment of counsel; however, the PCRA court denied Appellant's request. On January 28, 2015, the PCRA court denied Appellant's third PCRA petition. This timely appeal followed.

This Court remanded this matter to the PCRA court because it failed to appoint counsel for an evidentiary hearing when Appellant requested such appointment. Upon remand, counsel was appointed and, on July 20, 2015, a second hearing was held. On July 28, 2015, pursuant to this Court's remand order, the PCRA court entered findings of fact and conclusions of law.

Counsel raises one issue in his ***Turner/Finley*** brief:

Whether the letter [allegedly] written by [Bush] in which he accepts full responsibility for the drugs that underlie the present case constitute [newly-discovered facts]?

Turner/Finley Brief at 2 (complete capitalization omitted).

Prior to addressing the merits of the issues raised in counsel's ***Turner/Finley*** brief, we must determine whether he met the procedural requirements to withdraw as counsel. In order to withdraw in a PCRA proceeding, court-appointed counsel must file a letter (or in this case, brief) detailing (1) the nature and extent of her review of the record; (2) the

issues the petitioner wished to be raised; and (3) the reasons those issues are meritless. **See Commonwealth v. Pitts**, 981 A.2d 875, 876 (Pa. 2009). Additionally,

PCRA counsel seeking to withdraw [must] contemporaneously forward to the petitioner a copy of the application to withdraw that includes (i) a copy of both the “no-merit” letter, and (ii) a statement advising the PCRA petitioner that, in the event the [] court grants the application of counsel to withdraw, the petitioner has the right to proceed *pro se*, or with the assistance of privately retained counsel.

Commonwealth v. Widgins, 29 A.3d 816, 818 (Pa. Super. 2011) (citation omitted). If counsel fulfills these procedural requirements, we must then independently review the record and determine whether the issues raised are indeed non-meritorious. In this case, counsel basically fulfilled the procedural requirements for withdrawing as PCRA counsel.⁴ Therefore, we turn to the issue raised in counsel’s **Turner/Finley** brief.

“Crucial to the determination of any PCRA appeal is the timeliness of the underlying petition. Thus, we must first determine whether the instant PCRA petition was timely filed.” **Commonwealth v. Smith**, 35 A.3d 766, 768 (Pa. Super. 2011), *appeal denied*, 53 A.3d 757 (Pa. 2012). The timeliness requirement for PCRA petitions “is mandatory and jurisdictional in nature, and the court may not ignore it in order to reach the merits of the petition.” **Commonwealth v. Hernandez**, 79 A.3d 649, 651 (Pa. Super. 2013) (citation omitted). “The question of whether a petition is timely raises

⁴ Appellant did not file a response to PCRA counsel’s **Turner/Finley** brief.

a question of law. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary.” ***Commonwealth v. Taylor***, 65 A.3d 462, 468 (Pa. Super. 2013) (citations omitted).

A PCRA petition is timely if it is “filed within one year of the date the judgment [of sentence] becomes final.” 42 Pa.C.S.A. § 9545(b)(1). “[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S.A. § 9545(b)(3). As Appellant did not seek allowance of appeal on direct review, Appellant’s judgment became final on January 18, 2007, 30 days after this Court’s December 19, 2006 decision affirming his judgment of sentence. Appellant’s present petition, his third, was filed on November 5, 2014. Thus, the petition was patently untimely.

An untimely PCRA petition may be considered if one of the following three exceptions applies:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(i-iii). If an exception applies, a PCRA petition may be considered if it is filed “within 60 days of the date the claim could have been presented.” 42 Pa.C.S.A. § 9545(b)(2).

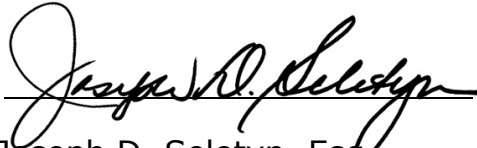
The only issue raised in counsel’s **Turner/Finley** brief is whether Appellant satisfied the newly-discovered fact exception to the PCRA’s timeliness requirement. Appellant avers that on October 29, 2014, he received a letter from Bush in which Bush took full responsibility for the drugs that were found under the kitchen table. Bush’s letter recanted his prior testimony that the drugs belonged to Appellant. Appellant argues that this letter was a newly-discovered fact.

As noted above, however, on April 17, 2008, Appellant received an affidavit from Bush in which Bush took full responsibility for the drugs that were found under the kitchen table and recanted his prior testimony that the drugs belonged to Appellant. **Commonwealth v. Russell**, 32 A.3d 832 (Pa. Super. 2011) (unpublished memorandum), at 2. Thus, the information in the letter Appellant received from Bush in October 2014, that Bush claimed responsibility for the drugs found under the kitchen table, was known to Appellant for over six years prior to the filing of the instant PCRA petition. Therefore, Appellant failed to file his PCRA petition within 60 days of receiving the alleged newly-discovered facts. As such, he failed to satisfy the newly-discovered fact exception to the PCRA’s timeliness requirement and the PCRA court lacked jurisdiction over his untimely petition.

In sum, counsel has fulfilled the procedural requirements for withdrawing as counsel. Our independent review confirms the sole issue raised in counsel's **Turner/Finley** brief is without merit. Accordingly, we grant counsel's application to withdraw as counsel and affirm the order dismissing Appellant's third PCRA petition.

Application to withdraw as counsel granted. Order affirmed.

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: February 2, 2016